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October 5, 2020

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By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: FD No. 36399, *Brookhaven Rail LLC – Petition for Exemption
from Requirements of 49 U.S.C. §10909*

Dear Ms. Brown:

Accompanying this letter for filing on behalf of Brookhaven Rail LLC are (1) a Motion for Leave to File a Reply to the Reply in Opposition of the Citizens Campaign for the Environment and (2) the proffered Reply to the Reply in Opposition.

Please do not hesitate to call me if you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "Thomas W. Wilcox". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Thomas W. Wilcox
Attorney for Brookhaven Rail LLC

Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36399

**BROOKHAVEN RAIL LLC - PETITION FOR EXEMPTION FROM
REQUIREMENTS OF 49 U.S.C. §10909**

**MOTION FOR LEAVE TO FILE REPLY
TO THE REPLY IN OPPOSITION OF THE
CITIZENS CAMPAIGN FOR THE ENVIRONMENT**

Brookhaven Rail LLC (“BHR”) respectfully requests leave to file the attached Reply to the Reply in Opposition of the Citizens Campaign for the Environment (“CCE”) filed in this docket on September 16, 2020 (“CCE Reply”). Although the Board’s rules do not permit the submission of a reply to a reply as a matter of right, 49 C.F.R § 1104.13(c), the Board has waived this restriction in situations where good cause has been shown in the interest of compiling a full record.¹ Good cause exists here because the CCE Reply introduces and seeks to rely upon new factual developments that have occurred since the Petition for Exemption was filed to oppose it. It also contains four extensive verified statements from persons who have made numerous speculative and unsupported factual assertions and allegations concerning the proposed solid waste

¹ See, e.g., F.D. 35960, *Petition of Union Pac. R.R. Co. for Declaratory Order* (served Sept. 30, 2016); F.D. 35157, *The City of Alexandria, Virginia – Petition for Declaratory Order* (served Nov. 6, 2008); F.D. 35765, *Wichita Terminal Association, BNSF Railway Company and Union Pacific Railroad Company – Petition for Declaratory Order* (served May 20, 2014). See also 49 C.F.R. §1100.3 (“The rules will be construed liberally to secure just, speedy and inexpensive determination of the issues presented.”).

rail transfer facility that is the subject of the Petition and the solid waste disposal situation on Long Island, New York, which BHR should be allowed to rebut.

Specifically, the CCE Reply relies heavily on a filing submitted in this Docket on September 11, 2020 in which the Town of Brookhaven, New York informed the Board that it had decided to “reconsider” the legal position it informed the Board of in July that 49 U.S.C. §10909 could operate to preempt the Town’s zoning code. The Town’s original position was discussed in the Petition for Exemption. Fundamental fairness dictates that BHR should have an opportunity to respond to CCE’s extensive, erroneous arguments that this action by the Town has any legal significance to the Board’s consideration of the Petition for Exemption, and to refute the notion that the Town’s action has any relevance given the Board’s longstanding interpretation of §10909. BHR’s proffered Reply also provides the Board with important and highly relevant factual context omitted by CCE’s Reply as to how the Town’s apparent change of heart was precipitated.

Additionally, the four verified statements that accompany CCE’s Reply contain a number inaccurate assertions about (1) the scope and size of the proposed Facility and the need for it, (2) the activities that will be conducted at the Facility, (3) the overall solid waste problem and impending crisis on Long Island and potential solutions to it, as well as (4) purely speculative statements about the potential environmental impacts of the project. The verified statements are also replete with misleading and inaccurate statements about the environmental review that has been conducted to date associated with the development of Parcel D as a rail-served industrial site, and how that existing work will be incorporated into the environmental review to be conducted by the Board’s Office of Environmental Analysis.

Because it was granted a generous 30-day extension to file its Reply on the date timely replies were due, CCE’s Reply was filed nearly two months after the Petition for Review was

filed, and nearly three months after Board's Office of Environmental Analysis began soliciting public input on the project in June, 2020. At no time prior to the filing of the Petition for Exemption did CCE express any opposition to the Facility or the overall plans of BHR and Winters Brothers Waste Systems of Long Island to carry out the long held plans to develop Parcel D of the Brookhaven Rail Terminal into a rail-served industrial park, with the addition of the proposed Facility on 50 acres of Parcel D. Moreover, BHR could not have anticipated the Town's September 11, 2020 filing upon which CCE now seeks to rely upon to oppose the Petition for Exemption. In addition to considerations of fundamental fairness requiring the acceptance of BHR's proffered reply, where a party could not reasonably have anticipated the contentions of an opponent that could be material to the resolution of a case, it has good cause for being granted leave to reply. *See, e.g., Delaware & Hudson Ry. Co. v. Consol. Rail Corp. – Reciprocal Switching Agreement*, 9 I.C.C. 2d 989, 990 (1993). BHR therefore states that good cause exists for it supplement the record in response to the CCE Reply so that the Board will have an accurate basis on which to render a decision.

Finally, neither this Motion nor the proffered Reply raise any new legal issues or expand the nature of this proceeding. Further, accepting this Reply into the record will not prejudice CCE or parties of record other than BHR because the Board has not yet issued any rulings on the merits of the issues raised in this proceeding. On the other hand, not permitting BHR to file the proffered Reply would be highly prejudicial BHR. Accordingly, and for the reasons stated above and Board precedent governing waivers of 49 C.F.R. § 1104.13(c), BHR requests that the Board grant this

Motion for leave to file BHR's proffered Reply to the Reply in Opposition of the Citizens Campaign for the Environment.

Respectfully submitted,



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Attorneys for Brookhaven Rail LLC

October 5, 2020

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36399

**BROOKHAVEN RAIL LLC - PETITION FOR EXEMPTION FROM
REQUIREMENTS OF 49 U.S.C. §10909**

**REPLY TO REPLY IN OPPOSITION OF
THE CITIZENS CAMPAIGN FOR THE ENVIRONMENT**

Petitioner Brookhaven Rail LLC (“BHR”) hereby submits this Reply to the Reply in Opposition of the Citizens Campaign for the Environment (“CCE”) to the Petition for Exemption filed in this proceeding by BHR on July 27, 2020 (“CCE Reply”).¹ This Reply addresses several aspects of the CCE Reply that introduce new evidence and factual assertions into this proceeding that CCE attempts to rely upon to oppose BHR’s request for a land use exemption under 49 U.S.C. §10909 in conjunction with its intention to construct and own a solid waste rail transfer facility (“SWRTF”) on Parcel D of the Brookhaven Rail Terminal. BHR also is compelled to address the erroneous legal arguments raised by CCE in its 11th hour filing,² as well as the exaggeration and

¹ On October 1, 2020 CCE filed a “supplement” to the CCE Reply, claiming that the information was “previously unavailable” to CCE. BHR will respond to this new filing by CCE in a subsequent filing in this docket.

² BHR filed its Petition for Exemption in this proceeding on July 27, 2020. However, it had previously filed on June 26, 2020 in Docket No. FD 36398 its related Petition for Exemption from the prior approval requirements of 49 U.S.C. §10901 concerning the proposed construction of 25,000 feet new lines of railroad on Parcel D of the Brookhaven Rail Terminal and its development it into a rail-served industrial park. This latter petition also discussed BHR’s plans to construct and own the Facility. CCE submitted no reply filings in Docket FD 36398 within the time allotted by the Board’s rules, let alone express any opposition to BHR’s proposal to construct and operate new lines of railroad on Parcel D or the Facility. It then waited until August 14, 2020 to request a 30-day extension to reply to the Petition for Exemption in this proceeding, asserting that it had

speculation contained in the CCE Reply and accompanying verified statements about the relief sought by BHR and the SWRTF it contemplates constructing, owning, and operating through contractual arrangements with Winters Brothers (the “Facility”).

It is telling that while CCE asserts the proposal in this docket has attracted “strong” opposition from it and “other segments of the community” the CCE Reply provides no specific examples of such “other segments,” and no other environmental organizations or members of the public other than CCE’s witnesses submitting verified testimony have opposed the project. While CCE also attempts to make much of the Town’s “reconsideration” of its legal position on the scope of the Board’s preemption under §10909 (unsuccessfully, as discussed more below) it is significant that the Town has not voiced any actual opposition to the Facility and it accepts that the Board will conduct a review under the National Environmental Policy Act (“NEPA”) that uses the prior environmental analysis of the development of Parcel D for rail-served industry discussed in the Petition for Exemption as a starting point.

A. BHR Does Not Need to Seek and Obtain an Adverse Siting Ruling from the Town of Brookhaven Before Seeking to Invoke the Board’s Authority under 49 U.S.C. §10909

A primary focus of CCE’s Reply is the September 11, 2020 “Response of Town of Brookhaven New York to Petition of Brookhaven Rail LLC for Exemption from the Requirements of 49 U.S.C. §10909” (“Response”) filed in this docket, in which the Town of Brookhaven “respectfully reconsider[ed] its position” that its local zoning laws could be preempted by §10909.

waited that long to retain counsel to assist it. Prior to August 14 CCE had given no indication to BHR or to its affiliate Winters Bros. Waste Systems of Long Island LLC (“Winters Brothers”) that it opposed the Facility in any way. On September 22, 2020 CCE attempted to bootstrap its belated entry into this docket into an even more belated entry into Docket FD No.36398. BHR has objected to CCE’s attempt.

This position was first expressed to the Board in a letter to the Office of Environmental Analysis (“OEA”) dated July 14, 2020. See Petition for Exemption, Exhibit A at page 2. CCE seeks to leverage this change of position by the Town into an argument that BHR should be required to first unsuccessfully pursue a zoning law change and other action from the Town before it can seek a land use exemption from the Board. However, CCE is merely parroting an interpretation of §10909 that has previously been emphatically rejected by the Board on multiple occasions as it developed its rules implementing the Clean Railroads Act (“CRA”). Moreover, the Town’s and CCE’s actions actually provide affirmation as to why the Board’s exercise of its preemptive authority over the applicable Town zoning law is appropriate in this case.

As for background on this issue the Petition for Exemption summarizes how it was preceded by discussions with the Town in which the Town (1) voiced its support for the new SWRTF and rail infrastructure on Parcel D due to the planned closure of its landfill in 2024, (2) recognized the need to replace that lost capacity to dispose of solid waste, and (3) recognized the value of transporting solid waste off Long Island by railroad instead of truck. The Town also recognized the Board’s authority under §10909 to preempt the provision of the Town’s zoning code that currently prevents the SWRTF from being sited on Parcel D. The Town expressed all these positions in its July 14, 2020 letter to OEA. As to the need for the Board’s exercise of its preemptive authority in these particular circumstances, the Town’s letter informed the OEA that siting the proposed SWRTF on Parcel D would require a “legislative change” to its zoning laws, and that it was “highly unlikely that a legislative change to the applicable zoning law required to permit a SWRTF could be made in time to enable the proposed facility to be a potential recipient of the volumes of waste that will have to be disposed of elsewhere due to the closure.” *Id.* The Town further expressed its view, with which BHR has consistently concurred, that development

of the Facility and Parcel D generally for other rail served industrial uses would be subject to all otherwise applicable local laws, and conditions and stipulations from the 2016 Settlement, Voluntary Draft Environmental Impact Statement (“VDEIS”) and related documents and rulings discussed in the Petition, as supplemented by the Board’s environmental review pursuant to NEPA.

In its September 11, 2020 filing, however, the Town informed the Board that it had “respectfully reconsider[ed] its position” that its local zoning laws could be preempted by §10909. The Town’s new position is not entirely clear from its filing, but it appears to be that the police powers of a municipality respecting zoning and the regulation of land use and natural resources within the Town override the Board’s authority under §10909 to preempt “laws affecting the siting of” a solid waste rail transfer facility. Response at 4-5.³ The Town’s filing glosses over its previously stated fact that for the Town to even consider allowing the Facility to be sited on Parcel D the applicable zoning law would have to be changed through the Town’s legislative process before any regulatory or special use proceedings could occur. Instead, the Town stated vaguely it was prepared to “promptly and fully review, consider and take such action concerning local approvals as may be appropriate when presented with such an Application by BHR.” *Id.* at 5. No estimated timelines for legislatively changing its zoning laws, or subsequent actions if and when the zoning law was changed, were provided. Nor did the Town describe or summarize what the legislative and regulatory processes actually entailed, and the extent to which they could be delayed, opposed, and judicially appealed by parties such as CCE⁴ who oppose any

³ The pleading is not paginated.

⁴ Given that CCE is unabashedly opposed to the Facility and the development of Parcel D generally, thereby making it highly unlikely that CCE would accept without question any decision the Town “promptly” made on any “Application” by BHR, the sincerity of CCE’s statement that there is no urgent need for Board action because the Town has said “it can and will act promptly on any local land-use, zoning, or related petition that is brought before it” is highly questionable, to say the least. CCE Reply at 5.

development on Parcel D and the siting of a SWRTF facility in particular. Not surprisingly, CCE's Reply also glosses over the process that will have to occur for the Town to be in a position to evaluate the siting of the proposed Facility, preferring instead to parrot back the Town's vague promise to "promptly" do something "appropriate." In order to provide the Board with more detail as to what exactly has to occur at the Town level before it could even consider the siting of the Facility, BHR has included as Attachment A to this Reply the Verified Statement of Lisa A. Cairo, an attorney who has significant experience and expertise respecting the Town's zoning code and processes. Ms. Cairo explains the process the Town would have to go through to first legislatively change its zoning law and the associated opportunities for delays and judicial appeals, a process which includes environmental review under the New York State Environmental Quality Review Act ("SEQRA"). Cairo V.S. at 3. She also explains the numerous pitfalls that would accompany the Town's process to consider a request by BHR to site the Facility on Parcel D if and when the law was changed. Indeed, Ms. Cairo concludes that "[u]nless the STB asserts its jurisdiction it is, in my opinion, unlikely a facility on Parcel D could be operational in less than a decade, assuming all legislative, discretionary, zoning application and court decisions favored BHR." *Id.* at 4.

The stated reason for the Town's reconsideration of its July 14 position was contained in a supplemental letter to OEA also dated September 11, 2020 and attached to the Town's Response, in which the Town stated "the Town Board and its Supervisor Edward P. Romaine were operating under COVID-19 limitations which restricted the ability of Town Officials to fully consider the BHR Petitions and the STB/OEA [June 25, 2020] request for input from the Town in the normal course" prior to July 14. Be that as it may, the Town's September 11, 2020 filing and letter also were preceded by a letter to Supervisor Romaine by CCE's Executive Director

Adrienne Esposito dated August 27, 2020, in which CCE informed Mr. Romaine that it was “extremely concerned with the letter from the Town of Brookhaven, dated July 14, 2020, submitted to the STB abdicating local control and zoning for this massive solid waste facility.” Attachment B to this Reply. CCE further charged that it was “reprehensible” for the Town to take no position on the application of §10909 to preempt the Town’s zoning law in this proceeding but acknowledging its preemptive effect. After further chastising Supervisor Romaine on other matters which misstated key facts,⁵ CCE demanded in no uncertain terms that the Town “rescind and revise the July 14, 2020 letter . . . and submit a new letter [in this docket] by the September 16 [extended reply] deadline explicitly stating that the Town does not support enacting 49 USC 10909 which would preempt the Town’s local zoning control.” *Id.* at 2.⁶

At first, the Town tried to resist CCE’s demands. On August 28, 2020, the Town responded to CCE and in part unequivocally affirmed and restated the Town’s July 14, 2020 position that “*the Town acknowledged the legal authority of the STB to pre-empt local Town zoning in a proper case*, but at the same time, advised the STB that the current owners of Parcel D remain and will remain subject to all the protective environmental mitigation measures imposed by the 2016 Stipulation.” Attachment C at 2 (emphasis added). Nevertheless, between August 28, 2020 and September 11, 2020 the Town decided to “reconsider” this position on §10909’s preemptive effect. This timeline calls into question the extent to which the Town’s “COVID-19 limitations” in place in June that purportedly affected the content of the July 14 letter could have

⁵ For example, CCE wrongly told Mr. Romaine that the land use exemption would “completely avoid” all “environmental review and public input from the residents of Brookhaven.”

⁶ On this last point BHR was disappointed to learn that after it consented to the 30-day extension requested by CCE for only CCE to file a reply to the Petition for Exemption due to its claim of belatedly retaining counsel to help it, CCE chose to repay BHR’s largesse by recruiting the Town and other parties to also file belated replies that supported CCE’s efforts to oppose the Facility.

also influenced a decision clearly made after August 28 and after Supervisor Romaine's receipt of CCE's highly critical letter. But whatever the reasons for the Town's reversal of its position, its apparent new position that §10909 cannot preempt its zoning law is simply incorrect, as is any assertion from the Town or CCE - or any other party - that BHR was required to seek and obtain a ruling from the Town denying the siting of the SWRTF before it could file the Petition for Exemption.

Specifically, BHR is a Class III rail carrier which plans to construct and own a SWRTF as part of its overall plan to execute the long-planned development of Parcel D of the Brookhaven Rail Terminal as a rail served industrial park. Petition at 2. Section 10909(a)(1) indisputably applies to this aspect of its overall plan. Throughout the course of its development of the final rules implementing the CRA the Board has consistently and repeatedly affirmed that the text and Congressional intent of §10909(a)(1) clearly contemplate that a rail carrier such as BHR that plans to own or operate a new SWRTF (or to have such a facility operated on its behalf) need not first seek and receive a negative determination from a state agency for authority under an applicable "law affecting the siting of" at SWRT. As first articulated in *Solid Waste Rail Transfer Facilities*, EP No. 684 (Interim Rules with Request for Comments served January 14, 2009) at 8 (emphasis supplied):

Indeed, the last clause of the subparagraph [10909(a)(1)] – permitting 'a rail carrier that owns or operates a facility [to] petition[] the Board for such an exemption' - *allows a rail carrier to petition the Board for a land use exemption permit without first receiving an unsatisfactory result from a state agency, regardless of the facility's characterization as existing or proposed.* The railroad would not need to make any showing to the Board of unreasonable burden or discrimination prior to applying for a land-use-exemption permit.

The Board reaffirmed this interpretation when later describing the three ways in which a land use exemption could be pursued, specifically stating that one way was “a rail carrier that owns or operates an existing facility or plans to own or operate a new facility petitions the Board for a land-use-exemption permit without first receiving an unsatisfactory result from the state.” *Id.* at 10. This is precisely what BHR has done in this proceeding, only it has sought the requested land use exemption from the Town’s zoning code through a Petition for Exemption instead of a land-use-exemption permit application because the requirements of 49 U.S.C. §10502(a) are clearly met in these particular circumstances.

Notwithstanding the foregoing, CCE argues throughout its Reply that the CRA requires BHR to first give the Town “a chance to act” before the Board can assert jurisdiction, particularly because the Town has apparently reconsidered its position on preemption. CCE Reply at 3. This is not the law. In response to comments it received on the Interim Rules the Board specifically rejected as “directly contradictory to [the] statutory mandate of [10901(a)(1)]” an interpretation desired by commenters that “where the state permitting process includes a siting determination the state should be allowed to make its determination before the Board acts on the permit exemption.” *Solid Waste Rail Transfer Facilities*, Docket No. EP 684 (Revised Interim Rules with Request for Comments served March 24, 2011) at 10. The Board affirmed its position in the Final Rules implementing the CRA when it rejected yet another attempt “to require, as a prerequisite, that an applicant seek state or local approval under the challenged laws and rules before they can be included on the list to be preempted . . . unless it is demonstrably futile to do so.” *Solid Waste Rail Transfer Facilities*, Docket No. EP 684 (Final Rules served November 20, 2012) at 9. In response to this last attempt the Board once again reiterated that “this suggestion

conflicts with the language of the CRA, which explains that a rail carrier that owns or operates a facility may come to the Board prior to seeking a determination from the state.” *Id.*

Thus the repeated assertions by CCE in its Reply, which it makes in each instance without any support, that because the Town now says it will “consider and take action concerning local approvals as may be appropriate when presented with such an Application by BHR,” BHR must make such “Application” before coming to the Board, is flatly wrong and directly contrary to §10901(a)(1). Moreover, *this is not even a case where the Town has existing processes that it could use to make such a siting determination.* As the Town itself told OEA on July 14, 2020, and as explained further in Ms. Cairo’s verified statement, the Town must first legislatively amend its zoning laws to enable it to create a process to change the zoning designation for Parcel D. Both actions would be subject to applicable public review, environmental review under SEQRA, and judicial appeal procedures. Thus, any applicable *regulatory* process the Town would apply would have to be preceded by a *legislative* change to its zoning law to enable such a process to be developed and/or applied. This is thus a situation that is much more tenuous and abstract than that repeatedly rejected by the Board when a rail carrier seeks to construct own and/or operate a SWRTF, *i.e.*, the scenario where a local entity had a process in place applicable to siting the proposed SWRTF that could have been applied but for the Board’s preemptive authority under §10909.

For all these reasons, the Town of Brookhaven’s recent decision to “reconsider” its view of the Board’s preemptive authority under §10909, whether it was because of “COVID 19 limitations” in place in June or the intense pressure applied by CCE to Supervisor Romaine in August, is contrary to the statute and the Board’s interpretation of it and it is ultimately not relevant to the Board’s application of §10909 in this proceeding.

Finally on this point, the actions of the Town and CCE provide a textbook illustration why STB preemption of siting laws affecting SWRTF's was preserved in the CRA and is needed and appropriate in this case. STB preemption exists – even as narrowed by the CRA - so that interstate railroad projects that are in the public interest may be constructed and operated without interference from local politics, biases, and agendas. *See, Vermont Railway, Inc. v. Town of Shelburne*, 287 F. Supp.3d 493 (D. Vt. 2017)(where the court found that the Town's pre-construction zoning regulations and storage ordinance were preempted because they placed unreasonable restrictions on the railroad's operations. Moreover, the court concluded that the Town had established the ordinance to specifically target the railroad's facility). *See also, BNSF Ry. Co. v. Clark Cty.*, 438 F. Supp. 3d 1199, 1205 (W.D. Wash. 2020) (“While a general land use regulation may seem incidental to rail operations, the Court agrees with BNSF that there is nothing “incidental” about a preclearance regulation imposed by a local county that interferes with BNSF constructing or repairing its track.”); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005) FD No. 33971, *Joint Petition for Declaratory Order—Boston and Maine Corp. and Town of Ayer, MA* (served October 5, 2001). Here, the siting of a much needed SWRTF to help resolve the solid waste disposal issues on Long Island, New York should not be controlled or thwarted by local politics and the political and organizational agendas of any special interest group.

B. The Facility Will Indeed Help Address an Oncoming Solid Waste Crisis on Long Island

CCE's Reply and the verified statements attached thereto also take issue with the Petition for Exemption's statements that there is an impending solid waste crisis on Long Island. On the one hand, it should not be surprising to the Board that an environmental group with “a strong environmental agenda,” Reply at 11, would be pre-disposed to downplay the need to construct new facilities to process for railroad transport what are indisputably significant volumes

municipal solid waste and construction debris on Long Island, despite the clear benefits to hauling such waste off of Long Island by railroad instead of truck. However, BHR's statements that a solid waste crisis is looming because of the impending closure of the Town's landfill are backed by statistics as well as articles and public statements from local officials. Petition at 5. Moreover, "crisis" is the precise characterization of the problem used by the aforementioned Supervisor Romaine, who in June 2020 warned the Long Island Regional Planning Council of "the *looming solid waste crisis* that Long Island will face in the next few years," in a June 15 letter to the Planning Council following a large public meeting on solid waste disposal on February 27, 2020. Attachment D (emphasis added). At the Planning Council meeting (which a CCE representative attended) Mr. Romaine was reported to have told the group "No, it is not a looming crisis. It's now." Attachment E. Mr. Romaine's June 15 letter also warned that "the closing of the Brookhaven Landfill will have a decidedly negative impact on the construction and building industry. Without an on-island site accepting construction debris, the impact of the regional economy would be immediate." Finally, he warned the Planning Council that "[t]ime is running out to address Long Island's solid waste disposal issue" and urged them to work with other local government entities "*to develop solutions to avoid a solid waste crisis.*" *Id.* (emphasis supplied).

Stakeholders like CCE and businesses on Long Island can argue over the magnitude of the solid waste disposal problem faced by Long Island generally and how much the closure of the Town's landfill in 2024 will exacerbate that problem, but no party can dispute that there is a large solid waste disposal problem, indeed a looming crisis, that must be resolved in short order. BHR's proposed Facility is one solution to a regional problem, and its benefits to the community far outweigh any potential environmental impact or harm.

C. CCE's Alleged Concerns About Environmental Impacts and the Role of the 2016 Settlement and Related Documents are Overblown

CCE's Reply is replete with exaggerated claims and accompanying verified statement testimony about the solid waste disposal situation on Long Island, the Facility, and the alleged environmental harm constructing and operating the new Facility would cause.⁷ CCE's Executive Director even goes so far as to question the competence of the Board and OEA to properly review the environmental impacts of the Facility, derisively suggesting that the Board is really only capable of evaluating the environmental impacts of rail construction and abandonment proposals. Verified Statement of Adrienne Esposito at 11. Among other things, CCE argues that its speculative allegations of potential environmental impacts should result in the Petition for Exemption being rejected or denied and the Facility not constructed. At the same time, however, CCE acknowledges that the development of Parcel D for expansive rail-served industrial use – including rail to truck transload operations - has been planned since 2014 and the impacts of such development have already been the subject of intensive environmental review involving many stakeholders. CCE seeks to make much of the fact that while the prior environmental analysis and development plans contemplated the construction and operation of extensive truck to rail transload operations, they did not contemplate a SWRTF. However, this aspect of CCE's Reply is puzzling because it merely points out something that BHR has readily acknowledged, which is that the prior efforts did not contemplate a SWRTF on Parcel D, although they did contemplate extensive rail track structure and truck to rail transload operations. Consequently, BHR and OEA

⁷ Attachment F to this Reply is the Verified Statement of Michael White, the Vice Chair of the Long Island Regional Planning Council, a member of the Long Island Commission on Aquifer Protection, a founding member of the Long Island Solid Waste Leadership Council and an Adjunct Faculty member at the Stony Brook University School of Marine and Atmospheric Sciences. Mr. White is also a consultant to Winters Bros. Mr. White responds to and refutes many of the factual misstatements made by the individuals who submitted verified statements with CCE's Reply.

have known since their first discussions about the proposed SWRTF prior to filing the Petition that OEA will conduct its own NEPA review of the environmental impacts of the Facility, as mandated by law, and that this independent NEPA review will supplement the extensive environmental review that has already been conducted, to the extent deemed appropriate by OEA and the Board.

Accordingly, all of the testimony of CCE's various witnesses regarding the alleged impacts of the Facility on aquifers, Northern Long Eared Bats, Eastern Box turtles, traffic, air quality and other environmental factors and flora and fauna are merely speculation on matters that have either already been studied in the VDEIS conducted prior to the Petition being filed, and/or will be studied by OEA during its NEPA process. CCE and its witnesses will have ample opportunity to participate in that process. BHR has also made it clear that it is not seeking to bypass any applicable state, local or federal legal requirements or conditions that protect the public health and safety, and it will comply with any environmental mitigation conditions imposed by the Board. Consequently, the mere fact that there may be potential environmental impacts of the proposed Facility that will need to be evaluated (to the extent they have not been evaluated already) is no reason to reject the Petition for Exemption, or any other filing at the Board that entails NEPA review for that matter.

D. Activities to be Conducted at the New Facility are Subject to the Board's Jurisdiction

CCE's dramatic accusation that the SWRTF is a "thinly veiled attempt" by Winters Bros. "cloaking itself as a railroad to independently manage" such a facility on Parcel D is nonsense and apparently a misguided attempt to lump Winters Bros. into the category of solid waste transload operators that resulted in the CRA being enacted. This is simply not the case. First, the Petition for Exemption unambiguously states that BHR, an established Class III railroad, will

construct and own the Facility, which was clearly contemplated and accounted for by Congress when it passed the CRA. As stated above, because BHR is a rail carrier, it may seek a land use exemption from the Board without first seeking an adverse ruling from the Town, even if the Town had such a process in place, which it does not.

Section §10909(a)(1) also explicitly states that the Board may issue a land-use exemption for a SWRTF “that is proposed to be operated by or *on behalf of* a rail carrier.” CCE recognizes, as it must, that Board precedent establishes that activities that are considered “transportation” conducted by a “rail carrier” and therefore subject to the Board’s jurisdiction may be performed by parties who contract with the railroad and act on its behalf. CCE Reply at 44. The authority cited by CCE confirms this. In such cases, the “rail carrier holds out its own service through the third-party as an agent or exerts control over the third-party’s operations.” See, *New York & Atlantic Railway Co. v. STB*, 635 F.3d 66, 69 (6th Cir. 2011)(*New York & Atlantic*). This is the arrangement contemplated by BHR in its Petition for Exemption, which is for BHR to construct and own the facility and to hold out to provide service through Winters Bros. as its agent. This situation is therefore easily distinguishable from *New York & Atlantic*, where the railroad was not involved in the facility at all, its contractor constructed and maintained the facility, including all track repairs and rail car maintenance, the contractor had “total control over the facility, including the exclusive right to conduct transloading operations,” and the railroad had no control over pricing matters. *Id.* BHR’s planned arrangement with Winters Bros. is more similar to that found in *Borough of Riverdale – Petition for Declaratory Order*, also cited by CCE, where the railroad constructed and owned the transfer facility, and exerted sufficient control over its third-party operator. STB Docket No. FD 35299 (served August 5, 2010) at 5-7. Thus, as summarized in the Petition, this will be a situation where “a rail carrier builds and owns a truck-to-rail

transloading facility, and holds it out to the public as its own facility, but chooses to have a contract operator,' which presumably, would qualify as transportation by rail carrier.” *New York Susquehanna and Western Railway Corporation, v. Jackson*, 500 F.3d 238, 249 (3rd Cir 2007), citing STB Finance Docket No. 34192, *Hi Tech Trans LLC – Petition for Declaratory Order – Newark, N.J.* (served August 14, 2003) at 7, note 13.

In any case, as the Petition also states, to the extent the Board disagrees that BHR’s contemplated contractual operations to be performed by its affiliate on its behalf are not activities that will be performed by a rail carrier, then BHR is willing to modify those arrangements accordingly, as it desires to structure its relationship with its affiliate to studiously avoid the “situation[] where [a] solid waste operator masqueraded as [a] railroad[]” CCE Reply at 45.

Moreover, the realization of CCE and its witnesses that some activities occurring at a SWRTF, including the Facility that BHR proposes to construct and own, may not be “transportation” that will be conducted by a “rail carrier” and therefore outside the jurisdiction of the Board, merely states a known fact the Board was aware of when it promulgated its rules implementing the CRA. As the Board noted “[a] property could host different activities subject to varying levels of Board jurisdiction, or host activities not within the Board’s jurisdiction at all.” *Solid Waste Rail Transfer Facilities*, EP No. 684 (Interim Rules with Request for Comments served January 14, 2009) at 5. Consequently, as BHR did in its Petition for Exemption, parties seeking land-use exemptions should provide a detailed description of their planned operations. The fact that some activities at a solid waste rail transfer facility might not fall under the Board’s jurisdiction is therefore no basis for denying a request for a land use exemption that preempts an applicable “law affecting the siting” of the facility. BHR has fully recognized that some of the functions of the planned facility will be subject to state and local laws which are not preempted

by operation of §10909, and it will comply with such laws. This being said, for all the reasons set forth in the Petition recycling and processing of solid waste are included within the activities falling within the Board's jurisdiction under the CRA. CCE's strained attempt to refute this reasonable interpretation of the CRA falls well short of its intended mark. CCE Reply at 46.

E. The Petition for Exemption Combined with the Extensive Prior Review of Development of Rail-Served Facilities on Parcel D and New Environmental Review by the STB, is the Appropriate Means to Obtain a Land Use Exemption in These Circumstances

Finally, CCE takes issue with BHR's election to seek a land-use exemption ruling through a Petition for Exemption rather than a full application for a land-use exemption permit under 49 C.F.R. Part 1155. However, despite CCE's efforts to portray the Facility as a totally new project to be constructed on pristine forest land on Long Island where no industrial development was contemplated, the history of this location and the actual facts set forth in the Petition for Exemption establish that Parcel D is located in a heavily industrial area, the construction of extensive railroad tracks and rail-served industries on it have been contemplated for many years, and the public benefits of such development have been extensively weighed against any potential environmental harm. Moreover, it is not disputed that the only law preventing the siting of the Facility on Parcel D is the Town's zoning law. Further, CCE misleadingly exaggerates the size and scope of the Facility by seizing upon an *estimated* intake of solid waste of 6,000 tons per day, which may or may not occur *five years* after the Facility is constructed, and falsely turning it into a *proposal* to ship this volume annually. *See e.g.*, CCE Reply at 5 and 20, Verified Statement of Esposito at 7; *contra* White V.S. at 4,5, and 12. CCE also downplays the extent to which the Town supports the construction of the Facility and the extent to which BHR and Winters Bros. have worked with the Town on issues such as the Conservation Easement, which would be expanded as a result of BHR's planned project. In short, when these and other CCE's exaggerations and misstatements

are stripped away, the relief sought by BHR remains very limited, and under all the facts and circumstances as explained in the Petition and clarified in this Reply, the request for a land-use exemption can and should be made through the petition for exemption process under §10502.⁸

Additionally, CCE's statement that §10502 exemptions are to be used only where "a matter presents neither controversy nor complexity" is flatly wrong, and it is belied by numerous instances to the contrary where the subjects of petitions for exemption are controversial, complex, or both. *See, e.g., Docket No. FD 35724 (Sub-No.1) California High-Speed Rail Authority – Construction Exemption – In Fresno, Kings, Tulare, and Kern Counties, California* (Decision Served August 12, 2014)(112 miles of high speed rail); Finance Docket No. 34797, *New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – In Wilmington and Woburn Ma* (controversial proceeding involving a transload facility that was commenced in 2005, a revised petition for exemption was filed in 2016, and the proceeding is ongoing), Finance Docket No. 34079, *San Jacinto Rail Ltd – Construction Exemption and the Burlington Northern and Santa Fe Railway Company – Operation Exemption – Build-out to the Bayport Loop Near Houston, Harris County, Texas* (served May 9, 2003)(highly contested railroad construction proposal that entailed implementing a condition placed on the merger of Union Pacific Railroad Company and Southern Pacific Lines). The weakness of this argument is highlighted by CCE's citation to *class exemption* proceedings before the Board, which are entirely different procedures that are of no relevance to this proceeding, as support for this erroneous assertion about petition for exemption proceedings. CCE Reply at 21. Additionally,

⁸ CCE's argument at page 19 of the CCE Reply that granting this Petition for Exemption, which would reduce the federal regulatory process for granting a land-use exemption, somehow would "maximize" federal control over the rail transportation system, is somewhat puzzling, given that a full application for a land-use exemption permit would produce the exact same result – preemption of the Town's zoning law – with more federal regulatory control.

in the single case CCE cites for the proposition that the Board “repeatedly” rejects petitions for exemption when they involve contested facts or other criteria CCE posits, *Id.*, the project had previously been approved pursuant to a petition for exemption but was reopened because of new facts - and also the keen interest of dozens of state and local officials and Members of Congress both for and against the project. That extraordinarily high level of interest from elected officials is lacking in this proceeding. Moreover, to the extent this Petition for Exemption proceeding has become “controversial” or “complex” it has become so primarily because of only two participants: CCE and the Sills Road Realty entities, both of whom have extreme opposition to the Facility, BHR, and Winters Bros. for different reasons. But, as past petition for exemption proceedings have shown, mere opposition to the subject of the exemption sought, even heated opposition, is no grounds for denying or rejecting the petition.

Finally, much of CCE’s arguments in opposition to BHR seeking a land use exemption through this Petition for Exemption emanate from its interpretation of the CRA and the regulations to consider such requests on a case-by-case basis. Reply at 17-18. BHR submits that is exactly what is occurring in this proceeding, albeit through the Board’s processes under §10502. However, BHR has also stated that if the Board believes that the information it has been provided by BHR in this proceeding is insufficient for it to make the required determination under §10909, the appropriate mechanism to address any concern, out of administrative efficiency and taking into account the need for this Facility in light of the impending solid waste disposal crisis on Long Island, would be for BHR to supplement this Petition for Exemption, as opposed to preparing a new land-use exemption permit application. This approach should also be preferred because the OEA’s review of the potential environmental impacts of the project pursuant to NEPA has been

well under way since June, 2020, including the retention of a Third-Party Consultant who is being funded by BHR pursuant to the Board's regulations.

**V.
CONCLUSION**

For all the reasons set forth above, BHR requests the Board to implement an exemption proceeding, and after compiling a sufficient record, issue a decision that (1) exempts Petitioner from the full requirements of 49 U.S.C. §10909 and 49 CFR Part 1155 for obtaining a "land-use exemption for a solid waste rail transfer facility that is or is proposed to be operated by on behalf of a rail carrier" (§10909(a)); and (2) rule that the Town zoning law described herein is preempted with regard to the construction, ownership, and operation of the Facility as described herein (§10909(f)).

Respectfully submitted,



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Kristine O. Little
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Washington, D.C. 20007
(202) 342-5248

Attorneys for Brookhaven Rail LLC

October 5, 2020

Docket FD 36399
Attachment A

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36399

**BROOKHAVEN RAIL LLC – PETITION FOR EXEMPTION FROM
REQUIREMENTS OF 49 U.S.C. §10909**

VERIFIED STATEMENT OF LISA A. CAIRO, ESQ.

My name is Lisa A. Cairo, Esq. I am a member of Jaspan Schlesinger, LLP, zoning counsel for Brookhaven Rail LLC (“BHR”) with respect to the proposed solid waste rail transfer facility (“SWRTF”) on Parcel D which is the subject of the within Petition for Exemption from Requirements of 49 U.S.C. §10909 (“Petition”). The purpose of this verified statement is to address certain factual inaccuracies set forth in the Town of Brookhaven New York’s September 11, 2020 “Response of Town of Brookhaven New York to Petition of Brookhaven Rail LLC for Exemption from Requirements of 49 U.S.C. §10909” (“Response”).

I have practiced in the areas of zoning, land use and municipal law for nearly two decades. I have appeared before various municipal boards across Long Island. I have represented many commercial property owners before both zoning and planning boards concerning applications that have been vehemently opposed by local civic associations. Additionally, since 2011, I have acted as counsel to the Village of Valley Stream Board of

Appeals. In my capacity as counsel to this Board I have defended multiple Civil Procedure Law Article 78 petitions for the review of zoning board's determinations in State Supreme Court. My firm has additionally represented numerous municipalities in zoning matters including Brookhaven at times.

As explained in BHR's accompanying Reply to Reply in Opposition of the Citizens Campaign for the Environment ("CCE") ("BHR Reply"), the Town's September 11, 2020 Response follows the Town's initial submission on July 14, 2020 to the Office of Environmental Analysis ("OEA"), wherein the Town acknowledges the STB's power to exempt BHR's Proposed Facility from local land use requirements. Particularly, in the initial submission, the Town states that "The Town's position regarding both the §10909 exemption application and NEPA review is that any approvals should include appropriate conditions comporting with the development conditions expressly imposed by the 2016 Stipulation" (see, Comm. Reilly letter, page 3).

After receiving the CCE's August 27, 2020 letter to the Town's Supervisor, the Town submitted its Response. The Response conflicts with the Town's acknowledgement in its initial submission concerning the STB's land-use exemption power. Specifically, the Response asserts, without elaboration, that BHR should now "petition the Town Board for a change of zone or seek other Permits required and appropriate to authorize the Proposed Project including the SWRTF, [and] the Town is prepared to promptly and fully review, consider and take such action concerning local approvals as may be appropriate when presented with such Application by BHR" (Response, pg. 2). What the Town fails to address is the fact it tangentially acknowledged previously in its letter to OEA, i.e. that currently neither a solid waste management facility (SWMF), nor a solid waste rail transfer facility (SWRTF) is a permitted use, or a special permit

use¹, in any of the Town's zoning districts. As such, in order for BHR to apply to the Town for the right to site and construct the proposed SWRTF on Parcel D, the Town must first legislatively amend its zoning code to include a SWRTF and/or SWMF as either permitted uses or, more likely, special permit uses in its industrial zoning districts. The Town is well aware that such a proposed amendment to the zoning code encompasses numerous procedural requirements that historically occur over a lengthy time period. Initially, the Town would have to draft the proposed code amendment and circulate it to various Town departments along with its referral to the Suffolk County Planning Commission ("SCPC") for review and recommendation. After the various Town departments complete their review and the SCPC provides a recommendation, a public hearing can be scheduled for the Town Board to consider adoption of the code amendment. The proposed code amendment will of course be subject to New York State Environmental Quality Review ("SEQRA"). Keep in mind that if the SCPC recommends disapproval of the code amendment, the Town Board must vote by super majority (majority plus one) to pass the code amendment. Legislative action of this sort is at best problematic, as evidenced by the Town's attempt to reverse its position before this Board at the slightest civic group's prodding. Additionally, any such legislative action taken by the Town Board to amend the zoning code may result in litigation such as a claim that the Town has engaged in unlawful "spot-zoning" (i.e., the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, see Adirondack Park Agency v. Ton-Da-Lay Associates, 61 A.D.2d 107 (3rd Dep't 1978), and/or a declaratory judgment action challenging the validity of the amendment. Of course, any litigation commenced as a result of the code amendment will postpone any BHR application process before the Town until the conclusion of

¹ A special permit use is a use of real property requiring approval from either a municipal zoning or planning board. As long as the special permit criteria and/or conditions set forth in the municipal code for the particular use are met the special permit should be granted.

the litigation. Accordingly, in my experience if the STB does not grant BHR the requested land-use exemption, and assuming the adoption of the necessary legislation, it is likely that it will be many years before processes are in place for an application to be submitted to the Town to consider and potentially approve the proposed SWRTF on Parcel D.

If the necessary legislation was duly enacted and upheld after court challenges, then BHR would then have to make application for a special use permit. Such application, in and of itself, is complex, subject to discretion and further court challenges. Unless the STB asserts its jurisdiction it is, in my opinion, unlikely a SWRTF on Parcel D could be operational in less than a decade assuming all legislative, discretionary zoning application and court decisions favor BHR.

Moreover, in determining whether or not the land-use exemption shall be approved, the STB is to consider the possible risk to public health, safety or the environment. 49 U.S.C. §10909(c). As referred to in the Town's initial July 14, 2020 submission, a Voluntary Draft Environmental Impact Statement ("VDEIS") was prepared in 2016 in conjunction with a Stipulation entered into between the Town and owners of real property including Parcel D (the "2016 Stipulation"). The VDEIS was drafted by VHB Engineering on behalf of the Town. Although a proposed SWRTF at Parcel D was not explicitly addressed in the VDEIS, the idea of Parcel D being used for rail related purposes was discussed along with references to the future development of Parcel D being exempt from the Town's zoning requirements.

The Proposed Action in the VDEIS was defined as "expansion of the existing Brookhaven Rail Terminal ("BRT") transloading and terminal facility, located at 2005 Sills Road, on the south side of the Long Island Expressway South Service Road, in the hamlet of Yaphank, Town of Brookhaven, Suffolk County, New York. Specifically the existing +/-29 acre

facility would be expanded to incorporate an additional +/-321 acres of generally contiguous, currently undeveloped, property to the east and southeast of the existing operation (identified as Parcels B, C, and D on Figure 1, herein referred to as the “Proposed Action”).”

Additionally, the VDEIS provides a detailed description of the properties surrounding Parcel D. “There are various Suffolk County municipal uses to the east of Parcel D, including: undeveloped Suffolk County owned land; Suffolk County offices, the Suffolk County Police Headquarters; the Suffolk County Yaphank Correctional Facility; the Suffolk County Fire Academy and the Yaphank Sewage Treatment Facility abuts the central portion of Parcel D to the east” (VDEIS, pg. 93). It goes on to provide that, “immediately west of Parcel D is a large-scale industrial facility engaged in rock-crushing operations along Grucci Lane, undeveloped wooded land, a LIPA substation, and a large excavated area to be developed as the commercial fish farm” (VDEIS, pg. 95).

In considering whether or not to approve BHR’s request for a land-use exemption, the STB must take into account the location of Parcel D and the existing surrounding uses, (i.e sewage treatment plant and rock crushing operation). These heavy industrial uses adjoining Parcel D exemplify that the proposed SWRTF will not create a risk to public health, safety or the environment. Rather, Parcel D is undoubtedly an appropriate location for the proposed SWRTF to be operated in conjunction with anticipated new common carrier track BHR has proposed to construct.

Verification

I, Lisa A. Cairo, Esq., declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to sponsor this testimony.

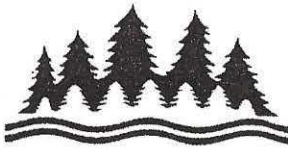
Executed: October 1, 2020



Lisa A. Cairo, Esq.

Docket FD 36399
Attachment B

**CITIZENS
CAMPAIGN**
FOR THE ENVIRONMENT



www.citizenscampaign.org

- 225A Main Street • Farmingdale, NY 11735
516-390-7150
- 744 Broadway • Albany, NY 12207
518-772-1862
- 733 Delaware Road, Box 140 • Buffalo, NY 14223
716-831-3206
- 2000 Teall Avenue, Suite #204 • Syracuse, NY 13206
315-472-1339
- 2404 Whitney Avenue, 2nd Fl. • Hamden, CT 06518
203-821-7050

Empowering Communities, Advocating Solutions.

August 27, 2020

Supervisor Ed Romaine
Town of Brookhaven
1 Independence Hill
Farmingville, NY 11738

**RE: Brookhaven Rail LLC Petition for Exemption from Requirements of 49 U.S.C.
10909 for a Rail Line and Solid Waste Transfer Facility in Suffolk County—FD
No.36399**

Dear Supervisor Romaine,

I am writing regarding the application submitted to the federal Surface Transportation Board (STB) for the construction and operation of a new common carrier track and for a land use exemption for a solid waste rail transfer facility in Yaphank, which will completely avoid all Town zoning and environmental review and public input from the residents of Brookhaven. The proposal is located on a 228-acre wooded property, where clearing and destruction of hundreds of acres of virgin land, trees, vegetation, and wildlife habitats would occur. This proposal ascertains the intent to accept 6,000 tons per day of construction and demolition waste. This is nearly triple the current daily intake from Brookhaven landfill. Citizens Campaign for the Environment (CCE) filed and was granted a 30-day comment period extension by the STB. The comment period has been extended to September 16, 2020.

CCE is extremely concerned with the letter from the Town of Brookhaven, dated July 14, 2020, submitted to the STB abdicating local control and zoning for this massive solid waste facility.

The Town's letter states, "The Town is also informed of the STB's jurisdiction under 49 U.S.C. 10909 to preempt the Town's local zoning code, in a proper case. The Town itself takes no position as to whether the Proposed Project involving SWRTF to transfer Municipal Solid Waste ("MSW") and Construction and Demolition Debris ("C&D") generated on Long Island railcars

for disposal is such a case, which is to be determined by the STB. However, the STB/OEA Letter itself notes the Town's landfill is closing in 2024 and it is highly unlikely that a legislative change to the applicable zoning law required to permit a SWRTF could be made in time to enable the proposed facility to be a potential recipient of the volumes of waste that will have to be disposed of elsewhere due to the closure."

It is reprehensible that the Town takes "no position" on retaining local zoning authority for siting this large-scale solid waste facility on 228 acres of virgin, wooded lands. 49 USC 10909 does not automatically exempt a project from local control and zoning. Brookhaven Rail is seeking an exemption from local zoning through 49 USC 10909. Brookhaven Town should object to this unreasonable request.

The Town cannot and should not rely on federal government oversight to ensure proper protocols and safety precautions are in place to protect residents, our environment and the neighbors' quality of life. The Town must keep local control to ensure a transparent and substantive public process. Relinquishing local control means that there will be no Town Board zone change public hearing, no special permit review, no opportunity for public input, and no review under the State Environmental Quality Review Act (SEQRA). It would be a disservice to the public for a project of this scope to circumvent the town's own code and procedure.

CCE is respectfully requesting and urging the town rescind and revise the July 14, 2020 letter to the Surface Transportation Board and submit a new letter by the September 16th deadline explicitly stating the Town does not support enacting 49 USC 10909 which would preempt the Town's local zoning control.

There are critical lessons learned from the historically troubled Brookhaven Rail project. The Brookhaven Rail owners made many promises to follow local environmental laws, however the owners instead sand mined the property, did not comply with local environmental protection laws and subsequently had to be sued by Brookhaven Town. As I am sure you recall, the Town of Brookhaven filed in U.S District Court in 2015 and demanded \$15 million in damages from the operators of Brookhaven Rail Terminal for what the Town called "the environmental destruction" caused by illegal sand mining and other actions at the terminal in Yaphank. How is it possible for the same Town that sued to protect the environment in 2015 from a rail terminal project gone amuck, is now abdicating your own authority to protect our environment from another similar project?

Keeping local control and siting ability for a new, large scale solid waste facility will allow the Town to ensure that residents and the environment are protected. This project will require the clearing and destruction of hundreds of acres of virgin land and is one of the last vestiges of open space in Yaphank. It is wholly inappropriate to allow Brookhaven Rail –a private entity- to entirely evade local zoning and environmental review for this massive Transfer Station, when the

Town itself will be going through a comprehensive review process for the proposed Regional Ashfill site.

CCE understands the Brookhaven landfill is scheduled to close in 2024 which necessitates a need for innovative waste solutions for Long Island. A holistic plan to manage Long Island's waste stream safely and effectively, including disposal options for construction and demolition debris and incinerator ash, is critically needed. This plan should be developed with local stakeholders, municipalities, and waste experts and not punted to the federal STB in Washington, D.C.

Brookhaven Town has a unique opportunity -- and responsibility -- to advance these conversations and we look forward to working with the Town to find solutions. Please feel free to contact me regarding any questions at 516-390-7150.

Thank you,



Adrienne Esposito
Executive Director

CC: US Senator Schumer
Congressman Zeldin
NYS Senator Kaminsky
NYS Senator Martinez
NYS Assemblyman Englebright
NYS Assemblyman DeStefano
Suffolk County Executive Steve Bellone
Suffolk County Legislator Calarco
NYS DEC Regional Director Carrie Meeks Gallagher
Ms. Sarah Lansdale, Suffolk County Planning Director
Brookhaven Town Board Members

Docket FD 36399
Attachment C

RCB | ROSENBERG CALICA & BIRNEY LLP

100 Garden City Plaza, Suite 408, Garden City, New York 11530 TELEPHONE 516-747-7400

Robert M. Calica
Partner

Writer's Contact Telephone: (516) 971-7400 (mobile)

DIRECT DIAL: (516) 747-7400 (Ext. 307)

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EMAIL ADDRESS: rcalica@rcblaw.com

August 28, 2020

VIA FEDERAL EXPRESS

Ms. Adrienne Esposito, Executive Director
Citizens Campaign for the Environment
225A Main Street
Farmingdale, New York 11735

Re: Brookhaven Rail LLC Petition for Exemption from Requirements of 49 U.S.C. 10909
for a Rail Line and Solid Waste Transfer Facility in Suffolk County - FD No. 36399

Dear Ms. Esposito:

As Special Counsel to Brookhaven Town Attorney Annette Eaderesto in the various legal matters concerning the proposed expansion of the Brookhaven Rail Terminal in Yaphank, New York, we respond to your August 27, 2020 letter addressed to Town of Brookhaven Supervisor Edward P. Romaine.

The Town shares the environmental and preservation goals of the Citizens Campaign for the Environment, and the Town itself has taken the lead in protecting and preserving the environment of the properties adjoining the Brookhaven Rail Terminal (consisting of Parcel B comprising 20 acres and Parcel C comprising 73 acres to the west and Parcel D comprising 228 acres to the south of the Long Island Railroad Tracks). We respectfully direct your attention to the Town's extensive environmentally protective role, and the nature of the recent proceedings before the United States Surface Transportation Board ("STB") relating to Parcel D which is already subject to extensive environmental protections imposed by the Town pursuant to Court Order.

The Town of Brookhaven was the lone governmental body which aggressively challenged the sand mining, including excavation, removal and sale of native sand and soils ("Native Materials") by the operators of the Brookhaven Rail Terminal from Parcels B and C under the guise of a purported railway expansion/spur. Despite the Rail Terminal operators' legal claims of complete Federal preemption of any Town or DEC environmental oversight, the Town at considerable effort and expense, successfully sued the BRT Operators and obtained a full injunction to halt their sand mining and environmental devastation of Parcels B and C. The Town also obtained an Order directing the BRT operators to remove 15,000 cubic yards of contaminants dumped on the site.

Adrienne Esposito, Executive Director

August 28, 2020

Page 2

Thereafter, because of the strong encouragement of New York State Officials seeking to facilitate an expansion of rail transport on Long Island, while at the same time preserving and asserting the Town's strict environmental oversight, the Town and the BRT Owners entered into a judicially "So-Ordered" Stipulation dated March 28, 2016 (the "2016 Stipulation"), under which, despite the rail operators' claims of Federal preemption, the entire development (including Parcel D at issue in your letter) were and remain subject to extensive environmental oversight by the Town under SEQRA. The environmental review was overseen by the prominent engineering firm of VHB Engineering serving as the Town's Consultant which prepared a 3,000 page Voluntary Draft Environmental Impact Statement ("VDEIS") for all of the Parcels as well as a conditioned Negative Declaration adopted by the Town Board on September 14, 2017 which subjected the planned rail development to extensive environmental mitigation and Town oversight which continues to date.

Throughout this process, the Town recognized (as it is required to legally) that as to "pure rail" structures such as "transloading buildings" to be constructed on any of the Parcels, the STB would be authorized to assume primary and pre-emptive jurisdiction. In fact, the "so-ordered" Stipulation approved by the Court made express provision for this pre-emption contingency.

Recently, the current owners of Brookhaven Rail LLC, which own the railway rights concerning Parcel D, filed an Application to the STB to exercise its pre-emptive jurisdiction over a proposed SWRTF on Parcel D. The Office of Environmental Administration ("OEA") of the STB requested the Town's "initial comments" which were contained in my firm's July 14, 2020 letter to which you refer. That letter scarcely "abdicated" the Town's local control. Rather, in accordance with federal statutory procedures (specifically 49 U.S.C. 10909), and upon the advice of my law firm, the Town acknowledged the legal authority of the STB to pre-empt local Town zoning in a proper case, but at the same time, advised the STB that the current owners of Parcel D remain and will remain subject to all of the protective environmental mitigation measures imposed by the 2016 Stipulation.

Rather than "abdicate" the Town's environmental oversight, the Town has actively and continues to actively assert and insist that the STB continue to apply the same strict environmental mitigation measures contained in the VDEIS, the Negative Declaration under SEQRA, and the 2016 Stipulation as to Parcel D. To this end, I enclose a copy of the July 31, 2020 letter of Brookhaven Town Senior Environmental Analyst Peter Fontaine (Ex. 1) in which the Town requests that the STB's environmental analysis and mitigation requirements mirror those previously ordered by the Town and which continue to bind the owners of Parcel D (except as to zoning).

The Brookhaven Rail Terminal operators, may be the source of the misunderstanding contained in your letter to Supervisor Romaine. They are the sole operators of Parcels B and C who alone have been responsible for violating the strong environmental protections contained in the 2016 Stipulation and the Negative Declaration by extensively "sand mining" those Parcels (an additional 547,000 cubic yards of Native Materials), despite having failed to construct any track, despite the lack of any feasible

Adrienne Esposito, Executive Director

August 28, 2020

Page 3

Track Plan pursuant to which to do so, and who are attempting to extensively reduce the grades across this entire 93 acre Parcels B and C via excavation and sand mining to accommodate a purported tunnel/underpass access to Parcel D which apparently will not be needed. As a result, and in order to salvage the environmental devastation to Parcels B and C already wrought by the BRT Operators, the Town has issued a Stop Work Order to halt further sand mining, has issued formal Notices of Default under the 2016 Stipulation to the BRT Operators, and has asked the Federal Court to reinstate the injunction against further sand mining of these properties and require their restoration.

Finally, we note that under the 2016 Stipulation, the Town acquired a 62-acre Open Space Conservation Easement on Parcel D (already zoned for L1 light industrial use) and that the current owners, rather than excavating Parcel D for purposes of a tunnel access, are proposing a short direct track spur onto Parcel D from the existing Long Island Railroad Tracks. In the event the STB determines to exercise its pre-emptive authority over the proposed development of Parcel D, the Conservation Easement and Open Space will continue with the minor exception that the approximately 3-acre corner portion which will be traversed by the spur track will be exchanged for twice the acreage incomparable open space property elsewhere on Parcel D. The clearing of the remainder of the 228-acre Parcel D for purposes of building structures to be supported by rail, less protective setbacks, was already approved as a result of the prior SEQRA proceedings described above.

Again, the Town appreciates the important environmental role played by your organization and appreciates its continuing interest in the development of this property. We ask however that your assessment of the Town's conduct respecting Parcel D and the proposed SWRTF be informed by the matters addressed above.

Very truly yours,

ROSENBERG CALICA & BIRNEY LLP

By: *Robert M. Calica*

Robert M. Calica

RMC:ds

Attachment

cc: Supervisor Edward P. Romaine
Town of Brookhaven
Annette Eaderesto, Esq.
Town Attorney Town of Brookhaven

Docket FD 36399
Attachment D



Town of Brookhaven Long Island

Edward P. Romaine, Supervisor

June 15, 2020

Mr. John Cameron
Long Island Regional Planning Council
1874 Muttontown Road
Syosset, NY 11801

Dear Mr. Cameron,

The impact of the Coronavirus pandemic has not allowed for a follow up to the Council's February 27th meeting concerning the looming solid waste crisis that Long Island will face in the next few years. The average Long Island resident is producing 4.5 pounds of residential waste each and every day. Essentially, there are currently two methods to handle this residential waste – transporting it off Long Island to a landfill either upstate or out of state, or having it burned in one of the Island's four waste-to-energy plants.

While recycling programs help, they have played a smaller role in solid waste management since China and other nations greatly reduced their market for recycled material from the United States.

Approximately 2,000 trucks transport waste to landfills off Long Island every day. These trucks stress our aging and congested highway and bridge infrastructure. New federal regulations limit truck drivers to no more than eight hours behind the wheel, making a one-day round trip less likely. Costs for transporting waste for North Hempstead, Oyster Bay, Riverhead, Southampton, East Hampton, and Southold towns are rising.

Meanwhile, the Towns of Islip, Babylon, Huntington, Smithtown, and Hempstead all have waste-to-energy plants where they burn their waste as well as Brookhaven's waste. However, the garbage incineration process produces ash as well as energy. This ash needs a place to go. Currently, 350,000 tons of this ash goes to the Brookhaven Landfill, the largest ash depository on Long Island.

The Brookhaven Landfill performs another crucial function. It is one of only two sites accepting construction debris from Long Island and parts of New York City. To date, the Brookhaven Landfill accepts 720,000 tons of construction debris annually.

Office of the Supervisor

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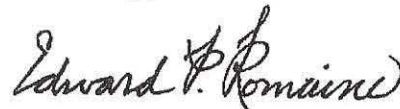
The Brookhaven Landfill is nearing the end of its useful life and is expected to close at the end of 2024. That would mean the cost of ash disposal for nearly 2,000,000 residents in Nassau and Suffolk County will increase dramatically since it is the only place on Long Island that accepts ash.

The closing of the Brookhaven Landfill will have a decidedly negative impact on the construction and building industry. Without an on-island site accepting construction debris, the impact on the regional economy would be immediate.

Time is running out to address Long Island's solid waste disposal issue. Even if we are able to do so now, it will still take several years to implement any changes. As I have said before, this is a regional issue that will impact all of us on Long Island. We need to come together as a region to find solutions that we can start implementing now.

I would urge the Long Island Regional Planning Council to work with the thirteen towns, two counties, two cities and the New York State Department of Environmental Conservation to develop solutions to avoid a solid waste crisis. If we don't address this issue now, it is going to be yet another thing that will make Long Island a less desirable place to live and work.

Sincerely,



Edward P. Romaine
Supervisor

EPR/kf

cc: Mr. Michael White, LIRPC Vice Chairman
Mr. Jeffrey Kraut, LIRPC Treasurer
Ms. Theresa Sanders, LIRPC Secretary
Ms. Barbara Donno, LIRPC Council Member
Ms. Elizabeth Custodio, LIRPC Council Member
Ms. Nancy Engelhardt, LIRPC Council Member
Mr. Jeff Guillot, LIRPC Council Member
Mr. Robert Kennedy, LIRPC Council Member
Mr. Ralph Scordino, LIRPC Council Member
Mr. Edward Wehrheim, LIRPC Council Member
Brookhaven Town Council
Carrie Meek Gallagher, NYSDEC Regional Director
Kevin Law, LIA President

Docket FD 36399
Attachment E

LONG ISLAND / ENVIRONMENT

LI Planning Council attendees agree solid waste disposal a 'looming crisis'



Will Flower of Winters Bros. Recycling, right, speaks during the Long Island Regional Planning Council panel discussion Thursday in Melville. Flower said glass should be recycled, but he said there needs to be a better way to do it. Credit: Danielle Silverman

By Olivia Winslow

olivia.winslow@newsday.com

Updated February 27, 2020 7:14 PM

How to dispose of millions of tons of solid waste on Long Island, with Brookhaven landfill scheduled to close in 2024, was described as a "looming crisis" during a panel discussion of experts at the Long Island Regional Planning Council meeting Thursday.

Brookhaven Supervisor Edward P. Romaine, who was asked to comment at the end of the panel discussion, offered an even starker viewpoint.

"No, it's not a looming crisis. It's now," Romaine told the standing-room-only crowd of about 100 people gathered in Melville. "Either we get together as a region to resolve this and have a path forward, or this is going to be yet another thing that makes Long Island less desirable to live, work, play, etcetera. Either we start addressing this, or we're going to suffer."

The planning council's probing of the solid waste management challenges Long Island faces brought together representatives of several municipalities, environmentalists, the state Department of Environmental Conservation whose Long Island regional director Carrie Meek-Gallagher was among the panelists, academics and others.

Among the data presented by Michael White, vice chair of the planning council, who gave an overview of the issue:

- The Brookhaven landfill handles the majority of ash from the energy-from-waste facilities, about 350,000 tons of ash annually that is the result of burning the waste.
- The Babylon Landfill handles 50,000 tons of ash.
- Long Island solid waste management is handled through public-private partnership endeavors.
- There are four energy-from-waste facilities on Long Island: Hempstead Covanta, Huntington-Smithtown Covanta, Babylon Covanta and Islip Covanta.
- "Thousands of tons of waste is shipped off Long Island every day, resulting in further stress on our aging and congested highway and bridge infrastructure," White said. "And this approach is bringing us ever-increasing costs."

"This sets the stage for our panel," White said. "The amount of waste generated on Long Island is increasing. The Brookhaven landfill, which opened in the mid-1970s, will close by 2024. With the current volume at the Brookhaven landfill, that means 720,000 tons a year of waste has to find a home somewhere. And another 350,000 tons of ash from the energy from waste facilities will have to find a home somewhere."

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The panel consisted of White; Meek-Gallagher; Will Flower of Winters Bros. Recycling; Matt Miner and Kevin Johnston of the Town of Brookhaven; Richard Sander of Covanta Energy; and Steve Changaris of the National Waste & Recycling Association.

"We need a regional solution,"

Sander said during the 90-minute discussion.

John Cameron, planning council chair, asked the panelists to lay out where things were headed.

Flower said the statistics show that each person produces about 4½ pounds of waste a day. With Long Island's population of about 2.8 million, he said that was a considerable amount. He said 2,000 trucks a day transport waste off the Island.

White added about 6,000 rail cars carrying 600,000 tons of municipal solid waste are transported off the Island. He said more rail capacity was needed.

Many panelists and members of the audience called for innovative ways to handle waste and creating more markets for waste residue, such as turning ash into building materials and pulverizing recyclable glass to use in road materials like Germany is doing, one audience member noted, something the panelists agree should be done. Flower said "glass can and should be recycled," but he said there needs to be a better way to do it, showing the audience pieces of recycling equipment he said was damaged by glass.

White said the planning council planned to form a subcommittee to take on the solid waste management challenges, and invited audience members to participate to help develop recommendations.

Romaine added: "Right now there's only two ways of disposing it: Burn it or bury it ... There has to be better ways for us to handle municipal solid waste ... We got to get out of the regulatory mode and get into the innovator mode. If we don't, all the regulations, all the laws, all the enforcement won't mean squat. We are facing a very serious problem."



By Olivia Winslow

olivia.winslow@newsday.com



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BY DR. MARTY

Docket FD 36399
Attachment F

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD 36399

**BROOKHAVEN RAIL LLC – PETITION FOR EXEMPTION FROM
REQUIREMENTS OF 49 U.S.C. §10909**

VERIFIED STATEMENT OF MICHAEL E. WHITE

My name is Michael E. White. I am an attorney that has practiced in the area of environmental law for more than 25 years. I am also the Vice Chair of the Long Island Regional Planning Council, a member of the Long Island Commission on Aquifer Protection, a founding member of the Long Island Solid Waste Leadership Council and an Adjunct Faculty at the Stony Brook University School of Marine and Atmospheric Sciences. The views and information presented here are my own, informed by the cited qualifications and experience, but do not represent any of the entities listed herein above. I am currently engaged as a consultant to Winters Bros. Waste Systems of Long Island LLC (“Winters Bros.”). Winters Bros. is a privately held, family owned and operated premier solid waste management and recycling company based in West Babylon, New York. Winters Bros. and its predecessor family-owned and operated companies have been providing solid waste collection, recycling, transport and disposal services on Long Island since 1950.

This Verified Statement is offered for the purpose of replying to the verified statements submitted by four individuals in support of the Reply in Opposition of the Citizen's Campaign for the Environment ("CCE") to the Petition for Exemption filed by Brookhaven Rail LLC ("BHR"), (an affiliate of Winters Bros.)(the "CCE Reply"). The four statements, which overlap in some areas, offer factual assertions and speculation about (1) solid waste management on Long Island; (2) the solid waste rail transfer facility proposed by BHR in the Petition for Exemption (the "Facility"); (3) the past and ongoing review of the potential environmental impacts of the Facility; and (4) the existing environmental conditions relating to the site of the Facility.

In an effort to be efficient and succinct, the format of this Verified Statement is a series of bulleted statements relevant to factual assertions in each of the verified statements submitted with the CCE Reply.

A. Verified Statement of Adrienne Esposito

Ms. Esposito makes a large number of incorrect and unsupported factual statements about the Facility and waste management on Long Island, to include Nassau and Suffolk Counties ("L.I.") generally.

1. Contrary to Ms. Esposito's statements, V.S. at 2,7, the Facility is not intended for only Brookhaven landfill waste. BHR and Winters Bros. recognize that the Brookhaven landfill does not accept municipal solid waste ("MSW"), but there are thousands of tons of MSW shipped off L. I. by truck every day. Some of this waste could be shipped by rail rather than truck. There is no other rail transload facility on L. I. shipping MSW off-Island by rail.

2. The Facility will not handle the entirety of waste generated on L I, and is not intended to accept waste generated in New York City (“NYC”) and beyond, as asserted at page 8 of her statement.
3. There is no evidence that the Facility will threaten the L. I. drinking water supply. V. S. at 2. Indeed, the operation of this Facility to move waste by rail rather than by truck will provide an environmental benefit by improving air quality and reducing long- haul truck traffic.
4. The statement discusses potential impacts of the Facility which were not only evaluated and given a hard look in the Voluntary Draft Environmental Impact Statement (“VDEIS”), but were also addressed in the Negative Declaration adopted by the Town of Brookhaven (the “Town”), which presents numerous mitigation measures to be incorporated in the Proposed Project. V S. at 3,4.
5. Contrary to the statements made at page 6, there is a need to ship MSW off-Island by rail as thousands of tons of MSW are presently shipped by truck. Shipping by rail will take thousands of long-haul trucks off the highways and bridges serving L.I., as well as reduce the carbon footprint of moving this waste.
6. The discussion about energy from waste (“EfW”) facilities on L.I omits the fact that such facilities handle only approximately 60% of the MSW generated on L. I. and the remainder goes off- Island by truck. These facilities handle no construction and demolition debris waste (“C&D”). (V S p. 6)
7. The Town’s agreement with Covanta mentioned on page 6 involves only the residential MSW generated in the Town—not the commercial MSW, and that agreement is set to expire about the same time as the Brookhaven landfill is scheduled to close. So, at that

time the Town will not have a disposal facility for C&D, no ashfill for the Covanta ash from its EfW facilities, and would need to address the disposal of the residential MSW generated in the Town.

8. The Town plan for expansion of the Brookhaven landfill as an ash monofill (V.S. at 6-7) is not a long- term management approach for MSW, but a disposal facility for ash from incinerated MSW. In addition to all the other factors which the Town will consider in deciding whether to pursue the plan for an ash monofill, it will be subject to New York State Department of Environmental Conservation (“NYSDEC”) permitting and, of course, a hard look under the State Environmental Quality Review Act (“SEQRA”), meaning there is no guarantee the ash monofill will ever exist.
9. While CCE mentions its wish for a “holistic plan” for resolving the solid waste crisis on Long Island (V.S. at 7) no one, including CCE, the Town, any of the Solid Waste Planning Units on Long Island, or the NYSDEC has come forward with such a “holistic plan.” The crisis will not wait. The proposed Facility is not intended to be, and cannot be, the total solution to the crisis.
10. BHR’s Petition does not “propose” that the Facility will handle 6,000 tons per day of unprocessed C&D. V. S. at 7. This number was provided as an estimated maximum daily tonnage throughput after five years of operation, and it is therefore it is purely speculation to state it will be achieved and sustained. Indeed, BHR’s priority is to minimize the amount of material that must be disposed of at any landfill, so the vast majority of material being shipped out by rail will be processed C&D.
11. The statement expresses an alleged concern that Winters Bros. will gain a monopoly on the C&D generated on L. I. by having this Facility. V. S. at 7. This fails to realize

that when the Brookhaven landfill closes there will be only one landfill left on L.I. that handles C&D. So BHR's Facility will actually prevent the private entity that owns and operates that landfill from gaining a monopoly.

12. Ms. Esposito makes numerous unsupported statements about the potential environmental impacts of the Facility. However, the environmental impacts of rail-served industrial development at the site of the proposed Facility have already been extensively studied and will also be the subject of the Board's NEPA review. For example, any impacts to groundwater, bats and turtles were studied in the VDEIS and any mitigation measures required are presented in the Negative Declaration as determined by the Town. (V S p. 9; VDEIS Sec. 3.2.1.3 ps. 105-109). Moreover, public water supply wells on L. I. are not in the upper glacial portion of the aquifer. (V S p. 10; VDEIS Sec. 3.3.1.1 p.12). Further, any potential impact to the Carman's River and /or Bellport Bay were assessed in the VDEIS and no mitigation measures are presented in the Negative Declaration respecting these waterways. (V S p.10; VDEIS Sec. 3.3.1.1 p.131 Fig. 19)

13. There is no basis for, and no support presented for, the statement that waste "unsuitable" to be shipped by rail will go out by truck. V.S. at 10. Likewise, there is no support for statements that the linehaul movement of the solid waste transloaded at the Facility will be harmful to the operations of the NY&A and LIRR. Both railroads have been briefed by BHR respecting development of the Facility and neither railroad has expressed any opposition to the Facility or the associated planned rail construction, nor have they expressed any problem or concern with the additional railcars anticipated from the Facility moving in their network. V.S. at 10,11. Similarly, there is no basis

for, and no support presented for, any claim that numerous grade crossings will be blocked by railcars to and from the Facility, or the notion that trains will be stopping on side rails. V.S. at.11. The railcars which will go to and from the Facility will go destination to destination. Again, neither the NY&A nor the LIRR have expressed this concern. Congestion on the LIRR network is not a concern expressed by LIRR or NY&A. (V S p.13)

B. Joint Verified Statement of Betak and Sullivan

1. This joint statement proceeds from the erroneous assumption that L. I.'s preferred approach for disposing of MSW is the EfW facilities. Whether there is actually any evidence that it is the preferred option is an open question, but the fact is that these facilities only handle about 60% of the MSW generated on L I and they can handle no C&D. The remainder of the MSW gets shipped off-Island by truck. It is the trucking of this MSW that is also driving the solid waste crisis on L.I. along with the scheduled closure of the Brookhaven landfill, which supports the need for additional waste-by-rail infrastructure. Contrary to the statement (V.S. at 4,5), which is made with no support, waste from off Long Island does not go to those facilities. As stated above, these facilities cannot even handle what is already generated on L.I..
2. This statement also presents the Town ash monofill as a certainty. V.S. at 5. Yet, as stated previously, the Town is still in the decision making stage of whether to build it, and the Town will need to secure a permit from NYSDEC and go through a SEQRA process, which has only just begun with a draft scope and public scoping session. Opposition to the ash monofill appears to be coming from some of the same community groups who are forcing the closure of the Brookhaven landfill. And while it is not the

present intention to ship EfW ash out from the Facility to be constructed by BHR, the Facility could do so.

3. The statement states that there is plenty of solid waste facility capacity to manage C&D on L. I. V S at 6,7. But, in a failed attempt to support this assertion the statement refers to a list of facilities that manage and process rock, brick, soil, asphalt, stone and tree debris, not C&D. The statement also confuses processing and transfer with disposal, as any processing facility and/ or transfer facility managing C&D waste still needs to have an outlet for final disposal, i.e., a landfill.
4. The alternative facilities cited in the statement as waste rail transload facilities available on L.I. (Coastal Distribution and One World Recycling) are already operating at capacity. V. S. at 13. In addition, the capacities of the facilities cited are incorrect. I know this because I worked for the company that owns and operates those facilities.
5. Similar to the Esposito statement, this statement offers uninformed and unsupported speculation about the effect of the Facility's operation on the LIRR and NY&A's operations. V. S. at 7-13. However, there is absolutely no proof of this and neither railroad entity has voiced any opposition to the Proposed Project.
6. The statement also wrongly asserts the Facility could/would take waste from New York City. V. S. at 7. BHR has provided no indication that the Facility would handle waste from NYC, and any statement to the contrary is pure speculation. Indeed, in the verified statement of Dr. David Tonjes discussed below he takes the opposite view in an attempt to show that there will not be enough waste to support the Facility as NYC waste would cost too much to ship by truck to the Facility, only to be shipped by train back through the City.

C. Verified Statement of Gobler

As a general point, I am familiar with Dr. Gobler and my understanding is that his prime research field is toxic algal blooms in coastal waters, not groundwater and certainly not the operation of solid waste management facilities. His qualifications to opine on the impacts of the Facility on groundwater and the operation of a solid waste rail transload facility are therefore somewhat questionable. Consistent with this observation is the fact that Mr. Gobler presents no factual or scientific support for the hyperbole that the Facility will create a serious threat to groundwater, drinking water and surface waters, which is what one would expect from a research scientist in making such conclusions. V.S. at 1, 2. As stated below, the facts, based upon the analysis of these issues in the VDEIS, draw into question and discount the assertions made on these topics in the statement.

1. The comments in the VS that "...spills into the ground at the site, including expected substantial amounts of volatile organic compounds ("VOCs") and other hazardous contaminants from solid wastes, will be transported to groundwater in a matter of hours " is no more than unsupported speculation and sensationalism. As a related point, Dr. Gobler fails to recognize that the Town not only has the operating landfill—and wants to expand its facility with an ash monofil, . the Town also has an operating MSW transfer facility which handles all of the residential MSW generated in the Town. Of course, those facilities (which are south of our Proposed Project and therefore closer to the Carmen's River and Bellport Bay) are permitted by NYSDEC. Those permits have compliance conditions and require environmental monitors, as will the Facility, to prevent the problems the statement claims are "expected." V.S. at 2.

2. The proffered assessment of the environmental risk of the Facility presented in the statement also fails to recognize the risks of the existing surrounding land uses: the Town Solid Waste Management Facility, the composting operation next door on bare ground, the rock crushing operation, the County Firematic Center, the County Sewage Treatment Plant operations. V. S. at 2. Under the views presented in the statement, these activities could present more of a threat than the Facility, but are all conforming and complying with the applicable laws and regulations to protect the environment and public health, as the Proposed Project will be.
3. The statement wrongly describes the site of the Facility (Parcel D) as a “pristine forest.” V S at 2,5. This fails to acknowledge that this property was exsessed by the County and sold for the purpose of economic development—specifically an expansive rail transload terminal. If the habitat was so valuable and “pristine”, the County would have held onto it—as it has held onto and purchased thousands of additional acres of land in the County under its land preservation and groundwater protection program.
4. Dr. Gobler is wrong to state that the entirety of the site of the Facility is in the Groundwater Recharge Zone III. It is in Zone VI. His statement references the L.I. 208 Study on this question, but fails to realize that the 208 Study and the location of the various Zones has been updated in the present Suffolk County Sanitary Code and what is stated in the VDEIS reflects the updated maps. Dr. Gobler states that he has read the VDEIS, but a number of his statements are inconsistent with the information and determinations presented in the VDEIS and the Negative Declaration, such as this groundwater Zone mis- statement. Another example is that the V S states the depth to groundwater at the site is 6-20 feet. Yet the VDEIS, which presents backup data on

this point, states it is 2-60 feet, with a 12-26 foot average, and that the shallow points reflect two confined identified areas of depression in the contour of the land at the site. (V.S. at 2; VDEIS Sec.3.3.1.1 ps.125,128,134,Figs. 15,16,17,18).

5. The statement speculates the Facility could impact the Carman's River. Yet the VDEIS concluded that the site is not covered by the Carman's River Management Plan, and the recommendations contained in the Plan to avoid impact to the river do not apply. (V.S. at 5; VDEIS Sec.3.3.1.1 p. 131 Fig.19)
6. The statement goes on about the potential impact of the Town landfill to groundwater—apparently just for effect, as there is no comparison or relationship of a landfill to a solid waste rail transfer facility. V.S. at 3.
7. The statement suggests that all the vehicles that will be associated with the Facility will likely result in the release of contaminants. V. S. at 7. Yet it fails to acknowledge or comment on the fact that under the present conditions there are over 50,000 tractor trailers a year going in and out of the Town's landfill facility, which is directly across the street from the proposed Facility site. Indeed, if these concerns were legitimate, one could argue that there is a need to close down the Long Island Expressway as it is directly over the groundwater recharge area. V.S. at 3.
8. The statement throws in, again seemingly for sensational effect, comments on 1,4 dioxane, which has been the subject of a major successful campaign of CCE to protect L.I.'s drinking water. V. S. at 3. But the major source of this contaminant is commonly used personal care products and laundry detergent, which pass through hundreds of thousands of on-site wastewater systems which discharge into the L.I. sole source

aquifer by over 70% of Suffolk County. This 1,4 dioxane concern has nothing to do with a solid waste rail transfer facility.

9. Despite Dr. Gobler's condemnation of the Facility, V.S. at 4,5,6, he fails to acknowledge—and likely does not even know - that the Town has a transfer station south of the proposed site of the Facility (closer to the Carmen's River Bellport Bay) that handles all of the residential MSW generated in the Town. In addition, he likely is not aware that the MSW generated at his offices at Stony Brook University is transported off-Island by truck. The Facility would clearly present a more environmentally friendly alternative.
10. Again demonstrating that Dr. Gobler is not familiar with the VDEIS or other documents produced from the prior environmental review, his statement expresses concern about impermeable surfaces causing runoff with contaminants. But The Negative Declaration requires permeable pavement, as feasible, as part of the development of Parcel D.
11. The statement opines on the supposed problem of nitrogen releases to groundwater, but Dr. Gobler is apparently also not aware of the fact that the Facility would be connected to the County Sewage Treatment Plant. V.S. at 5; Neg. Dec. at 5,6.
12. Finally, it is simply not credible for Dr. Gobler to say the Facility would impact hard clams in Bellport Bay by creating biotoxins—and a public health threat. V.S. at 5,6. There are literally thousands of existing untreated sanitary wastewater discharges to groundwater permitted by the State and County in the Bellport Bay watershed, none of which have been eliminated on the basis of harming clams in Bellport Bay.

D. Verified Statement of Tonjes

1. Like Ms Esposito, Mr. Tonjes attempts to play up the fact that BHR's Petition contains an estimate that the Facility could reach up to 6,000 tons per day of waste in the fifth year of operation. V. S. at 2. Again, this is a potential facility capacity maximum, not an everyday operating number. Indeed, the Facility may never reach that capacity, but it does need to be sized to accommodate future population growth needs and the needs of an event—such as storm or hurricane—which may require handling of an extraordinary amount of debris.
2. The Facility is not just about managing the waste going to the Town landfill. V.S. at 3. While Winters Bros. is one of the largest customers of the Town landfill, Winters Bros. is also the largest waste collection company on L.I., and Winters Bros. already has a significant amount of waste being handled by its existing operations every day, including MSW that is transported off-Island by truck, as do the numerous other commercial waste collectors serving customers in Suffolk County.
3. The statement mentions the Covanta EfW facilities on Long Island, but fails to recognize that these facilities are operating at capacity and extremely unlikely to be expanded. V S at 3.
4. The V S presents pure speculation on activity based upon tipping fees, a topic Dr. Tonjes does not seem to be familiar with. V.S. at 4.
5. The One World Recycling and Coastal Distribution rail transfer facilities mentioned in the statement are operating at capacity—again Dr. Tonjes engages in uninformed speculation. Again, I know the status of these facilities because I was employed by the company that operates both of those facilities. Also, the Excel Recycling facility mentioned in the statement is a Winters Bros. facility—that has a permit for rail transfer, but which is not

- fully improved with the rail infrastructure to operate. V.S. at 4. The Facility proposed to be constructed by BHR would be a regional facility in a better location.
6. The statement references local and community planning. V.S. at 5. First, the structure of any such plans do not typically deal with commercial waste and C&D. These plans are focused on residential waste. In any case, there has been a lot of talk about what to do with the waste but no decisions made. BHR and Winters Bros. are taking action by committing to the Facility as one component of an overall solution.
 7. With respect to the statement's comments about the potential issues associated with the operation of a transfer station, V.S. at 7,8, the Facility will be subject to a NYSDEC permit, which will include conditions addressing the concerns expressed. In addition, Winters Bros. already operates numerous transfer stations on L.I. both for its own collection operations and for municipalities, all with an exceptional compliance record.
 8. Dr. Tonjes' statement also speculates about the impact of the Facility on truck traffic. V.S. at 10-11. In the first place, the VDEIS included a standalone Traffic Impact Study and included a detailed analysis of the expected additional traffic for a build-out of Parcel D as a rail-served industrial park that conducted truck to transload activities. The VDEIS concluded that this additional traffic would not have an adverse impact. VDEIS, Exh. K. The analysis of trucks and movement of waste on the L.I., particularly from NYC, ignores the existence of the 110 Sand Company landfill on the border of Nassau and Suffolk Counties. The majority of waste, which is restricted to C&D, going into that facility comes out from the City, and we would expect that to stay the same. The comment on the last page of the statement regarding the Town of North Hempstead is yet another showing of lack of knowledge and failure to do any investigation before making conclusory statements.

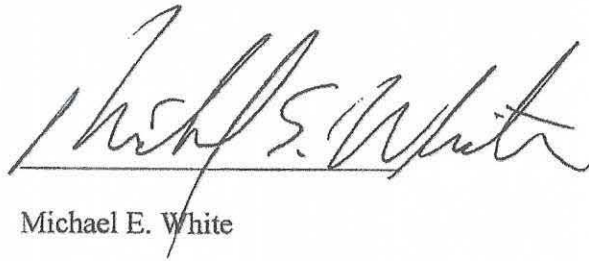
The waste from the Town of North Hempstead goes off-Island by truck and is landfilled in upstate New York under a competitively procured contract. That contract is coming to an end and the Town has recently solicited new proposals. Neither BHR nor Winters Bros. submitted a proposal, so that waste will not be transported to the Facility. Finally, BHR knows that using railroad takes long-haul trucks off the roads and bridges that connect L.I. to the mainland—it does not need to study that question. V.S. at 11. Numerous State and local agencies agree—and so does the Town.

Verification

I, Michael E. White, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to sponsor this testimony.

Executed: October 2, 2020

A handwritten signature in black ink, appearing to read "Michael E. White", is written over a horizontal line. The signature is fluid and cursive.

Michael E. White

CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of October 2020, a copy of the foregoing Motion for Leave to File Reply to the Reply in Opposition of the Citizens Campaign for the Environment and the accompanying Reply to Reply in Opposition was served by email on all parties on the official Service List for this Proceeding.



Thomas W. Wilcox