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October 15, 2020
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October 15, 2020

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

Dear Ms. Brown:

This letter is filed on behalf of Petitioner Brookhaven Rail LLC (“BHR”) in reply to the 105-page “limited supplement” filed in this docket by The Citizens Campaign for the Environment (“CCE”). The submitted materials relate to a proposed solid waste transloading facility that CCE says is information that was “previously unavailable” to it until September 17, 2020 and could therefore not have been included in its September 16, 2020 Reply in Opposition to BHR’s Petition for Exemption. However the submitted materials clearly show CCE knew a great deal of information about this proposed project as early as January 2020, when CCE was provided direct notice and an invitation to, and presumably attended, an expansive Public Information Meeting held on January 21, 2020 by the project proponent Omni Recycling of Brentwood LLC (“Omni Recycling”) and its engineering consultant in compliance with New York State Department of Environmental Conservation (“NYSDEC”) permitting regulations. Supplement at pages 15, 31, 61.¹ This special outreach was required by NYSDEC regulations as

¹ Page number citations are to the PDF document page numbers. According the meeting notice, it was “to provide an overview of CDDHRF and Baled MSW TS operations, the permit

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the proposed project is within an environmental justice area. Prior to the meeting public repositories containing voluminous information about the proposed project were established pursuant to applicable NYSDEC Environmental Justice Policy regulatory requirements. *Id.* at 33, 35. Finally, much of the factual information about the proposed project CCE cites in its cover letter (in addition to improperly rehashing the arguments made in its Reply in Opposition) is contained in a PowerPoint presentation made at the January 21, 2020 meeting. *Id.* at 79-88. CCE's reliance on the Notice of Complete Application's September 17, 2020 date for its claim of "previously unavailable" information is therefore disingenuous.

In addition to being deceptive about its prior knowledge of the proposed project, CCE attempts to plant the false impression that the facility is on the verge of being approved for operation. Nothing could be further from the truth. First, a Notice of Complete Application from NYSDEC is not a permit. Under applicable NYSDEC regulations a "Complete Application" simply means an application for a permit which is determined by the NYSDEC to be complete for the purpose of commencing review of the application but which may need to be supplemented during the course of review in order to enable the NYSDEC to make the findings and determinations required by law. *See* 6NYCRR Part 621.2(f). The Notice of Complete Application is therefore the beginning of the process, not the end. It merely qualifies the proposed project for full review by the NYSDEC and to be subject further public review and comment. A final decision on such a permit application may be the issuance of a permit, issuance of a permit with conditions, or denial of the application for a permit. 6NYCRR 621.10(a)(f).

Given the nature of the proposed project and its location, it is reasonable to expect substantial comments will be submitted during the public comment period, specifically with respect to the Negative Declaration issued pursuant to the State Environmental Quality Review Act ("SEQRA"). It is also important to note that the NYSDEC has the right to amend or even rescind a Negative Declaration at any time prior to its decision on the permit application, if there are changes in the project or there is new information on the project. *See* 6NYCRR Part 617.7(e)(f).

There are also errors and omissions in the Environmental Assessment Form ("EAF") that was submitted by the project proponent. By example, it does not disclose the proposed facility is subject to a further Town of Islip land use process and a determination from the Suffolk County Planning Commission, which has jurisdiction over development within 500 feet of an existing state parkway. Also, the EAF erroneously states that the proposed facility will not use water and fails to disclose that the proposed facility is within five (5) miles of the Edgewood Oak Brush Plains State Preserve. These and many other hurdles mean that the proposed project is far from being approved, let alone constructed and operational.

application process, to describe NYSDEC's Environmental Justice Policy (CP-29), offer an opportunity for the public to ask questions and submit comments on the Project and permit application, confirm the Project public information meeting agenda, provide the Project fact sheet, supply a copy of the public notice for the Meeting, and deliver information on how the public may submit written or emailed comments on the application." *Id.* at 15.



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In conclusion, the fact that a company has proposed to construct a solid waste transfer facility on Long Island for which no regulatory approvals have been obtained and will not be obtained for the indefinite future, if ever, is of little relevance to the issues in this proceeding.² Coupled with the fact that CCE knew all about this proposed facility prior to September 16, 2020 and therefore could have included information about it in its Reply filing but chose not to, the Board should reject the proffered “supplement.”

Please do not hesitate to call me if you have any questions. I certify that a true and correct copy of this letter has been served on all parties of record in this proceeding.

Sincerely,



Thomas W. Wilcox
Attorney for Brookhaven Rail LLC

Cc: All parties on the official service list for this proceeding.

² Although the proposed project is not relevant, it is notable that CCE’s apparent support of it is inconsistent with its opposition to BHR’s proposed facility in some respects. Specifically, the proposed Omni Recycling facility is in or adjoining a Critical Environmental Area, indeed a Special Groundwater Protection Area for recharge of Long Island’s sole source drinking water supply. CCE has opposed the proposed BHR facility in part based on erroneous allegations it will impact groundwater, but in any case the BHR facility is not in a drinking water recharge area. CCE’s apparent support of a project with real potential to impact Long Island’s drinking water supply is at odds with the alleged concern it has expressed about potential water impacts in this proceeding.