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Via E-Filing

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

ENTERED
Office of Proceedings
October 23, 2020
Part of
Public Record

Re: FD 36399, *Brookhaven Rail LLC –Petition For
Exemption from Requirements of 49 U.S.C. § 10909*

Dear Ms. Brown:

The Citizens Campaign for the Environment (“Campaign” or “CCE”) submits this letter in response to (1) the Motion for Leave to File a Reply (“Motion”), and (2) the Reply to the Reply in Opposition (“Surreply”), that Brookhaven Rail LLC (“BHR”) filed in the above-captioned proceeding on October 5, 2020, in response to the Reply in Opposition that CCE filed on September 16, 2020 (“CCE Reply”), responding to the Petition for an Exemption from the Requirements of 49 U.S.C. § 10909 that BHR filed on July 17, 2020 (the “Petition” or “Pet.”).

In the face of CCE’s overwhelming showing in its Reply that BHR’s first-of-its-kind Petition must be denied because it established none of the elements required for a permit under § 10909, as well as none of the elements required for a § 10502 exemption, BHR desperately tries to fix its failed Petition through an expansive and improper 64-page Surreply, including two new statements from two new witnesses. BHR attempts to address a number of matters that it ignored in its Petition but offers no valid reason for belatedly raising them in a surreply. BHR’s new contentions are replete with factual distortions, omissions, and contradictions that only confirm the thinness of its initial filing. Even if BHR could show good cause for its Surreply, which it cannot, BHR’s attempt to supplement its Reply vastly exceeds whatever might be permissible under a reasonable waiver of 49 C.F.R. § 1104.31(c).

The rules prohibiting a reply to a reply exist to prevent a party from withholding information or arguments until some opposition is presented, and in the case of petitions for exemptions, does not allow the petitioner to have the last word, as BHR seeks here, without justification. Accordingly, BHR's Surreply should be disregarded in its entirety. Even if the Surface Transportation Board ("STB" or "Board") decides to accept it, the Surreply provides nothing new to warrant the further consideration of BHR's Petition, and instead provides further grounds for its denial.

A. The Board Should Not Consider BHR's Surreply

BHR's Surreply directly contravenes the Board's rules prohibiting a reply to a reply, and thus the Board should not consider it. *See* 49 C.F.R. § 1104.13(c) ("A reply to a reply is not permitted."); *Waterloo Ry. Co. – Adverse Abandonment – Lines of Bangor & Aroostook R.R. et al. in Aroostook Cnty., ME*, No. AB-124 (Sub-No. 2) (STB served May 6, 2003) (Decision ID 33324) ("*Waterloo*"), at 3 ("the pleading process ends with the reply, and replies to replies are not permitted"). BHR contends in its Motion that its massive Surreply somehow is still necessary and justified because "[a]t no time prior to the filing of the Petition . . . did CCE express any opposition to the Facility." Motion at 3. Potential parties to Board proceedings are not required to inform other parties of their intentions in advance, and a lack of such communications in no way entitles BHR to file a reply to a reply that is squarely prohibited under 49 C.F.R. § 1104.31(c), all the more so in light of the expansive nature of BHR's Surreply.

BHR's core claim that it "could not reasonably have anticipated the contentions of an opponent that could be material to the resolution of a case" rings particularly hollow. In filing a petition for exemption, BHR was obligated to present its case-in-chief. *Id.*, § 1121.3(a). When it made its filing, BHR could not have known whether CCE or anyone else (except perhaps Sills) would have opposed its filing, but it should have prepared for that possibility. In any event, BHR should have considered that it needed to make a persuasive showing under § 10909 as to such matters as: the need for its facility; available alternatives for handling the waste at issue; whether proposed activities actually constitute transportation by rail subject to the Board's jurisdiction; the environmental risks posed by its proposed facility at its chosen location; advantages of other locations in terms of environmental and logistical concerns; the upstream and downstream consequences of its proposal; and whether the existing zoning restrictions are unreasonable or discriminatory. As CCE demonstrated, BHR's Petition largely ignored those matters, and its Petition could not have been granted under § 10909, even if it were unopposed.

BHR also contends that its Surreply is justified because CCE's Reply allegedly contains "new evidence and factual assertions," including from expert witnesses, and "erroneous legal arguments." However, CCE's Reply responded directly to BHR's Petition and thoroughly refuted in all material respects such justifications as it provided for the requested exemption. CCE's Reply contained no new evidence or factual assertions, nor

could it have, because CCE had not previously presented any evidence, opposition or otherwise, in this proceeding. Additionally, the legal arguments made by CCE on Reply are in no way “erroneous” and provide no justification for BHR’s Surreply. *Waterloo* at 3 (claim that a party “blatantly mischaracterizes case law” does not warrant the filing of a surreply, and instead “is merely an argument that [a party’s] interpretation of case law . . . is incorrect”).

BHR points to only one new factual development, the filing that the Town of Brookhaven submitted to the Board on September 11, 2020. Even assuming that BHR is entitled to reply to the Town’s filing,¹ its reply to that filing was due on or before October 1, 2020. 49 C.F.R. § 1104.13(a) (“[a] party may file a reply . . . addressed to any pleading within 20 days after the pleading is filed with the Board”). BHR provides no explanation for its delinquent response to the Town’s filing.

In addition, this is the type of evidence that BHR could have, and should have, presented in its Petition. Under 49 C.F.R. § 1121.3(a), “[a] party filing a petition for exemption shall provide its case-in-chief, along with its supporting evidence, workpapers, and related documents at the time it files its petition.” A bedrock requirement for a showing that a permit under the Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (the “CRA”) and 49 U.S.C. § 10909(d)(6), is a demonstration that siting requirements present unreasonable burdens on, or the potential for discrimination against, the siting of a solid waste rail transfer facility. 49 C.F.R. § 1155.21(b). However, as CCE established in its Reply, BHR completely failed to meet this essential burden, and it barely tried. CCE Reply at 30-33. Recognizing this failure, BHR is only now presenting a witness and submitting evidence on this topic as part of its Surreply, with the Verified Statement of its zoning lawyer, Lisa A. Cairo (“Cairo V.S.”). As explained below, even this new belated testimony completely fails to demonstrate that BHR is entitled to the relief it seeks.

Further, the Surreply is not limited to correcting alleged misstatements. BHR’s initial filing consisted primarily of a 34-page pleading and two verified statements from in-house employees of six pages each, for a total of 46 pages. Its Surreply is only slightly shorter at 38 pages, consisting of a 19-page pleading and two new verified statements: Ms. Cairo, BHRs counsel (five pages); and Michael E. White, attorney and Vice President of Special Projects for Winters Brothers (14 pages) (see Exhibit A). BHR’s attempt to supplement its original 46 pages with 38 new pages and statements of two new witnesses, neither of whom are independent outside experts, vastly exceeds whatever might be permissible under § 1104.31(c).

¹ BHR asserts that CCE somehow “introduced” the Town’s filing, and it therefore is entitled to a surreply. However, the Town of Brookhaven introduced the Town’s letter, not CCE, and CCE’s Reply was filed five days after the Town’s filing. While CCE’s Reply addressed the Town’s filing, this fact alone provides no justification for BHR’s Surreply.

BHR's Surreply is essentially an attempt to salvage its filing in response to the extensive deficiencies that CCE identified. The rule against replies to replies exists to prevent a party from withholding information until some opposition is presented, and does not allow the petitioner to have the last word, as BHR seeks here. *Potomac Elec. Power Co. v. CSX Trans., Inc.*, NOR 41989 (STB served June 27, 1997), at 1 n.1 (Board will not waive its reply-to-reply prohibition rules and allow a party to have "last word," especially where evidence or arguments could have been submitted earlier).

B. BHR's Surreply Does Not Favor Granting the Exemption

In the event the Board chooses to allow BHR's filing, it is only fair and appropriate to permit a response by CCE. As shown below, BHR's Surreply does not support development of a full and complete record "so that the Board will have an accurate basis on which to render a decision." BHR Motion for Leave at 3. Instead, it largely repeats BHR's earlier distortions, introduces new ones, and in a number of instances contradicts or otherwise impeaches what BHR originally submitted. To the extent needed, CCE respectfully requests leave to address those distortions and inaccuracies. In the interest of brevity, CCE will focus only on some of the most significant. Failure to address any item should not be construed as any sort of acquiescence or concession by CCE.

1. The Breadth of Opposition to BHR's Solid Waste Rail Transfer Terminal. BHR seeks to minimize the scope of opposition to BHR's Solid Waste Terminal by claiming that no other community "segment" or members of the public have opposed its facility. Surreply at 2. BHR ignores the fact that CCE has 120,000 members. Esposito V.S. at 2. The size and motivation of that grassroots membership is the source of CCE's influence in matters of local and regional public importance. In addition, New York State Assemblyman Steven Englebright filed his letter of opposition on September 25, 2020. Assemblyman Englebright represents approximately 130,000 Long Island constituents in Suffolk County, is the only natural scientist in the State Legislature, and is Chair of the Assembly Committee on Environmental Conservation. As such, he is able – and elected – to express the general views of his large local constituency, he is independent from the parties, and he has direct, first-hand experience in the matters addressed in his filing. Under the circumstances, Assemblyman Englebright's filing is particularly helpful and should be afforded significant weight.

Any suggestion that CCE or its Executive Director is engaged in a rogue operation that does not represent widespread local concern regarding BHR's proposal is an attempt to mislead. Beyond that, BHR has not identified *any* public support for its proposal, beyond its fabricated claim that the Town supports or has endorsed its proposal (while also claiming it cannot get a fair hearing from the Town). BHR has also not identified any outside support for its proposal, and in fact has submitted testimony only from internal employees and retained attorneys.

2. BHR's Faulty Local Review Procedural Claims. BHR erects a massive strawman that it then seeks to tear down in arguing at length that § 10909 does not require it to proceed locally before invoking the Board's processes under § 10909. Surreply at 3-10. However, CCE *never* asserted there was such a procedural requirement and it did not argue "throughout its Reply that the CRA requires BHR" to seek local siting approval first as BHR now contends. *Id.* at 8. Instead, CCE explained, repeatedly, that the determination under the CRA is made on a *case-by-case basis*, and that BHR's conclusive assertion, without support, that the Town's current zoning law "indisputably prohibits" its proposed facility (Pet. at 24), completely fails to meet and cannot meet the substantive showing required under § 10909. CCE Reply at 30-33.

Also, under the *circumstances of this case*, where the Town has unequivocally stated its openness to considering a zoning change or special use permit, BHR cannot presume that denial of its request is a foregone conclusion. *Id.* BHR insists, with little or no factual support, that the Board must expeditiously render null the Town's local zoning requirements and land use restrictions. However, that is not what the CRA requires, and BHR does not and cannot show that the existing siting requirements unreasonably burden or discriminate against its proposal. Especially in light of its September 11, 2020 filing, having the Town of Brookhaven decide the issue in the first instance in this case is reasonable, appropriate, and in full compliance with the CRA. BHR's procedural claim amounts to a clear attempt by BHR to engage in misdirection and does not offset the substantive defects in its Petition.

In an attempt to resurrect its fatally flawed Petition, BHR's Surreply contains a new Verified Statement of its local zoning counsel, Ms. Cairo. Ms. Cairo states that "[t]he purpose of this verified statement is to address certain factual inaccuracies set forth in the Town of Brookhaven New York's September 11, 2020 [filing]." This type of testimony could have and should have been addressed in its original Petition, even without the September 11, 2020 filing, in order for BHR to meet its burden of proof under § 10909. Regardless, the new belated testimony of Ms. Cairo still fails to satisfy the elements required for a permit under § 10909.

If BHR's belated testimony is allowed, fairness requires that CCE have an opportunity to respond to BHR's new evidence. Accordingly, CCE's filing includes the attached Verified Statement of Larry R. Davis, Esq. ("Davis V.S.") appended hereto in Attachment A. Mr. Davis is an expert in the rezoning and special permit matters that Ms. Cairo wrongly asserts requires an extended time period to achieve, and he has extensive experience practicing before the Town of Brookhaven on such matters for over 20 years.

As Mr. Davis verifies, the Town of Brookhaven's September 11, 2020 filing to the Board that "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 an

Application by BHR,” is correct, and that “if subject to local land use review by the Town of Brookhaven, the proposed SWRTF could be authorized and operational within one year.” Davis V.S. at 1, 3.

As Mr. Davis further verifies, Ms. Cairo’s conclusion that it would be “unlikely” that a transfer facility could be operational in under a decade is wrong, and is based on several false premises. First, Ms. Cairo incorrectly assumes that a solid waste rail transfer facility is not currently a permitted use in the Town of Brookhaven, but such facilities are actually permitted in the Town. *Id.* at 2. Second, Ms. Cairo incorrectly assumes that it would take years to schedule and obtain a change of zone for the property at issue, but applicants have numerous opportunities to apply to the Town Board to schedule a public hearing on as few as ten (10) days notice, and here the Town has verified that it will “promptly” review any such application. *Id.* Third, Ms. Cairo incorrectly assumes that, if a special permit is required, multiple public hearings extending over a period of years would be necessary. *Id.* However, “the Town Board regularly considers multiple applications, specifically including zone change and special permit applications, at the same time at one public hearing.” *Id.* Finally, Ms. Cairo incorrectly assumes that an approval of the Town Board may result in litigation that will indefinitely “postpone” the approval. *Id.* at 2-3. However, such an assumption is also false, as project approval is not stayed pending final resolution of any litigation, and because injunctions are rarely issued developers regularly proceed with approved projects despite pending litigation. *Id.*

Again, based on Mr. Davis’ longstanding and specific experience practicing before the Town of Brookhaven, the proposed transfer facility could be authorized and operational within one year. *Id.* at 1, 3.

3. BHR’s Retreat on Its Prior Solid Waste Crisis Claims. Faced with clear evidence supported by independent expert witnesses in CCE’s Reply that BHR’s proposed facility is not required to address a so-called “crisis” caused by the impending closure of the Brookhaven Landfill, BHR now massively pivots, admitting in large part that there is no actual urgent need for the project to replace lost disposal capacity caused by the Landfill’s closure. BHR instead now argues that there is a “solid waste disposal problem faced by Long Island generally,” and that its “Facility is one solution to a regional problem.” Surreply at 10-11. BHR then challenges why CCE, “an environmental group with ‘a strong’ environmental agenda, ... would be pre-disposed to downplay the need” for BHR’s rail transfer facility in light “of the impending closure of the Town’s landfill.” *Id.* But CCE never suggested that the expected exhaustion of the existing Brookhaven landfill capacity in 2024 can or should go unaddressed. Instead, CCE demonstrated that: (a) the Town has better options to consider, including nearby expansion; (b) even if rail transfer is preferred, more optimal and less environmentally sensitive locations exist; and (c) such decisions should be made locally, by the citizens with the most at stake and their elected representatives, and not the STB. Tellingly, BHR’s original petition gave no hint that the landfill could be expanded, that other locations might exist or already be under development,

and now merely contends on Surreply that “there is no guarantee” that such alternatives will be realized. White V.S. at 4. BHR also did not disclose that C&D already moves off Long Island by rail from several locations and it now admits that Winters Brothers already has an alternative, fully permitted rail transfer facility only a few miles away from its proposed facility in Medford, but it has simply elected not to utilize the facility at this time to address the so-called waste “crisis.” *Id.* at 12-13. This is a remarkable admission against interest. These are also substantial fatal omissions under § 10909, and BHR still has not adequately addressed them.

4. BHR’s Admission that the Prior Environmental Review Did Not Contemplate or Address its Facility. Faced with uncontroverted evidence that a waste transfer facility was outside the scope of and actually conflicts with the prior VDEIS, BHR again resorts to misdirection. BHR insists that CCE’s criticism of BHR’s attempt to rely on the earlier VDEIS is unwarranted, and somehow “puzzling” because, as “BHR has readily acknowledged, . . . the prior efforts did not contemplate a SWRTF on Parcel D.” Surreply at 12. But that admission only serves to contradict BHR’s broad statements elsewhere that the “potential impacts of the Facility . . . 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 . . . which presents numerous mitigation measures to be incorporated in the Proposed Project.” White V.S. at 3.

It should not be puzzling at all that CCE, as well as the Town of Brookhaven, would criticize an effort to rely on an environmental study that did not actually study the unique risks posed by BHR’s proposed operation that even BHR now admits was never contemplated or reviewed. Moreover, CCE has provided a number of verified, expert statements about the potential harmful environmental impacts of the proposed facility – most of which BHR fails to dispute at all, other than to continue to assert generally and incorrectly, that “the environmental impacts of rail served industrial development at the site of the proposed facility have already been extensively studied.” *Id.* at 5. The only thing puzzling is how BHR could equate a facility for receiving residential and commercial building products that arrive by rail with one for receiving, tipping, processing, and then shipping out solid waste, especially at a location where the ground surface is only a few feet above Long Island’s sole-source aquifer.

5. BHR’s Continued Failure to Demonstrate that Its Activities Will Constitute Transportation by a Railroad. In response to CCE’s showing that Winters Brothers, and not BHR, will direct and manage all operational and contractual arrangements for the proposed facility, and merely “coordinate” with BHR on rail service, such that these activities do not constitute transportation by or on behalf of a rail carrier as required by § 10909 (CCE Reply at 43-47), BHR merely responds that CCE is wrong because BHR “will construct and own the Facility.” Reply at 13-14. But that limited response as to ownership only serves to highlight the problem because it completely ignores facility operations, a matter on which BHR already has unequivocally admitted will be handled independently and exclusively by

Winters Brothers. Pet. at 3 (“Winters Bros. will manage both operational requirements and contractual arrangements for the acceptance of inbound waste commodities delivered by truck, as well as making all necessary arrangements for the rail shipment of processed MSW, C&D and marketable recyclables from the Facility. BHR will coordinate with Winters Bros. to provide rail services in conjunction with the loading of and movement of rail cars within the Facility.”)

BHR now claims that Winters Brothers will merely serve as BHR’s agent, but it is clear that true agency as required under the Board’s governing precedent cited by CCE (and by BHR) will not be established. *Borough of Riverdale—Pet. for Decl. Order*, FD 35299 (STB served Aug. 3, 2010); *Town of Babylon and Pinelawn Cemetery—Pet. for Declaratory Order*, FD 35037 (STB served Sept. 26, 2008); *The City of Alexandria, Va.—Petition for Declaratory Order (City of Alexandria)*, FD 35157 (STB served Feb. 17, 2009). A lack of agency is established for many reasons, including that BHR will not be holding out the waste processing and transloading activities as part of its common carrier transportation service; BHR will not retain control over Winters Brothers operations or operating procedures; Winters Brothers will be supplying all of its own equipment and trucks for its services; Winters Brothers will not be compensated by BHR for its services; Winters Brothers will make all of its own arrangements and contracts with customers for its services; Winters Brothers will set, invoice, and collect its own established fees; and BHR will only be providing rail services in conjunction with the loading and movement of railcars within the Facility. Each of these undisputed facts establishes that the Winters Brothers waste processing, recycling, and transload operations are not part of rail transportation and thus do not qualify for preemption.

BHR feebly asserts that CCE has not fleshed out any problem in the relationship between BHR and Winters Brothers that would be disqualifying under § 10909 and that BHR stands willing to modify those arrangements as needed. Surreply at 13-15. However, the problem, as CCE explained, is that BHR has not identified that relationship or specified how the entities will actually function in any meaningful detail. BHR has failed to provide the Board with any operating agreements, which is standard practice in preemption proceedings. BHR should not be allowed to hide behind generalities and then criticize CCE for not being more specific, when it is BHR that is seeking affirmative relief from the Board. Even in its Surreply, BHR still declines to provide any additional detail, or disclaim operational control by Winters Brothers.

Moreover, BHR does not dispute and appears to acknowledge that a substantial component of its activities that are the subject of its Petition, including planned truck-to-truck transloading of recyclables, do not fall under the Board’s jurisdiction. CCE Reply at 45. However, BHR still contends that “[t]he fact that some activities at a solid waste rail transfer facility might not fall under the Board’s jurisdiction is . . . no basis for denying a request for a land use exemption that preempts an applicable ‘law affecting the siting’ of the facility.” Surreply at 15. BHR has it wrong. The Board may not grant a land

use exemption for *any* activities over which it does not have jurisdiction, which even BHR appears to begrudgingly accept when admitting that “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.” *Id.* at 15-16. Yet BHR has not sought to limit its § 10909 Petition to only railroad transportation activities, and it has not sought state or local permitting authority for its planned recyclables processing activities that will be transloaded/transferred off Long Island by truck, and not by rail.

6. The Inappropriateness of BHR’s Exemption Petition. BHR’s seeks to defend its use of a petition for exemption by attacking CCE for its criticisms. Surreply at 16-19. But BHR’s attacks only draw attention to the defects in its Petition.

BHR first claims its project has “been contemplated for many years, and the public benefits of such development have been extensively weighed against any potential environmental harm.” *Id.* at 16. But that harm could not have been accounted for when, as “BHR has readily acknowledged, . . . the prior efforts did not contemplate a SWRTF on Parcel D.” *Id.* at 12 (discussed *supra*). BHR obviously cannot rely on a study that never contemplated it proposed facility. Also, in attempting to downplay the massive scale and scope of its proposed facility, BHR strongly criticizes CCE for citing BHR’s own volume projections, *id.* at 16, but those are the only volume projections that BHR presented (BHR Petition at 13). BHR grossly misrepresents its prior testimony when it now claims that its plan to handle 6,000 tons of waste a year is only “a potential facility capacity maximum, not an everyday operating number.” White V.S. at 12. This statement contradicts BHR’s prior testimony that the facility will “expand to 6,000 tons per day of C&D as well as MSW” within five years. Flower V.S. at 5. Contrary to BHR’s contentions, CCE does not “misleadingly exaggerate[] the size and scope of the Facility” (Surreply at 16), and BHR can hardly defend its Petition by impeaching it, especially when it presented so little data.

BHR also asserts that CCE’s opposition is “somewhat puzzling” because granting a full application would have the same impact as an exemption in terms of maximizing federal control over rail transportation. *Id.* at 17 n.8. But granted exemptions always have the same effect as granted applications. The issue is whether BHR should receive relaxed and expedited review under § 10502 for an authorization that is novel and has no precedent and whose sole purpose is to maximize federal control, in violation of the rail transportation policy, and usurp local authority over how a town chooses to handle its solid waste and that of its neighbors.

BHR then seeks to defend its use of a petition by referencing a few successful petitions for construction and operation authority and claiming that the Board has not repeatedly rejected petitions for exemptions involving controversy or complexity. CCE Reply at 17-18. BHR is wrong, but BHR again ignores the main point. The Board has ample experience with other construction and acquisition filings, and even then, has engaged in restraint in cases which are complex or when there is significant public opposition. It has

no prior experience with § 10909. Moreover, § 10909 has a far more specific and demanding standard than § 10901 (lack of inconsistency with the public convenience and necessity), adopted specifically in response to earlier abuses under the § 10901 standard. It is inappropriate that the first authorization under § 10909 should occur via the abbreviated review required for an exemption, particularly in light of the problems CCE identified with BHRs filing.

The same is true for BHR's restated offer/request to supplement its petition if its filing is found "insufficient." *Id.* at 18. A petition for exemption should be used only where it is clear that the filing is complete and at least adequate. At a minimum, it must present the petitioner's case-in-chief. 49 C.F.R. § 1121.3(a). BHR's filing is woefully deficient in that regard, particularly its minimal presentation as to § 10909(c)(1) and (d). CCE Reply at 30-33. Requiring the Board to identify all of BHR's deficiencies first in order to afford BHR an additional opportunity to address them is inappropriate. BHR should instead do what it should have done all along – file a full application – if it wishes to proceed before the Board at this time.

7. BHR's Surreply Testimony

At p. 12 n.7 of its Reply, BHR introduces the Verified Statement of Michael White ("White V.S.") to make more specific factual rejoinders to CCE. Mr. White is hardly independent, as Winters Brothers employs him as its Vice President of Special Projects, and he refers to himself as a "consultant" to Winters Brothers (*see* Surreply Exhibit A). His statement addresses the verified testimony of CCE's expert witnesses on a wide range of topics, many of which he has little or no apparent substantial expertise or experience, including railroad transportation. In any event, Mr. White's testimony consists of red herrings, new and repeated distortions, and efforts to walk away from BHR's own filing and representations. Many of his points are addressed in the preceding discussion, and a discussion of additional, select matters raised in Mr. White's testimony, is appended in Attachment B.

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Ms. Cynthia T. Brown

October 23, 2020

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In short, BHR tries but fails with its Surreply to rehabilitate the many deficiencies of its original Petition. Instead, it largely devolves to an unwarranted and unsupported attack on CCE and its witnesses and sets forth a series of contrived strawmen and red herrings. The fact remains that BHR has not even begun to make an adequate showing under § 10909, and its Petition cannot possibly be granted based on what BHR has submitted.

Respectfully submitted,

/s/ Peter A. Pfohl
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*Attorneys for Citizens Campaign
for the Environment*

Enclosures

cc: Service List for FD 36399

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of October, 2020, caused a copy of the foregoing filing to be served by U.S. Mail, postage prepaid or by more expedited means upon all parties of record.

/s/

Katherine F. Waring

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 LARRY R. DAVIS, ESQ.

My name is Larry R. Davis, Esq. I am a member of Davis & Prager, P.C., a real estate law firm located in the Village of Patchogue, within the Town of Brookhaven. My principal area of expertise is representing real estate developers in zoning, land use, and other municipal law matters before the Town of Brookhaven and its various Boards including, the Town of Brookhaven Zoning Board of Appeals, the Town of Brookhaven Planning Board, and the Town of Brookhaven Town Board. I have been practicing before the Town of Brookhaven in this particular field for over 20 years. I am also a lifetime director and former president of the Long Island Builders Institute, one of Long Island's largest building industry associations. Based on all such experiences, I am extremely familiar with timeframes for project development approvals on Long Island, generally, and in the Town of Brookhaven, specifically.

I submit this statement in response to the Verified Statement of Lisa A. Cairo, Esq., who practices in a number of different municipalities, and who claims that it would be “unlikely” that a solid waste rail transfer facility (“SWRTF”) could be operational on Parcel D of the Brookhaven Rail Terminal site “in less than a decade” if it underwent local land use review. Based on my experiences on similar such applications and the municipal rules and regulations governing such facilities in Brookhaven, I dispute this claim. Indeed, it is my opinion that if subject to local land use review, a SWRTF on Parcel D could be authorized and operational within one year.

This is particularly true where, as here, the Town has already stated, in its September 11, 2020 submission (p. 6), that with regard to the proposed SWRTF: “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 an Application by BHR.”

Ms. Cairo's conclusion about the time it would take for such an SWRTF to be approved is based on several false premises.

The first false premise is no SWRTF may be located in the Town of Brookhaven because SWRTF is not currently a permitted use in any of the Town's zoning districts and is prohibited under Town Code. This is false. In the L Industrial 2 District, known as the "Heavy Industry" district, all uses are permitted, except those specifically prohibited and those authorized by a special permit. (Town Code § 85-578). Nothing in the Brookhaven Town Code specifically prohibits SWRTF; thus, SWRTF is a permitted use in the L Industrial 2 District as of right. Indeed, there are at least ten (10) solid waste transfer facilities currently operating in the Town of Brookhaven, including three operated by Winters Brothers, located in Holtsville, Medford and Yaphank. Further, to the extent the Town may consider the SWRTF to be a "transfer station" under Town Code, such facilities are also authorized in the L Industrial 2 District by a special permit from the Town Board. (Town Code § 85-581(A)). In sum, an SWRTF is currently permitted under Town Code in the L Industrial 2 District either as of right or with a special permit.

The second false premise is that the change of zone that would be required for the property at issue, from L Industrial 1 District (the current zoning) to the L Industrial 2 District (the zoning that permits an SWRTF) would take years. This is also false. Although a zone change requires a public hearing, such public hearings can be scheduled on ten (10) days' notice. (See Town Code § 85-85(A); Town Law § 264). Typically, such zone change public hearings are scheduled during regular Town Board meetings, which are calendared every other Thursday. Indeed, there are Town Board meetings currently scheduled for November 5, and 19, December 3 and 17, and so on – at any of which the applicant could apply to the Town Board to schedule such public hearing. Additionally, in this case, where the Town has stated they will "promptly" review any such application, an expedited public hearing is expected.

The third false premise is that if a special permit is required – i.e., if the SWRTF is considered a transfer station – that this will require a second public hearing and take several more years beyond and in addition to a change of zone public hearing. This too is false. To the extent a special permit is required for an SWRTF, the public hearing will typically be held in concert with the zone change public hearing. In other words, there will only be one public hearing on these applications, not two. This is particularly true where, as here, both the zone change and special permit are applications to the same board – i.e., the Town Board. Indeed, recent Town Board calendars/agendas make clear that the Town Board regularly considers multiple applications, specifically including zone change and special permit applications, at the same time at one public hearing.

The final false premise underlying Ms. Cairo's opinion is that an approval of the Town Board may result in litigation that will indefinitely "postpone" the SWRTF until the conclusion of the litigation. This is also false. While, of course, any party may commence a lawsuit for any reason, my experience has been that, unless an injunction is granted, a developer will proceed with an approved project despite the existence of pending litigation. It is also my experience that injunctions will rarely issue based on a change of zone and/or the granting of a special permit –

both of which are given great deference by the Courts. See, e.g. Levitt v. Inc. Village of Sands Point, 6 N.Y.2d 269, 272 (1959) (zone changes and amendments entitled to “presumption of validity”); Tabernacle of Victoria v. Weiss, 101 A.D.3d 738, 740 (2d Dep’t 2012) (special permit in zoning code is “tantamount to legislative finding that the permitted use is in harmony with the general zoning plan”).

Thus, for all these reasons, it is my opinion that if subject to local land use review by the Town of Brookhaven, the proposed SWRTF could be authorized and operational within one year.

VERIFICATION

I, Larry R. Davis, Esq., declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to make this testimony.

Dated: October 21, 2020
Patchogue, New York



Larry R. Davis, Esq.

ATTACHMENT B

Response to Selected Points Raised in the Verified Statement of Michael E. White

1. Michael E. White is Winters Brothers Employee/No Independent Support For This Petition. Despite BHR's efforts to present Michael White as an independent expert, in fact, Mr. White is a Winters Brothers' employee, serving as their Vice President of Special Projects. Accordingly, all of his statements about the Petition and the Facility should be seen for what they truly are – self-serving statements by Winters Brothers/BHR through Mr. White – and disregarded. Further, to the extent BHR relies on statements before the Long Island Regional Planning Council, such statements should also be disregarded, because Mr. White is the Vice Chair of such Council, and the Chairman of such Council is John Cameron, the managing partner of Cameron Engineering & Associates, LLP, which is Winters Brother/BHR's civil engineering firm on the Project. In sum, there is simply no independent support for the Petition or even for this Project.

2. BHR Facility Not Limited to Brookhaven Waste. Mr. White criticizes CCE for failing to recognize that “the Facility is not intended for only Brookhaven landfill waste.” White V.S. at 2 (¶1). His statement is a retreat from BHR's prior assertions that the proposed facility is needed to address a so-called “crisis” caused by the closure of the Brookhaven Landfill. Regardless, Ms. Esposito affirmatively noted the broader scope of BRH/Winter Brothers' plans, Esposito V.S. at 2, as did CCE's other experts. In CCE's view, the fact that the waste will come from elsewhere, and is not necessarily required to address an impending event (Landfill closure) are additional reasons to consider carefully whether the zoning restrictions (assuming they are retained as-is) are unreasonably burdensome or discriminatory.

3. Presence of New York City Waste. Mr. White also criticizes CCE for suggesting that BHR's facility will handle waste from New York City. White V.S. at 3 (¶2), and 7 (¶6) (“BHR has provided no indication that the Facility would handle waste from NYC, and any statement to the contrary is pure speculation.”). But this fact was verified in the testimony and reports submitted and referenced by CCE in its Reply, and BHR verified in its Petition that the Brookhaven facility already receives New York City waste. BHR Pet. at 8; Flowers V.S. at 4. BHR never suggested that its facility would avoid handling waste that is currently received at the Brookhaven Landfill, and indeed, relies on the argument that it will accept all waste received by the landfill.

4. Supposed Study of Potential Impacts. Mr. White asserts the potential impacts were not only evaluated and given a hard look in the VDEIS, but also in the Town's Negative Declaration. White V.S. at 3 (¶4), and 13 (¶8). But BHR elsewhere admits that the impacts of handling solid waste were not studied because they were not even proposed at the time of the earlier review. BHR cannot have it both ways.

5. Taking Trash Trucks Off the Highways. Mr. White repeats BHR's assertion that trucks will be taken off the highways. White V.S. at 3 (¶5). But every ton that BHR handles will first arrive by truck. BHR also admits that it will be moving substantial outbound recyclables by truck. Pet. at 11-12; Newell V.S. at 4; Flower V.S. at 3. Additional

rejected waste materials will be moving back out by truck. CCE Reply at 36; Betak/Sullivan V.S. at 3. Similarly, Mr. White's reliance on the VDEIS study of truck volume at Parcel D, *id.* at 13 (¶8), is makeweight because the study did not contemplate the arrival and departure of additional waste and recyclables by truck. Trash trucks are not equivalent to regular trailers.

6. Some Long Island MSW Moves by Truck. Mr. White appears to criticize CCE for not noting that some Long Island MSW moves off-Island by truck and no C&D is incinerated. White V.S. at 3 (¶6). CCE never said otherwise. However, BHR did not discuss those matters in its own Petition, perhaps because BHR sought to limit such discussion to the Town of Brookhaven. Also, BHR failed to inform the Board that the Brookhaven Landfill receives no MSW, or that BHR proposes to receive over double the amount of total solid waste currently received at the Landfill. BHR also did not disclose that some C&D already moves off of Long Island by rail from Farmingdale and Lindenhurst, and failed to disclose until its Surreply that Winter Brothers already has a fully permitted rail transfer facility only a few miles away from its proposed facility in Medford, which it has elected to *not* utilize. *Id.* at 12-13. Otherwise, Mr. White's assertion that tractor trailers do not pose a direct risk to groundwater, *id.* at 10 (¶7), ignores the key point that it is not the trucks, but the receiving, tipping, sorting, processing, and reloading of waste in those trucks that presents the significant risk, particularly due to the close proximity of the water table.

7. Groundwater Risks. Mr. White asserts that the risks of transmission of volatile organic compounds and other contaminants into the groundwater discussed by Dr. Gobler "is no more than unsupported speculation and sensationalism." *Id.* at 8 (¶1). However, Dr. Gobler's analysis is based directly on the VDEIS, the same VDEIS that BHR asserts somehow confers approval of its proposal, even though the VDEIS did not study BHR's waste proposal. Dr. Gobler relied on the VDEIS and its groundwater maps which indicate that BHR's proposed location of the transfer facility has a "*depth to ground water of only 6-20 feet below ground surface. . . [and] 'hydraulic gradients for the Long Island upper glacial aquifer range from 40 – 230 feet per day.'*" Gobler V.S. at 1-2 (original emphasis). Mr. White cites to Figure 16 of the VDEIS to dispute Dr. Gobler's understanding of the VDEIS, and strangely argues that instead of 6-20 feet bgs that the depth to groundwater at Parcel D is really "2 to 60 feet." White V.S. at 9-10 (¶4). But Dr. Gobler was referencing the same Figure 16 of the VDEIS and comparing it to the proposed location of the transfer station. Gobler V.S. at 1-2. Arguing that there are locations at Parcel D where the depth to water is a mere two feet instead of six feet only highlights the risks to groundwater. White V.S. at 9-10 (¶4).

Perhaps recognizing that the facts are not on his side, Mr. White instead seeks to impugn Dr. Gobler's basic knowledge and experience in groundwater. White V.S. at 8. However, Dr. Gobler is a recognized expert and has published articles in the field over a twenty-year span, starting shortly after he earned his doctorate in 1999. CJ Gobler, SA Sañudo-Wilhelmy, *Temporal variability of groundwater seepage and brown tide blooms in a Long Island embayment*, Marine Ecology Progress Series 217, 299-309 (2001); CJ Gobler, GE Boneillo, *Impacts of anthropogenically influenced groundwater seepage on water*

chemistry and phytoplankton dynamics within a coastal marine system, Marine Ecology Progress Series 255, 101-114 (2003); BJ Peterson, AD Stubler, CC Wall, CJ Gobler, *Nitrogen-rich groundwater intrusion affects productivity, but not herbivory, of the tropical seagrass Thalassia testudinum*, Aquatic Biology 15 (1), 1-9 (2012); CS Lee, AK Venkatesan, HW Walker, CJ Gobler, *Impact of groundwater quality and associated byproduct formation during UV/hydrogen peroxide treatment of 1, 4-dioxane*, Water Research 173, 115534 (2020); Stony Brook Experts, <https://www.stonybrook.edu/experts/profile/christopher-gobler>. Mr. White's challenges on Dr. Gobler's analysis, his expertise, and his credentials are all devoid of substance.

8. Commercial MSW. Mr. White appears to fault CCE for not discussing commercial MSW. White V.S. at 3-4 (¶7). Again, BHR premised its Petition on the imperative to address a so-called "crisis" caused by the closure of the Brookhaven Landfill, and CCE recognized the need to address the situation when the existing landfill space is consumed. However, the landfill does not accept MSW. Therefore, the closure of the landfill will have zero impact on any purported "crisis" regarding MSW.

9. Ash Monofill Storage. Mr. White asserts that storage of ash monofill "is not a long-term management approach for MSW." White V.S. at 4 (¶8). But that is how Long Island handles a majority of its MSW, as even Mr. White admits. *Id.* at ¶6. Additionally, Mr. White does not explain why it failed to inform the Board of this substantial new 5.5 million cubic yard facility, along with the construction of an Enhanced Ash Recycling Facility on 45 acres that will handle a substantial amount of the waste previously handled by the Brookhaven Landfill. CCE Reply at 24. BHR now merely contends that "there is no guarantee" that the Ashfill will be built. White V.S. at 4 (¶8). Indeed, and, in any event, BHR has never claimed that it would accept any ash at the facility.

10. "Holistic Plan". Mr. White criticizes CCE for not defining a "holistic plan" for addressing solid waste issues on Long Island. White V.S. at 4 (¶9). Mr. White and BHR seek to distort CCE's intent. CCE's intent is to promote an approach or approaches that are developed locally, in conjunction with local governments, that garner local support, as opposed to an approach imposed upon those localities by a single waste industry operator or a distant agency in Washington, D.C., whose core expertise is not in the disposal of solid waste.

11. Volumes, Recycling, and C&D. Mr. White claims that BHR did not "propose" to handle 6,000 tons per day of unprocessed C&D, but he then admits that is the estimate that BHR provided. White V.S. at 4 (¶10), and 12 (¶1). BHR cannot present a figure (one of the relatively few that it did present regarding its volumes) and then seek to dismiss it as "purely speculation." *Id.* at 4 (¶10). Mr. White then claims that BHR's priority will be to minimize the materials that must be disposed of at any landfill, *id.* at 4 (¶10), but that will not happen with solid waste that is shipped by rail to some more distant landfill rather than incinerated. Mr. White comes far closer to the truth in stating that the majority of the material to be shipped out by rail will be "processed" C&D, *id.*, but that is not the focus

on BHR's Petition, besides which the unprocessed C&D will still be destined to end up in some distant landfill.

12. Infeasibility and Impacts of Train Operations. Mr. White also asserts that neither the NY&A nor the LIRR has expressed any concerns about the impact of the facility on their network. *Id.* at 5-6 (¶13). However, he fails to address the only evidence of record presented by BHR showing that BHR informed NY&A that railcar volumes will be less than one-sixth of the volume that BHR projects in its Petition, and then reveals LIRR has not provided its consent even to that level of traffic to date. CCE Reply at 38; Betak/ Sullivan V.S. at 7. Thus, BHR does not even have consent from the said rail partners. Additionally, Mr. White quibbles with, but does not dispute CCE's testimony that volumes of waste found unsuitable for transloading by rail will be removed back out from the facility by truck. In addition, he completely fails to address BHR's lack of any credible railroad operating plan, or dispute the substantial railroad operating constraints, and associated environment, public health, and safety issues arising from the proposed project that are thoroughly addressed by CCE's railroad experts who have over 80 years of combined experience in the railroad industry, including in solid waste transportation. CCE Reply at 37-39; Betak/Sullivan V.S. at 7-14.

13. Surrounding Industrial Land Use Only Increases Environmental Impact of the Transfer Facility. Mr. White incorrectly suggests that the surrounding industrial use of the surrounding land somehow mitigates the risks and impact from a Transfer Facility in such an environmentally sensitive location. White V.S. at 9 (¶2). No one disputes that other nearby activities, which are primarily consistent with "light" industrial use, pose their own risks for groundwater and surface water, or that there is already some groundwater contamination in the immediate vicinity of Parcel D. Town of Brookhaven Comments to OEA (dated Aug. 7, 2020), at 4 ("groundwater plumes exist that are contaminated with VOCs in the area of Parcel D"). The issue is the potential of BHR's proposed Transfer Facility – a "heavy" industrial use – to exacerbate and compound the problem, especially as the other cited activities, rock crushing and composting, do not pose nearly the same level of potential environmental threats from handling waste. Fast moving water, and a lot of it, can mitigate contamination, as "the best solution is dilution." But that approach fails when you run out of water, and BHR's proposed site overlies Long Island's sole-source aquifer by mere feet. Further, as Dr. Gobler notes, waste received at the Transfer Facility may include "contaminants from items such as tires, paint, batteries, electrical appliances, fluorescent lamps, aerosol spray cans, chemicals, and fertilizers which collectively may contain and leach VOCs, polychlorinated biphenyls, and heavy metals." Gobler V.S. at 3. For this reason, the Campaign supports the EPA's recommendation in its July 15, 2020 comments to OEA that any environmental review include a "comprehensive evaluation of indirect and cumulative impacts."

14. The Fact that No Land at Parcel D is Currently Preserved Does not Reduce its Environmental Sensitivity. Mr. White states that Dr. Gobler "wrongly describes the site of the Facility (Parcel D) as a 'pristine forest,' . . . [and] [i]f the habitat was so valuable and 'pristine', the County would have held onto it." White V.S. at 9 (¶3). This is

not a legitimate criticism, as efforts have been and are being made to preserve this land. The Town of Brookhaven in its August 7, 2020 comments to the Board, lists at the very top under “Proposed Action, as defined in the VDEIS” the “Establishing an Undisturbed/Conservation Easement on Parcel D.” *Id.* at 2. In addition, the 2016 Stipulation also required measures to protect storm water, such as requiring “permeable surfaces and pavements.” *Id.* at 5. Notably, Mr. White cites the permeable pavement as evidence that Dr. Gobler is unfamiliar with the VDEIS (White V.S. at 11 (¶10)). However, Mr. White fails to consider that permeable pavement may not be feasible in most locations at a Transfer Facility that handles waste and includes a fueling station. Indeed, permeable pavement by itself is not designed to act as a barrier, as its purpose is “to enhance the infiltration of stormwater to the ground to the maximum extent practicable.” VDEIS at 151. As such, permeable pavement “should not be applied” when there is a risk of contaminated runoff, and this includes places such as “recycling facilities, fueling stations, industrial storage facilities . . . some outdoor loading facilities, public work yards, . . . vehicle service and maintenance areas, and vehicle and equipment washing and steam cleaning facilities.” Rich Wagner, Int’l Parking & Mobility Institute, *From the Ground Down* (2013), <https://www.parking-mobility.org/2016/01/19/tpp-2013-10-from-the-ground-down/>.