

FD 36398

FD 36399

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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BROOKHAVEN RAIL LLC –	)	ENTERED
CONSTRUCTION AND OPERATION	)	Office of Proceedings
EXEMPTION – SUFFOLK COUNTY, NEW	)	October 6, 2021
YORK, AND UNDOCKETED	)	Docket No. FD 36398 Part of
APPLICATION FOR A LAND-USE	)	Public Record
EXEMPTION UNDER 49 U.S.C. § 10909	)	

APPEAL OF DIRECTOR’S DECISION

CITIZENS CAMPAIGN FOR THE
ENVIRONMENT

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The Citizens Campaign for the Environment (“CCE”) respectfully submits this appeal of the decision that the Director of the Office of Environmental Analysis (“OEA”) issued on September 17, 2021 (the “Director’s Decision”),¹ that found no conflict of interest and authorized Henningson, Durham & Richardson Architecture and Engineering, P.C. (“HDR”) to continue to serve as OEA’s third-party independent contractor (“third-party contractor” or “Contractor”) for the environmental review of both a rail line construction and operation exemption sought by Brookhaven Rail LLC (“BHR” or “Applicant”) and a related application that BHR has represented it will be filing for a proposed land-use exemption for a

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solid waste rail transfer facility (“SWRTF”) under 49 U.S.C. § 10909 (together, the “Project”).²

SUMMARY

CCE respectfully submits that HDR’s retention as the third-party contractor is fundamentally improper because HDR has previously performed substantial planning and design work on the Project for Applicant, and as Applicant highlighted and emphasized in its June 25, 2020 Petition in Docket No. FD 36398, HDR had been “retained” by Applicant to “design and assist with the construction” of the rail line and to “coordinate” with an engineering contractor “in connection with the development” of the Project “once it is approved by the Board.” HDR is therefore far from an independent or disinterested third-party contractor in assisting OEA in its environmental review of the Project, which will necessarily require HDR to assess the environmental impacts of its own design and to propose and evaluate alternatives. OEA has had HDR submit additional statements stating it does not currently have a contract with Applicant and that it “does not plan” to perform future engineering work on this project. However, even with those additional steps, serving

² Applicant apparently contemplates using sub-docket FD 36399 (Sub-No. 1) for its planned § 10909 application. However, the Board denied Applicant’s earlier § 10909 exemption petition in *Brookhaven Rail LLC – Petition for Exemption from Requirements of 49 U.S.C. § 10909*, FD 36399 (STB served Oct. 23, 2020) (“*October 2020 Decision*”), and closed the proceeding, as OEA has confirmed. Use of a new sub-docket in an exemption petition proceeding that has been terminated is inappropriate. Nonetheless, since OEA continues to use FD 36399 (Sub-No. 1) as a docket number reference for the proposed application land-use exemption for a SWRTF under 49 U.S.C. § 10909, and to ensure that the record is complete, CCE is filing this appeal in both FD 36398 and FD 36399.

both as the Project designer for the applicant and the independent reviewer poses a clear conflict of interest and should not be authorized.

HDR has also expressed its clear partiality and acted as a Project advocate rather than an extension of OEA staff. OEA's monthly planning session meeting minutes reflect and demonstrate that in the very first meeting where HDR participated, on April 6, 2021, it acted as a cheerleader for the Project, actually **agreeing** with the Applicant about Project air quality impacts and that "the project will benefit the environment." This was highly inappropriate considering HDR had yet to perform any review and as the meeting minutes reflect, "OEA remained concerned about local air quality impact of trucks in and out of the facility and downline impacts of more than three trains per day." Evaluating air quality and traffic levels are critical, substantive parts of the environmental review, are highly contentious, and Applicant's claims already have been vigorously disputed by CCE in opposing Applicant's previous unsuccessful exemption petition.

Additionally, at that same meeting, HDR acted far beyond its employment responsibilities by actually advocating for the Project to be considered as a priority project under New York's statewide transportation improvement program, and eligible for substantial federal and state local grants and funding assistance. Such blatant advocacy, which CCE brought to OEA's attention and is uncontested by meeting participants, is in clear contravention of the contractor's responsibilities and duties, and the Board's rules that third-party contractors function as an extension of OEA staff. Yet no actions were taken to address the Contractor's violations, to CCE's knowledge, and the Director's Decision simply **ignores** these direct violations of the contractor's duties that CCE fully raised with OEA.

In addition, the Director's Decision explanation for the change in third-party contractors is without a valid basis, contrary to the evidence of record, and defies credibility. Furthermore, OEA violated its own third-party contractor rules by agreeing to Applicant's request to substitute the original, independent Contractor for the Project, with substantial expertise and experience in environmental reviews of this size and scope, with Applicant's directly connected Project planner and designer, HDR.

Finally, HDR has failed to disclose, and OEA has failed to investigate, substantial other conflicts of interest involving HDR's continuing employment for cooperating agencies to these proceedings, in clear violation of its employment agreement.

Respectfully, OEA's determination to retain HDR as its third-party contractor for the Project constitutes serious error and misjudgment, that if allowed to stand sets a very dangerous precedent, and that determination should be reversed.

I. FACTUAL AND PROCEDURAL BACKGROUND

1. Applicant seeks to obtain the first **ever** exemption under 49 U.S.C. § 10909, to override and preempt state and local land use and zoning law to establish the largest waste transfer station in the State of New York, if not the country. The Project is massive in scope and scale, designed to receive 6,000 tons of unprocessed municipal solid waste ("MSW") and construction and demolition debris ("C&D") per day, from all of Long Island and portions of New York City. The Project also entails the proposed construction and operation of approximately 4.5 miles of new rail line across an undisturbed and protected conservation easement.

2. The Board denied Applicant's original § 10909 exemption petition in its *October 2020 Decision*, and ruled that "[i]f Brookhaven Rail wishes to seek approval from the Board, it must file an application under 49 C.F.R. part 1155 and provide all the information required under the statute and the Board's regulations." *Id.* at 6.

3. Because of the Project's potential to cause significant adverse environmental impacts, the National Environmental Policy Act ("NEPA"), as amended, 42 U.S.C. §§ 4321 *et seq.*, obligates the Board to conduct appropriate environmental review. 49 C.F.R. §§ 1105 *et seq.* The Board's rules implementing the Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848, 49 U.S.C. §§ 10908-10910 (the "CRA"), further require the Board to undertake a detailed environmental review. Furthermore, 49 U.S.C. § 10909(d) of the CRA requires the Board to make findings regarding detailed substantive factors beyond the typical procedural-type NEPA review overseen by OEA before granting authority under § 10909.³

4. The full scope of OEA's evaluation and approval of HDR as its third-party contractor under 49 C.F.R. § 1105.10(d) for these proceedings is unclear. It does not appear that all relevant materials and correspondence have been placed in the docket, and to CCE's knowledge, OEA has failed to seek to obtain pertinent and relevant materials as requested by CCE, or explained its full evaluation. What is publicly known is based on the materials that OEA has posted to date, sometimes belatedly, as set forth below.

³ The Board's *October 2020 Decision* noted that this is a case of first impression and that "[t]he [Clean Railroads Act] enumerated six factors for the Board to consider, as well as 'any other relevant factors, as determined by the Board,' in a land-use-exemption proceeding." *Id.* at 5-6 (citing 49 U.S.C. § 10909(d) and *Solid Waste Rail Transfer Facilities*, EP 684 (STB served Jan. 14, 2009), at 3).

5. On May 14, 2020, pursuant to 49 C.F.R. § 1105.10(d), OEA approved Applicant's use of a third-party contractor, ICF Jones & Stokes, Inc. ("ICF"), as OEA's independent, third-party contractor to assist in the environmental review of the Project. *See* copy of OEA approval letter at ***Attachment 1***.⁴ ICF was engaged and designated as the third-party contractor for the Project, and the monthly meeting agendas posted by OEA (which did not post any minutes from the meetings where ICF participated) indicate that ICF actively participated in the early stages of the OEA's environmental review of the Project, through the spring of 2021.

6. In its June 25, 2020 Petition in Docket No. FD 36398, Applicant emphasized that it "has retained HDR Engineering ('HDR') to design and assist with the construction of the new rail line once it is approved by the Board. HDR will coordinate with Cameron Engineering & Associates, which has been engaged to provide site design and civil engineering services in connection with the development of Parcel D." *Id.* at 7. That Petition relied on HDR's track schematics and drawings for the Project, set forth at Exhibit C to the Petition, and Applicant continues to file copies of, and rely on those these drawings for the Project.

7. On or shortly before March 1, 2021, Applicant discussed with OEA that it desired to have HDR replace ICF as the third-party contractor for the environmental review of the Project. Applicant also inquired "about using HDR as a third party NEPA contractor

⁴ OEA has posted HDR's MOU and additional letters and disclosure statements, but the docket does not include ICF's MOU or disclosure statement.

and also as a sub-contractor for the SWRTF engineering/design work.” See copy of email correspondence at ***Attachment 2*** (emphasis added).

8. OEA responded on March 1, 2021 that “it’s OK to hire HDR for the NEPA analysis but not for the engineering/design work because of their prior work on the project. So moving forward, we’ll need a new third party contractor approval letter, disclosure statement and MOU to start. Also, I have a bi-weekly meeting scheduled today with ICF and will cancel it, but you need to inform them of BHR’s intention to go with another third party consultant.” *Id.*

9. Nothing in the correspondence posted by OEA includes evidence of any independent evaluation or analysis regarding HDR’s substantial prior work on the Project for Applicant, including that HDR had been actively involved in the basic design and planning for the Project for Applicant. Significantly, there is nothing in the record to suggest that OEA was aware that Applicant had actually engaged HDR for continuing future work with the Project should it be approved. It does not appear that Applicant fully disclosed to OEA such conflicts of interest before or at the time it requested that ICF be replaced by HDR as the third-party contractor. Nor does the correspondence suggest any interest on OEA’s part in assuring that HDR was truly independent or in what other matters in which HDR might be engaged.

10. Furthermore, nothing in the correspondence posted by OEA provides any explanation for why Applicant sought to replace ICF with HDR as the Board’s third-party contractor or why the Board approved the change.

11. On March 10, 2021, HDR signed a Disclosure Statement representing, without qualification, that it had no financial or other interests in the outcome of the proceedings. *See* copy of disclosure at ***Attachment 3***. Nowhere in the Disclosure Statement, or in any other contemporaneous correspondence or exchanges from that time, did HDR ever, to CCE's knowledge, fully disclose to OEA its substantial prior work on the Project for Applicant or that Applicant "has retained [it] to design and assist with the construction of the new rail line once it is approved by the Board." Applicant's June 25, 2020 Petition in Docket No. FD 36398 at 7.

12. On March 16, 2021, OEA approved Applicant's use of HDR as OEA's new third-party contractor, pursuant to 49 C.F.R. § 1105.10(d), to assist OEA in its environmental review of the Project. *See* copy of email correspondence at ***Attachment 4***.

13. OEA later posted a signed March 30, 2021 Memorandum of Understanding ("MOU") among the STB, Applicant, and HDR, governing the environmental analysis consulting work to be performed by HDR, the relationship between OEA, HDR, and Applicant in performing that work, and restrictions on employment. *See* copy of MOU at ***Attachment 5***.

14. CCE first became concerned about HDR's possible conflicts shortly after it became aware that HDR had been hired and this concern was elevated after reviewing OEA's April 2021 meeting minutes with Applicant and HDR. *See* copy of April 2021 Meeting Minutes at ***Attachment 6***.

15. CCE was concerned that Applicant was not acting independently and was taking positions on the ultimate merits before the review process had even commenced. In

particular, the April 2021 meeting minutes reflect: “BHR pointed out, and HDR agreed, that from a cumulative air quality / GHG / climate change analysis, the project will benefit the environment [sic] by taking hundreds of thousands of trucks off the road in the lifetime of the project.” OEA Apr. 6, 2021 Meeting Minutes at 3-4, ¶ 7. HDR’s statement was made in the absence of any current traffic plan, at least on the record, without any apparent evaluation of any sort, and despite the fact “OEA remained concerned about local air quality impact of trucks in and out of the facility and downline impacts of more than three trains per day.” *Id.* In addition, “HDR suggested consideration be given to have the project to be made part of the [Regional Transportation Plan and Regional Transportation Improvement Plan (TIP)]” – clearly seeking to assist Applicant and advocate for the Projects it was retained to impartially evaluate after it had assembled a complete factual record. Meeting Minutes at 3, ¶ 6.

16. As soon as CCE became aware of HDR’s additional serious conflicts of interest due to its prior track design work and retention for future work, CCE sent a protest letter to OEA on June 21, 2021 (“CCE Protest Letter”). *See* copy of CCE Protest Letter at ***Attachment 7***. That letter described HDR’s prior track design work and contracted-for prospective construction work for Applicant for the Projects, the lack of any known prior disclosure of these substantial conflicts, the sudden replacement made of the retained third-party contractor, presumably at Applicant’s specific request (which was unknown to CCE at the time) and without any public disclosure of why the replacement was made.

17. The CCE Protest Letter also discussed the evident partiality that HDR had displayed, whereby it acted beyond its role of an extension of OEA staff, especially because the substantive matters that HDR expressed an unqualified opinion on are a critical part of

the Environmental Impact Statement (“EIS”) review, are likely to be heavily disputed, and have already been disputed by CCE in opposing Applicant’s previous unsuccessful exemption petition.

18. CCE’s Protest Letter made two requests, based on the events and facts known to CCE. First, CCE requested that, under the circumstances, HDR recuse itself, and if it failed to do so, for arrangements to be made to use a different third-party contractor that has had no prior involvement in the matter and that fully satisfies the requirement to be disinterested. Second, CCE requested that, ultimately, if OEA, Applicant, and HDR maintain that allowing HDR to continue in its current position is somehow compliant with applicable regulations and policies, then substantial disclosures and explanations should be provided as to the full extent of HDR’s past, present, and future involvement, including all communications and work prepared by HDR for Applicant on the Projects, so that the public can maintain confidence in the integrity of the Board’s processes.

19. On June 28, 2021, Applicant responded to the CCE Protest Letter, apparently at the request of OEA. *See* copy of letter at ***Attachment 8***. Applicant admitted that HDR had been involved in substantive track design and planning for HDR for the Project, and it did not dispute that Applicant continued to rely upon HDR’s design and planning work in its recent filings. Applicant did not address, much less disavow, its prior representation to the Board in its June 25, 2020 Petition in Docket No. FD 36398 that it “has retained HDR Engineering (‘HDR’) to design and assist with the construction of the new rail line once it is approved by the Board.” Instead, Applicant noted that HDR had not performed any Project engineering or design work since March 2020, and that “neither BHR nor its affiliates have

employed HDR subsequent to March 1, 2021 for any design or engineering consulting services to BHR on either the rail construction project or the SWRTF project, or any other project for that matter.” Finally, Applicant did not disavow or address CCE’s allegations of HDR’s expressions of evident partiality.

20. On July 5, 2021, Applicant sent a letter to OEA to provide additional information regarding changes in property ownership and the “type of rail-facilities being constructed.” A copy of the letter is included at *Attachment 9*. Applicant continued to rely on HDR’s drawings and design and further advised twice in its letter that these developments were resulting in only a “minor modification to the design and configuration.” Applicant attached HDR’s drawings at Exhibit 1.

21. On July 12, 2021, HDR sent a letter to OEA to “clarify” HDR’s work on the Project. A copy of the letter is included at *Attachment 10*. HDR admitted its engineering and design work for the Project, stating that its work was “completed in the spring of 2020,” with its “final deliverable to Brookhaven Rail LLC/ Winter Bros. being submitted on June 23, 2020,” a somewhat different timeline then that expressed by Applicant. Although HDR’s initial disclosure statement to the Board expressing a lack of interest in the Project is dated March 10, 2021, (see *Attachment 3*), HDR added that “CADD and PDF files were last transmitted on behalf of Brookhaven Rail LLC/Winter Bros. to Cameron Engineering and The LiRo Group on March 16, 2021.” HDR further stated that “HDR no longer has an active rail engineering and design services contract with Brookhaven Rail LLC/Winter Bros.” HDR did not disavow or address its previous retention by Applicant for future work to design and assist with the construction of the Project if approved by the Board. Instead, it

stated that “HDR acknowledges that, as being selected as the Third-Party EIS contractor to the STB OEA, it is precluded from providing concurrent rail engineering and design services to Brookhaven Rail LLC and/or Winter Bros. on the project while under contract to complete the EIS.” Finally, HDR did not disavow or address CCE’s allegations of HDR’s expressions of evident partiality on the Project.

22. On July 14, 2021, Applicant sent an email to OEA seeking to clarify a discrepancy between HDR’s representations and Applicant’s understanding on the dates HDR was working on the project design. In that communication, Applicant acknowledged “that there were some follow up inquiries related to track length and configuration in late June 2020 *as the environmental review process began* that entailed asking HDR for data” (emphasis added). A copy of this email is included at ***Attachment 11***.

23. On July 28, 2021, OEA sent a response letter to HDR describing:

Board regulations and the Memorandum of Understanding between HDR and OEA further require that, other than its work for OEA, HDR have no financial or other interest in the outcome of the projects that are the subject of these proceedings. We interpret this prohibition to include not entering into an agreement to perform future work related to these construction projects for any party. Accordingly, we ask that you provide a letter confirming that HDR will continue to comply with the contractor restrictions and that it does not have any agreements to perform, and does not plan to perform, future work relating to these projects for any party other than OEA either before or after the close of these proceedings.

A copy of OEA’s July 28, 2021 letter is included at ***Attachment 12***.

24. On July 27, 2021, CCE sent a letter to OEA (a copy is included at ***Attachment 13***) responding to Applicant’s and HDR’s above-referenced follow-up communications with

OEA included at *Attachments 8 - 11*. CCE's July 27, 2021 response letter emphasized that Applicant's and HDR's replies were confusing and wholly insufficient to address the concerns raised, and instead merely confirmed that HDR "has been operating through an active 'revolving door.'" CCE's response letter also stressed that Applicant and HDR had still not yet provided adequate disclosures and explanations necessary for OEA to conduct an adequate and full review of the matter and had failed to address the Contractor partiality issues raised by CCE. Additionally, CCE noted that Applicant continues to rely on HDR's work product as Applicant had resubmitted HDR's design plans in its recent Project update to OEA.

25. HDR further responded by letter dated July 28, 2021. A copy of the letter is included at *Attachment 14*. In its letter, HDR stated it will "comply with NEPA Third Party Contractor restrictions and that HDR does not have any agreements to perform, and does not plan to perform, future work relating to the proposed project for any party other than OEA either before or after the close of these NEPA proceedings."

26. Except for the exchange of letters described above, there is absolutely no record or other evidence of any further actions taken by OEA to investigate the matter. HDR has so far refused CCE's request that it recuse itself. HDR (and Applicant) continue to participate in monthly meetings on the Project, although following CCE's Protest Letter, the monthly meeting minutes have become much more truncated and far less descriptive than those previously prepared. OEA also declined CCE's request that, if HDR were to continue as the third-party contractor for the Project that OEA require "substantial disclosures and explanations . . . as to the full extent of HDR's past, present, and future involvement,

including all communications and work prepared by HDR for Applicant on the Projects, so that the public can maintain confidence in the integrity of the Board's processes."

27. On September 17, 2021 OEA issued its Director's Decision. A copy of the Decision is included at ***Attachment 15***. The Director's Decision first notes that, in response to CCE's Protest Letter, "OEA asked HDR to provide written details of any relationship that it may have had and may continue to have with BHR." OEA then describes HDR's July 12, 2021 reply described above, and that OEA further followed up with a letter request to HDR on July 28, 2021, "seeking information about any plans for future work by HDR relating to the Proposed Project." However, a review of OEA's July 28, 2021 letter indicates that no such request for additional information was actually made to HDR. Instead, OEA simply requested that HDR simply confirm that "it does not have any agreements to perform, and does not plan to perform, future work relating to these projects for any party other than OEA either before or after the close of these proceedings." A copy of this letter is included at ***Attachment 12***.

28. The Director's Decision further describes that HDR replied by letter of August 2, 2021, and that "HDR confirmed that it does not have any agreements or plans to perform future work pertaining to the Proposed Project beyond its role as OEA's third-party contractor during the environmental review." The docket confirms correspondence from HDR posted on August 2, 2021, but the letter is actually dated July 28, 2021. A copy of the letter is included at ***Attachment 14***. The letter states that HDR will "comply with NEPA Third Party Contractor restrictions and that HDR does not have any agreements to perform,

and does not plan to perform, future work relating to the proposed project for any party other than OEA either before or after the close of these NEPA proceedings.”

29. The Director’s Decision “concludes that there is presently no conflict of interest,” for three reasons. First, it found that “OEA’s environmental review of the Proposed Project is an examination of the potential environmental impacts of the project as presented to it, and not a technical review of any engineering and design work previously performed for the project,” and therefore HDR’s prior design and engineering work for the Project “does not present a conflict of interest in connection with its current work for OEA.” *Id.* at 2. Second, the Director’s Decision found that since HDR was no longer providing assistance to Applicant for the Project, “therefore, OEA believes HDR’s prior work is not a conflict.” *Id.* Third, the Director’s Decision found that there is no conflict of interest based on HDR’s contract to perform future work related to the Project “because HDR has represented that it has no contracts with any party for future work related to the Proposed Project and that it has no intention of entering into any such contracts.” *Id.*

30. In addition, the Director’s Decision explained that the reason it allowed a change of third-party contractors for the Project was because the OEA had determined that an EIS, rather than an Environmental Assessment (“EA”), was required. *Id.* at 2. However, as fully set forth below, such explanation by the Director is without foundation, contrary to the evidence of record, and defies credibility, because, among other reasons, the original third-party contractor is fully qualified to perform – and has regularly performed for the Board – complex EIS reviews, and, in any event, all parties knew full well that this Project would require an EIS since its inception as required under the governing rules.

II. STANDARD OF REVIEW

Under 49 C.F.R. § 1105.2, appeals to the Board by decisions of the OEA Director under its delegated authority by the Board, including interpretations of the Board’s NEPA review processes, are “available as a matter of right.”⁵ In considering an appeal of Directors’ decisions of this nature, the Board “considers whether the Director made the correct decision given the circumstances presented.” *CSX Trans., Inc. – Abandonment Exemption – in Pinellas County, Fla.*, AB 55 (Sub-No. 794X) (STB served June 22, 2020) at 3; *Union Pac. R.R. – Abandonment & Discontinuance of Serv. Exemption – in Cerro Gordo Cty., Iowa*, AB 33 (Sub-No. 327X) (STB served Jan. 26, 2018). Such careful and close review is especially necessary here under the circumstances where (1) the Board must ensure “that adequate safeguards exist that ensure the neutrality of the third-party contracting process,” and “to address the public’s chief concern – assurance of the objectivity of the environmental review process.” *Policy Statement on Use of Third-Party Contracting in Preparation of Environmental Documentation*, EP 585 (STB served Mar. 19, 2001), (“3P Contractor Policy Statement”) at 11, 18, and (2) this is a case of first impression (to CCE’s

⁵ Directors’ decisions are separate and distinct from initial decisions of an administrative law judge (“ALJ”), individual Board Members, or employee Board’s covered by 49 C.F.R. §§ 1115.1 and 1115.2. They are also separate and distinct from interlocutory appeals of rulings of Board employees and ALJs, under 49 C.F.R. § 1115.9. The Part 1115 Appellate Procedures were adopted when the Board’s predecessor used its own ALJs and individual agency members and employee boards to issue decisions that are inapplicable here. Finally, director’s decisions are separate and distinct from decisions reached under delegations of authority from the Chair or delegations of authority by the Board to specific employee boards or offices of the Board under 49 C.F.R. §§ 1011.6, 1011.5, and 1011.7, respectively. In any event, appeals as “of right” are addressed by 49 C.F.R. § 1105.2.

knowledge) where the applicable standards and application of those standards of Contractor neutrality and independence have been at issue and the subject of a challenge and review before the full Board.

III. ARGUMENT

A. The Contractor Is Not a Disinterested Party to the Project

Under the Board's rules, at 49 C.F.R. § 1105.10(c), third-party consultants may be used to assist OEA in its environmental review "on behalf of the Board, working under OEA's direction." As a condition of their retention, "Contractors must sign a disclosure statement prior to beginning work, indicating that they are **disinterested parties** to the project." *3P Contractor Policy Statement*, at 4 n.6 (citing Council on Environmental Quality regulations at 40 C.F.R. § 1506) (emphasis added).

The record makes clear that Applicant originally retained HDR to perform its design and construction work for the Project. Applicant highlighted HDR's past and continuing work prominently in the Petition for Exemption that Applicant filed in STB Docket No. FD 36398 on June 25, 2020 (the "Petition"), reciting that:

Finally, BHR, has retained HDR Engineering ('HDR') to design and assist with the construction of the new rail line *once it is approved by the Board*. HDR will coordinate with Cameron Engineering & Associates, which has been engaged to provide site design and civil engineering services in connection with the development of Parcel D.

Id. at 7 (emphasis added).

Applicant's Petition and follow-up filings make clear that HDR's involvement for Applicant and financial interest in the Project has been meaningful, and is not merely

prospective or contingent. Specifically, Applicant's Petition relies on HDR's track design work and drawings contained in Appendix C, which includes two track schematics and an annotated map/schematic. Applicant continues to use and rely upon HDR's design work as a fundamental part of its Applicant's exemption petitions. On April 23, 2021, Applicant submitted to OEA a request for a waiver of the six-month prefilings notice under 49 C.F.R. § 1105.10(a) and its supporting documents included another HDR track design drawing, labeled as "Draft Rail Alignments, Alternative 1." Applicant's six-month waiver request remains pending.

HDR's active involvement for Applicant on the Project demonstrates a clear interest and partiality in the Project, in contravention of the Board's rules. Allowing a contractor to design a project, and then oversee an analysis of the environmental impacts of that same project, is essentially allowing that contractor to predetermine the outcome of the environmental review.

B. The Contractor's Project Design Work, and Its Engagement for Future Work, Presents a Direct and Present Conflict of Interest with the Work It Is Performing for OEA

The Director's Decision finds that "there is **presently** no conflict of interest" (emphasis added) because HDR now states that it is no longer a current contractor for Applicant for the Project, and that HDR's prior retention for future construction work should the Project be approved is presently not in force. However, there has been continued reliance by Applicant on HDR's design and engineering work that continues to overlap with its retention as the third-party contractor. It is this significant prior work itself on the Project that precludes HDR from being a disinterested party.

The Director's Decision further finding that there is no conflict because HDR has been hired to assist in the Board's review of the "potential environmental impacts of the project . . . and not a technical review of any engineering and design work" that HDR previously performed is erroneous. OEA's assessment of the track plan and design is necessarily a critical component of the environmental review process. For example, in assisting OEA, **HDR will need to review its own design** in determining the feasibility of the project, if project purposes are being fulfilled under the design, and whether there are alternative feasible alternatives, which alternatives will be reviewed and assessed in direct relation to HDR's Project design. There is an obvious inherent bias, and any alternatives naturally may be disfavored or not given equal and fair consideration on review by the Contractor who designed and obviously favors the Applicant's (and its own) competing and preferred alternative.

Further, the environmental review will be directly impacted and constrained by HDR's design work. For example, the HDR designed line traverses through and breaches a 62-acre permanent conservation easement, apparently to enable Applicant to realize cheaper line construction costs, and is to be constructed above an aquifer system that is the sole source of Long Island's drinking water. The Project's impact on air quality, including emissions from trucks and trains, are a critical part of the EIS review. OEA's assessment on the Project's impact to air quality is likely to be heavily disputed, as Applicant's claims of air quality impacts was already vigorously contested by CCE in opposing Applicant's previous unsuccessful exemption petition, and these impacts are also directly impacted by the Project design. In fact, the design fundamentally affects all aspects of the environmental review,

including impacts on the transportation system, land use, energy, air and noise, safety, biological resources, water, and potential mitigation. Furthermore, the review will be utilized not only for NEPA purposes, but also for determining if the criteria specified in the CRA, 49 U.S.C. § 10909, have been satisfied.

Simply put, HDR cannot put on blinders and somehow ignore its prior design and planning work for the applicant when assisting OEA in its environmental review. Again, HDR has already exhibited its bias, as indicated in the April 2021 meeting minutes, where HDR clearly acted as an advocate for the Project, in contravention of its duties as a third-party consultant, as discussed further in the following section.

In addition, while HDR now states that it “has no plans” to perform future work on the project, that is at odds with Applicant’s representations that it did have such plans, and that HDR was contracted by Applicant to perform such work.⁶ Again, the Director’s Decision misses the fundamental conflict at issue. While OEA has gone to great lengths to ensure there is a signed statement in the record that HDR no longer has a contract to perform design work, the Director’s Decision sidesteps the clear and documented overlap and conflict between HDR’s work on Project design for Applicant, and the additional

⁶ The Director’s Decision states that “you [CCE] assert that HDR has contracted with BHR to perform future work related to this proposed project, which would create an additional conflict of interest.” Decision at 1. But this was not CCE just “asserting” this, as it was HDR that declared to the Board in its June 25, 2020 Petition in Docket No. FD 36398 that it “has retained [HDR] to design and assist with the construction of the new rail line once it is approved by the Board.” OEA apparently conducted no review of the referenced contracts and other correspondence between Applicant and HDR addressing the future work on the Project to actually determine the nature and status of the engagement.

handoff from Applicant to perform the environmental review of that same work for the Board.

C. If Allowed to Stand, the Director's Decision will Set a Dangerous Precedent

Allowing the Director's Decision to stand will set a dangerous precedent.

Other applicants will perceive that they have carte blanche to: (a) first hire a consultant on the Board's list of approved environmental review contractors for substantial initial project work and even additional post-approval related work; (b) continue to retain that contractor through the early stages of the OEA's NEPA review of the project; and then (c) have the contractor halt that work and then switch hats to enable it to serve as the OEA's independent, third-party contractor, with only a simple attestation that it is no longer actively working on the Project. Under the Director's Decision, if upheld, OEA would have no reason to refuse to hire the contractor because that contractor would no longer "presently" have a conflict of interest with the applicant. Following the environmental review, and upon Board approval of a project, the contractor could then turn around again and be retained by the applicant to complete the very work that the contractor originally planned and designed – all in compliance and furtherance of the Board's third-party contractor rules as authorized in the Director's Decision.

The Director's Decision, if left to stand, would create a giant loophole in the Board's rules swallowing the fundamental rule that third-party contractors must be disinterested. Such absurd, unintended results are exactly what is being allowed to occur with the retention by OEA of HDR as its third-party contractor for the Project under the

Director's Decision. CCE respectfully submits that the Board should not allow this to happen.⁷

D. The Contractor Has Exercised Evident Partiality that Demonstrates a Clear Conflict of Interest

CCE's Protest Letter emphasized that HDR made statements during planning meetings with OEA, as reflected in the April 2021 meeting minutes, evidencing partiality and the existence of a clear conflict of interest. As CCE documented in its Letter to OEA:

[T]he [April 2021] meeting minutes reflect: "BHR pointed out, and HDR agreed, that from a cumulative air quality / GHG / climate change analysis, the project will benefit the environment [sic] by taking hundreds of thousands of trucks off the road in the lifetime of the project." Meeting Minutes at 3-4, ¶ 7. HDR's agreement was made in the absence of any current traffic plan, at least on the record, without any apparent evaluation of any sort, and despite the fact "OEA remained concerned about local air quality impact of trucks in and out of the facility and downline impacts of more than three trains per day." *Id.* The truck traffic and air impacts of the project are a critical part of the EIS review, are likely to be heavily disputed, and already have been disputed by CCE in opposing BHR's previous unsuccessful exemption petition. In addition, "HDR suggested consideration be given to have the project to be made part of the [Regional Transportation Plan and Regional Transportation Improvement Plan (TIP)]" – clearly seeking to assist BHR and advocate for the Projects it is designed to impartially evaluate. Meeting Minutes at 3, ¶ 6.

Attachment 6.

⁷ The Department of Transportation Office of Inspector General issued a report this year finding FAA's delegation of certification to Boeing prevented proper oversight, and that "the Boeing [Organization Designation Authorization ("ODA")] process and structure do not ensure ODA personnel are adequately independent." Dep't of Transp. OIG, *Weaknesses in FAA's Certification & Delegation Processes Hindered Its Oversight of the 737 MAX 8*, Report No. AV2021020 (Feb. 23, 2021), [Weaknesses in FAA's Certification and Delegation Processes Hindered Its Oversight of the 737 MAX 8 | Oversight.gov](#).

The referenced minutes from OEA's first monthly planning session where HDR participated as the supposedly independent contractor clearly demonstrate that HDR is acting as an advocate and cheerleader for the Project rather than as an independent third-party consultant, which contravenes the Board's requirement that "contractors function as an extension of [OEA's] staff." *3P Contractor Policy Statement* at 10. These critical statements of bias and favoritism as reflected in the meeting minutes (apparently prepared by HDR, if not Applicant, and approved by OEA) are uncontested on the record.

After CCE filed its Protest Letter, the posted minutes for the monthly meetings were immediately truncated and no longer reveal what HDR has expressed during more recent monthly planning sessions.⁸ However, these initially filed meeting minutes make manifest that HDR has exercised evident partiality, creating a clear conflict of interest with its duties to OEA, in contravention of the Board's rules. While CCE clearly raised these conflicts in its Protest Letter, the Director's Decision completely ignores them. Respectfully, the failure of OEA to fully consider, address, and remedy this clear bias through removal of HDR as its third-party contractor is in clear error and requires reversal.

E. OEA's Justification for the Replacement of the Prior Contractor Is Mistaken and Fails to Comport with the Governing Requirements

The Director Decision's rationale for replacing ICF with HDR as the third-party contractor is contrary to the evidence of record and inconsistent with Board policy and

⁸ CCE objects to this arbitrary excising of the monthly meeting minutes, and under the circumstances of this proceeding, asks the Board to ensure that all of the communications made during the meetings, including those in the past and going forward, are reasonably and fully reflected, and further that interested parties be allowed to listen-in to the meetings.

the governing rules. The Decision states as follows:

[CCE] also raise a concern about a claimed lack of explanation for a change of third-party contractors that resulted in HDR becoming the third-party contractor for the Proposed Project. The change occurred following OEA's determination that an Environmental Impact Statement (EIS) rather than an Environment Assessment was required. OEA approved both the original third-party contractor and HDR because both contractors complied with OEA's third-party contracting requirements.

Director's Decision at 2 n.3. However, there should never have been any expectation that an EA, rather than an EIS, would be prepared for the Project, and even if there somehow were any doubt, the matter was settled far before the Director approved the replacement third-party contractor.

Even if the original contractor, which is well known to OEA, as it has served as OEA's third-party contractor on many prominent EISs, was suddenly somehow deemed incapable of performing this EIS, for which the record provides no support, there was no change in the anticipated level of environmental review warranting contractor replacement as the Director's Decision belatedly claims. Even if there were some valid basis for its termination decision, OEA failed to comply with its governing rules for such a replacement.

1. An EIS Was Unavoidable, as Even Applicant Recognized

Contrary to the reasoning in the Director's Decision, the nature of the Project under review effectively compelled the preparation of an EIS, rather than an EA.

Under 49 C.F.R. § 1155.24, "[a] land-use-exemption permit generally will require the preparation of an EIS" for any § 10909 land-use-exemption permits. As the Board concluded in its CRA rulemaking:

Because a significant factor in our consideration of land-use-exemption permit requests under the CRA will be environmental concerns (see 49 U.S.C. § 10909(d)) and because solid waste rail transfer facilities have the potential for significant environmental impacts, we now conclude that an EIS (which considers as part of its scope the standards set out at 49 U.S.C. § 10909(d)(1) through (5)) generally should be prepared for each land-use-exemption-permit application.

Solid Waste Rail Transfer Facilities, EP 684 (STB served Mar. 14, 2011), at 7 (internal citation omitted).

In addition to the general requirement that an EIS be prepared for any § 10909 application, the Board's rules generally require that an EIS be prepared for rail construction projects: EISs "will normally be prepared for rail construction proposals." 49 C.F.R. § 1105.6(a). Limited exceptions exist for "[c]onstruction of connecting track within existing rail rights-of-way, or on land owned by the connecting railroads," 49 C.F.R. § 1105.6, but Applicant's proposed rail line and SWRTF do not qualify as there is no existing rail right-of-way and the land to be used is not owned by a connecting railroad.

The Board allows rail construction projects to be reclassified to proceed under an EA rather than an EIS in individual cases, but only where the applicant demonstrates "the particular proposal is not likely to have a significant environmental impact." 49 C.F.R. § 1105.6(d). No such showing is possible here since the Project encompasses both a substantial rail line construction project, over a conservation easement no less, and a substantial new waste transfer station to receive and process 6,000 tons of raw MSW and C&D per day in an environmentally sensitive area. Further, a request for such reclassification "in a rail construction, should be presented with the prefiling notice required

by § 1105.10(a)(1) (or a request to waive that prefiling notice period).” *Id.* Applicant made no such request in the prefiling notice for the construction and operation it submitted in FD 36398 on May 14, 2020.

Additionally, CCE fully demonstrated in its July 27, 2020 Reply in Opposition to Applicant’s Petition for Exemption in FD 36399 that the Project easily meets or exceeds the thresholds for significant impacts on the environment that require an EIS be performed in terms of existence of alternatives, impacts on the transportation system, land use, energy, air and noise, safety, biological resources, water, and potential mitigation.

Finally, under 49 C.F.R. § 1105.10(a)(1), “where an environmental impact statement is required or contemplated,” the prospective applicant is required to file with OEA with written notice of its proposal at least six months prior to the filing of the application. Applicant filed a request for waiver of those rules with its rail line construction proposal in Docket No. FD 36398 on May 14, 2020, and OEA approved the request in that docket on May 26, 2020, reflecting both Applicant’s and OEA’s belief and expectation that such a request and waiver approval was necessary because an EIS was contemplated. This filing was made at the very **same time** that OEA approved ICF as the independent third-party contractor for the anticipated EIS review, and some ten months prior to Applicant seeking replacement of ICF with HDR.

Under the facts of the case, and the governing law, the Director’s Decision explanation that a change in third-party contractors was warranted due to a change in expected environmental review from an EA to an EIS is a contrivance that lacks basic plausibility.

2. OEA's Termination of the Prior Contractor Violated Governing Rules

While OEA has not publicly posted a copy of the MOU that Applicant, OEA, and ICF entered into with respect to ICF's third-party contractor services, there are standard applicable nonperformance and terminations clauses in MOUs, as reflected in Section IX of HDR's MOU (*see Attachment 5*). The MOUs require, among other things, that prior to termination: (a) the Petitioner first notify OEA with any concerns it might have regarding the Contractor's performance and actively engage in attempts to resolve, in good faith, any disputes or disagreements; (b) that if OEA finds the Contractor is not adequately performing its responsibilities and duties, it discuss its concerns with the Contractor and Petitioner, and only if such concerns by OEA cannot be satisfactorily resolved, would it seek to remove the Contractor **for cause**; and (c) any termination of the contract is subject to OEA's prior approval, after consultation with the Petitioner and Contractor. There is no indication of any attempt to follow any of these procedures with respect to the Applicant's termination of ICF as the Board's third-party contractor.

HDR merely stated in its July 12, 2021 letter to OEA that "Brookhaven Rail LLC/ Winter Bros selected HDR in March 2021 as the Third-Party Contractor to the STB OEA to prepare the EIS for the proposed project," even though the Board's rules at 49 C.F.R. § 1105.10(d) require such third-party contractors to be approved by OEA, working under OEA's direction. OEA is required to "retain ultimate responsibility," and has "sole" control over the Contractor's selection. *3P Contractor Policy Statement*, at 6. While the Applicant may participate in choosing a Contractor, "to avoid any impermissible conflict of interest . . .

the railroad may not be *responsible* for the selection or control of independent contractors.”

Id. quoting 49 C.F.R. § 1105.4(j).

There is no suggestion, much less record, that ICF was terminated for cause. There is also no evidence that Applicant notified even OEA of any concerns of ICF’s performance or attempted to resolve any possible disputes or disagreements, that OEA had made any determination of the inadequacy of ICF’s inadequate performance of its responsibilities and duties, or that OEA discussed any performance concerns with ICF. Instead, the record shows that Applicant simply asked that ICF be replaced with a new, preferred third-party contractor, one that has had an active involvement in the Project for Applicant, without a valid basis or cause, and OEA agreed, with little, if any, further inquiries or investigation.

The Director’s Decision explanation for the change in third-party contractors is without a valid basis and in clear error, and the facts show that OEA failed to follow its own established rules and agreements in making the change.

F. The Retention of HDR Also Appears to Violate Additional Restrictions on Contractor Employment that OEA Has Made No Effort to Investigate

The March 31, 2021 MOU among the STB, Applicant, and HDR (*see Attachment 5*) imposes strict restrictions on employment. Specifically, Section III.D.(2) specifies that:

No other employee of the Contractor or other employee of any subcontractor shall, unless OEA is provided prior notice of and approves such work, engage in (a) other work for the Petitioner or any entity or person directly or otherwise affiliated with the Petitioner, or (b) any work, relating to the notice before the Board, or any cooperating agencies that may elect to participate

in this process, or any other party to this proceeding during this proceeding.

There is no indication that HDR, Applicant, and even OEA have made any effort to ensure compliance with this provision. To the contrary, there is substantial evidence that at the time HDR entered into the MOU, and continuing to today, HDR has violated this Section. It has done so by doing substantial work for cooperating agencies to OEA's environmental review of the Project and other directly interested parties, including the New York State Department of Environmental Conservation ("NYSDEC"),⁹ the Long Island Railroad ("LIRR"),¹⁰ and the New York & Atlantic Railway ("NY&A").¹¹ NYSDEC, LIRR, and NY&A can all be reasonably expected to participate in the environmental and other review in at least some capacity, *e.g.*, one issue that CCE has also raised is the impact of the trash trains on the already congested local and regional rail lines. HDR's entanglements with these other entities is at least highly problematic. Yet, there is no indication that the entanglements have been disclosed, much less considered, and it thus also appears that OEA

⁹ See <https://www.dec.ny.gov/chemical/35727.html> (investigation and remediation of a groundwater plume on Long Island); https://www.dec.ny.gov/data/DecDocs/130003A/Work%20Plan.HW.130003A.2021-03-31.DEC-HDR_DECHC05_Toluene_Area_PDI_Final_WP.pdf (related); <https://www.dec.ny.gov/lands/31879.html> (tidal wetlands); <https://www.hdrinc.com/portfolio/new-york-state-water-quality-rapid-response-team-statewide-pfas-survey>.

¹⁰ See <https://www.hdrinc.com/portfolio/long-island-rail-road-enhanced-station-initiative> (LIRR enhanced station initiative). Furthermore, HDR's relationship with the LIRR has given rise to ethics issues. See <https://mtaig.state.ny.us/Reports/17-02.pdf>, and <http://www.mtaig.state.ny.us/Reports/18-37.pdf>.

¹¹ See <https://www.hdrinc.com/portfolio/wheelspur-multimodal-facility-and-freight-yard>.

has made no apparent effort to inquire into these arrangements or that HDR has disclosed them.¹² Similar questions arise as to whether HDR is doing or has done any work for affiliates and partners of Applicant, including Winters Bros. or NorthPoint Development.

To CCE's knowledge, HDR has not provided OEA with any notice and approval request for this work to date, or otherwise filed any disclosure statement verifying compliance with this Section.

CONCLUSION

Under the circumstances, and based on the record as it currently exists, it is not possible to have any confidence in: (a) the independence of HDR as the Board's environmental contractor, (b) the soundness of having HDR act as the independent third-party contractor to review the environmental impact of a project that it designed that will be used not only for general NEPA purposes but also for the first ever application under § 10909 of the CRA; and (c) the determination to have HDR replace ICF for any reason other than Applicant's expectation that HDR's presence would result in a more favorable outcome.

It is also not possible to have confidence that OEA has engaged in the sort of independent review of the retention of HDR that is required under the Board's rules, and to ensure that any retained third-party contractor is truly independent and a disinterested party to the Project. This lack of confidence is demonstrated perhaps most graphically by the fact that OEA did not even bother to investigate or address clear conflicts of interest brought to

¹² Issues may also exist as to HDR's compliance with its professional obligations to "act as faithful agents of their clients and employers with integrity and professionalism" and "make clear to clients any real, potential, or perceived conflicts of interest." *See* <https://www.asce.org/career-growth/ethics/code-of-ethics>.

its attention by CCE in the form of disturbing statements of partiality expressed by the Contractor in meetings with OEA as reflected in the public meeting minutes, but instead, allowed the meeting minutes that followed to be substantially excised and scrubbed. Restoring confidence in the Board's third-party contractor process is especially vital in the first proceeding under 49 U.S.C. § 10909 since the CRA was enacted.

CCE respectfully requests that the Board itself engage in an independent *de novo* review of the facts and circumstances so that the public can have confidence in the Board's procedures and processes. Such a review should result in a finding that the Director's Decision is in clear error and should be reversed, along with other appropriate steps to restore confidence in the environmental review. If HDR continues to refuse to recuse itself, the Board and OEA should make arrangements to use a different third-party contractor, for cause, one that is truly independent, has had no prior involvement in the matter, and fully satisfies the requirement to be disinterested. Ultimately, if the Board decides that a different result is warranted, and/or its own additional investigation is necessary, then substantial disclosures and explanations should be provided as to the full extent of HDR's past, present, and future involvement, including all communications and work prepared by HDR for Applicant on the Projects, all contracts, and all of its other work

on behalf of other consulting parties or interested parties, so that the public can maintain confidence in the integrity of the Board's processes.

Respectfully submitted,

/s/ Peter A. Pfohl
Robert D. Rosenberg
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

*Attorneys for Citizens Campaign
for the Environment*

Dated: October 6, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of October, 2021, 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 in STB Finance Docket No. 36398 and Finance Docket No. 36399, and to Joshua Gilliespie with Henningson, Durham & Richardon Architecture and Engineering, P.C. (“HDR”).

/s/

Katherine F. Waring

ATTACHMENT 1



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

May 14, 2020

Thomas W. Wilcox
CKG Law
The Foundry
1055 Thomas Jefferson Street NW
Washington, DC 20007

Re: Docket No. FD 36398, Brookhaven Rail, LLC – Construction and Operation Exemption – In Suffolk County, New York; and FD No. 36399, Brookhaven Rail, LLC – Petition for Exemption from the Requirements of 49 USC 10909; approval of third-party contractor

Dear Mr. Wilcox:

Pursuant to 49 C.F.R. § 1105.10(d), the Surface Transportation Board's Office of Environmental Analysis (OEA) is approving ICF Jones & Stokes, Inc. (ICF) as the independent third-party contractor for the above referenced proceedings. ICF will assist OEA in preparing the appropriate environmental documentation in connection with the Brookhaven Rail, LLC prospective petitions to construct and operate a line of railroad and a solid waste rail transfer facility in the Town of Brookhaven, Suffolk County, New York.

We have received the executed disclosure statement from ICF. As we previously discussed, OEA will solely direct, supervise, and review ICF's work in assisting OEA prepare the requisite environmental documentation in this proceeding.

If we can be of further assistance, please contact Diana Wood of my staff at 202-245-0302 or by email at Diana.Wood@stb.gov.

Sincerely,

Victoria Rutson
Director
Office of Environmental Analysis

ATTACHMENT 2

From: [Wood, Diana](#)
To: [Tom Wilcox](#)
Subject: BHR - Third Party Contractor Questions
Date: Monday, March 1, 2021 9:11:17 AM

Tom,

As I mentioned in my phone message a few minutes ago, Danielle is out this week on bereavement leave and asked me to relay the GC's response to your question about using HDR as a third party NEPA contractor and also as a sub-contractor for the SWRTF engineering/design work. She said it's OK to hire HDR for the NEPA analysis but not for the engineering/design work because of their prior work on the project. So moving forward, we'll need a new third party contractor approval letter, disclosure statement and MOU to start. Also, I have a bi-weekly meeting scheduled today with ICF and will cancel it, but you need to inform them of BHR's intention to go with another third party consultant.

Thanks,
Diana

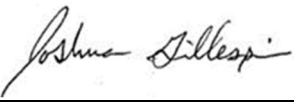
Diana F. Wood
Office of Environmental Analysis
Surface Transportation Board
395 E Street SW
Washington DC 20423
202-245-0302
Diana.Wood@stb.gov

ATTACHMENT 3

SURFACE TRANSPORTATION BOARD

DISCLOSURE STATEMENT

On behalf of Henningson, Durham & Richardson Architecture and Engineering, P.C. (“HDR”), I hereby certify that HDR has no financial or other interests in the outcome of either (1) the pending petition of Brookhaven Rail LLC (“BHR”), a Class III rail carrier, for an exemption from the requirements of 49 U.S.C section 10901 for the purpose of constructing and operating a new line of railroad in the Town of Brookhaven, County of Suffolk, N.Y.; or (2) the prospective application of BHR under 49 U.S.C. section 10909 to request for a “land-use exemption permit” for the purpose of enabling the construction and operation of a solid waste rail transfer facility that would be served by the new line of railroad.

Signature: 

Printed Name: Joshua Gillespie

Title: Transportation Environmental Section Manager

Date: March 10, 2021

ATTACHMENT 4



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

March 16, 2021

Thomas W. Wilcox
CKG Law
1055 Thomas Jefferson Street NW
Washington, DC 20007

Re: Docket No. FD 36398, Brookhaven Rail, LLC – Construction and Operation Exemption – in Suffolk County, N.Y.; and Docket No. FD 36399 (Sub-No. 01), Brookhaven Rail, LLC – Application Under 49 U.S.C. § 10909 for a Land Use Exemption Permit; Approval of Third-Party Contractor

Dear Mr. Wilcox:

Pursuant to 49 C.F.R. § 1105.10(d), the Surface Transportation Board's Office of Environmental Analysis (OEA) is approving Henningson, Durham & Richardson Architecture and Engineering, P.C. (HDR), as the independent third-party contractor for the above-referenced proceedings. HDR will assist OEA in preparing the appropriate environmental documentation in connection with Brookhaven Rail, LLC's petition to construct and operate a line of railroad and the prospective application for Brookhaven Rail, LLC to construct and operate a solid waste rail transfer facility in the Town of Brookhaven, Suffolk County, New York.

Thank you for submitting the executed disclosure statement. As we previously discussed, OEA will direct, supervise, and review all environmental documents prepared by HDR in these proceedings.

If you have any questions or need further assistance, please contact Diana Wood of my staff at 202-245-0302 or by email at Diana.Wood@stb.gov.

Sincerely,

Danielle Gosselin
Acting Director
Office of Environmental Analysis

ATTACHMENT 5

**MEMORANDUM OF UNDERSTANDING
AMONG
SURFACE TRANSPORTATION BOARD,
BROOKHAVEN RAIL LLC and
HENNINGSON, DURHAM &
RICHARDSON ARCHITECTURE and
ENGINEERING, P.C.**

RE: ENVIRONMENTAL ANALYSIS AND PREPARATION OF APPROPRIATE ENVIRONMENTAL DOCUMENTS RELATING TO (1) A PETITION REQUESTING AN EXEMPTION OF THE REQUIREMENTS OF 49 U.S.C. 10901 GOVERNING CONSTRUCTION OF A NEW LINE OF RAILROAD, AND (2) AN APPLICATION FOR A LAND-USE EXEMPTION PERMIT PURSUANT TO 49 U.S.C. §10909 FOR THE PURPOSE OF CONSTRUCTING A SOLID WASTE RAIL TRANSFER FACILITY.

I. Introduction and Purpose

- A. Brookhaven Rail, LLC, a Class III railroad ("Petitioner") has filed a Petition in FD Docket No. 36398 seeking an individual exemption from the approval requirements of 49 U.S.C. §10901 governing the construction of an approximately 25,000 foot line of railroad. Petitioner also intends to file an Application for a land-use exemption permit pursuant to 49 U.S.C. §10909 for the purpose of enabling the construction and operation by Petitioner of a solid waste rail transfer facility (the Facility) that will be connected to and served by the proposed new line of railroad.
- B. When making its decision on the petitions, the Board will consider the potential environmental impacts of constructing rail line and constructing and operating the Facility, and any rail-related alternatives. The Board will be the lead agency for preparing the environmental documentation required for the projects, either an Environmental Impact Statement (EIS) or Environmental Assessment (EA), as required by the National Environmental Policy Act (NEPA). Pursuant to 40 C.F.R. § 1506.5(c), and 49 C.F.R. §§ 1105.40) and 1105.10(d), the Board, through its Office of Environmental Analysis (OEA), has selected and the Petitioner has agreed to engage, at the Petitioner's expense, Henningson, Durham & Richardson Architecture and Engineering, P.C. (Contractor) as the Independent Third-party Contractor for this proposal. The Contractor shall assist OEA in conducting the environmental review and

preparing the environmental documentation¹ related to the Petitioner's proposals. The Contractor's scope of work, approach, and activities shall be under the sole supervision, direction, and control of OEA.

- C. This Memorandum of Understanding (MOU) summarizes the relationship among the Contractor, the Petitioner, and OEA, as set forth in applicable regulations and Board policy, regarding the conditions and procedures each party must follow in preparing all environmental documentation. The MOU does not supersede or amend, and is made expressly subject to, the requirements of NEPA, and, to the extent applicable, related environmental laws, and 49 C.F.R. Part 1105 and 40 C.F.R. Part 1500.
- CI. The Petitioner, the Contractor, and OEA agree to work within the framework of this MOU to develop an efficient method to complete the environmental review for the proposed projects. OEA shall maintain overall responsibility for the documentation, analysis, methodology, consultation, and mitigation related to the environmental review process. OEA shall direct, evaluate, oversee, and approve the environmental review process.

II. Document Process

OEA will prepare, on behalf of the Board, the draft environmental document (EA or EIS) for each project for agency and public review. It is presently contemplated that one environmental document will be prepared covering both projects. OEA will independently draft mitigation, based on its review of potential environmental impacts of the project.

III. Agreement between the Petitioner and Contractor

- A. Any contract between the Petitioner and Contractor, and any subcontracts, shall be consistent with the provisions of the MOU.
- B. The terms of the MOU shall override any contradictory or conflicting terms regarding the scope and performance of any work to be conducted under any contract entered into between the Petitioner and the Contractor; provided, however, that the foregoing shall not limit the rights of the Petitioner and Contractor to contract on terms which require the work to be performed cost-effectively.
- C. The contract between the Contractor and Petitioner shall specifically provide, and the Contractor shall represent, that (1) the Contractor and any subcontractors do

¹ The terms "environmental documentation" and "environmental document(s)" embrace draft, supplemental, and final EAs, EISs, and any other reports, studies, surveys, or related documents.

not and shall not have any financial or economic interest in the Petitioner or any entity or person directly or otherwise affiliated with the Petitioner except for payment for services rendered in connection with the preparation of all required environmental documentation, and except for services rendered pursuant to other agreements not prohibited by the MOU, and (2) there is no agreement between the Petitioner, or any other person or entity and the Contractor regarding future employment that is contingent upon the Contractor's performance under this contract. The Contractor shall concurrently execute a disclosure statement as mandated by the regulations of the Council on Environmental Quality (CEQ) (40 C.F.R. § 1506.5(c)) and submit it to both OEA and the Petitioner, before beginning any work under OEA's direction. It is understood that the Contractor and any subcontractors have not been employed to conduct any environmental analysis related to the petition for the Petitioner, or for any other person or entity, and, therefore, can be retained as independent third-party contractor(s).

D. Restrictions on other work:

- (1) No employee of the Contractor or employees of any subcontractor, who is a part of the Contractor's core team committed to the environmental review process for the petition, shall engage in (a) other work for the Petitioner or any entity or person directly or otherwise affiliated with the Petitioner or (b) any work, relating to the notice of exemption, for any other party to this proceeding during the proceeding; and
- (2) No other employee of the Contractor or other employee of any subcontractor shall, unless OEA is provided prior notice of and approves such work, engage in (a) other work for the Petitioner or any entity or person directly or otherwise affiliated with the Petitioner, or (b) any work, relating to the notice before the Board, or any cooperating agencies that may elect to participate in this process, or any other party to this proceeding during this proceeding.

E. The Petitioner shall bear the costs incurred by the Contractor, and by any subcontractor approved by OEA in accordance with Section IV. A. , in preparing the required environmental documentation to implement NEPA and related environmental laws under the direction of OEA. The Petitioner agrees to hold harmless and indemnify the United States of America and the Board with respect to any and all claims, demands, causes of action, and the like, which may arise in performing the work under the contract between the Contractor and Petitioner.

F. Any contract between the Contractor and Petitioner shall specifically limit any remedies available to the Contractor and subcontractors upon termination of the

contract to affirmatively relieve the United States of America, the Board, and any officer, agent, or employee, from any liability from terminating the contract.

IV. Contractor Responsibilities

- A. The Contractor may engage subcontractors to perform work related to environmental review of the petitions, subject to the provisions of Section III.C and Section III.D. All work performed by the Contractor or any subcontractors shall be under the sole direction, control, supervision, and final approval of OEA. Contractor and subcontractors, if any, will act as the agent(s) of the Board, not the Petitioner, in performing its/their duties.
- B. The Contractor shall provide:
 - (1) Appropriate expertise in the areas of environmental concern (including, but not limited to, air quality, wetlands, biological resources, geotechnical resources, hydrology, land use, safety, noise, social and economic, and cultural/historic resources);
 - (2) A good working knowledge of environmental laws, applicable laws and regulations (including environmental regulations) administered or promulgated by the Board, CEQ regulations and guidelines, other applicable federal regulations, state laws and regulations, and applicable local ordinances and regulations;
 - (3) The capacity to perform environmental impact analysis and prepare appropriate environmental documentation;
 - (4) Thorough, readable, technically sound, and informative environmental documents, as well as related charts, maps, diagrams, etc.;
 - (5) Representatives to attend and/or facilitate meetings with federal, state, regional, and local agencies, other interested parties, and the Petitioner for exchanging and obtaining information, explaining the notice and related environmental concerns and impacts, and receiving comments in preparing the required environmental documentation;
 - (6) Expertise in data management; and
 - (7) Assistance to OEA in ensuring that the data collection, analyses, and methodologies for the environmental documents are complete, accurate, and relevant to OEA's needs for the environmental review of the notice under NEPA.
- C. The Contractor shall maintain and provide OEA upon request:

- (1) Adequate record-keeping and reporting systems to assure preservation of all data gathered, including surveys, studies, etc.;
 - (2) Logs summarizing all telephone calls, meetings, document reviews, and other substantive communications with OEA, the Petitioner, local governments, governmental agencies, citizens' groups, and any other interested parties; and
 - (3) Lists of all agencies, other railroads, citizens' groups, organizations, and individuals (including their respective addresses and telephone numbers) contacted in preparing the environmental documentation.
- D. The Contractor shall perform the work in a timely, responsive, satisfactory, and cost-effective manner, pursuant to a work schedule developed with OEA in coordination with the Petitioner and approved by OEA.
- E. The Contractor shall assist OEA in coordinating the exchange of all relevant environmental information and technical data/studies related to the notice and all required environmental documentation among OEA staff, the Petitioner's staff and representatives, the Contractor, and any subcontractors.
- F. The Contractor will submit directly to OEA any and all work the Contractor performs in preparing all required environmental documentation, studies, surveys, etc. The Contractor, and any subcontractors, shall not disclose the results of their work or release any of the underlying work papers, drafts, or other materials prepared under the contract to anyone, including the Petitioner, without OEA's express authorization. In no case shall the Petitioner be provided the opportunity to modify or edit the Contractor's work prior to submission to OEA, without OEA's express authorization.
- G. The Contractor shall follow the directions and instructions of OEA, and incorporate them into the environmental document(s) in a timely and responsive manner. The Contractor shall submit preliminary and final drafts of any documents to OEA for final review and approval.
- H. The Contractor shall provide OEA access to and the right to review all procedures and underlying data used in the Contractor's development and preparation of any and all environmental documents. This includes, but is not limited to, field reports/surveys, technical studies and analyses, subcontractor reports, and interviews with concerned private and public parties, whether or not such information may be reflected in draft, supplemental, or final environmental documents submitted to OEA.

- I. The Contractor, and any approved subcontractors, shall cooperate fully with OEA in organizing, participating in, and conducting any public workshops, informational meetings, and other meetings, as OEA determines are necessary, to foster public understanding of and/or participation in the environmental review process, and to assess potential environmental impacts and develop mitigation measures related to the petition.
- J. The Contractor will assist OEA in reviewing comments received during the environmental review process, will draft a summary of rail-related comments, and will coordinate analysis of these comments with OEA.
- K. The Contractor shall assist OEA in preparing the required environmental documentation, environmental recommendations, selection of alternatives, and development of mitigation measures.
- L. The Contractor's Project Manager, other technical experts, as appropriate, shall be available to attend all meetings, briefings, consultations, and site visits as OEA deems necessary. The Project Manager shall devote as much time to environmental review of the petition as is necessary to assure the Contractor's performance of its responsibilities under this MOU. This work commitment will extend for the entire time necessary to complete the environmental review for the petition.
- M. Except as specifically authorized by OEA, the Contractor and any of its subcontractors shall refer all media/press inquiries directly to OEA.
- N. As needed, the Contractor will provide technical expertise and administrative support to OEA during preparation of the Board's decision and in addressing any environmental issues arising in the Board's consideration of this proceeding. In the event of any appeal from a Board decision in this proceeding, the parties hereto shall at that time determine the need for and terms of the Contractor's services in connection with judicial review of that decision.
- O. Contractor shall retain all project-related environmental and historic documents, including supporting documentation, emails, project files, reports and drafts for at least 3 years beyond issuance of the final decision by the Board for at least 3 years beyond the close of any Board imposed oversight period, whichever is longest. Documentation for Memorandum of Agreements (MOA) or Programmatic Agreements (PA) under the National Historic Preservation Act shall be maintained for 3 years after the stipulations of the MOA or PA have been satisfied.

- P. The Contractor shall submit invoices to the Petitioner on a monthly basis and shall concurrently provide a copy of each invoice to OEA. An invoice shall be considered unpaid if the Petitioner fails to pay the invoice within 60 days of receipt. In the event of two consecutive unpaid invoices, the Contractor shall notify OEA as soon as practicable. If the Contractor determines that it will stop work associated with the environmental review process because of two or more consecutive unpaid invoices, the Contractor will notify OEA and the Petitioner within three business days of making that determination.

V. Petitioner Responsibilities

- A. The Petitioner shall retain the Contractor to assist OEA in preparing all required environmental documentation and services, as that assistance and its costs are defined by a contract to be negotiated and executed by the Petitioner and the Contractor, and in the Work Plan described in Section VIII.
- B. The Petitioner, including its staff and representatives, shall provide to OEA and the Contractor any requested supportive expertise, resources, data, and technical capabilities necessary to undertake the environmental analysis, subject to the right of the Petitioner to advise OEA of any request received from OEA of the Contractor that the Petitioner believes either is not germane to matters appropriately reviewed in the environmental review process, is contrary to applicable statutes and regulations, would impose an extraordinary burden on the Petitioner, or is subject to the right of the Petitioner to maintain confidentiality as to proprietary, privileged, or other information which is not otherwise subject to disclosure. If the Petitioner so advises OEA, OEA shall determine whether the request is appropriate and shall so advise the Petitioner and the Contractor of its determination. OEA shall, to the extent possible, maintain the confidentiality of any information if so requested by the Petitioner.
- C. The Petitioner shall cooperate fully with OEA in organizing and participating in any public workshops, hearings, and meetings, as OEA determines are necessary to (1) foster public understanding and/or participation in the environmental review process, and (2) assess potential environmental impacts and mitigation measures related to the notice.
- D. With respect to all reports, analyses, and documents, including drafts, supplements, and final copies of the environmental documents, the Petitioner shall be responsible for the Contractor's administrative and clerical costs, as well as the costs of graphics, maps, layouts, mailing, and printing, as those costs are defined by a contract to be negotiated and executed by the Petitioner and the Contractor. The Petitioner shall, however, have the option of directing that the printing of the

environmental documentation be performed by a private entity, rather than OEA. The Petitioner shall be solely responsible for the cost of preparing and providing to OEA the appropriate number of copies of all required environmental documentation.

- E. The Petitioner shall provide complete, accurate, relevant, and timely responses to all reasonable requests for information pertaining to the notice to the Board, the Operating Plan, and the environmental aspects and effects of the proposed rail construction and operation, and of the proposed solid waste transfer facility construction and operation.
- F. The Petitioner shall pay invoices received from the Contractor in full and on time. If the Contractor sends a stop work notification due to two or more consecutive unpaid invoices, pursuant to Section IV. P above, the Petitioner shall within five business days of the notification submit a request in writing to OEA to hold the environmental review process in abeyance until the Petitioner has sufficient funds to continue with the environmental review process without interruption.

VI. Board/OEA Responsibilities

- A. The Board is responsible for ensuring compliance with the requirements of NEPA and other applicable environmental statutes and regulations by preparing appropriate environmental documentation.
- B. OEA shall:
 - (1) Direct, review, and approve all phases of preparing all required environmental documentation, including the work of the Contractor, using OEA's best efforts to ensure that the work is reasonably necessary to conduct the environmental review process regarding the proceeding and the work is within the scope of NEPA requirements. For example, OEA shall ensure that the Contractor considers existing data and environmental analyses available from the Petitioner, OEA, and other sources, and that the Contractor does not duplicate work already done, unless OEA determines that the existing data are not adequate for use in preparing the environmental documentation;
 - (2) Designate appropriate staff to review and approve all work as it is developed and completed;
 - (3) Ensure that its representatives attend meetings, as needed, with federal, state, regional, and local agencies, and other interested parties, as well as any public hearings or meetings, to exchange information, explain the petition and related environmental concerns and impacts, obtain technical

- input, and receive comments in preparing all required environmental documentation; and
- (4) Coordinate, with the Contractor's assistance, the exchange of information among any planning, design, or construction engineers or technical staff employed by the Petitioner and Contractor.
- C. OEA will periodically review the work of the Contractor to ensure that the Board's responsibilities under NEPA and related environmental laws and regulations are being satisfied. As each portion of any draft or final document is completed, OEA staff shall review and approve that portion and those tasks completed, and/or direct further work with regard to that portion or task.
- D. OEA will monitor the Contractor to ensure that the Contractor is making adequate progress toward meeting specific time frames established in the Work Plan described in Section VII. If OEA determines these commitments are not being met, it will notify the Petitioner of its findings. It will be the responsibility of OEA to recommend any necessary corrective action to be taken under this MOU.
- E. In all instances involving questions concerning the content or relevance of any material (including all data, analyses, charts, and conclusions) prepared by the Contractor, OEA shall make the final determination on including, deleting, or revising any such material in the environmental documents.
- F. To coordinate the preparation of all required environmental documentation, and to verify notice-related data, OEA may hold joint meetings with the Petitioner and Contractor. As necessary, OEA may exclude the Petitioner from participation. OEA may also consult directly with appropriate federal, state, and local officials, and other interested parties.
- G. OEA, with the assistance of the Contractor, will be responsible for organizing and conducting any public workshops or meetings that may be necessary in preparing environmental documents during the environmental review process.
- H. OEA, with the assistance of the Contractor, will receive all relevant comments submitted during the environmental review process and comment period. At the close of any public review and comment period, OEA, in consultation with the Contractor, shall identify the issues and comments that will require a response from the Board. OEA may direct these comments to the Petitioner and to the Contractor, as appropriate, to be included in the final environmental document. OEA may modify these responses as appropriate.

- I. OEA, with the assistance of the Contractor, shall prepare final recommendations for the Board.
- J. OEA shall retain responsibility for deciding the environmentally preferable alternative for each project, and any mitigation measures to be included in the final environmental document.
- K. If OEA receives a request from the Petitioner to hold the environmental review process in abeyance, OEA shall respond to Petitioner and shall post the Petitioner's request and OEA's response on the Board's website to provide public notice that the environmental review is being held in abeyance and the reason for the abeyance, including whether it is due to insufficient funds from the Petitioner.

VII. Work Plan

- A. The Contractor, in consultation with OEA and the Petitioner, shall submit a draft Work Plan to OEA for preparing the required environmental documentation within 10 business days after all parties have signed this MOU. The draft Work Plan shall contain at least the following elements:
 - (1) A description of all work to be performed (including preparing and sending any consultation letters; participating in public and agency meetings; outlining and drafting environmental documents; reviewing, analyzing, and summarizing public comments, conducting analyses, etc.);
 - (2) The projected schedule for completing the various tasks described;
 - (3) Identification of the Contractor's staff members who will be responsible for preparing, analyzing, and reviewing the work; and
 - (4) An outline of the environmental analysis.
- B. Following receipt of the draft Work Plan, OEA, in consultation with the Contractor and Petitioner, shall finalize the Work Plan in a timely manner.
- C. After consultation with the Contractor and Petitioner, OEA may amend the Work Plan from time to time as the environmental review of the notice may necessitate. The parties hereto shall consult at least once every two weeks to confirm that the work is being performed in the most efficient and cost-effective manner and to consider possible measures to improve the efficiency and cost-effectiveness of the work.

VIII. Disputes

Disputes between the parties may arise regarding the environmental review process, including approach, methods, analysis, conclusions, and performance of the obligations of the parties to this MOU. The parties agree to seek resolution of disputes among the individuals or parties directly involved. In addition, the parties may seek independent facilitation or mediation to assist in resolving disputes if resolution is not achieved.

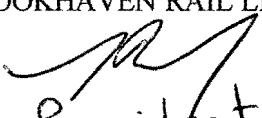
IX. Nonperformance and Termination

- A. The Petitioner or Contractor shall notify OEA of any concerns either party might have with respect to the other party's performance under the contract between the Petitioner and Contractor or this MOU. All parties will attempt to resolve, in good faith, any disputes or disagreements.
- B. If OEA determines that either the Contractor or Petitioner is not adequately performing its responsibilities and duties in accordance with this MOU, OEA will discuss its concerns with the Contractor and Petitioner. If OEA's concerns cannot be satisfactorily resolved, OEA will notify the Petitioner that OEA is removing the Contractor for cause, or direct the Petitioner to comply with the MOU. Upon removal of the Contractor, OEA shall endeavor to replace the Contractor with another qualified contractor as soon as practicable.
- C. Both the Petitioner and Contractor shall immediately notify OEA of any attempt by either party to modify or terminate the contract between the Petitioner and Contractor. Termination of the contract shall be subject to OEA's prior approval, after consultation with the Petitioner and Contractor. Upon approving termination of the contract, OEA shall endeavor to replace the Contractor with another qualified contractor as soon as practicable. Notwithstanding the foregoing, the Petitioner may terminate the contract without OEA's approval if it withdraws notice of intent or petition.

X. Modification

This MOU may be modified only by written amendment executed by OEA, the Petitioner, and the Contractor.

BROOKHAVEN RAIL LLC

By: 

Title: President

Date: 3/26/21

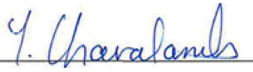
SURFACE TRANSPORTATION BOARD

By:

Title:

Date:

HENNINGSON, DURHAM &
RICHARDSON ARCHITECTURE
AND ENGINEERING, P.C.

By: 

Title: Authorized Representative

Date: March 29, 2021

SURFACE TRANSPORTATION BOARD

By:

Wm. A. ...

Title:

Acting director

Date:

3/30/21

HENNINGSON, DURHAM &
RICHARDSON ARCHITECTURE
AND ENGINEERING, P.C.

By:

J. Chavala

Title: Authorized Representative

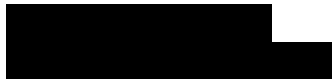
Date: March 29, 2021

ATTACHMENT 6



**Surface Transportation Board
Brookhaven Rail Environmental Impact Statement
Monthly Meeting (STB/BHR/HDR) Agenda
April 6, 2021**

Join by phone:



Time:



Subject: Monthly Meeting on the Brookhaven Rail EIS

Agenda:

1. Roll Call
2. Ground rules for third party contractor HDR and BHR
3. Meeting minutes – who will take notes for the public record - HDR or BHR?
4. Draft Work Plan
5. Website: Establish and manage project web site that has list serv capabilities, among other things.
6. Contact Agencies involved in EIS preparation/review
 - a. potential cooperating agencies – NYSDEC and NYSDOT
 - b. potential participating agencies – Town of Brookhaven and Suffolk County
7. CEQ changes to new NEPA rules forthcoming. Current directive is to include analysis of cumulative impacts, Environmental Justice, greenhouse gases and climate change but other changes expected.

- 8.** Executive Order for all agencies to expand outreach to Environmental Justice communities.
- 9.** EIS to include a down line impact assessment due to the project's exceedance of the Board's three trains per day threshold in AQ nonattainment areas. Will need to assess air quality and greenhouse gases; noise and vibration; vehicle safety and delay; railroad operations; and environmental justice. Will need more information on train operations and movements, and track conditions for BHR and NYA operations.
- 10.** Data needs for EIS: HDR drafting
- 11.** Mediation and BHR/Town agreed upon environmental analyses and mitigation commitments. What is the status of the tunnel and conservation easement and other environmental mitigation measures per Stipulation of Settlement and VDEIS?
- 12.** Timeframe for filing Application
- 13.** CCE Letter

Surface Transportation Board
Brookhaven Rail Environmental Impact Statement
Monthly Meeting Minutes
Meeting of April 6, 2021

1. Roll Call – Participants included: Diana Wood (OEA), Josh Gillespie, Audrey Heffernan (HDR), Tom Wilcox, Michael White and Will Flower (BHR).
2. Ground Rules- OEA reiterated the ground rules with regard to communications about the project with HDR. Specifically, all communications between BHR and HDR must go through OEA, unless otherwise expressly agreed with respect to a particular question/ issue. OEA will provide BHR copies of information/ documentation of HDR, as and when OEA determines appropriate.
3. Meeting minutes – BHR agreed to take notes during the monthly meetings and prepare minutes, which will be circulated to OEA and HDR in draft for review and comment. BHR will then prepare the “final” minutes incorporating comments received and distribute same to OEA and HDR.
4. Draft Work Plan – A Draft Work Plan for the project NEPA process / EIS preparation will be developed by OEA and HDR, then shared with BHR. A final Work Plan will be prepared by HDR following review and comment on the Draft, which will be reviewed and approved by OEA, then shared with BHR.
5. Website – HDR has been tasked with the development, administration, and management of a website for the project NEPA process / EIS preparation. The website will provide access to all public information and documentation related to the project. The website will also provide capability for the public and interested parties to sign up to the website to receive notice of and access to updates of information / documentation put up on the website.
6. Contact Agencies – OEA presented a discussion of potential cooperating and participating agencies to potentially be involved in the preparation/ review of the EIS. NYSDEC will be considered as becoming a cooperating agency, given their ultimate involvement in permitting of the SWRTF. BHR suggested the New York Metropolitan Transportation Council (NYMTC), the federally designated Metropolitan Planning Organization for the region, to be considered as becoming a cooperating agency rather than the NYSDOT. NYMTC is directly responsible for the Regional Transportation Plan and Regional Transportation Improvement Plan (TIP). NYSDOT is a member of NYMTC. HDR suggested consideration be given to have the project be made part of the TIP. The Town of Brookhaven and Suffolk County will be given consideration as becoming participating agencies. The question of timing and manner of contact to these agencies was left for further discussion.
7. CEQ changes to new NEPA rules forthcoming- OEA emphasized forthcoming amended NEPA rules related to the need to provide analysis of cumulative impacts, environmental justice issues, and greenhouse gases/climate change in NEPA EISs. BHR pointed out that prior environmental analysis concluded, and review of present EJ areas maps of the NYSDEC show, the project is not in an EJ area. Additionally, BHR pointed out, and HDR agreed, that from a cumulative air quality / GHG /climate change analysis, the project will benefit the environment by taking hundreds of thousands of trucks off the road in the lifetime of the

project. OEA remained concerned about local air quality impact of trucks in and out of the facility and downline impacts of more than three trains per day. BHR also raised the issue of the version of the NEPA rules that would be applied to the analysis of the project. In short if we were responsible to change the Work Plan / Scope with potential ongoing changes in the NEPA rules, the danger is that the analysis may never finish.

8. Executive Order on Environmental Justice - as presented in Item 7. BHR explained that the project is not in an EJ area, as drawn on the NYSDEC issued maps.
9. Downline impact analysis – Air quality, GHG and EJ discussed in Item 7. BHR reported that BHR has been and remains in constant conversation with NY&A respecting train operations, movement and track conditions and is confident of NY&A cooperation in providing information and analysis of its operation and the LIRR system.
10. Data Needs for EIS – OEA and HDR will consult on this and HDR will provide BHR a list of such data, and if not immediately available, the approach to obtaining the necessary data.
11. STB Mediation – BHR reported anticipating an extension of the Mediation to allow the Town and BHR to finalize their agreements on issues that would be memorialized in a confidential MOU. BHR also reported that the Town and BHR will come to an agreement with respect to disclosing certain elements of the Mediation to OEA which are directly related to the NEPA analysis. Providing some preliminary feedback, BHR reported that the Town and BHR have agreed in principle there will be no underpass between what has been known as Parcel C of the Brookhaven Rail Terminal and the property subject of the project. Instead, there would be a new switch on the LIRR mainline with a southern turnout and the Town has agreed to proceed with the adjustment of the Conservation Easement areas to accommodate this approach, which adjustment will actually expand the size of the Conservation Easement area. BHR will report to OEA on further mitigation measures as will be agreed upon between the Town and BHR.
12. Timeframe for the Application – OEA brought forward a discussion of new consultation letters and the need for a 6- month pre-filing Notice. BHR understood the approach of new consultation letters, but requested; the list of entities to be sent such letters, an opportunity to review a draft of the letter and being provided notice before the letters are sent out. BHR stated it would address the 6-month pre-filing Notice issue, which was raised for the first time in this meeting. OEA further commented on the need for a project schedule and the standards by which the Board would weigh the request for a land-use exemption. In response to a request from OEA, BHR provided a summary status report of litigation related to the Brookhaven Rail Terminal.
13. CCE letter – A number of the issues raised in the letter submitted to OEA on April 1, 2021 were discussed as part of Item 6. Most importantly in response to the CCE substantive request, the decision had already been made to prepare an EIS for both the rail construction and the solid waste rail transfer facility.

The next monthly meeting will be on May 4, 2021

ATTACHMENT 7



SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

PETER A. PFOHL

June 21, 2021

Via E-Filing

Danielle Gosselin
Acting Director
Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: FD 36398, *Brookhaven Rail LLC – Construction and Operation
Exemption – Suffolk County, New York, and undocketed application
for a land-use exemption under 49 U.S.C. § 10909*

Dear Ms. Gosselin:

The Citizens Campaign for the Environment (“CCE”) writes to convey its concerns and objections regarding the retention of Henningson, Durham & Richardson Architecture and Engineering, P.C. (“HDR”), by the Office of Environmental Analysis (“OEA”) of the Surface Transportation Board (“STB” or “Board”) for the environmental review of both a rail line construction and operation exemption sought by Brookhaven Rail LLC (“BHR”) and a promised application for a proposed land-use exemption for a solid waste rail transfer facility under 49 U.S.C. § 10909 that would be served by the proposed rail line (the “Projects”).

CCE has recently become aware that HDR has been involved in track design work and prospective construction work for BHR for the Projects, and that involvement calls into question HDR’s suitability to serve as an independent, disinterested third-party contractor for OEA’s review of these Projects. CCE respectfully requests that the OEA take immediate steps to investigate and address this matter.

Specifically, the Petition for Exemption that BHR filed in STB Docket No. 36398 on June 25, 2020 (the “Petition”), recites that: “Finally, BHR, has retained HDR Engineering (‘HDR’) to design and assist with the construction of the new rail line once it is approved by the Board. HDR will coordinate with Cameron Engineering & Associates, which has been engaged to provide site design and civil engineering services in connection with the development of Parcel D.” *Id.* at 7.

BHR’s Petition and follow-up filings make clear that HDR’s involvement for BHR on the Projects has been meaningful, and also not merely prospective or contingent. Specifically, the BHR Petition relies on HDR’s track design work and drawings contained in

Appendix C, which includes two track schematics and an annotated map/schematic. This design work continues to be used and relied upon by BHR as a fundamental part of its exemption petitions. On April 23, 2021 BHR submitted a six-month waiver request to OEA, and supporting documents including another HDR track design drawing.¹

These documents indicate that HDR has been actively involved in the basic design and planning for the Projects for the Applicant, and it has been retained by BHR for continuing future work with the project. HDR has also been retained by OEA to be its independent contractor assisting in the review of the Projects to which HDR itself has played a central role in designing. HDR's involvement in the Projects for BHR and for OEA call into question its basic suitability to serve as an independent third-party contractor.

Under the Board's rules, at 49 C.F.R § 1105.10(c), third-party consultants may be used to assist OEA in its environmental review "on behalf of the Board, working under OEA's direction." As a condition of their retention, "Contractors must sign a disclosure statement prior to beginning work, indicating that they are *disinterested* parties to the project." *Policy Statement on Use of Third-Party Contracting in Preparation of Environmental Documentation*, EP 585 (STB served Mar. 19, 2001), at 4 n.6 (emphasis added) (citing Council on Environmental Quality regulations at 40 C.F.R. § 1506) ("*3P Contractor Policy Statement*"). To that end, the Memorandum of Understanding ("MOU") that HDR entered into to serve as the third-party contractor requires it to not "engage in (a) other work for the Petitioner or any entity or person directly or otherwise affiliated with the Petitioner or (b) any work, relating to the notice of exemption, for any other party to this proceeding during the proceeding." MOU at 3 ¶ D(1). HDR further certified in its disclosure statement:

that HDR has no financial or other interests in the outcome of either (1) the pending petition of Brookhaven Rail LLC ("BHR"), a Class III rail carrier, for an exemption from the requirements of 49 U.S.C. section 10901 for the purpose of constructing and operating a new line of railroad in the Town of Brookhaven, County of Suffolk, N.Y.; or (2) the prospective application of BHR under 49 U.S.C. section 10909 to request for a "land use exemption permit"

HDR's involvement in the Projects for BHR plainly constitutes an interest in the matter, and there is no indication that its interest was disclosed to, much less considered by, OEA in conjunction with HDR's retention. Plainly, an independent and disinterested entity should not be in a position where it assesses the merits of Projects in which it had prior involvement, nor can it be expected to be entirely neutral if OEA has criticisms or questions regarding the project's design and feasibility or the impacts of that design on matters being evaluated. Furthermore, the record does not contain any disavowal or qualification of the

¹ It appears BHR mistakenly included an earlier version of HDR's track design (the drawing submitted is missing track and is dated January 7, 2020).

prior statement that HDR was retained by BHR “to design and assist with the construction of the new rail line once it is approved by the Board.” The lack of disclosure also raises questions as to the level of BHR (and HDR’s) basic candor before the Board, especially because “contractors function as an extension of [OEA’s] staff.” *3P Contractor Policy Statement* at 10.

The independence of the third-party contractor is of heightened importance here because the Board’s restrictions on *ex parte* contacts do not apply in the context of environmental reviews. 49 C.F.R. § 1102.2(b)(5). The conflict of interest concerns are further elevated here because use of the environmental analysis prepared by the supposedly independent third-party contractor will be used not only for the review under the National Environmental Policy Act (“NEPA”), but also as a major component of the Board’s own consideration of whether the land-use exemption application meets the substantive requirements under 49 U.S.C. § 10909. Because the analysis under § 10909 is substantive, and not merely procedural as under NEPA, the contractor’s prior involvement in the design of the Projects is of fundamental concern and presents due process issues.

The matter is of additional concern here for two additional reasons. First, HDR was only recently engaged in this matter, in late March, 2021, when it replaced the previously retained third-party contractor, presumably at BHR’s specific request, without any public disclosure of why the replacement was made. *3P Contractor Policy Statement*, at 4-6 (applicant may choose to use a third party contractor, and initially selects a contractor from the OEA’s list of approved third-party contractors, although the OEA is ultimately responsible for the selection and control of the contractor).

Second, under the Board’s rules, a third-party contractor is to be impartial and “work[s] under OEA’s direction to collect the needed environmental information and compile it into a draft . . . EIS, which is then submitted to OEA for its review, verification, and approval.” 49 C.F.R. 1105.10(d). As part of OEA’s posted April 2021 meeting minutes with BHR and HDR, HDR expressed evident partiality, and acted beyond its role of an extension of OEA staff. For example, the meeting minutes reflect: “BHR pointed out, and HDR agreed, that from a cumulative air quality / GHG / climate change analysis, the project will benefit the environment [sic] by taking hundreds of thousands of trucks off the road in the lifetime of the project.” Meeting Minutes at 3-4, ¶ 7. HDR’s agreement was made in the absence of any current traffic plan, at least on the record, without any apparent evaluation of any sort, and despite the fact “OEA remained concerned about local air quality impact of trucks in and out of the facility and downline impacts of more than three trains per day.” *Id.* The truck traffic and air impacts of the project are a critical part of the EIS review, are likely to be heavily disputed, and already have been disputed by CCE in opposing BHR’s previous unsuccessful exemption petition. In addition, “HDR suggested consideration be given to have the project to be made part of the [Regional Transportation Plan and Regional Transportation Improvement Plan (TIP)]” – clearly seeking to assist BHR and advocate for the Projects it is designed to impartially evaluate. Meeting Minutes at 3, ¶ 6.

Ms. Danielle Gosselin

June 21, 2021

Page 4

Under the circumstances, CCE respectfully submits that the most appropriate course is for HDR to recuse itself, and if it fails to do so, for arrangements to be made to use a different third-party contractor, one that has had no prior involvement in the matter and that fully satisfies the requirement to be disinterested, or perhaps substitute back the prior third party contractor. If OEA, BHR, and HDR maintain that allowing HDR to continue in its current position is somehow compliant with applicable regulations and policies, then substantial disclosures and explanations should be provided as to the full extent of HDR's past, present, and future involvement, including all communications and work prepared by HDR for BHR on the Projects, so that the public can maintain confidence in the integrity of the Board's processes.

Respectfully submitted,

/s/ Peter A. Pfohl
Robert D. Rosenberg
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

*Attorneys for Citizens Campaign
for the Environment*

cc: Service List for FD 36398
Joshua Gilliespie, HDR

ATTACHMENT 8

LAW OFFICE OF THOMAS W. WILCOX, LLC
1629 K. STREET, NW SUITE 300
WASHINGTON, DC 20006
(202) 508-1065
TOM@TWILCOXLAW.COM
WWW.TWILCOXLAW.COM

June 28, 2021

Via Email

Ms. Danielle Gosselin
Acting Director
Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Docket No. FD 36398, *Brookhaven Rail LLC – Construction and
Operation Exemption – In Suffolk County, NY*

Dear Ms. Gosselin:

This letter is submitted to you on behalf of Brookhaven Rail LLC (“BHR”) at the request of Ms. Diana Wood of your staff and it responds to the letter you received from counsel for the Citizens Campaign for the Environment (“CCE”) on June 21, 2021. The CCE letter generally questions the selection of Henningson, Durham & Richardson (“HDR”) as the Third-Party Contractor to assist the Office of Environmental Analysis (“OEA”) in conducting the environmental review of the captioned construction project and of the proposed construction and operation of a solid waste rail transfer facility (“SWRTF”) which BHR anticipates will be the subject of an Application for Land-Use Exemption Permit in a separate proceeding.

HDR was approved by OEA as the Third-Party Contractor by letter from you dated March 16, 2021 following discussions between BHR and OEA concerning HDR’s prior involvement in the proposed projects. This prior involvement consisted of preparing preliminary conceptual plans of the railroad track design and construction layout in early 2020 for Winters Brothers Waste Systems of Long Island, an affiliate of BHR. The last engineering or design work performed by HDR for either project was in March 2020. On March 1, 2021 Ms. Wood informed BHR, via email to the undersigned counsel for BHR, that the Board’s General Counsel had reviewed the matter and determined HDR could be selected by BHR as the Third-Party Contractor; however, BHR could not also employ HDR to perform any engineering or design consulting services for either project.

Letter to Danielle Gosselin

June 28, 2021

Page 2

As stated, HDR had not performed any engineering or design work for either project since March 2020. In accordance with the guidance provided by the General Counsel, neither BHR nor its affiliates have employed HDR subsequent to March 1, 2021 for any design or engineering consulting services to BHR on either the rail construction project or the SWRFT project, or any other project for that matter.

BHR's only contact with HDR respecting the projects after its selection to be the Third-Party Contractor was to request HDR to turn over its prior work product related the projects to Cameron Engineering & Associates, the firm originally retained by BHR to perform the site design and civil engineering services, but which assumed the additional duties of preliminary railroad design and construction planning when HDR was approved to be the Third-Party Contractor.

CCE's allegations that HDR is actively involved in track design and construction work on the projects are therefore baseless and there are no grounds to question HDR's independence or compliance with the regulations and policies applicable to Third-Party Contractors.

Please feel free to contact me if you desire any additional information or have any questions.

Sincerely,

A handwritten signature in blue ink that reads "Thomas W. Wilcox". The signature is fluid and cursive, with a small dot above the 'i' in Wilcox.

Thomas W. Wilcox
Attorney for Brookhaven Rail LLC

Cc: Counsel for CCE

ATTACHMENT 9

LAW OFFICE OF THOMAS W. WILCOX, LLC
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WASHINGTON, DC 20006
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TOM@TWILCOXLAW.COM
WWW.TWILCOXLAW.COM

July 5, 2021

Via Email

Ms. Danielle Gosselin
Acting Director
Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Docket No. FD 36398, *Brookhaven Rail LLC – Construction and
Operation Exemption – In Suffolk County, NY*

Dear Ms. Gosselin:

This letter is submitted on behalf of Brookhaven Rail LLC (“BHR”) to inform you and the Office of Environmental Analysis (“OEA”) of several relatively recent developments with the proposed rail construction project that relate to OEA’s review of the potential environmental impacts of the project. These developments concern the ownership of the 228-acre parcel of land on which the new rail tracks would be constructed (the “Subject Property”), previously known as “Parcel D” of the Brookhaven Rail Terminal (“BRT”), the type of rail-served facilities being constructed there, and a minor modification to the design and configuration of the railroad track to be constructed and operated by BHR.¹

When the Petition for Exemption was filed in this docket on June 25, 2020, the Subject Property was owned by New York Site Operations, LLC (“NYSO”) and Winters Bros. Waste Systems of Long Island, LLC (“Winters Bros.”) had contracted with NYSO for Winters Bros., or its designee to purchase the Subject Property (the “Parcel D PSA”). The intention at that time was for Shamrock Rail, LLC (“Shamrock Rail”) - a newly created affiliate of Winters Bros. - to acquire the parcel for development of rail-served industrial and logistics businesses in conjunction with

¹ Informing OEA of changes to a rail construction project that could affect OEA’s review of environmental impacts, as opposed to a formal filing with the Secretary that is served on all parties, is the preferred means of conveying this information to the Board. STB 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 TX* (Served December 2, 2002). While service on all parties is not required, BHR is nevertheless providing copies of this letter to all persons on the official service list for this docket.

Letter to Danielle Gosselin

July 5, 2021

Page 2

BHR through leases and other appropriate agreements to facilitate the construction and operation of rail infrastructure.² The purchase of the Subject Property was anticipated to be completed near the end of 2020. The plan of Winters Bros., Shamrock Rail, and BHR described in the Petition was in part (and still is) for BHR to secure leasehold and/or easement rights to the necessary land for the new rail track and to construct and operate the rail tracks and rail infrastructure as generally contemplated by NYSO and the owners of the other three parcels that made up the BRT, and the development goal remains to attract industries who desire transloading and other rail freight service such as those currently provided by BHR on Parcel A of the BRT. As explained in the Petition at page 4 and shown on Attachment C to the Petition:³

In general, over the three phases the tracks will consist of (1) an approximately 11,000 foot, stub ended rail line that will run south from a connection with the LIRR; (2) an approximately 4,000 foot line of rail that will run off of the main section of track to enable service to shippers locating on the eastern portion of Parcel D; and (3) approximately 9,000 feet of track to be utilized for storage.

The proposed design as set out in the Petition varies from the original conceptual rail construction plans of the BRT landowners by establishing rail access to the Subject Property via the installation of a new switch connection with the Long Island Rail Road ("LIRR") and a southeast turning #10 turnout for the purpose of enabling the freight operator of the LIRR line - New York & Atlantic Railway ("NY&A") - to directly interchange traffic to and from shippers on Parcel D with BHR. BHR also explained in the Petition that Winters Bros., Shamrock Rail and BHR contemplate that the proposed rail lines will provide freight service to a proposed solid waste rail transfer facility ("SWRTF") to be constructed, owned and operated under the control of BHR on approximately 50 acres of the Subject Property, the realty right(s) to which BHR would also acquire via a long-term lease. Finally, at the time the Petition was filed there were no concrete arrangements for rail shipper facilities other than the SWRTF to locate on the Subject Property and require rail service from BHR.

Subsequent to the filing of the Petition there have been several developments concerning the ownership of the Subject Property and the plans for developing it for rail-served industrial use. As stated, these developments will result in a minor modification to the design and configuration of the track to be constructed by BHR. These developments have also clarified the type of rail service that will be provided by BHR and the timeline on which such service will be required. Specifically, on or around May 6, 2021, Winters Bros. Industrial Park Realty LLC, an affiliate of Winters, Shamrock Rail, and BHR, joined with two affiliates of Northpoint Development to create NP/Winters Long Island Industrial, LLC ("NP/Winters"). Effective May 6, 2021, NP/Winters acquired approximately 178 acres of the Subject Property pursuant to the Parcel D PSA. On that

² On May 11, 2020 the membership shares in BHR were acquired by Shamrock Rail, a non-railroad affiliate of Winters Bros. BHR's status as an independent Class III short line railroad was unchanged by the transfer of its membership shares.

³ A copy of Exhibit C is Attachment 1 to this letter for your convenience and ready reference.

Letter to Danielle Gosselin

July 5, 2021

Page 3

date Winters Bros. Shamrock Rail Realty LLC (“Winters Shamrock Realty”), another affiliate of Winters Bros., purchased the remaining approximately 50 acres of the Subject Property which is the planned location for the proposed SWRTF. The entire Subject Property has been renamed the Winters Rail Terminal.⁴

The manner in which the simultaneous closings transferring ownership of the Subject Property from NYSO occurred will have little or no practical impact on BHR’s acquisition of the necessary interest in the land associated with the proposed track. It is still anticipated that BHR will lease the necessary land for the rail construction and operation from NP/Winters and Winters Shamrock Realty as the owners of the Winters Rail Terminal. While there were no prospective rail shippers identified other than the SWRTF when the Petition was filed, and so the type of other facilities and rail service BHR might provide were not known, this is no longer the case. Over the past five months a development plan has been formulated by NP/Winters and BHR which provides for the construction on the N/P Winters portion of the Winters Rail Terminal of two rail served warehouse building structures of approximately 306,000 square feet and 1,000,000 square feet, respectively. See Attachment 2 (prepared by Northpoint Development). It is contemplated that these facilities will be constructed and owned by NP/Winters and occupied and operated by industrial tenants of NP/Winters. The planned use for such structures is the receipt of inbound loaded railcars of commodities from BHR for transloading into trucks for warehousing and logistics operations; distribution to locations on Long Island; and for BHR to potentially pick up outbound loaded railcars for delivery to NY&A. None of the commodities received at or shipped from either of the warehouses would be solid waste. Neither NP/Winters nor BHR currently have estimates of the number of railcars and trucks that will be involved in the warehouse operations.

The construction of these two structures will result in the track configuration being slightly modified and a reduction of the total feet of track. While the connection to LIRR and the main 11,000 stub ended track will be largely unchanged, the overall length of trackage to be constructed will be less than the proposed 23,685 feet due to (1) the elimination of approximately 4,000-foot section of track that would have branched off of the main track for the purpose of serving individual rail shipper facilities that might have thereafter located there; and (2) a reduction in the planned 9,000 feet of storage track. See Attachment 2.

In terms of timing, NP/Winters is currently in the process of obtaining the necessary development approvals from the Town of Brookhaven, as well as other local government approvals. It is anticipated that all necessary local approvals associated with construction of the two structures will be received before the end of 2021, and that construction of the 306,000 square foot structure could then begin in 2022, with occupancy and use commencing in the second quarter of 2023. Construction and operation of the second, 1,000,000 square foot facility would follow some time thereafter.

⁴ <https://wintersrailterminal.com/>

Law Office of Thomas W. Wilcox, LLC

Letter to Danielle Gosselin

July 5, 2021

Page 4

Please do not hesitate to call or email me with any questions, or if you would like BHR to provide any additional information.

Sincerely,

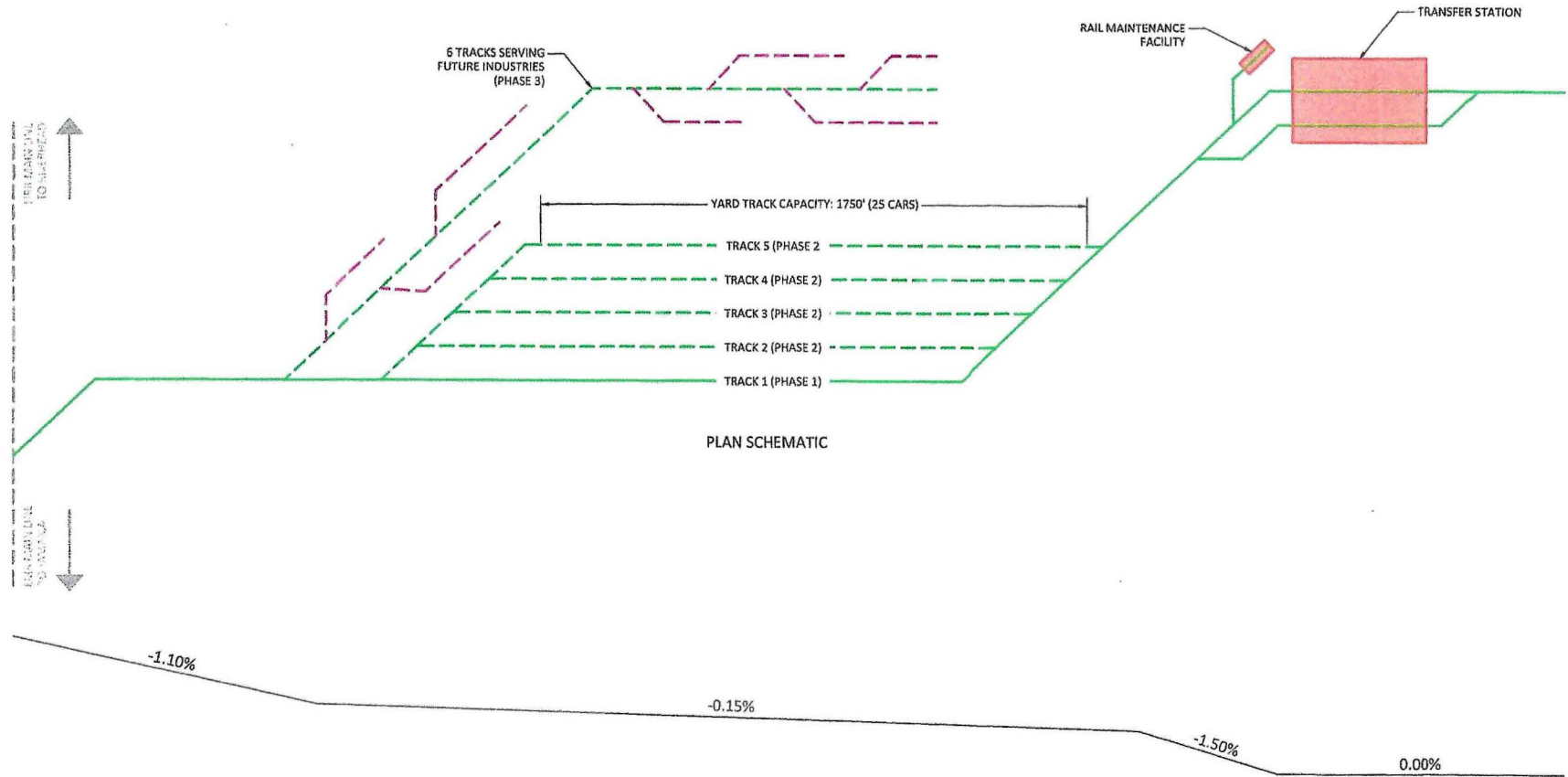


Thomas W. Wilcox

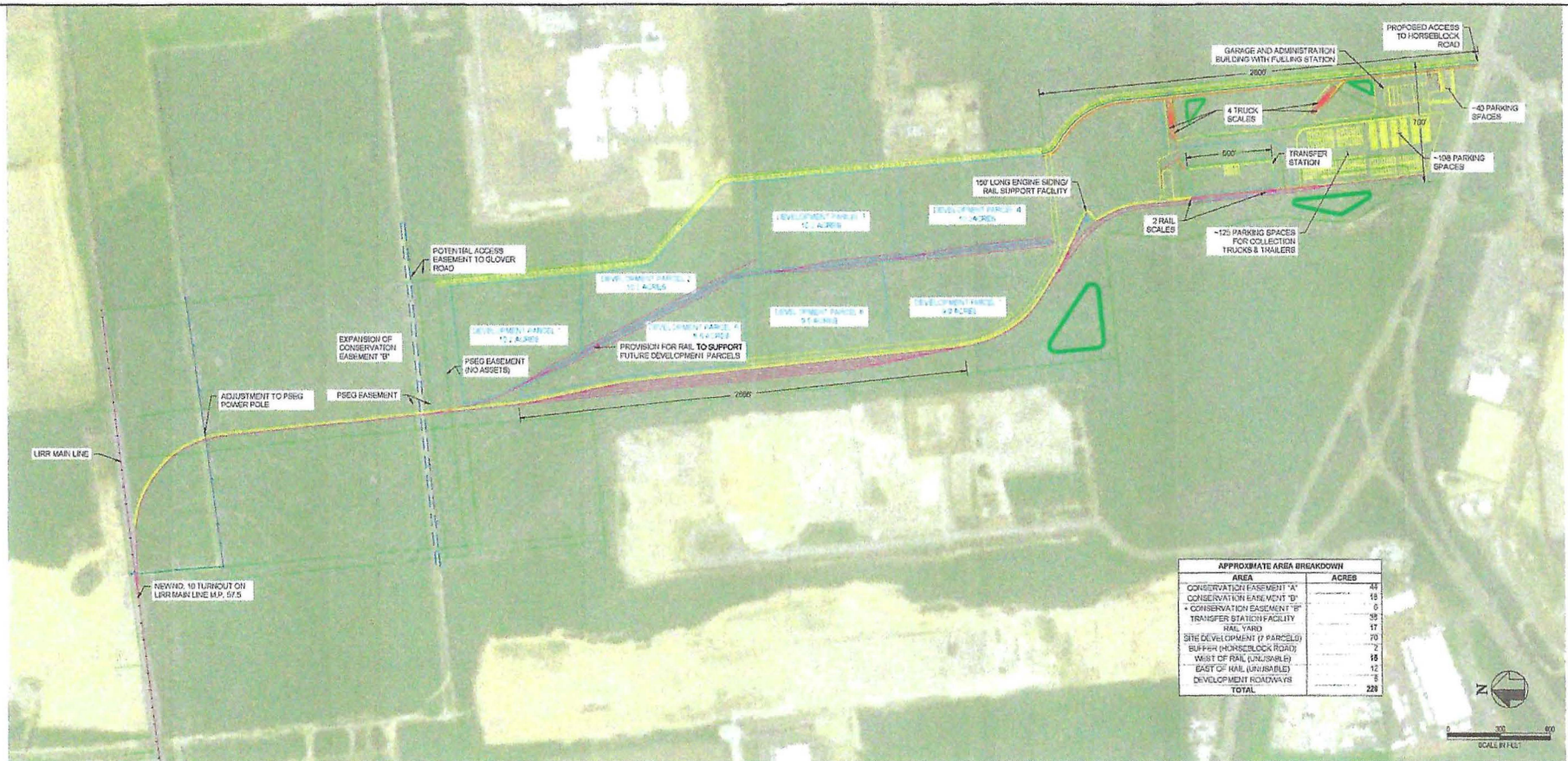
Attorney for Brookhaven Rail LLC

Cc: Ms. Diana Wood

ATTACHMENT 1
(EXHIBIT C TO PETITION FOR EXEMPTION)

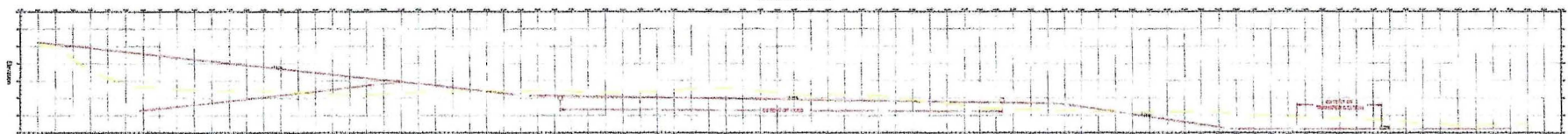


IT IS A VIOLATION OF THE PROFESSIONAL LICENSE LAW FOR ANY PERSON TO ALTER THIS DOCUMENT IN ANY WAY UNLESS THAT PERSON IS ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL. THE LICENSED PROFESSIONAL SHALL AFFIX TO THIS DOCUMENT THE SEAL AND THE NOTATION "ALTERED BY," FOLLOWED BY THE AUTHORIZED SIGNATURE AND THE DATE OF THE ALTERATION.				PE:	DESIGNED BY:	 HENNINGSON, DURHAM & ROBINSON ARCHITECTURE AND ENGINEERING P.C.	PROJECT: BROOKHAVEN ENVIRONMENTAL COMPLEX		SCALE: NTS	CONTRACT NUMBER: N/A
					DRAWN BY: D. BAGGOTT		DRAWING TITLE: TRACK SCHEMATIC WITH PHASING		REVISION NUMBER: -	DATE: 2/1/2020
					CHECKED BY:				DRAWING NUMBER: T001	SHEET NO: 01 OF N/A
					APPROVED BY:		DRAFT NOT FOR CONSTRUCTION			



APPROXIMATE AREA BREAKDOWN	
AREA	ACRES
CONSERVATION EASEMENT 'A'	23
CONSERVATION EASEMENT 'D'	18
CONSERVATION EASEMENT 'F'	0
TRANSFER STATION FACILITY	25
RAIL YARD	17
SITE DEVELOPMENT (9 PARCELS)	70
SUPPLY (HORSEBLOCK ROAD)	2
WEST OF RAIL (UNUSABLE)	18
EAST OF RAIL (UNUSABLE)	12
DEVELOPMENT ROADWAYS	8
TOTAL	228

Main Track 1 PROFILE



IT IS A VIOLATION OF THE PROFESSIONAL LICENSE LAW FOR ANY PERSON TO ALTER THIS DOCUMENT IN ANY WAY UNLESS THAT PERSON IS ACTING UNDER THE DIRECTION OF A LICENSED PROFESSIONAL. THE LICENSED PROFESSIONAL SHALL AFFIX TO THIS DOCUMENT THE SEAL AND THE NOTATION "ALTERED BY," FOLLOWED BY THE AUTHORIZED SIGNATURE AND THE DATE OF THE ALTERATION.		DESIGNED BY: DRAWN BY: CHECKED BY: APPROVED BY:	 HENNINGSON, DURHAM & RICHARDSON ARCHITECTURE AND ENGINEERING, P.C.	PROJECT: BROOKHAVEN ENVIRONMENTAL COMPLEX DRAWING TITLE: DRAFT RAIL ALIGNMENTS ALTERNATIVE 1	SCALE: 1" = 300' REVISION NUMBER: - DRAWING NUMBER:	CONTRACT NUMBER: N/A DATE: 2/7/2020 SHEET NO.: 01 OF N/A
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ATTACHMENT 2



ATTACHMENT 10



July 12, 2021

Ms. Danielle Gosselin
Acting Director
Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Dear Ms. Gosselin,

This letter is intended to clarify HDR's rail engineering and design services in connection with the Brookhaven Rail LLC/ Winter Bros. proposed Brookhaven Rail Line and Solid Waste Rail Transfer Facility Project (the proposed project) on Parcel D in Yaphank, NY was completed in the spring of 2020.

HDR last performed conceptual engineering and design work for the proposed project in spring of 2020 with the final deliverable to Brookhaven Rail LLC/ Winter Bros. being submitted on June 23, 2020. Since that date, HDR has not provided any design or engineering services for the proposed project. The only documents sent since that date have been transfers of previously completed conceptual layouts and survey information to the current Engineering Consultant for the proposed project, Cameron Engineering and their subconsultant The LiRo Group. Specifically, CADD and PDF files were last transmitted on behalf of Brookhaven Rail LLC/ Winter Bros. to Cameron Engineering and The LiRo Group on March 16, 2021. HDR no longer has an active rail engineering and design services contract with Brookhaven Rail LLC/ Winter Bros.

After a coordinated review by Brookhaven Rail LLC/ Winter Bros and STB, confirming HDR will no longer provide rail engineering and design services for the proposed contract, Brookhaven Rail LLC/ Winter Bros selected HDR in March 2021 as the Third-Party Contractor to the STB OEA to prepare the EIS for the proposed project under the National Environmental Policy Act (NEPA). Under HDR's Third-Party Contractor EIS services contract, the first engagement was attending an initial coordination meeting on April 6, 2021. At the time of the start of HDR's EIS services contract, the rail engineering and design services with Brookhaven Rail LLC/ Winter Bros. had ended and no further rail engineering and design services has been performed by HDR to date.

HDR acknowledges that, as being selected as the Third-Party EIS contractor to the STB OEA, it is precluded from providing concurrent rail engineering and design services to Brookhaven Rail LLC and/or Winter Bros. on the project while under contract to complete the EIS.

Sincerely,

Henningson, Durham & Richardson Architecture and Engineering P.C.

Yiannoulla Charalambous
Authorized Representative
500 7th Avenue
New York, NY 10018-4502

ATTACHMENT 11

From: [Tom Wilcox](#)
To: [Wood, Diana](#); [Gosselin, Danielle](#)
Cc: mwhite@wintersbros.com
Subject: HDR Letter
Date: Wednesday, July 14, 2021 9:42:22 AM
Attachments: [BHR Letter Confirming HDR Services 20210712.pdf](#)

Diana and Danielle – I received a copy of the attached July 12 letter from HDR to Danielle this morning. It does not indicate how it was sent so I am forwarding it in case it went by regular mail. I noticed one discrepancy with my letter to Danielle of June 28, namely that HDR says its “final deliverable” to BHR/Winters was June 23, 2020, and not March 2020 as I had indicated. I looked into this, and I am told that HDR completed its work and was paid for it in March 2020, but that there were some follow up inquiries related to track length and configuration in late June 2020 as the environmental review process began that entailed asking HDR for data.

Please let me know if you have any questions or desire additional information.

Regards,

Tom

Thomas W. Wilcox

Law Office of Thomas W. Wilcox, LLC

Office: 202.508.1065

Mobile: 202.365.8409

1629 K. Street, NW Suite 300

Washington, DC 20006

tom@twilcoxlaw.com | www.twilcoxlaw.com

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ATTACHMENT 12



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

July 28, 2021

Yiannoulla Charalambous
Joshua Gillespie
Henningson, Durham & Richardson Architecture
and Engineering P.C.
500 7th Avenue, 15th Floor
New York, NY 10018-4502

**Re: Docket Nos. FD 36398, Brookhaven Rail LLC – Construction and Operation
Exemption – In Suffolk County, New York; and FD 36399 (Sub-No. 1),
Brookhaven Rail LLC – Land Use Exemption Permit Application under 49
U.S.C. § 10909**

Dear Ms. Charalambous and Mr. Gillespie:

Thank you for your July 12, 2021 letter confirming that Henningson, Durham & Richardson Architecture and Engineering P.C. (HDR) understands that, pursuant to the terms of its third-party contractor agreement with the Surface Transportation Board's (Board) Office of Environmental Analysis (OEA), it is precluded from engaging in any work related to the above-referenced proceedings, other than its environmental review for OEA, during the course of these proceedings, and for further confirming that HDR will not engage in any such work.

Board regulations and the Memorandum of Understanding between HDR and OEA further require that, other than its work for OEA, HDR have no financial or other interest in the outcome of the projects that are the subject of these proceedings. We interpret this prohibition to include not entering into an agreement to perform future work related to these construction projects for any party. Accordingly, we ask that you provide a letter confirming that HDR will continue to comply with the contractor restrictions and that it does not have any agreements to perform, and does not plan to perform, future work relating to these projects for any party other than OEA either before or after the close of these proceedings.

If you have any questions, please do not hesitate to contact me or Diana Wood, OEA Project Manager at 202-245-0302 or by email at diana.wood@stb.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Danielle Gosselin". The script is fluid and cursive, with the first name "Danielle" written in a larger, more prominent hand than the last name "Gosselin".

Danielle Gosselin
Acting Director
Office of Environmental Analysis

ATTACHMENT 13



SLOVER & LOFTUS LLP

ATTORNEYS AT LAW

PETER A. PFOHL

July 27, 2021

Via E-Filing

Danielle Gosselin
Acting Director
Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: FD 36398, *Brookhaven Rail LLC – Construction and Operation
Exemption – Suffolk County, New York, and undocketed application
for a land-use exemption under 49 U.S.C. § 10909*

Dear Ms. Gosselin:

On June 21, 2021, the Citizens Campaign for the Environment (“CCE”) wrote to express its concerns and objections regarding the retention of Henningson, Durham & Richardson Architecture and Engineering, P.C. (“HDR”), by the Office of Environmental Analysis (“OEA”) of the Surface Transportation Board (“STB” or “Board”) for the environmental review of both a rail line construction and operation exemption sought by Brookhaven Rail LLC (“BHR”) and a promised application for a proposed land-use exemption for a solid waste rail transfer facility under 49 U.S.C. § 10909 that would be served by the proposed rail line (the “Projects”).

BHR and HDR have since responded to CCE’s letter with: (i) a letter from BHR’s counsel dated June 28, 2021; (ii) a letter from HDR dated July 12, 2021; and (iii) an email from HDR’s counsel dated July 14, 2021, that seeks to address a discrepancy between the two earlier responses as to when HDR ceased working on the Projects on BHR’s direct behalf. The BHR and HDR responses do not allay the concerns that CCE raised, but instead reinforce them. Meanwhile, HDR continues to actively participate in the proceedings as reflected in the July meeting minutes for the project recently posted by OEA.

In particular, the submissions from BHR and HDR confirm that BHR has been operating through an active “revolving door.” HDR has now been retained to serve as OEA’s ostensibly, neutral, “third-party” contractor to conduct the independent environmental review of the very Projects it originally designed, and will then turn around and assist with the construction of the new rail line once (and if) it is approved by the Board. Despite CCE’s requests, BHR and HDR have not submitted the earlier retention agreements or other communications regarding the scope of their relationship. Absent such disclosures, it must be assumed that HDR was responsible for all relevant features of the Projects’ design. The fact that HDR provided an unspecified “final deliverable” on June 23, 2020, shortly before BHR filed its Petition for

Exemption from Requirements of 49 U.S.C. § 10909 in FD 36399, provides further confirmation of HDR's intimate involvement in and deep knowledge of the Projects.

The substance of BHR and HDR's responses is there is no conflict of interest because HDR worked for BHR previously and is working for OEA now. However, the design and configuration of the proposed rail line is obviously a critical component under review, and BHR continues to utilize and rely on HDR's track design and configuration plans that HDR is now in charge of reviewing for OEA. In fact, BHR recently resubmitted HDR's design plans in its recent letter to OEA of July 5, 2021. In that letter, HDR further informed OEA that the proposed project has grown substantially in size and scope and will cause "a minor modification to the design and configuration of the railroad track" that HDR itself designed. *Id.* at 1.

Furthermore, nothing appears to bar HDR from working on the Projects on behalf of BHR in the future, as HDR has said is planned, assuming the Board approves Projects (based on HDR's review). In particular, there is no disavowal, retraction, or qualification of the statement in BHR's Petition in FD 36398 that "BHR has retained HDR Engineering ('HDR') to design and assist with the construction of the new rail line once it is approved by the Board." Petition at 7.

BHR does reference a March 1, 2021 email from OEA to BHR stating that the Board's General Counsel reviewed the matter and signed off on HDR's retention.¹ However, it is unclear whether the General Counsel was aware of the extent of HDR's prior involvement, or that this environmental review was going to contribute towards the 49 U.S.C. § 10909 review. The March 1, 2021 email from OEA specifically advises that "it's OK to hire HDR for the NEPA analysis but not for the engineering/design work because of their prior work on the project." It is entirely unclear what this means. For example, is HDR precluded from engaging in any review that references or relies on its prior engineering/design work for OEA, or is HDR precluded from performing engineering/design work for BHR while engaged by OEA, or both?

Additionally, CCE's letter requested "substantial disclosures and explanations," not self-serving characterizations. CCE and other interested stakeholders are entitled to see the General Counsel's opinion, and the facts relied on in making that opinion. Further, the General Counsel's determination was made without the benefit of any opportunity for comment from the public, which had no reason to suspect that HDR was even a candidate for the third-party contractor role. Reliance on a determination made without opportunity for submittal or consideration of opposing viewpoints constitutes a denial of due process.

BHR and HDR have also not addressed the problems that CCE noted regarding ex parte communications, as exemplified by the partiality that HDR exhibited, as shown in the minutes that were posted for the April 2021 meeting among OEA, BHR, and HDR, when HDR agreed with BHR that moving waste by rail would displace trucking, when, as CCE has explained previously, all of the waste would arrive by truck (and BHR and perhaps also HDR in its earlier capacity – working for BHR – contemplated that recyclables will also depart by truck). CCE's concern is heightened because of the effort that appears to have been made subsequently to "sanitize" the minutes for later meetings by eliminating any informative detail of who said

¹ This email (EO-3539) has since been made a part of the record.

Ms. Danielle Gosselin

July 27, 2021

Page 3

what. Again, these meetings occur on an ex parte basis, and without being present, CCE, NAACP, and the rest of the public have no opportunity to learn what is really said or to challenge any characterizations.

A further problem is that the environmental review in these proceedings will be used not only to meet the procedural requirements of the National Environmental Policy Act, but will also form a key component of the substantive record to be utilized to make key factual determinations required under the Clean Railroads Act, 49 U.S.C. § 10909. This use of the analysis should require more stringent checks on independence and impartiality, yet the requirements of the Clean Railroads Act are ignored by both BHR and HDR. Within that context, it has not been established that the existing exception to the bar on ex parte communications for the environmental reviews should continue to apply.

For all these reasons, CCE continues to maintain that the appropriate and prudent course is for OEA to take the simple measure of requiring BHR to propose a third-party contractor that has not previously worked for BHR on the design of the Projects and that commits not to work for BHR on the Projects in the future. Neutrality and independence require nothing less as a minimum.

If OEA persists in concluding otherwise, and without the substantial disclosures and explanations provided as reasonably requested by CCE, then OEA and BHR should be prepared for the possibility that a favorable determination will be found to have been impermissibly tainted by HDR's prior involvement and set aside. CCE expressly reserves the right to challenge the Board's ultimate decision on the merits on that basis.

Respectfully submitted,

/s/ Peter A. Pfohl
Robert D. Rosenberg
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, D.C. 20036

*Attorneys for Citizens Campaign
for the Environment*

cc: Service List for FD 36398
Joshua Gilliespie, HDR

ATTACHMENT 14



July 28, 2021

Ms. Danielle Gosselin
Acting Director
Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

RE: Docket Nos. FD 36398, Brookhaven Rail LLC – Construction and Operation
Exemption – In Suffolk County, New York; and FD 36399 (Sub-No. 1),
Brookhaven Rail LLC – Land Use Exemption Permit Application under 49 U.S.C. § 10909

Dear Ms. Gosselin,

This letter is to confirm that HDR will continue to comply with the NEPA Third Party Contractor restrictions and that HDR does not have any agreements to perform, and does not plan to perform, future work relating to the proposed project for any party other than OEA either before or after the close of these NEPA proceedings.

Sincerely,

Henningson, Durham & Richardson Architecture and Engineering P.C.

A handwritten signature in black ink, appearing to read 'Y. Charalambous', written over a horizontal line.

Yiannoulla Charalambous
Authorized Representative
500 7th Avenue
New York, NY 10018-4502

ATTACHMENT 15



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

September 17, 2021

Peter A. Pfohl
Robert D. Rosenberg
Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street NW
Washington, DC 20036

Re: Docket Nos. FD 36398, Brookhaven Rail LLC – Construction and Operation Exemption – In Suffolk County, New York; and FD 36399 (Sub-No. 1), Brookhaven Rail LLC – Land Use Exemption Permit Application under 49 U.S.C. § 10909

Dear Mr. Pfohl, Mr. Rosenberg and Ms. Waring:

This letter responds to your June 21, 2021 and July 27, 2021 letters on behalf of the Citizens Campaign for the Environment (CCE) raising concerns about a potential conflict of interest resulting from the approval of Henningson, Durham & Richardson Architecture and Engineering P.C. (HDR) by the Surface Transportation Board's Office of Environmental Analysis (OEA) as the third-party contractor for the environmental review in the above-referenced proceedings. This letter also responds to your July 28, 2021 letter that raises questions concerning the July 5, 2021 letter from Brookhaven Rail LLC (BHR) informing OEA of the latest development plans on surrounding parcels that include NP/Winters Long Island Industrial LLC's (N/P Winters) plans relating to certain facilities proposed for construction adjacent to the proposed rail line at issue.

Regarding a potential conflict of interest, you express concern that HDR may have an interest in the proceedings other than the environmental review for OEA because HDR was involved in track engineering and design work done for BHR prior to its approval by OEA. You assert that, in its role as third-party contractor for OEA, HDR will be reviewing and assessing its own track engineering and design work, which would create a conflict of interest. Further, you assert that HDR has contracted with BHR to perform future work related to this proposed project, which would create an additional conflict of interest.

In response to your concerns, OEA asked HDR to provide written details of any relationship that it may have had and may continue to have with BHR. In a July 12, 2021 letter

to OEA, HDR stated that it last performed conceptual engineering and design work in support of the above-referenced proposed solid waste rail transfer facility and related track and structures for BHR (together, the Proposed Project) in the spring of 2020 and submitted the last deliverable to BHR on June 23, 2020. HDR also explained that, to facilitate the transfer of data, it provided BHR's new engineering firm, Cameron Engineering and its subcontractor, LiRo Group, with CADD and PDF files on March 16, 2021, but stated that thereafter, HDR no longer had a role in providing BHR with engineering services in support of the Proposed Project. OEA followed up with an additional letter request to HDR on July 28, 2021, seeking information about any plans for future work by HDR relating to the Proposed Project. In a reply letter of August 2, 2021, HDR confirmed that it does not have any agreements or plans to perform future work pertaining to the Proposed Project beyond its role as OEA's third-party contractor during the environmental review.

OEA concludes that there is presently no conflict of interest. OEA's environmental review of the Proposed Project is an examination of the potential environmental impacts of the project as presented to it, and not a technical review of any engineering and design work previously performed for the project. Therefore, a technical review of any engineering and design work is not part of any work HDR would be conducting as part of OEA's environmental review. As a result, HDR's prior design and engineering work on the Proposed Project does not present a conflict of interest in connection with its current work for OEA.¹ HDR has confirmed that it is no longer providing any services to BHR, and therefore, OEA believes HDR's prior work is not a conflict. In addition, you expressed concern about a conflict of interest because you believe HDR has contracted with BHR to perform future work related to the proposed project.² However, because HDR has represented that it has no contracts with any party for future work related to the Proposed Project and that it has no intention of entering into any such contracts, there is no conflict resulting from alleged plans for potential future work by HDR.³

In response to your July 28, 2021 letter questioning the development of the future N/P Winters project that BHR presented in its July 5, 2021 letter to OEA, OEA notes that BHR has represented that NP/Winters (which appears to be a non-carrier entity) is proposing to construct

¹ You additionally expressed concern that HDR had not disclosed to OEA that it had done track design and engineering work related to the Proposed Project prior to being retained by OEA. HDR did, however, disclose that prior work and OEA concluded that, subject to the conditions of the Memorandum of Understanding (MOU) with OEA, this prior work did not constitute a conflict of interest.

² Pursuant to the terms of its MOU with OEA and Board regulations at 49 C.F.R. §§ 1105.4(j) and 1105.10(d), HDR is precluded from engaging in any work related to the above-referenced proceedings, other than the environmental review for OEA during these proceedings. Additionally, HDR can have no financial or other interest in the outcome of the Proposed Project, which includes performing any future work related to this project for any party.

³ You also raise a concern about a claimed lack of explanation for a change of third-party contractors that resulted in HDR becoming the third-party contractor for the Proposed Project. The change occurred following OEA's determination that an Environmental Impact Statement (EIS) rather than an Environment Assessment was required. OEA approved both the original third-party contractor and HDR because both contractors complied with OEA's third-party contracting requirements.

certain warehouse and other facilities on Parcels B, C, and D. BHR's letter also indicated that the Town of Brookhaven and other local entities are reviewing this proposal for appropriate permits, that construction of a 306,000 square foot structure on Parcels B and C is anticipated to begin in 2022, and that occupancy could be as early as 2023. According to BHR, construction and operation of a second larger facility on Parcel D would likely follow with a similar timeline. However, BHR has not indicated that these facilities need authority from the Board to be constructed and operated, nor has BHR or any other entity filed anything with the Board seeking such authority. OEA can only conduct environmental reviews of projects for which a rail carrier has sought authority, or in the near future will seek authority, from the Board. If a party believes that authority from the Board is required for the proposed N/P Winters project, it may seek a determination from the Board concerning whether such authority is required. Any such jurisdictional determination would be for the Board to make, and not OEA. Based on the current information before OEA and because development of both N/P Winters' facilities appears to be reasonably foreseeable, the most OEA could do at this time would be to evaluate the proposed N/P Winters development as a cumulative impact in the EIS analysis to be prepared for the Proposed Project.

Finally, while you also raise objections to BHR's request for a six-month waiver pursuant to 49 C.F.R. § 1105.10(a)(1), BHR's request and any objections to that request will be addressed separately.

If you have any questions, please do not hesitate to contact me or Diana Wood, OEA Project Manager, at 202-245-0302 or by email at diana.wood@stb.gov.

Sincerely,

A handwritten signature in cursive script, appearing to read "Danielle Gosselin".

Danielle Gosselin
Acting Director
Office of Environmental Analysis