

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**ENTERED
Office of Proceedings
October 19, 2021
Part of
Public Record**

DOCKET NO. FD 36398

**BROOKHAVEN RAIL LLC – CONSTRUCTION AND OPERATION EXEMPTION
- IN SUFFOLK COUNTY, NEW YORK**

REPLY IN OPPOSITION TO APPEAL

Brookhaven Rail LLC, the Applicant in this proceeding (“Brookhaven Rail”), hereby files this Reply in opposition to the Appeal of Director’s Decision (“Appeal”) filed by Citizen’s Campaign for the Environment (“CCE”) on October 6, 2021 in this docket. Through its Appeal CCE asks the Board to step in and reverse the September 17, 2021 letter decision (“September 17 Letter”) of the Acting Director of the Office of Environmental Analysis (“OEA”) that properly rejected CCE’s baseless claims concerning the selection of Henningson, Durham & Richardson Architecture and Engineering, P.C. (“HDR”) as the third-party consultant pursuant to 49 C.F.R. §1105.11(d) to assist OEA in preparation of the environmental documentation for (1) the rail construction project proposed by Brookhaven Rail in this docket and (2) its forthcoming Application for Land-Use Exemption Permit to be filed in Docket No. FD 36399 (Sub-No. 1)(together the “Projects”). For the reasons set forth below, the Appeal should be rejected, and if not rejected, denied because it is utterly without merit.

I. The Appeal Should be Rejected

CCE waited to file its Appeal until October 6, 2021, which is nineteen days after the Acting Director's September 17 Letter. However, under the applicable Board regulations and precedent the Appeal should have been filed within 10 days of the letter's issuance. Specifically, the Acting Director is an employee of the Board that was acting under authority delegated to her by the Chairman of the Board. Appeals of decisions of such employees are governed by 49 C.F.R. §1011.6(b), which states (emphasis supplied):

the Board will decide appeals acting under authority delegated under this section. Appeals *must* be filed within 10 days after the date of the employee's action, and replies must be filed within 10 days after the due date for appeals. Appeals are not favored and will be granted only in exceptional circumstances to correct clear error of judgement or to prevent manifest injustice.

Accordingly, pursuant to §1011.6(b) CCE's appeal of the Acting Director's decision was due not later than September 27 in order to be timely, and CCE did not seek leave to file its Appeal late.¹ The Appeal was therefore untimely filed and should be rejected.

¹ In STB Finance Docket No. 30186 (Sub-No. 3), *Tongue River Railroad Co. – Construction and Operation – Western Alignment* (served April 16, 1998), the Board referenced – albeit without citing a particular regulation – a “10-day appeal period” for appeals of a decision issued by the OEA Director's predecessor, the Chief of the Board's Section of Environmental Analysis. *Id.* at 1. The Board granted several parties' requests for leave to file their appeals late. CCE does not explain why this prior case does not govern the timing of its Appeal and why CCE chose to not follow that same process of formally seeking leave to late-file after the 10 day deadline.

Obviously, Brookhaven Rail could not feasibly have complied with the requirement under §1011.6(b) that it submit its reply to any appeal of CCE within 20 days of the date of the September 17 Letter since CCE waited virtually the entire 20 period to file its Appeal. Moreover, CCE affirmatively states its Appeal is not being made pursuant to §1011.6 (Appeal at 16, note 5) and so the 10-day limit for replies under that regulation arguably does not apply to this Reply in any event. To the extent the Board determines it technically does apply (which would require it to grant CCE an extension it did expressly did not request), then Brookhaven Rail respectfully submits that under these circumstances, which include CCE filing a 97-page Appeal and that Brookhaven Rail is nevertheless filing this Reply only 13 days after the Appeal was filed (and only

In point of fact, CCE does not cite to a particular Board regulation that allegedly governs its Appeal. Rather, it cites to regulations that it maintains do *not* apply, including §1011.6, and then asserts generally that its appeal is authorized by 49 C.F.R. §1105.2, which states that appeals of decisions of the Director of the Office of Environmental Analysis “to the Board will be available as a matter of right.” In terms of the procedures that apply to its Appeal, CCE appears to have chosen the 20-day period for filing appeals of Initial Decisions set out in 49 C.F.R. §1115.2. However, having cherry-picked that aspect of §1115.2, CCE then completely ignores the page limits for appeals in §1115.2(d), which states that “appeals and replies shall not exceed 30 pages in length, including argument, and appendices or other attachments, but excluding a table of cases and an index of subject matter.” Regardless of which of the Board’s appeal regulations apply to it, CCE’s 97-page Appeal tome is an abuse of the Board’s procedural rules governing appeals of decisions of Board employees and should not be countenanced. The Appeal should be rejected for this reason as well.

II. If the Board Accepts the Appeal, it is Utterly Without Merit and Must be Denied

A. CCE Asks the Board to Apply the Wrong Standard of Review

In addition to picking and choosing the regulations to govern the time period for filing its Appeal and the page limits that might apply to it, CCE also attempts to have the Board apply the wrong standard of review. Specifically, on the one hand CCE states that 49 U.S.C. §1011.7, which applies to appeals of decisions of the Director of the Office of Proceedings is “separate and

one day after it would have been due under the Board’s procedural rules, which was Monday, October 18), good cause exists for waiving the period for replies under §1011.6(b).

distinct” from decisions of the OEA Director and therefore inapplicable here,² but on the other hand CCE asserts that the standard of review for its Appeal is the one specific to such appeals, namely “whether the Director [of the Office of Proceedings] made the correct decision, given the circumstances presented.”³ CCE is apparently attempting to avoid the adverse effect on its Appeal of the correct standard for review, which Brookhaven Rail asserts is found in §1011.6(b), and is that “appeals [of decisions of Board employees] are not favored and will be granted only in exceptional circumstances to correct clear error of judgement or to prevent manifest injustice.” As explained below, when this correct standard is applied to the “facts” and arguments set out in CCE’s Appeal it is clear there was absolutely no error in judgment by the Acting Director, let alone a clear error of judgement, there are no exceptional circumstances when CCE’s falsehoods and misstatements are exposed, and there is no manifest injustice that needs to be prevented by the Board stepping in and reversing the September 17 Letter.

B. The Grounds Asserted for the Appeal are Simply Wrong

Throughout this process CCE has consistently distorted the actual facts, invented new “facts,” and packaged them all up into a false narrative of alleged misbehavior that unfairly and wrongly impugns the integrity of the Acting Director, the staff of OEA, Brookhaven Rail, and

² See Appeal at 16, note 5 (“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”).

³ Appeal at 16, citing *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)(“*Union Pacific*”). These decisions cited by CCE actually undercut its position, particularly *Union Pacific*, which confirms that the “correct decision, given the circumstances presented” standard is specific to the appeals of decisions of the Director of the Office of Proceedings. Notably, while CCE prefers the standard of review for appeals brought under §1011.7, it ignores that appeals brought under §1011.7 also must be filed within 10 days. 49 C.F.R. §1011.2 (a)(7).

HDR. In all respects, all of these parties acted reasonably and prudently, and there is absolutely no basis for reversing the Acting Director's September 17 Letter. Brookhaven Rail addresses the main deficiencies of the Appeal below.

1. HDR has not conducted “substantial planning and design work” on either component of the Projects

Many, if not all, of CCE's arguments proceed from fundamentally wrong assumptions because they are not based in actual facts, but rather CCE's distorted interpretation of facts to suit its chosen narrative. A primary example of this is the falsehood that HDR conducted “substantial planning and design work” on the rail construction project and solid waste rail transfer facility for Brookhaven Rail.⁴ This is simply not the case. On the contrary, in early 2020 HDR prepared “preliminary conceptual plans of the railroad track design and construction layout for Winters Brothers Waste System of Long Island.”⁵ The limited, conceptual nature of HDR's work (described as “conceptual layouts and survey information”) was confirmed by HDR in its July 28, 2021 letter to the Acting Director.⁶

Moreover, the documentary evidence is clear that the conceptual design work HDR performed in early 2020 is the *only* engineering “planning and design work” HDR has ever done on either component of the Projects, and that both Brookhaven Rail and HDR have confirmed HDR will not be retained for any future work on the Projects other than its role as the third-party consultant to assist OEA. Nevertheless, CCE ignores the actual facts and attempts to build on the manufactured falsehood that HDR conducted “substantive” design work on both projects by

⁴ CCE Appeal at 1, 8, 10 (where CCE makes the patently false statement that in a June 28, 2021 letter to OEA Brookhaven Rail “admitted that HDR had been involved in substantive track design and planning for HDR for the Project”), 18 (HDR allegedly conducted “significant prior work”)

⁵ Appeal Attachment 8 at 1.

⁶ Appeal Attachment 10 at 1.

claiming further that there has been allegedly “continued reliance” by Brookhaven Rail on such “substantive” rail planning and design work. This assertion arises solely out of the fact that the initial conceptual design maps prepared by HDR in early 2020 were attached to a letter from Brookhaven Rail to OEA dated July 5, 2021 providing it with an update of project developments that affected OEA’s review of the environmental impacts.⁷ However, that letter states clearly that the original conceptual plans prepared by HDR were attached for the “convenience and ready reference” of OEA to compare the original plans attached to the Petition for Exemption to the *new* schematic of the tracks and the SWRTF that was *not prepared by HDR*.⁸ Absolutely nothing in the July 5, 2021 letter states or infers that Brookhaven Rail relied upon, or is relying upon any work from HDR. This is consistent with the correspondence and emails on the subject prior to that date, all of which state there was no involvement by HDR in the Projects after its initial work in the Spring of 2020,⁹ let alone “active” involvement.

In summary, despite CCE’s strained attempt to construct a contrary picture through distortions and misstatements of fact, HDR’s involvement in the projects from an engineering design and planning standpoint was limited, and effectively ended in the Spring of 2020. Moreover, while CCE attempts to make much of the fact that Brookhaven Rail stated in its Petition for Exemption in June of 2020 that HDR had been retained to assist Brookhaven Rail if and when the Board granted authority to construct and operate the railroad line and solid waste

⁷ Appeal at 6, 11, 13

⁸ Appeal Attachment 9 at 2, note 3.

⁹ The fact that HDR was subsequently requested by OEA and Brookhaven Rail to provide backup data to its initial conceptual design drawings to OEA in June of 2020 (Attachment 11), and then was asked to provide the work product that Winters Brothers and Brookhaven Rail paid for in March of 2020 to Cameron Engineering Associates when that firm took over the duties of preliminary railroad design and construction when HDR was approved to be the third-party consultant (Attachment 8) hardly rises to the level of ongoing, active involvement in the projects.

rail transfer facility, the facts of the matter are that Brookhaven Rail has not retained HDR for this purpose in light of HDR's role as the third-party consultant, and HDR's role has therefore been and will continue to be limited to solely being the third-party consultant to assist OEA.

2. HDR has not Displayed "Evident Partiality"

CCE's assertion that HDR has a disqualifying conflict of interest based on CCE's slanted interpretation of the minutes from a single conference call between OEA, Brookhaven Rail and HDR on April 6, 2021 similarly is not supported by facts, is not credible, and therefore should also be rejected. As Brookhaven Rail understands the first aspect of this two-part claim, CCE alleges that because the minutes state a HDR representative on the call merely agreed with Brookhaven Rail that, as a general proposition, over the life of the Projects the replacement of thousands of trucks hauling solid waste on Long Island with railcars would benefit the environment, this is conclusive evidence that HDR was a "cheerleader" for the project and therefore should have been disqualified. This is ridiculous on multiple levels, not the least of which is that under the Board's processes, the third-party consultant works for OEA, and ultimately the Board, which determine what environmental benefits and impacts exist and how to account for them. Moreover, no party can in good faith dispute that rail transportation produces lower carbon emissions than trucks and is therefore generally more environmentally beneficial from that standpoint.¹⁰ If and when the Projects are authorized and constructed, tens of thousands of tons of municipal solid waste and construction and demolition debris that currently is transported off Long Island in 20-ton trucks will move in railroad cars capable of transporting 105 tons. Therefore, each railcar transporting waste will remove four to five diesel trucks off Long Island's already congested highways and aging infrastructure. As such, HDR's mere agreement with Brookhaven Rail that this potential

¹⁰ <https://www.aar.org/wp-content/uploads/2021/02/AAR-Climate-Change-Report.pdf>

large-scale change would be environmentally beneficial of the life of the Projects, particularly during the first meeting HDR that participated in of what is expected to be a multi-year NEPA process, was hardly “cheerleading,” or even particularly impactful, let alone disqualifying.

The second alleged disqualifying act of “evident partiality” is even more tenuous. According to CCE, “HDR clearly [sought] to assist Applicant and advocate for the Projects it was retained to impartially evaluate after it had assembled a complete factual record”¹¹ because the minutes state that, during a general discussion on potential cooperating and participating agencies to potentially be involved in the preparation and review of the EIS, “HDR suggested consideration be given to have the project be made part of the [New York Metropolitan Transportation Council (“NYMTC”) Regional Transportation Improvement Plan].”¹² If anything, this comment by HDR just shows its qualifications to provide analysis to OEA of the Projects with the perspective of reviewing their consistency with the NYMTC, which is the federally designated Metropolitan Planning Organization for Long Island and the New York City metropolitan region, Regional Transportation Plan. How the mention in the minutes of this suggestion during a discussion identifying potential cooperating and participating agencies – a suggestion which Brookhaven Rail has never acted upon – rises to the level of a “critical statement[] of bias and favoritism” is never explained by CCE.¹³ Rather, CCE again instead chooses to support its allegations by grossly misstating the facts, falsely asserting in its Appeal that during the call HDR “actually advocat[ed] for the Project *to be considered as a priority project* under New York’s statewide transportation

¹¹ Appeal at 9

¹² *Id.* at 22-23.

¹³ *Id.* at 23.

improvement program. . . .,”¹⁴ a statement that appears nowhere in the minutes CCE relies upon and which was never made.

CCE’s allegations about “evident partiality” on the part of HDR are therefore specious on their face, and for that reason CCE’s complaints that OEA recognized them as such and declined to act on them by disqualifying HDR, are unfounded.

3. The Replacement of ICF with HDR was Reasonable and Properly Conducted by Brookhaven Rail, HDR, OEA and Board Staff

In her September 17 Letter the Acting Director stated the change of third-party contractors “occurred following OEA’s determination that an Environmental Impact Statement (‘EIS’) rather than an Environmental Assessment was required. OEA approved both the original third-party contractor and HDR because both contractors complied with OEA’s third-party contractor requirements.”¹⁵ There is nothing incorrect about this statement, and nothing in the Board’s policies or rules required OEA to provide a more expansive explanation to CCE during or at the conclusion of that process. In its Appeal CCE now questions the process by which ICF was replaced and speculates, for the first time in its Appeal,¹⁶ that ICF was replaced by HDR due to “Applicant’s expectation that HDR’s presence would result in a more favorable outcome.”¹⁷ As a threshold matter, CCE has cited no authority that requires OEA or an Applicant to explain to interested parties during an ongoing environmental review how a third-party contractor is selected or replaced by the Applicant and OEA, and Brookhaven Rail is aware of none. However, in light

¹⁴ *Id.* at 3 (emphasis added).

¹⁵ September 17 Letter at 2, note 3.

¹⁶ CCE briefly raised this issue in its letter to OEA dated June 21, 2021, but it did not do so issue in its letter of July 28, 2021 that preceded this Appeal.

¹⁷ Appeal at 30.

of the degree to which CCE's allegations on this subject in its Appeal differ from reality, Brookhaven Rail includes a brief discussion of the process for the Board in this section of its Reply.

Specifically, as the Acting Director explained, the change in third-party consultants followed the OEA's decision to conduct a combined EIS for the Projects rather than an EA. Early in the OEA's involvement and commencement of its environmental review Brookhaven Rail asked OEA to consider preparing an EA given the extensive prior environmental review of the development of the land on which the Projects would be constructed for rail-served industry that had occurred at the local government level under the auspices of the Town of Brookhaven, N.Y. as Lead Agency issuing a Negative Declaration under the New York State Environmental Quality Review Act. Consequently, ICF was selected by Brookhaven Rail to be the third-party consultant in May 2020, based on terms, timeframes, and cost estimates for preparing an EA, pending the outcome of the OEA's consideration of Brookhaven's request.

OEA first informed Brookhaven Rail that it was likely going to prepare a combined EIS in December 2020, following the Board's rejection of Brookhaven Rail's Petition for Exemption from Requirements of 49 U.S.C. §10909 in Docket No. FD 36399 and Brookhaven Rail subsequently informing OEA that it would prepare a full Application for Land-Use Exemption Permit per the Board's direction. The shift toward preparation of an EIS was marked by OEA furnishing to Brookhaven Rail and ICF numerous documents pertaining to regulations implementing NEPA and examples of their various components. These documents were publicly posted by OEA to the Environmental Comments section of the Board's website during this time period.

As explained in the attached letter from ICF to Brookhaven Rail dated December 7, 2020 (Attachment A), OEA's decision to prepare an EIS instead of an EA for the Projects necessarily

resulted in ICF proposing a “substantial increase in costs from the original Agreement for the preparation of an environmental assessment, which is reflective of the much greater level of effort required to prepare an EIS.”¹⁸ Simply stated, despite good faith efforts to do so, Brookhaven Rail and ICF were unable to agree on the terms of a new agreement for ICF to serve as the third-party consultant with OEA to prepare the EIS. Consequently, Brookhaven Rail reluctantly began to explore replacing ICF with a new third-party consultant that also met the Board’s qualifications. Thus, the entire discussion in CCE’s Appeal at pages 23-28 concerning the process is either mooted or wrong, or both. In particular, OEA did briefly consider the merits of preparing an EA instead of an EIS, and this was not a situation where either OEA or Brookhaven Rail terminated ICF for cause pursuant to an existing Memorandum of Understanding.¹⁹ Rather, it was a mutual decision between ICF and Brookhaven Rail. The process of attempting to reach agreement with ICF and then eventually selecting HDR as the new third-party consultant for OEA’s approval took several months. As the documentary record shows, after Brookhaven Rail identified HDR as a potential candidate, it engaged in open and transparent discussions with OEA to ensure that HDR’s limited past conceptual design work on the Projects did not disqualify it from serving as the third-party consultant, and Brookhaven Rail sought and obtained a directive from OEA (which was supported by an opinion from the Board’s Office of General Counsel) that HDR would be prohibited from conducting any design or engineering work on the Projects if it became the third-party consultant for the environmental review under the direction of OEA. As the later correspondence with OEA prompted by CCE’s objections to the Projects and to HDR attached to the Appeal confirmed,

¹⁸ Attachment A at 3.

¹⁹ Appeal at 27.

Brookhaven Rail and HDR understood and expressly agreed to these conditions without reservation.

Accordingly, the reasons for Brookhaven Rail replacing ICF with HDR as the third-party consultant were reasonable, and Brookhaven Rail, the Acting Director and her staff, and HDR acted transparently and prudently.

4. CCE's Other Allegations are Similarly Without Merit

CCE concludes its Appeal by throwing in several baseless allegations about potential conflicts because HDR has worked for other parties on other matters which are pure speculation and refuted by HDR's written statements to OEA about its role and lack of conflicts. HDR employs over 10,000 people in 13 countries. HDR has also undoubtedly worked for other entities in New York. It is absurd to assert without any actual evidence that because professionals at HDR may have provided engineering and consulting services unrelated to the Projects to the NYSDEC, Long Island Rail Road, or New York & Atlantic Railroad, HDR should be disqualified from being the third-party consultant to assist OEA on its review of the Projects. The simple answer to CCE's baseless assertions that "questions arise" as to HDR's potential work for any of Brookhaven Rail's affiliates or Northpoint Development LLC is that there have not been and are not now any such conflicts of interest, and if any arise Brookhaven Rail will immediately notify OEA.

III. Conclusion

In conclusion, CCE's Appeal should be rejected outright for being untimely and for otherwise violating the Board's procedural rules. If the Board accepts and reviews the Appeal, it should be summarily denied as being utterly without merit. In addition to denying it because it is based largely on misstatements of facts and speculative innuendo to advance a false narrative about the past role of HDR concerning the Projects and its selection as the third-party consultant, the

Board should heed 49 C.F.R. §1011.6(b)'s admonition to look with disfavor upon third parties who seek to advance their agenda of opposing and delaying projects under the Board's jurisdiction by baselessly appealing decisions of the Director of OEA. The Acting Director's approval of HDR and her rejection of CCE's opposition were reasonable and these are in no way "exceptional circumstances" where the Board needs to "correct clear error of judgement or to prevent manifest injustice." For all the foregoing reasons, the Appeal should be rejected or denied.

Respectfully submitted,



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Attorney for Brookhaven Rail LLC

October 19, 2021

ATTACHMENT A



December 7, 2020

Michael E. White
Brookhaven Rail, LLC
120 Nancy St.
West Babylon, New York 11704

RE: Brookhaven Rail EIS
Consulting Agreement,
Amendment No. 1

Dear Mr. White:

ICF Jones & Stokes, Inc. (an ICF company hereafter "ICF") respectfully submits this cost estimate to Brookhaven Rail, LLC (BHR) to amend the Consulting Agreement dated May 5, 2020 (Agreement) between ICF and BHR for the Brookhaven Rail Environmental Impact Statement (EIS). Amendment No. 1 would authorize funding for ICF to provide third-party contractor services to the Surface Transportation Board (Board) Office of Environmental Analysis (OEA) in preparing an EIS. For cost estimating purposes, the period of performance would be extended through January 2023 to accommodate the anticipated 2-year EIS process.

As you are aware, ICF's current contract with BHR is to support OEA in the preparation of an environmental assessment for the Brookhaven Rail project that was to be completed within a more expedited timeframe of six months instead of the prescribed one-year limit of the Council of Environmental Quality's (CEQ) 2020 amended National Environmental Policy Act (NEPA) regulations. The environmental assessment would have relied on much of the analyses conducted in the 2017 Voluntary Environmental Impact Statement (VDEIS) that was prepared for the Town of Brookhaven in accordance with the current light industrial land use designation for the property, pursuant to the 2016 Stipulation of Settlement Agreement. OEA has since determined, through initial consultations with federal, state and local agencies that preparation of an EIS is more appropriate. Comments received through agency consultation indicated that additional analyses was warranted because the VDEIS did not contemplate the effects that construction and operation of the heavier industrial use – the proposed solid waste rail transfer facility – would have on the environment. Commenters indicated that such a use would have greater impact on a number of resource areas, including but not limited to traffic, infrastructure, air quality, noise, odor, visual/lighting effects, etc., and asked that the Board prepare an EIS that would evaluate these effects in detail. Accordingly, OEA has determined that closer examination of the potential environmental effects of the proposed rail line, solid waste rail transfer facility and other reasonably foreseeable development on Parcel D (together, the Proposed Action) is justified and warranted. Preparation of an EIS involves additional procedural steps, greater levels of public and stakeholder involvement and additional analyses over what is normally required in the preparation of an environmental assessment. In order to estimate the level of effort to support OEA in the preparation of

the EIS, ICF has reviewed the VDEIS, BHR's data gap responses, agency correspondence, and formal Board filings from interested parties. To provide clarity to all parties on the level of effort expected for this EIS, ICF has developed a scope of work with OEA that describes the tasks that ICF would need to perform, as well as estimated costs and assumptions. The scope of work tasks are outlined below:

1. Project Management

- Project management support over the anticipated 26-month period of performance rather than a six-month period of performance. Participate in regular check-in meetings with OEA and monthly meetings with BHR. Manage budget and schedule. Compile an administrative record.

2. Project Initiation

- Support OEA with initial project startup tasks prior to the release of the Notice of Intent, such as developing data requests and analytical methods. Some of the consultation letters received by OEA will help inform these methods and the types of data needed.

3. Public and Stakeholder Involvement

- Develop, host and maintain a project EIS website.
- Develop and maintain project mailing list.
- Prepare the Notice of Intent, Draft Scope of Study, and a Final Scope of Study. Develop scoping notification materials.
- Organize and participate in four online scoping meetings. Prepare a scoping report that summarizes scoping comments.
- Develop notification for the Draft EIS public comment period. Organize and participate in two in-person Draft EIS public meetings. Collect, parse, and analyze public comments.

4. Consultation

- Cooperating Agency Consultation – Support cooperating agency consultation including participating in periodic calls.
- Endangered Species Act Section 7 Consultation – Support consultation activities with the U.S. Fish and Wildlife Service including preparing a biological assessment for Endangered Species Act listed species that could be affected by the project.
- National Historic Preservation Act Consultation – Support consultation activities for Section 106 of the National Historic Preservation Act (NHPA). Activities are anticipated to include identifying and coordinating with consulting parties, conducting literature review, establishing an area of potential effect (APE), developing an identification and evaluation methodology, and preparing an identification and evaluation technical report. Reconnaissance field surveys of the site for cultural resources are likely going to be required based on initial agency consultation which will be confirmed following initial research and consultation activities.
- Government-to-Government Consultation – Support tribal government-to-government consultation.

5. Draft EIS

- Develop the Draft EIS in accordance with CEQ regulations and OEA direction.
 - ICF has worked with OEA to determine the level of analysis for the various topics to be covered in the EIS, this includes resources to be analyzed in detail versus those that may be dismissed from a full analyses in the EIS as the impacts are minimal. For those resources to be analyzed in detail, ICF has proposed an approach for each one, as well as an approach for those to be dismissed. These approaches were informed by agency consultation conducted to date. However, the final scope of the analysis will be determined through public and agency input gathered prior to and during the scoping process and therefore the full scope of the analysis cannot be known at this time. Additional information is needed to determine the scope of analysis for certain resource topics, such as traffic, cultural resources, and air quality.
 - The EIS analysis will be based on existing and publicly available data. While information from the VDEIS can be used, OEA will need to conduct an independent analysis of this information, along with other publicly available data, consistent with the Final CEQ NEPA regulations in order to assess the potential effects of the proposed project. Additionally, the Final NEPA regulations call for the assessment of planned future actions and trends within the affected environment.
 - Coordinate with OEA, BHR, and Cooperating Agencies to obtain data to support the development of the EIS and to identify alternatives to be analyzed in the EIS.

6. Final EIS

- Following the close of the Draft EIS public comment period, prepare responses to comments and prepare the Final EIS.

Attachment A includes our estimated cost for the preparation of the EIS, which is \$998,208.00 and number of labor hours by task. The current remaining Environmental Assessment budget can be subtracted from this amount. Our cost estimate reflects our current understanding of the proposed project, the scope of work and the anticipated level of effort that will be required to support OEA in the preparation of the EIS. However, there are still considerable unknowns that could affect scope and budget, such as the outcome of the public and agency scoping, need for additional information about the proposed project and site, comments on the Draft EIS, and other variables. While we have developed our best estimate given our experience working with the OEA, the level of effort may be different than what we have estimated, and costs may vary. ICF developed assumptions contained in **Attachment B** based on our experience with past projects of a similar scope and nature. We offer these assumptions to explain the basis of our price estimate, add clarity to the approach, and explain how we estimated the level of effort and costs that form the basis of our price.

We recognize this is a substantial increase in costs from the original Agreement for the preparation of an environmental assessment, which is reflective of the much greater level of effort required to prepare an EIS. We would be happy to discuss this letter with you further.

Upon agreement, ICF will perform these services as an amendment to our existing Agreement with BHR dated May 5, 2020. ICF proposes to invoice costs monthly, on a time and materials basis. Please contact Elizabeth Diller at 704-458-8769 or Elizabeth.Diller@icf.com.

Sincerely,

Handwritten signature of Elizabeth Diller in blue ink.

Elizabeth Diller
Project Director
704-458-8769
Elizabeth.Diller@icf.com

Handwritten signature of Trina L. Fisher in blue ink.

Trina L. Fisher
Contracts Administrator
916-231-7636
Trina.Fisher@icf.com

Attachment A: Cost Estimate

Task	Subtask	Total Hours	Total Cost
Task 1 Project Management			
	Project Management: Schedule, Budget, Task Tracking	256	\$ 31,772
	Project Management: Weekly OEA Meetings	398	\$ 51,384
	Project Management: Monthly Applicant Meetings	133	\$ 16,974
	Project Management: Administrative Record	90	\$ 9,394
Task 2 Project Initiation			
	Project Initiation: Internal Kick Off Meeting	27	\$ 4,144
	Project Initiation: Information Requests	122	\$ 19,529
	Project Initiation: Work Plan	24	\$ 2,802
	Project Initiation: Methodologies	166	\$ 26,805
Task 3 Public and Stakeholder Involvement			
	Public and Stakeholder Involvement: Website	168	\$ 24,439
	Public and Stakeholder Involvement: Mailing List	31	\$ 3,531
	Public and Stakeholder Involvement: NOI/Draft and Final Scope of Study	48	\$ 5,933
	Public and Stakeholder Involvement: Scoping Meetings	214	\$ 51,209
	Public and Stakeholder Involvement: Scoping Report	148	\$ 15,755
	Public and Stakeholder Involvement: DEIS Public Meetings	236	\$ 57,177
Task 4 Agency Consultation			
	Consultation: Cooperating Agencies	112	\$ 13,962
	Consultation: ESA	59	\$ 10,394
	Consultation: NHPA	444	\$ 89,582
	Consultation: Gvt to gvt	22	\$ 2,513
Task 5 Draft EIS			
	Draft EIS: PM, Editing, QAQC	513	\$ 72,107
	Draft EIS: Chapter 1, Chapter 2	262	\$ 37,420
	Draft EIS: Transportation Resources	324	\$ 62,348
	Draft EIS: Natural Resources	186	\$ 33,188
	Draft EIS: Physical Resources	415	\$ 78,219
	Draft EIS: Human Resources	466	\$ 64,805
	Draft EIS: Other EIS Sections	292	\$ 37,375
Task 6 Final EIS			
	Final EIS: Public Comment Analysis	180	\$ 20,019
	Final EIS: RTC & FEIS	949	\$ 155,427
Total Cost		6,285	\$ 998,208

Attachment B: Assumptions

ICF developed the below assumptions in the development of this cost estimate.

- General / Project Management
 - The EIS will be prepared pursuant to the CEQ's final NEPA rule. The EIS will be 150 pages or less, not including appendices, and will be completed within 2 years.
 - For cost estimating purposes, the period of performance is assumed to be through January 2023.
 - ICF will participate in meetings with OEA once a week and monthly meetings with OEA and BHR. All meetings will last up to one hour.
- Public and Stakeholder Involvement
 - ICF will support up to four virtual scoping meetings up to two hours in length and up to two in-person Draft EIS public meetings.
 - Advertising of these meetings will be completed in 2 rounds of advertisements in up to four local papers, each ad will not cost more than \$1,000.
 - There will be up to 20 substantive comment letters submitted during scoping and 20 truly substantive comment letters submitted during the Draft EIS public review period.
- Consultation
 - ICF will participate in up to 12 calls with cooperating and consulting agencies that are anticipated to last approximately one hour each.
 - A draft and final Biological Assessment will be prepared for one species. Minimal coordination with USFWS is assumed for Section 7 consultation given the limited extent of potential impacts.
 - For NHPA consultation, this cost estimate assumes no historic properties will be present in the area of potential effect. The area of potential effect will be no more than 1,500 feet beyond the limits of ground disturbance. Field investigations will be limited to above ground pedestrian observation of the proposed project area only. The pedestrian observations and other research will inform whether subsurface investigations would be required, which are not currently included in this cost estimate. If subsurface investigations are required, a contract amendment may be required.
- Draft EIS
 - Unless otherwise noted, all data used in the EIS will be from publicly available sources or be provided by BHR. As requested by OEA and ICF, BHR will provide data used for the VDEIS. Up two rounds of information requests between OEA and BHR may be required to obtain necessary information to inform the analysis. BHR will provide an adequately detailed project description and supporting information to support preparation of the EIS.
 - There will be three reviews of the administrative Draft EIS, two by OEA and one by cooperating agencies.
 - As noted above, the final scope of the analysis will be determined through public and agency input gathered prior to and during the scoping process and therefore the full scope of the analysis cannot be known at this time. Additional information is needed to determine the scope of analysis for certain resource topics, such as traffic, cultural resources, and air quality. Based on initial agency consultation, a new traffic study may

be required. The scope of the traffic study is unknown at this time and is not included in this cost estimate. For air quality, ICF assumes general conformity and transportation conformity would not apply and there would not be a need for a quantitative analysis.

- Final EIS
 - o The effort to respond to comments and revise the Final EIS will primarily be limited to providing clarification or additional information about existing material in the EIS and will not require a substantial rewrite. There will be no new analysis, modeling, technical studies, or field work required.
 - o There will be three reviews of the administrative Final EIS, two by OEA and one by cooperating agencies.

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of October 2021, a copy of the foregoing Reply to Appeal of Director's Decision was served by email on all parties on the official Service List for Docket No. FD 36398.

/ss/ Thomas W. Wilcox