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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

BROOKHAVEN RAIL LLC –	)	
CONSTRUCTION AND OPERATION	)	
EXEMPTION – SUFFOLK COUNTY, NEW	)	Docket No. FD 36398
YORK, AND UNDOCKETED	)	
APPLICATION FOR A LAND-USE	)	
EXEMPTION UNDER 49 U.S.C. § 10909	)	

**CCE REQUEST FOR LEAVE AND RESPONSE
TO BHR REPLY IN OPPOSITION TO APPEAL**

CITIZENS CAMPAIGN FOR THE
ENVIRONMENT

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Dated: October 26, 2021

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	)	

The Citizens Campaign for the Environment (“CCE”) respectfully requests leave to respond to the Reply in Opposition to Appeal (“Reply”) that Brookhaven Rail LLC (“BHR” or “Applicant”) submitted on October 19, 2021, in response to the appeal that CCE submitted on October 6, 2021 (“Appeal”), from the decision that the Director of the Office of Environmental Analysis (“OEA”) issued on September 17, 2021 (the “Director’s Decision”), 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 BHR’s proposed rail construction project and an associated land-use exemption permit (the “Projects”).

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(Sub-No. 1X) (STB served May 18, 2011), at 1 (accepting surreply that “addresses allegations first asserted on [] reply, and because it establishes a more complete record”).¹

I. CCE’s Appeal Is Properly Filed, and the Director’s Decision Is Subject to Full Review

Applicant’s threshold argument is that CCE’s appeal is made too late and is too long. Reply at 2-3. Applicant’s claims are unfounded.

Applicant contends that because the Director was “acting under authority delegated to her by the Chairman of the Board” under 49 C.F.R. § 1011.6, and because “appeals from decisions of employees acting under authority delegated under this section” must be made within ten days, CCE’s Appeal was filed nine days too late. Applicant is wrong. First, the Chair has delegated no authority to the OEA Director **at all** under 49 C.F.R. § 1011.6, in contrast to the specific, but discrete, authorities specifically delegated to the Directors of **other** Board offices under this same section. In this instance, the OEA Director exercised authority delegated from the **Board** itself under 49 C.F.R. § 1105.2 and 1105.10(d).

CCE filed its Appeal in accordance with 49 C.F.R. § 1105.2 for an appeal “as a matter of right,” and Appeals made pursuant to 49 C.F.R. § 1105.2 need not be filed within ten days, as CCE explained in footnote 5 on page 16 of its Appeal.² CCE acted promptly to have the Board address what is an important matter, as evidenced by the decision of the Director served

¹ Consistent with CCE’s Appeal and OEA’s decision suspending the environmental review process served by the Board on October 20, 2021, and to ensure that the record is complete, CCE is filing this surreply in both FD 36398 and FD 36399.

² BHR’s reference to *Tongue River R.R. – Constr. & Op. – W. Alignment*, FD 30186 (Sub-No. 3) (STB served Apr. 16, 1998) (Reply at 2 n.1), does not help its cause. The appellants appear to have merely assumed, incorrectly, that the 10-day period applied. In any event, the Board found that good cause existed for granting leave and considered the appeals on the merits. Also, the standard of review used in the case was whether there was “an adequate basis” for the decision and it “was improper,” and not the “clearly erroneous” standard Applicant prefers.

October 20, 2021, suspending the environmental review until CCE's appeal is resolved. That decision refutes Applicant's claims that CCE's appeal constitutes "an abuse of the Board's procedural rules ... [that] should not be countenanced." Reply at 3.

Applicant's objections to CCE's Appeal based on its length, *id.*, are similarly unfounded. The 30-page limit under 49 C.F.R. 1115.2(d) cited by Applicant applies only to appeals of "the initial decision of an administrative law judge ["ALJ"], individual Board member, or employee Board." CCE's Appeal is not from an ALJ, individual Board member, or employee Board, as noted in the Appeal at 16, n.5. Moreover, the text of CCE's Appeal barely exceeds thirty pages and only because of the need to summarize the facts that were not presented in the Director's Decision, and are largely undisputed by the Applicant. The remainder of the filing consists of complete copies of all of the cited documents, provided for the Board's convenience. CCE submits that the length complies with the Board's rules and is fully warranted under the circumstances. Should the Board determine otherwise, CCE respectfully submits that the attachments can be deleted.

Applicant's claim that the "clearly erroneous" standard under 49 C.F.R. § 1011.6(b) should apply to CCE's Appeal, Reply at 3-4, is also devoid of merit. Section 1011.6(b) does not apply, for the reasons stated above. CCE's appeal is one as of right under 49 C.F.R. § 1105.2. It also presents substantial questions, which the Board has not previously addressed, that go to the basic integrity of the Board's environmental review processes and the true independence of OEA's third-party contractor. While the Director's Decision cannot stand even under the "clearly erroneous" standard, the matter fully warrants *de novo* review.

II. Applicant's Belated Contention that HDR Conducted Only "Limited" Work Is Untimely, Improperly Raised, and Unsupported by the Evidence of Record

Applicant claims for the first time in its Reply that CCE's assertions that HDR engaged in "substantial planning and design work" for the Projects are unfounded because HDR's work was too limited to give rise to any conflict. Reply at 5-7.

As a threshold matter, Applicant's conjecture is untimely because it could have and should have been presented to OEA in order to be considered as part of the Director's Decision. Applicant's claim is therefore waived by Applicant's "own failure to raise the argument in good time." *E.g., Consolidated Rail Corp. – Abandonment Exemption – In Hudson County, NJ*, AB 167 (Sub-No. 1189X), et al. (STB served Aug. 18, 2017) at 4 ("*Hudson County*").

Furthermore, the Director's Decision made no such factual finding that HDR's work was merely limited and that no conflict was created on that basis. The Director's Decision cannot be upheld on a finding that the Director never made and a reason that the Director never considered.

The amount of detail included in HDR's design work and the fact it included a track schematic also call into question how "limited" HDR's role could have been when preparing these plans. In any event, the record shows that Applicant continues to utilize and rely upon HDR's prior work. Indeed, Applicant represented to the Board that HDR's design work was complete and sufficient enough to: (a) obtain the exemption to construct and operate the proposed line, (b) obtain the exemption for the land-use permit, (c) justify waiver of the six-month prefiling notice for the environmental review, (d) obtain a favorable environmental review for the Projects, and (e) meet the criteria specified at 49 U.S.C. § 10909 for a land-use permit for a solid waste rail transfer facility ("SWRTF").

Applicant's new claim that HDR's previous work that it has relied upon is incomplete or inadequate is tantamount to an admission that its original exemption filings were incomplete and inadequate. Particularly for a massive and unprecedented SWRTF in an environmentally-sensitive environmental justice area, a mere preliminary and conceptual approach is insufficient to support a rail line exemption petition and Section 10909 application, and certainly insufficient to support a thorough environmental analysis.

III. Applicant's New Efforts to Dismiss HDR's "Evident Partiality" Are Untimely, Improperly Raised, and Unsupported by the Evidence of Record

Applicant also claims for the first time on appeal that HDR has not displayed any evident partiality since the OEA and the Board ultimately make the environmental determinations and the environmental benefits of the Projects cannot be disputed in "good faith." Reply at 7. In doing so, Applicant suggests that the Directors Decision should be upheld on the grounds that HDR is a disinterested party.

As above, arguments not presented, much less considered and adopted below, cannot be utilized to sustain a decision on appeal. Applicant waived this contention by failing to present it in a timely manner. *E.g. Hudson County* at 4.

As CCE's Appeal further explains, the Director's Decision failed to address the issue squarely raised by CCE about HDR's evident partiality toward Applicant, neither Applicant nor HDR disputed this evidence whatsoever before OEA, and this failure constitutes clear error and requires reversal. Notably, Applicant does not dispute this point at all. In any event, the decision cannot be upheld based on Applicant's belated suggestions that CCE's partiality allegations are "specious on their face."

Moreover, Applicant's new position is so problematic as to be dangerous. Applicant's logic is that the independence of the third-party contractor is irrelevant because the

decisions are ultimately those of the OEA and the Board. Reply at 7. That reasoning is an affront to the Council on Environmental Quality and Board regulations that allow use of third-party consultants in the first place, and the Board's requirements that third-party contractors must be disinterested. Appeal at 17-18.

Additionally, Applicant's *post hoc* rationalization is in error. The issue is not simply whether a train produces more emissions than an equivalent number of trucks. Reply at 7. As CCE has explained, every bit of waste that Applicant would move by rail must first arrive at the transfer station by truck; some of those trucks will come from considerable distances and the wrong direction to be beneficial; those trucks will contribute to considerable congestion and emissions not just for themselves, but also for other vehicles; and alternatives to the Projects may include continued incineration/monofills for the municipal solid waste and rail transfer at other or multiple locations. These are matters to be considered and assessed in the EIS based on actual data and modeling, rather than assumed or concluded away at the outset by HDR, without the benefit of any analysis.

Applicant's claim that HDR displayed no partiality in suggesting at the same meeting³ that the Projects be included in the New York Metropolitan Transportation Council ("NYMTC") Regional Transportation Improvement Plan ("TIP"), Reply at 8, is also off base. Applicant contends that when HDR suggested that the Projects be included as part of the TIP, it was "just show[ing] its qualifications to provide analysis to OEA of the Projects with the perspective of reviewing their consistency with the NYMTC." Applicant's new explanation is far-fetched and absurd. Even if on point, which it is not, there is no reason for HDR to be

³ CCE notes again that the OEA minutes of the meetings with BHR/HDR have become severely truncated and thus fail to inform the public as to the content of the actual discussions.

pontificating on the consistency of a project with NYMTC's TIP criteria, especially in a manner that would clearly benefit Applicant. In any event, such suggestions on subjects far outside the scope of employment are standard for an advisor or supporter, but inappropriate for a contractor assisting in an independent environmental review. Also, while Applicant claims that the HDR suggestion had nothing to do with funding, the core purpose of TIP is to identify and prioritize projects proposed to receive federal transportation funding. In other words, eligibility for priority funding is precisely the benefit that flows from inclusion in the plan. "[T]he Plan is a blueprint that helps guide federal funding of investments in the NYMTC planning area based on Council members' vision for the region." See NYMTC, *Required Planning Prods.*, <https://www.nymtc.org/Required-Planning-Products/Regional-Transportation-Plan-RTP> (last visited Oct. 26, 2021).⁴ Again, HDR ceased to serve as an extension of OEA and its adjunct, and instead is serving as Applicant's advocate and advisor, thereby evincing its partiality.

IV. Applicant's Belated Attempt to Explain the Third-Party Contractor Changeover Is Untimely, Improperly Raised, and Fails to Adequately Justify the Change

Applicant seeks to rely on other new evidence by contending, for the first time on appeal, that it sought and obtained the Director's approval to change the third-party contractor in order to save costs once it became clear that an Environmental Impact Statement ("EIS") would be required instead of an Environmental Assessment ("EA"). Reply at 9-12. In other words, Applicant suggests that ICF's selection was somehow premised on the adequacy of an EA and that the Director's Decision should be upheld as a response to the unraveling of that premise.

⁴ In fact, after this meeting, the Federal Railroad Administration was invited by OEA to participate "due to potential funding." (EO-3544).

Again, the Director's Decision cannot be upheld based on *post hoc* rationalization, and Applicant waived this theory by failing to present the evidence to OEA on a timely basis. *E.g. Hudson County* at 4. Additionally, the Director's Decision did not mention any cost savings as the basis for replacement of the third-party contractor, and the decision cannot be upheld on that basis. Beyond that, the explanation lacks basic plausibility.

First, Applicant asserts that "OEA did briefly consider the merits of preparing an EA instead of an EIS." Reply at 11. But the idea that an EA would ever suffice for a SWRTF, likely the largest of its kind in the country, in an environmentally sensitive environmental justice area strains credulity. Beyond that, documents submitted to the OEA show that Applicant has been working, both behind the scenes and publicly, to expand the size of the development dramatically and has asked local authorities for tens of millions of dollars in tax incentives and economic assistance for the expanded Projects, making an EIS even more appropriate.

Second, the cost explanation is not justified or credible, and raises other issues. Preparing an EIS is necessarily substantially more expensive than an EA, and an increased cost estimate is to be expected. Again, this is the largest project of its kind in the country, likely involving total Project costs of over \$100 million or more in an environmentally sensitive environmental justice area. Applicant's contention that it needed to replace ICF with its Project designer in order to save a few dollars on the environmental review of a project of massive size and scope is inexplicable. Additionally, what Applicant has not explained is how and why replacing ICF with HDR will yield any savings. Both ICF and HDR are large consulting firms with similar experience and expertise. Is the reason HDR is cheaper than ICF because it proposed a smaller scope of work than ICF? Did HDR propose less hours of work and/or the use of less senior staff with lower hourly rates? Was HDR able to propose lower rates because of its

prior work for Applicant and familiarity with the site and its ability to rely on its previous work? Or simply was HDR doing Applicant “a favor” based on their prior relationship and potential benefit from the Projects being approved in terms of gaining additional future work from Applicant?

Despite its claims of being “open and transparent,” Applicant has not entered any of its fee discussions with HDR into the record nor its original ICF fee arrangements. An explanation of the putative savings is especially needed because the scope and extent of the work required are determined by **OEA, and not the Applicant** as specified in the Memorandum of Understanding (“MOU”) (Attachment 5 to CCE’s Appeal). To the extent HDR’s lower estimate rests on a reduced scope of work – and Applicant has not indicated otherwise – the asserted savings do not provide a reasonable basis for the changeover.⁵

Third, Applicant incorrectly asserts that it has discretion to change contractors, virtually at-will. But the contractor is retained and controlled by OEA, not merely by Applicant. Also, the Board may hire its own third-party contractor for a Section 10909 application and charge all costs to the applicant. 49 U.S.C. § 10009(h). Furthermore, the MOU requires that Applicant notify OEA first and attempt to resolve the issues and that OEA, not the Applicant, can remove the contractor only for cause. Appeal at 27.

The above confirms that Applicant has not been “open and transparent” but has disclosed only what it wants when it wants. Such belated self-serving disclosures and

⁵ “[W]e see no way to set monetary limits at the outset of the NEPA process, because the NEPA analysis at times involves the discovery of unforeseen potential environmental impacts that require more analysis than originally contemplated.” *Major Rail Consolidation Procedures*, EP 582 (Sub-No. 1), (STB served June 11, 2001) at 38.

characterization cannot be given any weight unless the full documentary record and other communications are fully disclosed and made available for public review and comment.

V. Applicant Improperly Dismisses Other Potential HDR Conflicts.

CCE's Appeal also explained that HDR appears to do substantial work for numerous other entities that will be involved in the environmental review process, that Section III.D(2) of the MOU requires prior notice to and approval by OEA of any work by a contractor for "any cooperating agencies that may elect to participate in this process, or any other party to this proceeding during this proceeding," and that HDR had made no such disclosures as required Under Section III.D(2). Appeal at 28-31.

Applicant's responses are entirely contradictory. It first calls CCE's allegations "baseless," but then acknowledges that "HDR has undoubtedly worked for [unspecified] entities in New York." It then claims that "[i]t is absurd" that "HDR should be disqualified" because "professionals at HDR may have provided engineering and consulting services unrelated to the Projects" to the parties identified by CCE. It concludes by asserting "[t]he simple answer . . . 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." Reply at 12.

Applicant thus confirms CCE's factual allegations as to other work, but claims the other work is irrelevant. That position cannot be reconciled with the MOU. Under Section III.D(2), the duty to disclose attaches to HDR, and it is therefore not the Applicant that determines if these other activities are of concern and should be reported, as BHR suggests. Further, the governing rules state that even so-called unrelated work for other participating entities is of concern and must be reported since the same firm should not be working for two masters with conflicting interests at the same time. While Applicant may not like it, the other

work must be disclosed by HDR so that OEA can make an informed decision. Under the circumstances, there should be a full disclosure so that the interested public, including CCE, has an opportunity to submit informed comments.

VI. Conclusion

Applicant's Reply provides no valid basis for upholding the Director's Decision, and only confirms the seriousness of the situation. Under the circumstances, the best course of action should be for the Board to retain a third-party contractor that is truly independent and disinterested. At a very minimum, Applicant's Reply reinforces the need for a full investigation, including a full and complete disclosure as to HDR's arrangements for and work on the Projects that has been repeatedly requested by CCE, but rejected to date. Confidence in the Board's environmental review and process will be undermined otherwise.

Respectfully submitted,

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Dated: October 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have this 26th 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 & Richardson Architecture and Engineering, P.C. (“HDR”).

/s/
Katherine F. Waring