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November 1, 2021
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November 1, 2021

By E-Filing

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

Re: FD No. 36398, *Brookhaven Rail LLC – Construction and
Operation Exemption – Suffolk County, New York*

Dear Ms. Brown:

This letter is submitted on behalf of Brookhaven Rail LLC (“Brookhaven Rail”) in response to the letter submitted in this docket on behalf of the New York State NAACP (“NAACP”) on October 26, 2021. The letter “requests to comment on” the Appeal of the decision of the Acting Director of the Office of Environmental Analysis (“OEA”) filed by Citizens Campaign for the Environment (“CCE”) and the reply to that filing submitted by Brookhaven Rail.

As a threshold point, to the extent that the letter is considered a reply to CCE’s Appeal filing, it should be disregarded because, as Brookhaven Rail has established in its Reply to the Appeal, the Appeal was untimely filed and cannot be accepted. If the letter is to be construed as a reply to Brookhaven Rail’s reply to the Appeal, then the letter is barred by 49 C.F.R. §1104.13(c), and NAACP has made no claim that there is any cause that this regulation should be waived. The letter should also be disregarded because NAACP, which is obviously coordinating its opposition with that of CCE’s, simply says it agrees with CCE without any further explanation or analysis and so it adds nothing substantive to the record of the Appeal.

In the event the Board accepts the letter into the record of this proceeding, then Brookhaven offers the following brief responses. First, any statements by NAACP concerning an alleged lack of “transparency” on the part of Brookhaven Rail, or lack of acceptance of “public scrutiny,” “secrecy,” or the lack of “opportunity to air views and trust,” and similar pejoratives

Law Office of Thomas W. Wilcox, LLC

Letter to Cynthia T. Brown

November 1, 2021

Page 2

directed to Brookhaven Rail, should be ignored by the Board because they are untrue, but also because NAACP lacks any credibility to make them. Numerous attempts by Brookhaven Rail, its affiliated companies, and their various representatives to meet with NAACP, listen to its concerns, and try to address them have been rejected. The attached correspondence shows only a portion of the extent to which Brookhaven Rail has tried to engage NAACP in a dialogue and educate it about the projects and the STB's processes, only to be rebuffed at every turn. NAACP cannot credibly accuse Brookhaven Rail of a lack of transparency or secrecy when NAACP refuses to even discuss its alleged concerns with Brookhaven Rail, let alone take any steps to build the "trust" it says is "key." Letter at 2. Indeed, at the same time NAACP wrongly accuses Brookhaven Rail of being secretive, NAACP reveals in its letter that while Brookhaven Rail has been repeatedly reaching out to NAACP in good faith, the organization has apparently been recruiting "local stakeholder civic organizations to oppose Winters Bros. project" (sic).

The attached correspondence also shows some of the attempts Brookhaven Rail has made to correct NAACP's persistent misconceptions about the Board's mediation process, the environmental review process that will apply to the projects, and the degree to which NAACP will be able to participate in the Board's consideration of the pending construction application and Brookhaven Rail's forthcoming Application for Land-Use Exemption.

It is therefore unfortunate and counterproductive for NAACP to persist in making the same misguided and misinformed allegations about these subjects and the projects in general at this stage of the overall process. Nevertheless, Brookhaven Rail and its affiliated companies remain ready and willing to meet with NAACP and listen to its concerns and to try to address them.

Please do not hesitate to contact the undersigned if you have any questions.

Sincerely,



Thomas W. Wilcox

Attorney for Brookhaven Rail LLC

Enclosures.

ATTACHMENT A

Brookhaven Rail LLC

120 Nancy Street
West Babylon, NY 11704
(631) 491-4923

SENT VIA E-MAIL

July 13, 2021

Ms. Tracey A. Edwards
Long Island NAACP Regional Director
434 Nassau Road
Roosevelt, N.Y. 11575

Re: Winters Rail Terminal

Dear Ms. Edwards:

Brookhaven Rail LLC ("Brookhaven Rail") was sincerely disappointed by your refusal of our requests to open lines of communication with the NAACP about the proposed Winters Rail Terminal. Brookhaven Rail remains committed and available to meet at your convenience should you, members of the State NAACP and/or the Brookhaven Chapter change your decision. I have always known you to be a person who has sought to obtain the facts and engage in dialogue on any important issue. That is exactly what we would like to do, as it is apparent to us that you are receiving inaccurate and incomplete information.

First and foremost, NAACP has been seriously misinformed if it believes that the development of the proposed Solid Waste Rail Transfer Facility ("SWRTF") is being pursued in a way that bypasses state and local laws and the input and the interests of the local community. Quite the contrary, under the Clean Railroads Act ("CRA"), the Surface Transportation Board ("STB") has preemptive jurisdiction over only a narrow category of state and local laws that "affect the siting" of such a facility. In this case, the only such law is the Town of Brookhaven's ("Town") zoning law which does not currently allow for the SWRTF to be located on the parcel of land within the Winters Rail Terminal that makes the most sense for it to be constructed on.

There can be no legitimate dispute that there is a solid waste disposal crisis on Long Island, which has been intensified by the expected closure of the Brookhaven landfill in 2024. It is Brookhaven Rail's firm belief that the proposed SWRTF is critical to resolving that crisis, but that the process necessary to change the Town's zoning law and regulatory procedures cannot be completed in time, if at all. As a Class III railroad subject to the STB's jurisdiction, Brookhaven Rail has a statutory right to ask the agency to preempt the Town's zoning law, a decision that Brookhaven Rail did not make lightly. However, this will not diminish opportunities for local input. Pursuant

to the express intent of Congress in passing the CRA, *all state and local laws that do not affect the siting of the SWRTF must be complied with by Brookhaven Rail*. Moreover, under 49 U.S.C. §10909(c)(1) the STB:

may only issue a land-use exemption if it determines that the facility at the existing or proposed location does not pose an unreasonable risk to public health, safety, or the environment. In deciding whether a solid waste rail transfer facility that is or proposed to be constructed or operated by or on behalf of a rail carrier poses an unreasonable risk to public health, safety, or the environment, the Board shall weigh the particular facility's potential benefits to and the adverse impacts on public health, public safety, the environment, interstate commerce, and transportation of solid waste by rail.

Additionally, the STB's Office of Environmental Analysis ("OEA") is currently engaged in a review of the potential environmental impacts of the project pursuant to the National Environmental Policy Act and STB regulations. This process requires soliciting input from state and local entities and stakeholders that might be impacted by the project. The Town is aware of, and has actively participated in, the process with OEA and has been involved every step of the way. We also continue to work with the Town and many other parties of interest to address the solid waste management crisis on Long Island. The leadership of Brookhaven Supervisor Romaine has and continues to be a critical element in this effort.

Accordingly, far from bypassing any local laws or stakeholders, the proposed SWRTF is being subjected to an extensive review by state, local, and federal authorities with jurisdiction, and all three forums will provide plenty of opportunities for input from affected stakeholders. As for the STB process, be assured that the agency's review is both public and on-the-record to ensure transparency and allow public participation. The only exception to that process was the STB-directed mediation between the Town and Brookhaven Rail on several issues related to the environmental review process surrounding the rail construction aspect of the overall development in STB Docket No. 36398. The process was by law and Board regulations confidential, but the outcome of that process is not. While the Town informed Brookhaven Rail that it has certain steps it must take to finalize the terms of the parties' agreement, the Town has not objected to Brookhaven Rail discussing the agreement's terms with third parties pending the completion of that process.

We have made every effort to be transparent with the Brookhaven community and key stakeholders regarding the project and we will continue to do so. We have engaged in an open dialogue about the project with the Yaphank civics, among many others. What's more, our innovative solution by ~~maximizing the use of rail to address this regional crisis will take over 60,000 long haul trucks off~~ Long Island's already congested and aging bridges and roadway infrastructure each year, while simultaneously improving our regional air quality.

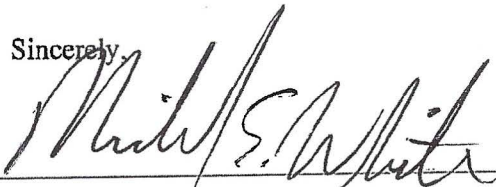
Environmental justice is a key pillar of our guiding principles, and its why we have committed our business model to bolster and advance environmentally and socially responsible disposal of societal waste. This rail infrastructure and SWRTF, the establishment of the Long Island Sustainability Center and rail served warehousing at the Winters Rail Terminal and the reservation and granting of a sizable conservation easement, included as components of this project, will further support the betterment of the region's environment while creating jobs and increasing tax revenue for local jurisdictions.

Finally, you should also know that when the subject property was purchased from Suffolk County in 2013, the County acknowledged that the subject property was to be a rail terminal and the County committed to assist in the development of the rail terminal. Also, development of the subject property is subject to a Stipulation of Settlement, So Ordered by the U.S. District Court EDNY in 2016 (the "Stipulation"), to which Brookhaven Rail and the Town of Brookhaven are parties. The terms of the Stipulation specifically provide for the development of rail support structures as of right. These structures will include over 1.3 million square feet of rail served warehousing.

As an express condition of the referenced Stipulation, the development of the subject property was analyzed in a Voluntary Draft Environmental Impact Statement prepared for the Town, from which the Town issued a Negative Declaration, meaning that the development of the rail terminal will not have a significant impact on the environment. This analysis identified the surrounding land uses, which include: the Long Island Rail Road mainline to the north, abutted by another rail terminal site for rail served warehousing; the County Police Headquarters, the County Correctional Facility and the County Yaphank Sewage Treatment Plant to the east; the Brookhaven Landfill to the south and a composting operation, a rock crushing operation (at the former Grucci Fireworks site) to the west, along with the Caithness Power Plant and Substation.

In conclusion, the Winters Rail Terminal has long been planned for rail-served industrial development, and Brookhaven Rail and its affiliates are pursuing that development in an open and transparent manner. It is our sincere hope that we will be provided an opportunity soon to discuss the Winters Rail Terminal project with you and others at NACCP, as there are many additional details we would like to discuss, including the numerous and substantial benefits to all members of the community.

Sincerely,

A handwritten signature in dark ink, appearing to read "Michael E. White", written over a horizontal line.

Michael E. White
Director of Special Projects

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June 15, 2021

By E-Filing

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Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
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395 E Street, SW
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Re: Docket No. FD 36398, *Brookhaven Rail LLC – Construction and
Operation Exemption – In Suffolk County, NY*

Dear Ms. Brown,

Brookhaven Rail LLC (“BHR”) hereby submits this reply to the letter submitted in this docket by NAACP NY¹ on June 2, 2021 (“Letter”). The Letter contains numerous misstatements of fact about BHR, the proposed rail construction project in this docket on a 228-acre parcel of land in the Town of Brookhaven, N.Y., and BHR’s proposal to construct a solid waste rail transfer facility (“SWRTF”) on 50 acres of that parcel.

First, NAACP NY’s allegations that BHR has engaged in a lack of transparency as to the proposed projects are surprising, and simply wrong. BHR’s separate petitions seeking approval from this Board for both the rail construction project and the SWRTF have been in the public record since the summer of 2020, and not only has a robust record of filings made by BHR and other parties been assembled in this docket and Docket No. FD 36399, the details of the proposed projects have been discussed in newspapers and other publications on Long Island, as well as in the community outreach efforts discussed below. Yet, prior to a May 21, 2021 press release where

¹ The Letter does not identify on whose behalf it is being filed. Instead, it states “[t]he NAACP President of the New York State, Hazel Dukes has joined with Town of Brookhaven NAACP Chair Dr. Georgette Grier-Key, NAACP Long Island Director Tracey Edwards, chapters across the region and other local organizations.” However, since the Letter references the “Petition/Request for Immediate Public Disclosure of Outcome of Mediation by and Between Brookhaven Rail LLC and Town of Brookhaven, NY,” (“Petition”) filed on behalf the NAACP New York State Conference (“NAACP NY”), BHR is assuming that the Letter was filed on behalf of NAACP NY, and that the references to “NAACP” in the Letter refer to this entity.

Letter to Cynthia Brown

June 15, 2021

Page 2

NAACP NY suddenly announced, without any attempt to first contact BHR or its affiliates, that it now opposed the projects, NAACP NY publicly expressed no interest at all in the proposed projects to BHR, the Board, or anyone else, let alone voice any of the concerns set forth in its Letter.²

Second, the charge that BHR and its affiliated companies have “dismiss[ed] the need for grass roots community involvement” is also flatly contrary to the facts. BHR and its affiliated companies began a robust and transparent public outreach campaign for this project in October of 2020 that continues to this day. This outreach has included meeting with elected officials at every level of government, the media, environmental organizations, and civic leaders and special interest groups active on solid waste disposal issues in the community. BHR and its affiliate, Winters Brothers Waste Systems of Long Island, LLC also created a comprehensive website that launched in February of this year, which has been openly accessible and allows anyone to contact either company should they wish to do so. Yet, NAACP NY never seized upon the multiple opportunities available to it to learn about the projects and to engage with BHR and its affiliates to express any concerns or recommendations it may have respecting either of the projects. Moreover, after NAACP NY issued its May 21 press release, representatives of BHR immediately requested a meeting with representatives of NAACP NY but the invitation was declined. NAACP NY has continued to rebuff BHR’s efforts to meet and discuss NAACP NY’s apparent concerns and possibly constructive recommendations. It is therefore simply wrong for NAACP NY to represent to the Board that the details of the projects were somehow obscured from NAACP NY until May of 2021 and that BHR has not sought the input of NAACP NY now that it has voiced objections to the projects.

The remainder of NAACP NY’s letter is mostly a further demonstration of NAACP NY’s lack of knowledge and understanding of the Board’s mediation processes, the rail construction licensing process, and the environmental review conducted by the Board’s Office of Environmental Analysis (“OEA”) pursuant to the National Environmental Policy Act (“NEPA”). BHR has responded to these points in its Reply to NAACP NY’s Petition and so need not repeat those responses here. However, BHR states that it vigorously disputes NAACP’s allegations that the long-planned development of this parcel for rail-served industrial and logistics development will have “an extremely negative impact on the residents of this area” and that “the most likely to be impacted are the residents of color that live in close proximity to the proposed site, Parcel D.”

² BHR notes parenthetically that the development of this 228-acre parcel of land for expansive rail served industrial use has been in the works since prior to 2016, as evidenced by the March 2016 “So-Ordered” Stipulation of Settlement and related environmental impact review documents that have been discussed extensively in the record of this proceeding. There is no record of NAACP previously expressing any objections to such development. Why NAACP waited over five years to take an interest in the development of “Parcel D” is not known, since NAACP has not provided any such explanation, and NAACP has declined to meet with BHR.

Law Office of Thomas W. Wilcox, LLC

Letter to Cynthia Brown

June 15, 2021

Page 3

Letter at 2. Quite the contrary, BHR is confident that after a thorough analysis of the potential impacts of the proposed projects by OEA through its NEPA process, OEA, and ultimately the Board, will conclude that just the opposite of these sweeping statements is true.³

In conclusion, NAACP NY has had ample opportunities to learn about and voice any concerns or recommendations to BHR respecting the long-planned proposed development of this parcel of land for rail-served industry, the proposed rail construction by BHR, and its proposal to construct a SWRTF on 50 acres of the parcel. Prior to May 21, NAACP NY did not express any interest in the development of this parcel, let alone any objections. BHR hopes NAACP NY will accept BHR's invitation to meet and discuss in more detail NAACP NY's concerns and/or recommendations regarding the alleged impact of either project on "Brookhaven's poor and marginalized residents." In the meantime, it is BHR's understanding that NAACP NY's fears that such concerns and/or recommendations will not be fully considered in this proceeding are allayed by the fact that NAACP NY will have ample opportunities to provide input to OEA on the potential impacts NAACP NY sees through the Board's environmental review process under NEPA and/or any other opportunities the Board deems appropriate.

Respectfully submitted,



Thomas W. Wilcox

Attorney for Brookhaven Rail LLC

³ For example, NAACP NY laments that the projects will impact "residents in this area." However, the new line of rail, rail terminal and solid waste rail transfer facility proposed by BHR would not be near any residential community. The neighboring "community" of the proposed projects is industrial, and it includes: the Long Island Rail Road mainline and an existing rail terminal site; the County Police Headquarters; a County Correctional Facility; a County Sewage Treatment Plant; the Town of Brookhaven's landfill; a composting facility; and a rock crushing operation. The site is also proximate to the Caithness Power Plant and power substation. In short, the reason this 228-acre parcel was chosen for rail-served industrial use (subject to establishment of a 62-acre Open Space Conservation easement) more than five years ago is the *absence* of any sensitive residential receptors.

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of June 2021, a copy of the foregoing Letter replying the Letter of NAACP NY filed June 2, 2021 was served by email on all parties on the official Service List for this Proceeding.



Thomas W. Wilcox

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of November 2021, a copy of the foregoing Letter was served by email on all parties on the official Service List for Docket No. FD 36398.

/ss/ Thomas W. Wilcox