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November 3, 2021

Via Email

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

Re: Docket No. FD 36399 (Sub No. 1), *Brookhaven Rail, LLC – Application for Land Use Exemption Permit*; Request for Waiver of Six-Month Pre-filing Notice Requirement under 49 C.F.R. §1105.10(a)(1)

Dear Ms. Gosselin:

On November 2, 2021, Brookhaven Rail LLC (“Brookhaven Rail”) complied with the attached Decision issued by the Surface Transportation Board (“Board”) in Dockets No. FD 36398 and 36399 and served a copy of that Decision on the relevant parties referenced in 49 C.F.R. §1115.20(a)(2) at least 10 days prior to when Brookhaven Rail intends to file an Application for Land-Use Exemption Permit (“Application”) in the captioned docket. Brookhaven Rail anticipates submitting that filing in the next 14 to 21 days. The proposed solid waste rail transfer facility (“Facility”) that is the subject of the Application has been the subject of numerous discussions between Brookhaven Rail and the Office of Environmental Analysis (“OEA”) since at least June of 2020.

The purpose of this letter is to request that you expeditiously issue a ruling that the request of Brookhaven Rail to OEA for a waiver of the six-month prefiling notice under 49 C.F.R. §1105.10(a) that would otherwise have applied to the Application is no longer necessary. OEA asked Brookhaven to submit the request and it has now been pending since April 23, 2021. The letter was supplemented at OEA’s request on May 10, 2021, and OEA did not seek any additional information relevant to the waiver request after that date.

Under the circumstances, while Brookhaven Rail presented numerous compelling grounds for waiving this requirement – an action which is usually routine - a waiver is no longer needed because Brookhaven Rail has complied with it in every respect and its limited purpose has been

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fulfilled in any event. As summarized below, OEA received verbal notice that Brookhaven Rail was preparing the full Application on October 26, 2020, and OEA received written confirmation of this fact on January 22, 2021, at the latest. Moreover, OEA began preparing for the drafting of an Environmental Impact Statement (“EIS”) for the proposed Facility (and also the rail construction project that is covered by Docket No. FD 36398) in December 2020 and actually took initial steps toward preparation of the EIS between December 2020 and October 20, 2021, when you issued a decision suspending the environmental review. Thus, at a minimum, the six-month advance written notice period has now been exceeded by four months and the purpose of 49 C.F.R. §1105.10(a) has been fulfilled. *See Tongue River Railroad Company – Construction and Operation – Western Alignment* (served April 16, 1998) at 4 (emphasis in original) (“The six-month lead time is designed to allow SEA [now OEA] adequate time to *prepare* for the environmental review process.”). The more detailed reasons for this request are as follows:

On October 23, 2020, the Board issued a Decision that rejected the Petition for Exemption of Requirements of 10909 filed by Brookhaven Rail in Docket No. FD 36399. That Petition sought approval for the same Facility that will be covered by the forthcoming Application through the Board’s authority under 49 U.S.C. §10502. In that decision, the Board advised Brookhaven Rail to seek the relief it desired through a full application for land-use exemption permit. On October 26, 2020, the undersigned counsel for Brookhaven Rail orally informed Ms. Diana Wood of OEA’s staff via telephone that Brookhaven Rail would prepare a full application for land-use exemption permit. The next day, Brookhaven Rail filed a letter with the Board in Docket No. FD 36399 stating it had accepted the Board’s decision and asked for clarification of the regulations that would apply to providing parties advance notice of the Application prior to filing it.¹

Because Brookhaven Rail informed OEA that it was intending to prepare an Application for the Facility, discussions concerning the level of the environmental review of both projects that had begun in June 2020 continued after October 23, 2020. On January 12, 2021, Ms. Wood distributed a document dated December 9, 2020, that was a first draft of a “Scope of Work for an Environmental Impact Statement” for the combined projects. Page one of that document (attached) stated (emphasis added):

Pursuant to 49 U.S.C. §§ 10901 and 10909, Brookhaven Rail LLC (BHR) filed for approval from the Surface Transportation Board (Board) to construct and operate up to approximately 25,000 feet of new common carrier track (the Line) *and intends to file for a land-use exemption for a solid waste rail transfer facility (SWRTF) (together, the Proposed Project)* that would connect to the existing mainline in the Town of Brookhaven, Suffolk County, New York. The Board’s Office of Environmental Analysis (OEA) is responsible for preparing an environmental review of BHR’s proposed actions pursuant to the National Environmental Policy Act (NEPA). *Based on available information, OEA*

¹ Arguably, that filing provided OEA with sufficient written notice under §1105.10(a), which does not specify what form “written notice” should be provided.

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plans on preparing an Environmental Impact Statement (EIS) that will examine the potential environmental effects of the Proposed Project.

On January 22, 2021, Brookhaven Rail asked Ms. Wood for examples of “purpose and need statements and/or project descriptions,” in conjunction with the commencement of the EIS process, and informed Ms. Wood and OEA that “[w]e are in the drafting process of the new application now,” to which Ms. Wood replied “[t]hanks for letting us know”² Despite having previously granted a waiver of the 6-month prefiling notice for the Petition for Exemption from the requirements of Section 10909, OEA nevertheless requested that Brookhaven Rail submit a request for a similar waiver for the Application, and Brookhaven Rail complied via the aforementioned letter dated April 23, 2021.

In summary, OEA has had actual notice of the proposed Facility for over 16 months. It has known that Brookhaven Rail intends to submit a full Application for around 12 months. OEA began preparing to undergo the process of preparing an EIS covering the Facility and the rail construction project around 11 months ago. The six-month period following the January 22, 2021 email to OEA informing it that drafting of the Application had begun and OEA’s confirmation of that notice ended around June 22, 2021, which was over four months ago.³ Moreover, the purpose of giving 6-months advance notice of the Application has clearly been fulfilled, since not only has OEA learned enough about the projects over the past 16 months to “prepare for the environmental review process,” it actually began as far back as December 2020 to implement the process that will eventually lead to an EIS for the Facility and the rail construction project. Finally, in more recent discussions concerning the environmental review of the project OEA staff have advised Brookhaven Rail that filing the Application will provide the basis for advancing the EIS process undertaken to date, including enabling the re-issuance of updated scoping documents, agency consultation letters, and other actions. As stated above, Brookhaven Rail intends to file the Application in the next few weeks.

Accordingly, even though ample grounds existed for waiving Section 1105.10(a) in April of this year, the regulation has now been complied with in every respect and so the pending request for waiver is moot. Brookhaven Rail requests that you indicate your concurrence with this conclusion in an appropriate manner at your earliest opportunity. If OEA maintains that action on the request is still required, Brookhaven Rail asks that you immediately grant the request for all the same reasons expressed above and those expressed in prior correspondence from Brookhaven Rail to OEA and Brookhaven Rail’s other submittals on this subject in Docket No. FD 36398.

² See Docket No. FD 36398, Environmental Comment No. EO-3537, *Monthly Email Exchanges with Outside Parties* at 17.

³ Brookhaven Rail also notes that the Docket Number FD 36399 (Sub- No. 1) was created by the STB for the full Application on March 12, 2021, over 7 months ago.

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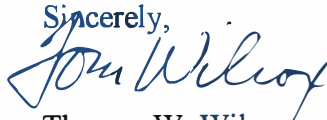
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Requiring Brookhaven Rail to provide OEA with any more advance notice about the Application or the Facility at this stage of the process would not only be superfluous, it would also be prejudicial to Brookhaven Rail and unnecessarily delay the Board's consideration of the merits of the Application.

Please do not hesitate to call me if you have any questions.

Sincerely,

Thomas W. Wilcox
Attorney for Brookhaven Rail LLC

Enclosure

ATTACHMENTS

SERVICE DATE – NOVEMBER 19, 2020

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36398

BROOKHAVEN RAIL LLC—CONSTRUCTION AND OPERATION EXEMPTION—IN
SUFFOLK COUNTY, N.Y.

Docket No. FD 36399¹

BROOKHAVEN RAIL LLC—PETITION FOR EXEMPTION FROM REQUIREMENTS OF
49 U.S.C. § 10909

Digest:² The Board provides that, if Brookhaven Rail LLC submits a full application for a land-use-exemption permit, it need not comply with certain requirements under 49 C.F.R. § 1155.20(a) and (b) but in lieu thereof must serve this decision on the entities listed in § 1155.20(a)(2) at least 10 days before filing its application and certify in its application that it has done so.

Decided: November 18, 2020

On October 23, 2020, the Board rejected a petition filed by Brookhaven Rail LLC (Brookhaven Rail) in Docket No. FD 36399 seeking exemption from the full requirements of 49 U.S.C. § 10909 and 49 C.F.R. part 1155 subpart C for a “land-use-exemption permit” in conjunction with the construction, ownership, and operation of a “solid waste rail transfer facility.”³ The Board stated 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.” Brookhaven Rail—Constr. & Operation

¹ These proceedings are not consolidated. A single decision is being issued for administrative purposes.

² The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

³ The Clean Railroads Act of 2008 (CRA), Pub. L. No. 110-432, 122 Stat. 4848, amended 49 U.S.C. § 10501(c)(2)(B) to restrict the Board’s jurisdiction over solid waste rail transfer facilities. The CRA also added three new statutory provisions—49 U.S.C. §§ 10908-10910—that address the Board’s regulation of such facilities, which is now limited to the issuance of “land-use-exemption permits” in certain circumstances. See 49 U.S.C. §§ 10908-10; Solid Waste Rail Transfer Facilities, EP 684, slip op. at 1 (STB served Nov. 20, 2012).

Exemption—in Suffolk Cnty., N.Y. (October 23 Decision), FD 36398 et al., slip op. at 6 (STB served Oct. 23, 2020).

On October 27, 2020, Brookhaven Rail submitted a letter seeking confirmation that it need not comply with 49 C.F.R. § 1155.20(a) and (b) before filing its application. (Brookhaven Rail Letter 1, Oct. 27, 2020, FD 36399.) Those sections require an applicant, among other things, to serve various entities with a “notice of intent” between 15 and 30 days before the application is filed. 49 C.F.R. § 1155.20(a)(2), (b)(1). The notice of intent explains filing procedures, including when comments on the application are due. The regulations also require that an applicant publish the notice of intent in a local newspaper once a week for three consecutive weeks within 30 days before filing the application. 49 C.F.R. § 1155.20(a)(3), (b)(2). Brookhaven Rail argues that the October 23 Decision did not mention the notice of intent requirements and that an extensive record has already been compiled. (Brookhaven Rail Letter 2, Oct. 27, 2020, FD 36399.) It adds that in July it served the now-rejected petition for exemption on state and local offices that would receive a notice of intent under § 1155.20(a)(2). (Id.) Finally, it asserts that newspaper publication is not necessary because the proposal to build the solid waste transfer facility is public knowledge and was already discussed in a local newspaper article, which Brookhaven Rail attaches to its letter. (Id.)

The Citizens Campaign for the Environment (CCE) filed in opposition to Brookhaven Rail’s letter on October 28, 2020. CCE argues, among other things, that Brookhaven Rail’s October 27 letter, the rejected petition, and the newspaper article relied upon by Brookhaven Rail have not alerted interested officials or the public of commenting procedures and deadlines for the application. (CCE Reply 2, Oct. 28, 2020, FD 36399.)

Under the circumstances here, Brookhaven Rail need not follow the agency’s notice of intent procedures and timetables set forth at § 1155.20(a) and (b) before it files its application. State and local entities are aware that Brookhaven Rail has sought to invoke the Board’s authority under the CRA concerning the proposed solid waste transfer facility. CCE’s involvement, as well as the newspaper article Brookhaven Rail includes with its letter, also suggest public awareness of the project. The Board will, however, require Brookhaven Rail to serve this decision on the entities that would receive a notice of intent under § 1155.20(a)(2) at least 10 days before filing its application and certify, in its application, that it has done so. This service will provide sufficient notice of the commenting procedures and deadlines set forth at 49 C.F.R. § 1155.23, including that comments on the application would be due 45 days from the filing date, should Brookhaven Rail choose to proceed with an application.

It is ordered:

1. If Brookhaven Rail intends to file an application seeking a land-use-exemption permit under 49 U.S.C. § 10909, it must serve a copy of this decision on the entities listed at § 1155.20(a)(2) at least 10 days before filing and certify in its application that it has done so.
2. This decision is effective on its service date.

By the Board, Board Members Begeman, Fuchs, and Oberman.

Brookhaven Rail Environmental Impact Statement

Draft Scope of Work for the Construction and Operation of a Proposed Rail Line and Solid Waste Rail Transfer Facility

December 9, 2020

Pursuant to 49 U.S.C. §§ 10901 and 10909, Brookhaven Rail LLC (BHR) filed for approval from the Surface Transportation Board (Board) to construct and operate up to approximately 25,000 feet of new common carrier track (the Line) and intends to file for a land-use exemption for a solid waste rail transfer facility (SWRTF) (together, the Proposed Project) that would connect to the existing mainline in the Town of Brookhaven, Suffolk County, New York. The Board's Office of Environmental Analysis (OEA) is responsible for preparing an environmental review of BHR's proposed actions pursuant to the National Environmental Policy Act (NEPA). Based on available information, OEA plans on preparing an Environmental Impact Statement (EIS) that will examine the potential environmental effects of the Proposed Project.

ICF prepared this draft Scope of Work to describe the tasks that would need to be performed to support OEA through the environmental review process. Under each task is a description of ICF's proposed approach and assumptions for completing the work. This Scope of Work is based upon ICF's understanding of the proposed action, review of the New York State Voluntary Draft EIS (VDEIS), review of the initial agency consultation letters, and ICF's experience performing similar types of work. The Scope of Work forms the basis for ICF's cost estimate. This Scope of Work reflects ICF's understanding of the level of effort required to support OEA through the EIS process. However, there are unknowns that could affect scope and budget, such as the outcome of the scoping process, changes to or additional information about the Proposed Project, comments on the Draft EIS, and other variables, such as but not limited to the scope of the analysis for climate change, traffic, air quality and cultural resources that may warrant further assessment. This Scope of Work is therefore subject to change. The Scope of Work incorporates the following general assumptions (additional assumptions are included under the individual tasks):

1. The EIS will be prepared pursuant to the Council on Environmental Quality's final NEPA rule. The EIS will be 150 pages or less and will be completed within 2 years.
2. The period of performance will be through January 2023.

This Scope of Work also serves as a preliminary scoping document that identifies the draft scope of resource issues to be analyzed in the EIS. Task 5, Draft EIS, Table 1 identifies the resource issues proposed for detailed analysis in the EIS and the issues that would not be carried forward for detailed analysis. Each resource topic under Task 5, *Draft EIS* includes a detailed description of ICF's proposed approach, methods for those resources to be analyzed in detail, and the rationale for dismissing certain issues from detailed analysis. With input from OEA, this preliminary list of issues would be used in the NOI to notify the public of the resource issues OEA intends to analyze. The list may change if additional resources/issues are identified during agency consultation.