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ATTORNEYS AT LAW

PETER A. PFOHL

May 6, 2021

VIA E-FILING

Ms. Danielle Gosselin, Acting Director
Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: FD 36399 (Sub-No. 1), *Brookhaven Rail LLC – Application Under 49 U.S.C. § 10909 for a Land Use Exemption Permit*

Dear Ms. Gosselin:

The Citizens Campaign for the Environment (“CCE”) hereby replies to the request for a waiver of the six-month prefiling notice under 49 C.F.R. § 1105.10(a) filed by Brookhaven Rail LLC (“BHR”) on April 23, 2021. For the reasons set forth herein, BHR’s request should be denied.

BHR first asserts that its compliance with the Board’s prefiling notice rules “is not appropriate in these circumstances” because BHR informed OEA of its intent to file its Application “immediately after” the Board’s denial of BHR’s exemption petition in *Brookhaven Rail LLC – Petition for Exemption from Requirements of 49 U.S.C. § 10909*, FD 36399 (STB served Oct. 23, 2020). BHR asserts that “[i]ndeed, references to the Application appear in the written materials of OEA dating back to at least December 9, 2020,” and therefore “the purpose and intent” of the rules have been met. However, no evidence of the referenced meetings and “written materials” exists in the public record. If such materials do exist, CCE requests that all such meeting records and written materials be posted in the docket immediately.¹ Also, even if such materials do exist, they would not absolve BHR from complying with the specific written notice requirements of 49 C.F.R. § 1105.10(a).

While prefiling notices “may be waived or modified where appropriate” (*id.* at § 1105.10(c)(1)), requests for waivers “must describe as completely as possible the

¹ For example, BHR states at note 2 of its letter that “[t]he timing, cost, and scope of the EIS has been the primary topic of our monthly conference calls and other correspondence concerning the project,” yet the only referenced materials that have been posted to date by OEA in this docket have been a copy of the April 6, 2021 meeting agenda and minutes (EI-30630) and limited third party contractor retention materials (EI-3511, EI-3507).

anticipated environmental effects of the proposed action, and the timing of the proposed action, and show that all or part of the six month lead period is not appropriate.” However, BHR’s request relies in large part on highly erroneous and misleading statements. For example, BHR wrongly asserts that the involved property for its proposed solid waste transfer facility (“SWTF”) “is already zoned for potential industrial use” presumably suitable for the project, but that is obviously not true. BHR is proposing to receive and process 6,000 tons of MSW and C&D per day in an environmentally sensitive area that is not zoned for such use. In fact, that is the very reason why BHR is seeking a land use exemption permit under 49 U.S.C. § 10909 from the Board to override and preempt local land use and zoning requirements.

BHR also asserts that the environmental impacts of its proposed project were already extensively reviewed through a 2017 Voluntary Draft Environmental Impact Statement (“VDEIS”), but that is also obviously not true. To the contrary, the Town of Brookhaven itself informed OEA less than a year ago, on July 31, 2020, that “[a] solid waste rail transfer facility (SWTF) was never envisioned for the site but rather a general industrial/transportation/rail transloading/industrial warehousing facility use, and the proposed action conflicts with the action studied in the aforesaid VDEIS.” (Emphasis added.) The Board simply cannot rely on the VDEIS that addressed a different project and rail design and in no way contemplated, much less evaluated, the potential impacts of a solid waste transfer facility of massive size and scope in a highly environmentally sensitive location, just feet above an aquifer system that is the sole source of Long Island’s drinking water.

BHR eventually begrudgingly acknowledges that the environmental review must address a number of serious potential significant impacts “particularly with regard to potential groundwater contamination, potential adverse impacts on air quality, potential nuisance impacts from odor, vectors and litter, the desire and need for a traffic study to review the impacts of trucking MSW and C&D into the facility, and more recently, issues such as environmental justice, climate change impacts, and potential downline impacts from rail operations.” However, BHR broadly speculates that the SWTF will “result in significant environmental and economic benefits,” by “alleviat[ing] the severe highway congestion . . . along with reductions in associated air and noise pollution and energy consumption.” BHR fails to reasonably advise that it has sited its Project at a location that will actually likely cause a large net increase in local truck traffic and significantly increased congestion on neighboring roads, with associated risks of cascading traffic delays, increased emissions, and a net decrease in energy efficiency, or even that such potential impacts exist and at least require further study and review. Additionally, BHR fails to acknowledge that the claim of shifting traffic from truck to rail is illusory here, especially where substantial waste originates west of the Project, and the proposed facility will likely not decrease the total number of trucks on Long Island roads. Further, it fails to reference that the train traffic that BHR projects exceeds environmental review thresholds and may cause further transportation congestion and

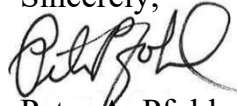
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delays and other adverse environmental impacts both locally and regionally (including for both freight and passenger rail) in non-attainment areas. BHR also fails to advise that potential alternatives exist, and that any environmental review needs to reasonably assess more than just a build and no-build alternative.

Additionally, BHR makes no acknowledgement of the fact that the environmental review will be used not only for NEPA purposes, but also for the Board's substantive review under 49 U.S.C. § 10909.

BHR's inaccurate and highly misleading project description and conclusory impact assertions purposely downplay the project's scope and the potential environmental impacts, significantly. Respectfully, BHR's failure to provide an accurate and complete description of the massive project and its potential impacts as required under the waiver requirements of 49 C.F.R. § 1105.10(c)(1), as well as its failure to note the additional function of the environmental analysis, require denial of its request.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter A. Pfohl", written over a horizontal line.

Peter A. Pfohl

Robert D. Rosenberg

Katherine F. Waring

Attorneys for the Citizens Campaign
for the Environment

cc: Diana Wood, OEA
BHR counsel