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VIA ELECTRONIC FILING

June 19, 2008

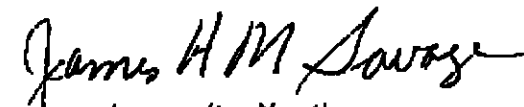
Hon. Anne K. Quirley
Acting Secretary
Surface Transportation Board
395 K Street, NW
Washington, DC 20423-0001

RE: STB Finance Docket No. 35036
T & P Rail Corporation--Construction and Operation
Exemption --Blackland Rail Terminal

Dear Acting Secretary Quirley:

On behalf of T & P Rail Corporation, I am electronically filing Petitioner's Motion to Strike the Town of Brookhaven's reply to T & P Rail's Petition for Clarification of the Board's Decision served October 12, 2007 in above captioned proceeding, or, in the alternative, for leave to file a limited rebuttal

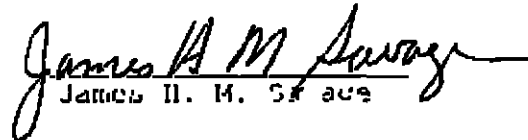
Respectfully submitted,
John D. Heffner, PLLC


By: James H. M. Savage

JHNS/mha
Enc
cc: Mark A. Luther (w/enc)

CERTIFICATE OF SERVICE

I, James H. M. Savage, certify that a copy of U & R
Corporation's Motion to Strike the Town of Brookhaven's response
to Petition for Clarification was served by electronic mail on
June 19, 2008 upon Mark A. Citabertson, counsel for the Town of
Brookhaven


James H. M. Savage

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35036

**U S RAIL CORPORATION
-- CONSTRUCTION AND OPERATION EXEMPTION --
BROOKHAVEN RAIL TERMINAL**

**MOTION TO STRIKE
TOWN OF BROOKHAVEN'S REPLY TO
PETITION FOR CLARIFICATION**

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Counsel for Petitioner
U S Rail Corporation

Dated: June 19, 2008

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35036

**U S RAIL CORPORATION
- CONSTRUCTION AND OPERATION -
BROOKHAVEN RAIL TERMINAL**

**MOTION TO STRIKE
TOWN OF BROOKHAVEN'S REPLY TO
PETITION FOR CLARIFICATION**

INTRODUCTION

Pursuant to 49 CFR 1104.8, 1104.10, and 1104.13, Petitioner U S Rail Corporation ("U S Rail") hereby moves to strike the Town of Brookhaven's ("Brookhaven") reply to U S Rail's Petition for Clarification of the Board Decision served October 12, 2007 ("October 12th Decision" or "Cease and Desist Order"), on the grounds that it contains material that is irrelevant, immaterial, impertinent and scandalous. In the alternative, U S Rail seeks leave to file this limited rebuttal to Brookhaven's reply in order to ensure a complete and accurate record.

BACKGROUND AND
PRELIMINARY STATEMENT

On May 2, 2008, U S Rail petitioned the Board, at the Board's suggestion, seeking a clarification as to whether the October 12th Decision permitted U S Rail to undertake certain activities[FN1] in advance of obtaining authority from the Board to construct railroad trackage at the Brookhaven Rail Terminal ("BRT"). Stripped of its invective and vituperative rhetoric, the Town of Brookhaven's ("Brookhaven's") redundant and at times inconsistent twenty-three page reply advances three basic arguments: 1) U S Rail's Petition represents an attempt to evade state and federal environmental and transportation regulation and oversight; 2) U S Rail has made numerous misrepresentations to the Board, the courts, and to Brookhaven itself; and 3) and the real purpose of this project is to conduct a sand-mining operation free from New York State and local oversight. Nothing could be further from the truth.

As the Board will recall, U S Rail had taken the position during the summer and autumn of 2007 that the construction of

FN1 Those activities which U S Rail characterized as necessary for site safety and security included 1) grading and removal of uneven mounds and pits created as a result of prior excavation work to eliminate potentially unsafe conditions, 2) installation of electric utilities, 3) installation of surveillance cameras, security equipment, and communications equipment, 4) installation of lighting, 5) installation of new , and maintenance of existing, fencing, and 6) use of the site for temporary structures such as trailers.

the BRT by an existing railroad common carrier involved spur, switching, or industrial track exempt from Board entry regulation under 49 U.S.C. 10906. After the Board ruled otherwise' U S Rail opted to seek construction authority from the Board. Accordingly, on March 17, 2008, representatives of U S Rail and Sills Road Realty LLC ("Sills"), the owner and lessor of the BRT site, met with representatives of the Board's Office of Proceedings, Office of the General Counsel, and Section of Environmental Assessment ("SEA") to discuss the project and how to proceed. During the ensuing weeks, U S Rail nominated Gannett Fleming, Inc. ("Gannett Fleming") as a third party independent environmental consultant to SEA, sought and obtained SEA permission to engage Gannett Fleming, sought a waiver of the SEA's regulation at 49 CFR 1105.10(a) requiring six months advance notice before filing a construction application, prepared and furnished the SEA with a Memorandum of Agreement ("MOA") among Gannett, SEA, and U S Rail governing the environmental aspects of this transaction, and filed the instant Petition for Clarification. U S Rail has proceeded in good faith and has done everything required of it "by the book."

Upon receipt of the six months waiver and execution of the MOA by all parties the SEA has advised that the environmental review process will have begun. U S Rail has been advised that

the filing of a Petition for Exemption governing the transportation aspects of its construction proposal is not yet required. Nevertheless, it will file a Petition for Exemption after receipt of the six months waiver or otherwise as the Board may direct.

In general, Brookhaven's highly redundant and often inconsistent Reply should be stricken because it is totally irrelevant to the sole issue here: whether the Board should clarify its October 12th Decision to permit U S Rail to engage in the Activities identified in Footnote 1 on page 5 in advance of a Board decision authorizing construction to begin. Rather than addressing the Board's standards for granting a clarification, [FN2] responding to the merits of U S Rail's request, or even identifying or describing the alleged adverse environmental impacts of the Activities, Brookhaven devotes the majority of its Reply to rehashing matters that occurred during 2007 and are no longer even at issue here.

FN2 The Board has held that a prior decision may be clarified in any instance in which there appears to be a need for a more complete explanation of the action taken therein. See, e.g., UP/SP, Decision No. 57, slip op. at 3 (Served: Nov. 20, 1996), accord, CSX/NC-Control-Conrail, STB Finance Docket No. 33388, Decision No. 96 (Served: Oct. 19, 1998).

MOTION TO STRIKE

Brookhaven mischaracterizes U S Rail's actions as "yet another attempt to evade regulation". Nothing could be further from the truth. The record reflects that U S Rail is scrupulously following the "letter of the law" by seeking Board authority for its rail construction activities.

Under Rule 4(d) of its Rules of Practice [49 CFR 1104.8], the Board may order that any redundant, irrelevant, immaterial, impertinent, or scandalous matter be stricken from any document. Associated Traffic Services, Inc. -- Petition for Declaratory Order -- Certain Rates and Practices Of SAIA Motor Freight Line, Inc., STB Docket No. 41996 (Decided: May 1, 1998). Petitioner accordingly moves to strike the following portions of Brookhaven's reply attacking U S Rail, Suffolk & Southern ("Suffolk"), Sills, their respective officers and counsel:

- P.1, L.3-5 "Petitioner's pleading is **yet another attempt to evade regulation** of its construction/mining activities at the Sills Road site by any governmental authority, be it Federal, State or local."
- P.1, L.5-6 "Brookhaven contends that **the Surface Transportation Board (the "Board") should not condone or foster U.S. Rail's [sic] activities, but instead should condemn those activities.**"

- P.1, FN 1 "Brookhaven also believes that the Board should consider imposing the penalties of 49 U.S.C 11901(c) on U.S. Rail [sic], Sills, Suffolk, and their respective officers "

Brookhaven provides no basis for asserting that the civil penalties of Section 11901(c) are either appropriate or warranted. Indeed, no order of this Board has been violated by the Petitioner, Suffolk or Sills or any of their respective officers. The only issue currently pending before the Board in FD 35036 is Petitioner's request to engage in certain Activities prior to receiving Board authorization for rail construction. The issues currently before the SEA in Finance Docket 35141 pertain to the SEA's environmental review of the proposed construction. Accordingly, the suggestion that the Board should impose some sort of penalty upon U S Rail or others for seeking clarification of a Board order or for initiating a required environmental assessment of the BRT shows Brookhaven's *animus* to this project and should be stricken.

- P.4, L.15-16 "Suffolk filed an **evasive response** on August 23, 2007 and stated, *inter alia*, that Sills never undertook any construction of rail facilities at the Sills Road location at issue here."

There was nothing evasive about Suffolk's August 23, 2007, response, which truthfully and accurately advised the Board that it was no longer involved in the Project and was seeking

to withdraw its Exemption Notice under this docket number. Gerard Drumm's April 22, 2008 verified statement indicates U S Rail, not Silis, commenced construction activities at the BRT site in August 2007. U S Rail was not a party to this proceeding until being made so *sua sponte* by the Board in October 2007. U S Rail initially intended to construct the BRT as an exempt spur, for which no Board authority was needed. U S Rail now intends to seek construction and operation authority from the Board under 49 U.S.C. 10901 in Finance Docket Number 35141 as the Board has indicated is required.

- P.6, L.6 "Though captioned as a different pleading, the Petition for Clarification is merely the latest in a series of many similarly-intentioned pleadings aimed at beginning construction free from any regulation and outside the bounds of the established regulatory framework by a nonrailroad."
- P.7, L.14 "Not content with two petitions before the Board and two separate attempts at judicial review by federal courts, through its Petition for Clarification U.S. Rail now comes to the Board for another bite at the apple "
- P.7, L.22 "Petitioner seeks permission to ignore the Board's prior mandate, side-step all state and local regulation, and begin activities without any oversight or authority from any governing agency."

As U S Rail explains in more detail later, the Petition for Clarification represents a good faith effort to stay within the Board's regulatory scheme by asking the agency for guidance as to whether it can conduct certain activities in advance of receiving construction authorization. Brookhaven's statement shows that it continues to harbor grudges by beating a dead horse well after the funeral. Brookhaven conveniently ignores U S Rail's statement at page 9 of that Petition that "it will continue to refrain from undertaking any of these Activities while awaiting the Board's clarification. U S Rail will only undertake those specific Activities authorized by the Board in its clarification ruling."

- P.8, L.12 "Forced to own up to its **misrepresentations** "
- P.8, L.13-14 "This **distorted account** of statements made at a meeting with the SEA is just the latest in a **string of misrepresentations** by U.S Rail [sic] before the Board "

Brookhaven seizes upon the exchange of correspondence between Petitioner's counsel and the SEA following the March 17, 2008 pre-filing meeting to question Petitioner's veracity in all matters before the Board. The exchange corrects a simple misunderstanding on the part of Petitioner's counsel, and in no way reflects upon the honesty of these parties.

Indeed, it was not until the March 17th conferees caucused further that a mutually acceptable resume of the conference arrived upon. Such reflection is neither evidence of nefarious motive on the part of the conferees, nor uncommon among deliberative bodies. The Board should not view U S Rail's submissions under any presumption of falsehood, as this would unfairly prejudice the Petitioner.

- P.8, L.22-23 "[B]ecause of the controversy created by U S Rail's [sic] **continuing attempts to evade** Board jurisdiction..."

There is no basis or justification for Brookhaven's continually referring to U S Rail's actions as controversial or evasive. There is nothing controversial about an existing Class III railroad seeking permission to construct a short new line of railroad to serve a new customer. The ICC Termination Act expressly authorizes such undertakings at 49 U.S.C. 10901 and there are numerous Board and Interstate Commerce Commission decisions authorizing such short track extensions.

The Board and Brookhaven are fully aware of U S Rail's rationale for proceeding initially with a plan to construct an exempt spur, as this was fully explained in U S Rail's Petition for Reconsideration as well as in its Stay Petition and will not be repeated at length herein. U S Rail accepts the Board's exercise of jurisdiction and is proceeding in good faith with

this Clarification Petition preparatory to filing its construction Petition.

- P.9, L.16 "Petitioner **misrepresents** its dealings with the Board to date "

On the contrary, it is Brookhaven that misrepresents the record when it wrongly states, "the threshold question regarding jurisdiction has not been answered." No reasonable interpretation of the Board's Decisions of October 12, November 16, and December 20, 2007 could possibly reach any other conclusion than that the Board was indeed exercising its jurisdiction over this Project. Petitioner agrees with Brookhaven that Board jurisdiction over Petitioner's activities [is] exclusive and preempts the application of [nearly all] state and local laws and regulations. FN3

- P.18, L.1-3 "[T]his Petition for Clarification is just another entry in [U S Rail's] **continuing ledger of misrepresentations and embellishments.**"

Brookhaven makes this impertinent statement as part of its collateral attack on Board Counsel's appellate pleading in the

FN3 In fact, this concession by Brookhaven contradicts its assertion at page 7 of its Reply that Petitioner seeks to "side-step all state and local regulation." Once the Board takes jurisdiction over a matter, one effect of that exercise will be to preempt state or local regulation.

Second Circuit. Brookhaven's thesis that counsel's signed pleading has no binding effect on her client is plainly wrong. Surely, fundamental fairness imposes a duty upon a party which has argued successfully (to the Second Circuit) that an opposing party (this Petitioner) has an alternative avenue for obtaining relief (via Petition for Clarification) to entertain that application once it is filed in the alternative forum. Brookhaven denies such a duty exists. This Board should find otherwise.

- P.21, L.2-5 "The evidence and testimony presented [at the District Court hearing] strongly suggested that U.S. Rail's [sic] involvement at the Property is **a mere subterfuge...to avoid state and local oversight of their true business venture-a lucrative sand-mining operation.**"

For the reasons set forth below in Petitioner's rebuttal to Point E of Brookhaven's Reply, the Board should strike this inflammatory and utterly inaccurate language from the Town's pleading.

REBUTTAL

Should the Board reject U S Rail's Motion to Strike, Petitioner alternatively requests the right to rebut each of Brookhaven's Points A through E in order to ensure the Board with a full and balanced record.

Regarding its first assertion, Point A, Brookhaven suggests that U S Rail is continuing to flout Board jurisdiction by failing to seek agency approval and evading any sort of environmental review. In fact, U S Rail is following the exact procedure contemplated by the Board and its regulations for railroad construction.

It has begun the environmental review process by requesting and participating in a pre-filing meeting with the SEA, seeking and obtaining SEA approval of a third party environmental consultant, drafting a memorandum of agreement concerning the terms and conditions of the consultant's retention, and obtaining a waiver of the six-month pre-filing notice requirements. See, Exhibits B and C. These actions clearly bespeak its intent to go forward with seeking Board authority to construct and operate the BRT. The only difference between this matter and a "garden variety" construction case is the filing of the Petition for Clarification.

Regarding Point B of Brookhaven's Reply, that U S Rail has avoiding engaging state and local officials in any review of this project, Petitioner submitted as Exhibit A to its Petition, the April 22, 2008 verified statement of Sills Vice President Gerard D. Drumm ("Drumm VS") documenting the nature and extent of those discussions to date. Once the SEA begins

its environmental review process, U S Rail is confident the SEA will seek extensive input from all affected federal, state, and local parties including Brookhaven.

Brookhaven's Point C, that neither the Board nor the SEA has suggested that U S Rail seek the instant clarification of the October 12th Decision, represents the biggest distortion of all. As the Board will recall, this suggestion - that U S Rail seek Board clarification of its ability to undertake some initial work at the site of the BRT - came during a hearing before the United States Court of Appeals for the Second Circuit and in the Board's brief to that Court. At pp. 10-11 of its brief, Board counsel states, "Because the STB is the agency that issued the Cease and Desist Order, it should have the first opportunity to interpret its own order, or to modify or clarify it if warranted." (Cite omitted.) For Brookhaven to suggest that the Board's attorney has no power to speak for the Board in a court filing or argument is nothing short of preposterous. Moreover, this suggestion was reiterated and discussed by Board employees present during the March 17, 2008 pre-filing meeting between U S Rail, Sills, representatives of the Board's Office of Proceedings and Office of General Counsel, and a staff member of the Section of Environmental

Analysis (SEA). FN4 U S Rail's petition for clarification followed.

As Brookhaven is well aware, U S Rail initiated the process of seeking Board authority to construct and operate the BRT on March 26, 2008 by filing pursuant to 49 CFR 1105.10(a)(1) a request for a waiver of the six month pre-filing notice requirement. That request, which Brookhaven opposed, is currently pending before the SEA. U S Rail has also obtained SEA approval, by letter dated June 4, 2008, of Gannett Fleming, Inc. to serve as third party environmental consultant for this construction project, which has been assigned STB Finance Docket No. 35141.

Accordingly, U S Rail did not mislead the agency in any way in stating that the Board invited it to seek clarification. At the worst, it could have stated that it did so upon the invitation of members of the agency's senior staff.

Finally, Brookhaven's Point D, that the proposed trackage is not an exempt spur under 49 U.S.C. 10906, and Point E, that the BRT is really an unauthorized sand mining operation masquerading as rail facility, illustrates this party's continued attempts to raise issues that are not relevant here

FN4 Whether or not to see clarification of a Board ruling would be outside the scope of responsibility of an SEA staff member as that section simply deals with environmental permitting and impact issues

and have been previously decided. In fact, U S Rail reiterates that it filed this Petition for Clarification with the understanding that it was seeking Board authority under 10901 to construct a line of rail, and not, as Brookhaven mistakenly believes, seeking a declaratory ruling that the BRT could be constructed as an exempt spur.

In response to Point E, the October 16, 2007 Verified Statement U S Rail President Gabriel D. Hall, submitted as Exhibit G in support of U S Rail's Petition to Stay the Board's October 12, 2007 Decision, sets forth in considerable detail the *bona fides* of U S Rail's intentions with respect the BRT. In particular, U S Rail has arranged for two locomotives to service the facility, which requires U S Rail to make a considerable tangible investment in this Project. On the contrary, there is not one shred of hard evidence that U S Rail's involvement in this Project is illusory. Brookhaven's scandalous accusations to this effect should be stricken. Moreover, the Drumm VS submitted with the Petition for Clarification indicates that site grading activities are a necessary precursor to installing rail. The disposition of the sand resulting from grading activities is ancillary to the main purpose of constructing a rail facility.

CONCLUSION

For the above stated reasons and based upon the above cited authorities, Petitioner U S Rail respectfully requests the Board strike the offensive portions of Brookhaven's reply, and further grant its petition for clarification of the Board's Cease and Desist Order (October 12, 2007 Decision). Petitioner further seeks expedited consideration for its request so that it can undertake this initial work during the 2008 construction season with a decision issued within 60 days of the date of filing and effective upon service.

Respectfully submitted,
JOHN D. HEFFNER, PLLC

By: John D. Heffner

And

James H. M. Savage

Attorneys for Petitioner
U S RAIL CORPORATION

Dated: June 19, 2008

EXHIBIT B



SURFACE TRANSPORTATION BOARD

Washington, DC 20423

Office of Economic, Environmental Analysis and Administration

June 4, 2008

John D. Heffner, Esq.
1750 K Street, NW
Suite 350
Washington, DC 20006

**Re: Finance Docket No. 35141, U S Rail Corporation Construction and
Operation of the Brookhaven Rail Terminal – Suffolk County, New York;
Approval of Third-Party Consultant**

Dear Mr. Heffner:

Thank you for your March 24, 2008 letter regarding the proposed construction and operation by U S. Rail Corporation (applicant) of an approximately 11,000 feet (roughly 2 miles) of new rail line to serve proposed facility in Yaphank, NY, the Brookhaven Rail Terminal. In your letter, you request approval under 49 CFR 1105.10(d) for the retention of Gannett Fleming Inc., (Gannett) as an independent third-party consultant for the above referenced project. Your request is approved and we ask that you follow the directions below to ensure that the third-party process is successful for all concerned.

On March 17, 2008, the Surface Transportation Board's Section of Environmental Analysis (SEA) met with the applicant regarding the proposed project. At the meeting, SEA was provided with an overview of the project and viewed maps of the area surround the proposal. SEA also presented an overview of the Board's environmental process, SEA's role in the process, and the use of third-party consultants.

As explained at the March 17 meeting, Gannett will prepare the appropriate environmental document on behalf of the Board. While Gannett's costs will be paid by the applicant U S. Rail, Gannett will work under the sole direction, control, and supervision of SEA.

I have enclosed a disclosure statement and ask that you forward it to Gannett to complete. Once the statement is signed by Gannett, Gannett should return the signed disclosure statement to me at the following address:

Victoria Rutson
Section of Environmental Analysis
395 L Street SW
Washington, DC 20123

I will ensure that the signed disclosure statement is posted on the Board's website. If you have questions or concerns, please do not hesitate to contact me or Troy Brady of my staff at (610) 793-4301 or Troy.Brady@vth dot gov

Sincerely,

A handwritten signature in black ink, appearing to read "Victoria Rutson". The signature is fluid and cursive, with a large initial "V" and "R".

Victoria Rutson
Chief, Section of Environmental Analysis

Enclosure

EXHIBIT C



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Economics, Environmental Analysis and Administration

June 17, 2008

John D. Heffner, Esq.
1750 K Street, NW
Suite 350
Washington, DC 20006

**Re: Finance Docket No. 35141, U.S. Rail Corporation Construction and
Operation of the Brookhaven Rail Terminal – Suffolk County, New York;
Waiver of Six-Month Prefiling Notice**

Dear Mr. Heffner:

Pursuant to 49 CFR 1105.10(c), we are granting your request of March 26, 2008, for waiver of the six-month prefiling notice generally required for construction projects under 49 CFR 1105.10 (a)(1).

On March 17, 2007, the Surface Transportation Board's Section of Environmental Analysis (SEA) met and consulted with representatives of U.S. Rail Corporation (U.S. Rail) regarding the potential environmental impacts associated with the construction and operation of 11,000 feet of new rail line in Suffolk County, NY. Also attending this meeting were representatives of Sills Road Realty, LLC (Sills Road). The representatives of U.S. Rail and Sills Road explained that, if approved, U.S. Rail would construct and operate a new rail line for the sole purpose of transporting stone aggregate to a proposed new rail served facility, Brookhaven Rail Terminal (BRT), which would be owned and operated by Sills Road. The proposed new rail line, as well as BRT, would be constructed on a 28 acre parcel that is located within the Town of Brookhaven's North Belleport Empire Development Zone and owned by Sills Road.

If approved, the new rail line would ship to BRT between 5,000 and 6,000 carloads of aggregate stone in bulk or as gabions (wire mesh baskets) annually for use by Sills Road. U.S. Rail would operate two trains per day (one train making a single daily roundtrip) comprising 40 carloads per trip. U.S. Rail and Sills Road have also indicated that the BRT may also be used for the temporary storage of intermodal containers.

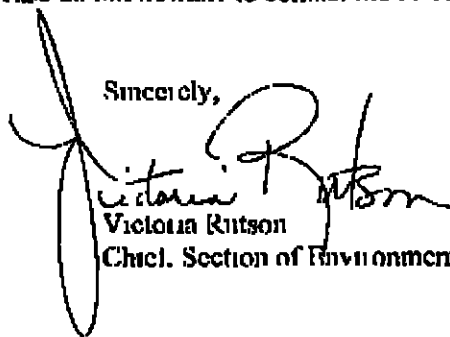
On April 21, 2008, the City of Brookhaven (City) submitted a letter requesting that SEA deny U.S. Rail's request for a waiver from the six-month prefiling requirement. In its submittal, the City makes the following assertions: 1) U.S. Rail has not fully described potential environmental impacts, 2) U.S. Rail's proposal is a subterfuge to allow the U.S. Rail and others to preempt state and local environmental laws, and 3) U.S. Rail and others are likely to use the new rail line (if permitted) to construct and debris materials from the BRT property.

In a letter dated April 29, 2008, U.S. Rail responded to the City's filing contesting the City's arguments.

SEA believes that it is inappropriate, at this preliminary juncture, to address the concerns raised by the City. Based on SEA's review of the criteria required by 49 CFR 1105.10(c), SEA believes that U.S. Rail has provided sufficient information to allow us to waive the six-month profiling requirement. Moreover, SEA notes that once the environmental review process is underway, the City will have ample opportunity to be heard and to fully air its concerns.

If we can be of further assistance, please do not hesitate to contact me or Troy Brady of my staff at (610) 793-4301.

Sincerely,

A handwritten signature in black ink, appearing to read "Victoria Rutson". The signature is stylized with a large, looped initial "V" and a cursive "R".

Victoria Rutson
Chief, Section of Environmental Analysis