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SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35141
U S RAIL CORPORATION – CONSTRUCTION AND OPERATION EXEMPTION–
BROOKHAVEN RAIL TERMINAL

**TOWN OF BROOKHAVEN'S REPLY TO BROOKHAVEN RAIL TERMINAL AND
BROOKHAVEN RAIL LLC'S NOVEMBER 10, 2014 MOTION FOR LEAVE TO FILE A
REPLY TO A REPLY**

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Dated: November 13, 2014

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Preliminary Statement

BRT's motion for permission to file a reply ("Proposed Reply") compounds its prior non-compliance with the Board's Orders, as well as its non-disclosure and prior fraudulent concealment of its illegal and environmentally destructive "transfers", "pumping", "storage", "handling", and "use" of "*used oil*" as a "used oil processor[]" at its Terminal. The Proposed Reply should be rejected as it seeks to mislead this Board and contains unsubstantiated assertions and abjectly meritless contentions. Alternatively, if the Board accepts BRT's Proposed Reply it should accept this submission by the Town of Brookhaven as the Town's first opportunity to respond to the false and misleading claims made by BRT in its Proposed Reply.

A. BRT's Proposed Reply admits it has been illegally transporting "used oil" for over one year without the permits it admits are required, and in direct violation of Environmental Condition No. 2.

After this Board's August 28, 2014 Order directed BRT to demonstrate compliance with three environmental conditions previously imposed by the Board concerning BRT's currently operating rail terminal located on the 28-acre Parcel ("Terminal"), which Terminal was represented by BRT to be principally devoted to transloading crushed stone aggregate and similar environmentally benign railway activities, BRT filed a September 29, 2014 Response ("Response") which astoundingly disclosed its plans to transfer over 100,000 gallons per week of "*used oil*" (even described at page 16 of its Spill Prevention Plan as "*waste or used oil*") into and out of its Terminal with no permits or regulatory oversight, and a glaringly insufficient proposed Spill Prevention Plan.

As noted in the Town's previously filed Reply to BRT's Response, BRT's disclosure

of its “*waste or used oil*” operations at the Terminal were artfully buried within its deliberately opaque and misleading 113 page Response and Spill Prevention Plan (with its only passing mention in the Response itself appearing parenthetically on its p. 8), which nevertheless startlingly disclosed BRT’s plans to transfer hundreds of thousands of gallons of “*used oil*” per week into and out of its Terminal (see BRT’s Response, p. 8; Exs. 3 and 4, Spill Prevention Plan, p. 3, 6, 10, 12, 15, 16, 18, 20, 22 and 23 citing to the numerous admissions of “*transfers*”, “*Process[ing]*”, “*pumping*”, “*storage*”, “*handling*”, and “*use*” of “*used oil*” at the Terminal quoted in the Town’s prior submission).

With appalling arrogance, BRT’s Proposed Reply dismisses the Town’s discovery of its heretofore undisclosed plans to transload “*used oil*” at the Terminal as “*the Town’s wild-eyed claims that [BRT’s] transportation of used oil, which commenced in September 2013, was ‘almost buried within’....*”. But, that dismissive remark contains yet another environmentally shocking revelation, disclosing for the first time that it has actually been engaged in the “*transportation of used oil [... since] September 2013*” (i.e., for more than a full year), without prior disclosure to the STB, to the Town, and to the numerous State regulatory authorities (including the New York State Department of Environmental Conservation and the Suffolk County Department of Health) having jurisdiction over the matter. As though that alone were not enough, as shown below (and affirmed in Declaration form at the foot of this submission), BRT has made misrepresentations to, and concealed the used oil transports from, the Suffolk County Department of Health, resulting in the illegal activity being referred by the Department of Health to its Legal Department upon its learning

of the admission contained in the Proposed Reply.

Thus, yet again, BRT's submission requires the reader and this Board to carefully read between the lines, and through a Proposed Reply dripping with condescension, even though buried within it are admissions of serious and troubling existing illegal conduct by BRT which dangerously imperils Long Island's Sole Source Aquifer and drinking water.

The Town's Reply pointed out that BRT's Response was worded in such a fashion as to completely avoid any temporal references, and failed to clearly state whether the massive amount (over one hundred thousand gallons a week) of "used oil" was already being transported (and possibly also stored and processed) from the Terminal, without Suffolk County of Health permits, in direct violation of the County Sanitary Code, Environmental Condition No. 2, and the Stipulation of Settlement, and with a completely inadequate SPCC Plan. BRT's Response had certainly suggested that the "used oil" operations were only a potential future endeavor,¹ but given BRT's record, the absence of indication of current and

¹ BRT's September 29, 2014 Response deliberately suggested that the used oil transfers were a future possible operation to be undertaken once Sanitary Code clearance is obtained, as opposed to an existing large-scale operation. Thus, other than stating that BRT's SPCC Plan shows compliance with various regulations including one which pertains to used oil "processors and refiners", the Response itself contains only one reference to "used oil", in the context of a future possible permit application to the County Department of Health. 9/29/14 BRT Response, p. 8 ("*Additionally, Respondents and P.W. Grosser are discussing with Suffolk County staff the extent to which the Suffolk County Sanitary Code Article 12 permit requirements are applicable to BRT's present and future operations (principally bio-diesel and used oil transfers). Exhibit 4. Respondents will file a notice with the Board once that determination is made*"). The SPCC Plan (adopted in late September 2013, the same date or after the September 2013 date BRT now admits it commenced the used oil transfers) makes clear that the "used oil transfer area" was not even yet constructed. SPCC Plan p. 10 ("*Used oil transfer operations include an anticipated area at the south eastern portion of the property as indicated on Figure 2. Trucks with a maximum capacity of 6,800 gallons of used oil will transfer contents to an awaiting railcar with a maximum capacity of 26,000 gallons. It is anticipated that, on average, four railcars will be*

past activities was suspicious.

Now, in its Proposed Reply, BRT in passing belatedly acknowledges that it has been transporting used oil since September, 2013. Proposed Reply p. 7. BRT does not excuse its complete lack of candor to this Board in having failed to mention that critical fact in its September 29, 2014 Response. Indeed, that BRT has for over one year been violating the County Sanitary Code, Environmental Condition No. 2, and the Stipulation of Settlement (even though its Response falsely contended that it was in compliance with the Stipulation of Settlement as well), but never saw fit to mention it in its Response to this Board's express order and directive for that very information, is no minor omission which should be excused.²

Moreover, in a reprehensible further diversionary tactic apparently aimed at again misleading this Board, BRT's Proposed Reply purports to address its compliance with the County Sanitary Code, boldly argues that the Town's objections are not "accurate", but the filing does not allege anything about complying with the Sanitary Code regarding used oil. Thus, the Proposed Reply asserts that the Suffolk County Department of Health has indicated that biodiesel does not require permits, and that "soybean oil" does not require permits. The reference to "soybean oil" is to biodiesel, and not to "used oil." Proposed Reply p. 8. The Board should accordingly notice what BRT conspicuously does not deny—the fact the even

filled and shipped out to destination facilities or transfer stations weekly") (emphasis supplied).

² This Board's August 28, 2014 Order mandated that BRT provide "proof of compliance" with the Environmental Conditions, past and future. Additionally, it is notable that BRT's new admission that used oil was transported from the Terminal since "September 2013" leaves open the possibility that these illegal transfers occurred even before BRT's management "adopted" the SPCC Plan on September 20, 2013 (Proposed Reply p. 8), let alone before that plan was implemented.

according to it “used oil” does require a permit from the County; even according to it BRT has been illegally transporting “used oil” without a permit for over a year and in direct violation of Environmental Condition No. 2; and even according to it BRT did not even contact the County Department of Health until September 2014, after this Board wisely determined to require BRT to prove compliance with the Environmental Conditions.

Upon reading BRT’s Proposed Reply, we were understandably wary of taking BRT at its word regarding its discussions with the County Health Department (particularly given that the Proposed Reply is not accompanied by any Declaration or sworn statements alleging that only pure “soybean oil” biodiesel is being and will be transported). On November 12, 2014, we telephoned the Department of Health official whom BRT’s Proposed Reply identifies, Assistant Public Health Engineer Kenneth Clunie, and inquired whether the contentions BRT has made to this Board in the Proposed Reply are true. We informed the health official that, again, the Town does not oppose BRT’s transfer of clean biodiesel at the Terminal if done in an environmentally responsible manner, but needed confirmation that BRT’s latest assertions were true. The official reported that BRT has (apparently verbally) promised that the biodiesel it is transporting is pure biodiesel without petroleum products, and that the Department did relay that pure biodiesel does not require permits under the Sanitary Code. However, he indicated that permits are still necessary for used oil transfers, on-site fuel storage, as well as for any biodiesel which may contain mixtures of petroleum products or other regulated substances. We inquired whether BRT has yet submitted a permit application, and were informed that it still has not done so. We further inquired whether BRT

had disclosed to the Health Department that it has already been transporting the used oil, and has done so for over one year, and the official informed us that this was not previously disclosed by BRT as far as he is aware, he learned of it for the first time by our report of what is stated in the Proposed Reply, and that to the contrary, BRT had made it appear to his Department as though the used oil transports were a proposed future endeavor, to be conducted only if and when permits are ever approved after it submits a permit application. He indicated that upon his receipt of a copy of the Proposed Reply, which we are supplying to his Department along with this filing, he is referring to the Department of Health's Legal Department the possible and apparent illegal massive transports of large amounts of used oil without permits and in violation of the Sanitary Code.³

BRT is in direct violation of Environmental Condition No. 2, is conducting highly dangerous to the Aquifer a massive over 100,000 gallon per week illegal "used oil" operation without permits and with an incomplete SPCC Plan, is doing so also in violation of the Stipulation of Settlement, and must be directed to discontinue the used oil operations. Additionally, as shown in Section D below, BRT's Proposed Reply does not even address, much less contest most of the fifteen numbered objections made by the Town in its Reply. The SPCC Plan should be deemed deficient as to the biodeisel, BRT directed to provide more protective measures and countermeasures, and the used oil barred.

³ The signature page of this Reply includes a declaration under penalty of perjury from the attorney who spoke with the County health official, confirming the above.

B. BRT’s claim that the Used Oil Recycling Act of 1980 rendered used oil not a “solid waste”, is specious, and its Proposed Reply does not claim the used oil it is transporting is not contaminated or not a historically “discarded” waste material.

The Stipulation of Settlement expressly prohibits BRT from transporting or otherwise handling “solid waste” as defined in 42 U.S.C. 6907, and that statute clearly includes “used oil” within the broad definition of “solid waste”. BRT’s argument in its Proposed Reply that this Board should ignore the plain meaning of that statute (42 U.S.C. 6907(27)), and ignore the EPA regulations promulgated under it deeming used oil a solid waste (40 CFR 261.3(a)(2)(v); 40 CFR 241.3), to conclude that somehow “used oil” is not or never a “solid waste”, is utterly meritless.⁴ See also 76 Fed. Reg. 15456, 15503 (Mar. 21, 2011) (as quoted below, the EPA rejected the exacts same statutory analysis which BRT now propounds in its Proposed Reply).

The Solid Waste Disposal Act (a part of the Resource Conservation and Recovery Act), at 42 U.S.C. 6907(27), broadly defines “solid waste” to clearly include used petroleum products like “used oil”. It would surely come as a surprise to anyone that contaminated used oil which is historically discarded after its use, and which sometimes qualifies as a

⁴ The Board should clearly reach the issue of whether the used oil violates the Stipulation of Settlement. As shown, the transportation (and storage and possible processing) of used oil in violation of the Stipulation of Settlement first arose when BRT referenced it in its September 29, 2014 Response to this Board’s directive, where BRT stated that it planned to seek permits if necessary for used oil transfers. That violation of the Stipulation of Settlement is not mentioned in the Town’s complaint in the pending federal action, for the obvious reason that BRT did not disclose it until the Response, and did not disclose that the used oil transfers have already been happening for a year, until its Proposed Reply. With Environmental Condition No. 2 being specifically targeted to potential petroleum spills and protecting the Aquifer, the issue of the used oil arising first and only in this proceeding, and all parties addressing it and seeking this Board’s ruling on it, the Board should clearly reach the issue.

“hazardous waste”, is somehow not even a mere “solid waste” on par with ordinary “garbage” or “refuse” or other “discarded material” resulting from any sort of commercial or noncommercial “operations” or from any sort of “community activities”, as “solid waste” is broadly defined in the statute. 42 U.S.C. 6907(27). BRT’s Proposed Reply does not at all indicate what sort of “used oil” it is illegally and without permits transporting out of the Terminal, the source of the used oil, the level of its contamination, or whether the used oil is destined for a landfill or solid waste recycling facility, and thus conspicuously makes no claim that the “used oil” which it is handling is not waste oil meeting the quite broad definition of “solid waste” provided in 42 U.S.C. 6907 and expressly incorporated into the Stipulation of Settlement.

Indeed, the Town’s Reply pointed out that the undescribed “used oil” which BRT is handling may even constitute a “hazardous waste”, in response to which BRT again does not claim that what it is handling is not so contaminated so as to meet that definition. See 42 U.S.C.A. § 6935; 40 CFR Part 261.3(a)(2)(v) (“*Rebuttable presumption for used oil*” constituting “*hazardous waste*”). “*Hazardous waste*” is by definition a “*solid waste*”. 42 U.S.C. 6907(5).

BRT’s reliance in its Proposed Reply on the Used Oil Recycling Act of 1980 (“Recycling Act”) is completely without merit. In 1980, Congress enacted the Recycling Act to supplement the Solid Waste Disposal Act, so that handlers of used oil—which liquids were always within the broad definition of “solid waste”—are encouraged not to dispose of it in solid waste landfills, and to instead recycle it. Pub. L. No. 96-463, 94 Stat. 2055. Turning

the text, purpose, and intent of the Recycling Act on its head, BRT argues that because the Recycling Act added a specific definition for “used oil” into the Solid Waste Disposal Act, that means that somehow used oil is not, and never can be, a solid waste. The claim finds no support whatsoever in the statute.

Thus, the added definition of “used oil” placed by the Recycling Act into the Solid Waste Disposal Act at its § 6907(36), does not purport to exclude used oil from the Solid Waste Disposal Act in general, or from its broad definition of “solid waste” in 6907(27). Indeed, the definition of “solid waste” in subsection (27) expressly states what its broad definition does not include, and contains no exclusion for used oil. 42 U.S.C. 6907(27)(“The term “solid waste” means ..., but does not include solid or dissolved material in domestic sewage,....”). Moreover, in the Recycling Act, Congress defined “used oil” as oil which was “used” and “as a result of such use, contaminated by physical or chemical impurities”, making it fall squarely within the “solid waste” definition of a “liquid” “discarded” materials that result from commercial or agricultural “operations, and from community activities.” Recycling Act, § 3, codified at 42 U.S.C. § 6907(36); see additionally Recycling Act § 2(3) (“used oil constitutes a threat to public health and the environment when reused or disposed of improperly”) (emphasis supplied). Additionally, the Recycling Act contains express provision directing the EPA to promulgate rules for when “used oil” is so contaminated as to constitute “hazardous waste”. Recycling Act, § 7, codified at 42 U.S.C.A. § 6935. This provision would have no meaning if used oil does not at the least constitute a solid waste, given that “hazardous waste” is defined to be a particular type of “solid waste.” 42 U.S.C. §

6907(5) (“The term ‘hazardous waste’ means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—....”) (emphasis supplied). Further, the Recycling Act added a provision regarding state plans for dealing with “solid waste”, allowing them to make provision in such “solid waste” plans for recycling of used oil. Recycling Act, § 5, codified at 42 U.S.C. § 6943; see 42 U.S.C. § 6943 (such “State plans” are plans for “solid waste management”).

C. BRT’s claim premised on EPA’s designation of combustible used oils as a solid waste in 2011 is meritless.

Applying bad logic, BRT contends that even though the EPA’s regulations concerning burning of used oil make clear that used oil intended for use as a combustible fuel, with limited exception, is a “solid waste” under the definition of “solid waste” found in 42 U.S.C. 6907(27), that is irrelevant because one particular EPA interpretation of 6907(27) came one year after the Stipulation of Settlement was entered into. See BRT’s Reply at p. 12, citing 76 Fed. Reg. 15456, 15503 (Mar. 21, 2011) and EPA final regulations codified at 40 C.F.R. pt. 241. The claim is baffling.

Simply put, the text of 42 U.S.C. 6907(27) was in place at the time the Stipulation of Settlement was executed in 2010, and the EPA’s subsequent further interpretation of it as including used oil (except for certain types of clean used oil for burning) only reinforces the fact that used oil is a solid waste. In the Solid Waste Disposal Act, Congress itself defined the term “solid waste” in the statute, and did not merely provide that later rule-making by the EPA will first give the definition. 42 U.S.C. 6907(27). Nor did Congress suggest that before

such rule-making “solid waste” had no meaning and was unregulated.⁵

Moreover, it is clearly relevant that the EPA has repeatedly determined that used oil is plainly a “solid waste” under 42 U.S.C. 6907 (except for certain clean used oil intended for burning), and that the EPA (even before 2010) has in fact dictated a rebuttable presumption that some used oil is a hazardous waste. 40 CFR 261.3(a)(2)(v); 40 CFR 241.3; see also 76 Fed. Reg. 15456, 15503 (Mar. 21, 2011) (rejecting the exacts same statutory analysis which BRT now propounds in its Proposed Reply, that because 42 U.S.C. 6907 defines “solid waste”, “used oil”, and “recycled oil”, each term is somehow “mutually exclusive”; holding that they are absolutely not “mutually exclusive” and pointing out that “a plain meaning of the word” “discarded” in the solid waste definition shows that contaminated used oil is a solid waste which has been historically discarded, and that it remains a solid waste even if it is designated to later be recycled).⁶ The Stipulation of Settlement incorporates the definition of

⁵ The EPA final rule-making comments quoted in BRT’s Proposed Reply (76 Fed. Reg. 15456, 15503 (Mar. 21, 2011)) concern the EPA’s analysis of whether used oil should be deemed a solid waste if it is to be burned as a fuel. That is, BRT is citing to the EPA’s rule-making under the Clean Air Act and not the Solid Waste Disposal Act. Unlike the relevant Solid Waste Disposal Act provision, the Clean Air Act defers to the EPA’s regulations for what particular contaminants and levels of contaminants constitute “solid waste”. See Clean Air Act § 129, codified at 42 U.S.C.A. § 7429(6) (“The terms ‘solid waste’ and ‘medical waste’ shall have the meanings established by the Administrator pursuant to the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.]”) (emphasis supplied). No similar provision is contained in the Solid Waste Disposal Act’s section 6907 referenced in the Stipulation of Settlement. Moreover, as quoted below, in applying its Clean Air Act authority to construe the definition of “solid waste” found in the Solid Waste Disposal Act, the EPA applied a “plain meaning” approach to conclude that the definition of “solid waste” therein easily includes contaminated used oil.

⁶ The EPA explained:

EPA’s Response: EPA disagrees that this analysis of the statute and regulations shows that off-specification used oil is not a solid

“solid waste” found in the Solid Waste Disposal Act, and that Act is most directly administered by the EPA. Under these circumstances, this Board should clearly give deference to the EPA’s conclusion that most used oil easily constitutes solid waste within the plain definition of that term found in 42 U.S.C. 6907(27). See State of N.M. v. Watkins, 969 F.2d 1122, 1131-1132 (D.C. Cir. 1992) (deferring to the EPA’s interpretation of the Resource Conservation and Recovery Act [of which the Solid Waste Disposal Act is a part] over that of another federal agency, when that other federal agency was not created under that statute).

waste. The Agency agrees that section 3014 of RCRA does not classify used oil as either a waste or a commodity. However, section 1004(37), also, does not define “recycled oil” as either a waste or a commodity. As EPA has explained elsewhere in this preamble, the recycling of secondary materials, per se, does not mean that such materials are either wastes or not. Wastes may have value and may be recycled, but they are still wastes. Used oil may be recycled by being “burned,” as provided under 10041371, or may be recycled in any number of other ways. The mere fact that the secondary material is recycled is not dispositive for determining whether it is a waste. Thus, under the statute, contrary to the commenter’s view, “recycling” and “solid waste” are not mutually exclusive. This means that [under the Clean Air Act § 129, codified at 42 U.S.C.A. § 7429(6)] EPA must decide whether the secondary material is a waste based on the definition of solid waste in RCRA 1004(27) by deciding whether material is “discarded” in the plain meaning of the word. (Emphasis supplied).

D. The Proposed Reply falsely claims the Town's Reply is "inaccurate," and BRT in fact does not contest most of the Town's objections.

With its bold claims that the objections in the Town's Reply are "inaccurate", the Board should not be misled by BRT's Proposed Reply to conclude that BRT denies all or even most of the Town's fifteen numbered objections enumerated in the Town's Reply. Proposed Reply, pp. 2-3. In fact, the Proposed Reply does not address the following numbered objections of the Town: 1 through 9, 13, and 14. And, as shown above, its argument with regard to objections 10 through 12 and 15 are meritless. Additionally, with respect to objections 8 and 9, that the operations regarding used oil appear to further include illegal storage of large amounts of used oil, and possibly its processing and refining, the Proposed Reply purports to address this but nowhere claims BRT is not already storing, and does not plan to store, the large amounts of used oil on site. Moreover, its footnote contention at p. 6 that "*BRT does not, in fact, perform services covered by used oil processing or refining*", in addition to being strangely worded and once again suspicious (does it perform used oil processing or refining that it not "covered" by the cited regulations?), is made without supporting proof.

Additionally, BRT cannot delay implementation of this Board's clear directive that it "*file ... proof of compliance*" with the three Environmental Conditions "*by September 29, 2014*", by promising to on some unspecified future date make a new filing with a new SPCC Plan. The existing SPCC Plan is woefully deficient, BRT was obligated to have a valid plan before it commenced operations in 2011, and its failure to have one requires a determination that it is and has been out of compliance.

Further, BRT wrongly pretends that the Town “concedes” BRT’s compliance with Environmental Conditions No. 1 and No. 3. The Town does not so concede. It is BRT’s obligation to present “proof of compliance” with those two further conditions. Moreover, the Town has specifically pointed out that BRT’s Response fails to provide sufficient details with regard to Environmental Condition No. 1. Even this Board’s staff has made the same observation. Additionally, as shown in the Town’s Reply at its objections 4 and 5, the SPCC Plan references a “used oil transfer area”, the construction of which BRT even now does not claim the Town was aware or approved its plans, such that the Town could comment on any drainage plan. Moreover, as shown in the Town’s Reply at its objection 3, the disclosed massive amounts of used oil are proposed to be (and it turns out have already been) transferred in that area with only a 50 gallon drip pan, which is not sufficiently protective of the Aquifer. And, as shown in the Town’s objection 5, it is not even apparent where that used oil transfer area is located, such that the Town could cogently address drainage there and whether it is adequate or appropriate to the area where large amounts of used oil are illegally being pumped, with a serious concerns of it seeping into the Aquifer in the event of a spill.

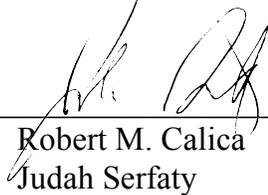
Moreover, as shown in Point III of the Town’s Reply, in 2014 BRT’s documents reflected that BRT planned to construct on this 28 acre parcel other unapproved uses, including a “*POLYMER PLANT*” and an “*ASPHALT CEMENT TERMINAL*”, which BRT’s current submissions do not claim have been or will be built, or provide that it has complied with any of the three Environmental Condition regarding them, such that they must be prohibited.

Conclusion

BRT's motion to file the Proposed Reply should either be denied or the Board should accept this Reply by the Town as well, and conclude that BRT's Response and its Spill Prevent Plan, are utterly deficient. Its plan to transport large quantities of used oil will imperil the Sole Source Aquifer, and should be prohibited, and its plan with respect to biodiesel should provide more protective measures and countermeasures.

Dated: November 13, 2014

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By:  _____
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JUDAH SERFATY declares under penalty of perjury, pursuant to 28 U.S.C. §1746, that I am the attorney identified in pages 5-6 above who on November 12, 2014 telephoned and spoke to Suffolk County Department of Health Assistant Public Health Engineer Kenneth Clunie, and that the above account of that conversation is true.

Dated: November 13, 2014

 _____
Judah Serfaty

CERTIFICATE OF SERVICE

I, JUDAH SERFATY, hereby certify that on the 13th day of November, 2014, I caused to be served the within **TOWN OF BROOKHAVEN'S REPLY TO BROOKHAVEN RAIL TERMINAL AND BROOKHAVEN RAIL LLC'S NOVEMBER 10, 2014 MOTION FOR LEAVE TO FILE A REPLY TO A REPLY** upon the attorneys/parties by E-mailing same to their email addresses:

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