

BEFORE THE
SURFACE TRANSPORTATION BOARD

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 SEPTEMBER 29, 2014 RESPONSE**

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Preliminary Statement

The Response dated September 29, 2014 (“Response”) of Brookhaven Rail Terminal and Brookhaven Rail LLC (“BRT”), to this Board’s August 28, 2014 Order directing that BRT demonstrate compliance with three Environmental Conditions previously imposed by the Board concerning the currently operating rail terminal located on the 28-Acre Parcel (“Terminal”), is as environmentally shocking as it is environmentally insufficient. Cynically, and almost buried within the 113 page Response, is the nearly secreted and startling disclosure that BRT has been or will soon be transferring “*used oil*” into and out of its Terminal. Specifically, BRT plans to transload hundreds of thousands of gallons per week of “*used oil*” at the Terminal which constitute prohibited “*solid waste*”, and hazardous waste,¹ with little spill prevention control, no permits or regulatory oversight, and a glaringly insufficient proposed Spill Prevention, Control, and Countermeasures Plan (“Spill Prevention Plan”), which Plan was apparently first being implemented the same date that the Response was recently filed. The Board should rule that BRT has failed to meaningfully comply with its Environmental Conditions and halt BRT’s planned “*used oil*” transload facility at the Terminal.

Much as BRT attempted to do (but was enjoined by the United States District Court from doing) respecting the adjacent 93 acre so-called “Expansion” Parcel, it appears that BRT is again attempting an outrageous “bait and switch” before the Board. BRT previously touted publicly

¹ Contaminated used oil is generally used motor oil. *See Used Oil in the United States: Environmental Impact, Regulation, and Management*, 41 BUFFALO L. REV. 157, 160 (citing statistics showing that “used motor oil [] accounts for approximately 60% of the used oil generated in the United States”). It is well-established that used oil is a “solid waste” which, depending on the level of contaminants introduced during its use, can qualify it as a “hazardous waste.” 42 U.S.C. 6903 (27), (36); 42 U.S.C.A. § 6935; 40 CFR Part 279.

(see, Newsday Article dated July 19, 2012, Ex. A²), to the Town of Brookhaven (“Town”) (see, BRT website, Ex. B³), and to the STB its supposed environmental responsibility in only importing a “green fuel”, specifically “*biodiesel*” onto Long Island via rail transportation. But, BRT’s Response now discloses its environmentally destructive and outrageous plan to ship out no less than 100,000 gallons per week of hazardous, contaminated, and strictly regulated “*used oil*” from the Terminal in an estimated four rail shipments per week, with numerous 6,800 gallon tanker trucks containing “*used oil*” brought to the Terminal to transload the “*used oil*” onto rail cars with a 26,000 gallon capacity at least four times per week, but with a reported “spill control” capacity of only 50 gallons, amounting to approximately 45 seconds before the contaminated oil being pumped can begin spilling to the ground, and leaching into Long Island’s Sole Source Aquifer located directly beneath it. The shocking environmental irresponsibility with which, and the cynical and misleading manner in which BRT has belatedly and only half-heartedly “disclosed” its “*used oil*” transloading plans in its Response are deserving of not only the strongest condemnation from the Board, but an explicit order halting BRT’s “*used oil*”

²Based upon BRT’s representation, Newsday reported that:

“A company that imports biodiesel by rail for eventual use as heating oil in Long Island homes officially opened its facility at the Brookhaven Rail Terminal in Yaphank Thursday.

Ultra Green imports the renewable energy product from the Midwest, Canada and upstate Ontario by rail to the terminal, where it’s loaded onto trucks and taken to terminals in New Hyde Park and elsewhere on the Island via Long Island Rail Road lines for blending into home heating oil.”

³BRT’s website, also provided to the Town, states inter alia, that the BRT rail terminal “*has an environmental benefit of improving air quality by taking trucks off the road [and that] users of the facility include...shipment of bio-diesel....*”.

transloading plans altogether as prohibited by the prior Stipulation of Settlement, or at a minimum, unless and until the Board is satisfied that all appropriate and necessary environmental conditions, including the adoption of an acceptable Spill Prevention Plan has been implemented to the Board's satisfaction.

Because the 28-Acre Parcel is located in the environmentally vulnerable and statutorily protected Hydro-Zone III located over the Long Island Sole Source Aquifer, we address principally BRT's deficient response regarding the second Environmental Condition.⁴

The "Used Oil" Transfer Facility Disclosed in BRT's Response

BRT's Spill Prevention Plan makes multiple references to "storage" of "used oil", including temporary storage of 32,800 gallons of it on site. It indicates the Terminal is subject to regulations regarding "Used Oil Processors and Refiners"; and it indicates that BRT will be receiving deliveries from "suppliers" of "used oil" (plural, as opposed to just from the biodiesel supplier). Thus, BRT's Response and Spill Prevention Plan provide:

- a. Response, p. 8:

"Jim Newell, Brookhaven Rail's President and authorized signatory for BRT, approved the SPCC Plan and stated management was committed to implementing the SPCC measures, SPCC Plan, Exhibit 3(a), at 8 (signature page at end of Exhibit 3(a)); Declaration of Jim Newell, Exhibit 4. BRT's SPCC Plan complies with U.S. Environmental Protection

⁴ This submission is made only in Reply to the Response of BRT. The Town understands this Board's two orders dated August 28, 2014 regarding the Terminal to indicate that this filing should be limited only to BRT's compliance with the three Environmental Conditions regarding the 28-Acre Parcel. The Town respectfully reserves the right to pursue all other issues at other appropriate times, proceedings, or forums. Thus, for example, given that BRT's activities at the 93-Acre Parcel are the subject of a pending federal lawsuit and a separate proceeding before this Board, which proceeding this Board held in abeyance pending the federal lawsuit, this Reply does not address the impact which BRT's illegal sand mining and other activities on the 93-Acre Parcel impact its compliance with the three Environmental Conditions.

Agency ("EPA") regulation 40 C.F.R. § 112.7-General requirements for Spill Prevention, Control, and Countermeasures Plans, EPA regulation 40 C.F.R. § 112.8-Spill prevention, Control, and Countermeasure Plan requirements for onshore facilities (excluding production facilities), and NYSDEC regulation 6 NYCRR 374-2.6 Standards for Used Oil Processors and Refiners.

Exhibit 3. 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.”

b. Spill Prevention Plan, p. 3:

“This Plan has been prepared to meet the requirements of the Title 40, Code of Federal Regulations, Part 112 (40 CFR part 112) and the Contingency Plan requirements *for Used Oil Processors* as outlined in 6 NYCRR Part 374-2.6(c)(2).

In addition to fulfilling regulatory requirements, the SPCC Plan is used as a reference for *used oil storage* information, as a tool to communicate practices on preventing and responding to discharges with employees, and as a resource during emergency response.”

c. Id., p. 6:

[BRT] periodically reviews and evaluates this SPCC Plan for any change in the Facility design, construction, operation, or maintenance that materially affects the Facility's *potential for an oil discharge*, including, but not limited to:

- applicable regulations are revised;
- the plan fails in an emergency;
- the facility changes - in its design, construction, operation, maintenance, or other circumstances in a way that materially increases the potential for fires, explosions, *or releases of used oil*, or changes the response necessary in an emergency;”

d. Id., 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 filled and shipped out to destination facilities or transfer stations weekly.”

e. Id., p. 12:

“The following measures are implemented *to prevent oil discharges during the handling, use, or transfer of used oil at the Facility.*”

f. Id., p.15:

“The Emergency Coordinator must take all reasonable measures necessary to ensure that fires, explosions, and releases do not occur, recur, or spread to *other used oil, hazardous waste, solid waste or used oil-derived fuels* or products at the Facility. These measures will include, where applicable, stopping processes and operation, collecting and containing *released used oil*, and removing or isolating containers.”

g. Id., p. 16:

- If the major discharge causes the Facility to be shut down for more than 24 hours, the Emergency Coordinator will *notify the used oil railcar companies and the used oil tanker truck companies of the situation. Used oil will not be accepted at the Facility until the Facility is operational again.*

- The Emergency Coordinator will ensure that, in the event of a major discharge, *no waste or used oil that may be incompatible with released material is recycled, treated, stored, or disposed of until cleanup procedures are completed in the affected Facility area(s).*

... 3.1.5 Waste Disposal (6 NYCRR 374-2.6(c)(2)(vi)('g'))

Used oil recovered from a spill will be stored in the portable trucks that will be delivered by the OSRO.”

h. Id., p. 18:

“For railcars:

Drip pans - Drip pans are used to contain small leaks from piping/hose connections. *A large, 50-gallon, portable drip pan is also placed underneath the railcar prior to the commencing of used oil transfer in case overfilling occurs.*

Sorbent material - Spill response supplies are stored in the Seale House Office and are available to on-site personnel. Spill response supplies include absorption pads, boots, gloves, safety glasses, and non-sparking shovels. Spill response supplies are transported from the Scale House Office to the used oil transfer area during each transfer event.”

i. Id., p. 20:

“3.8.2 Overfill Protection

A large 50-gallon drip pan is placed underneath the railcar in case overfilling occurs. As the railcar loading operation is continually observed, it is estimated that it will take a maximum of 30 seconds for either the truck driver or the overseeing Facility personnel to shut down the pump in an overfill event. As the used oil is pumped at 70 gallons per minute (GPM), the 50-gallon drip pan has been deemed acceptable for overfill protection.

...The Facility Manager or his/her designee *supervises used oil deliveries* for all new supplies, and continually observes deliveries for existing, approved suppliers.”

j. Id., p. 22:

“4.1 Facility Drainage (40CFR112.S(b))

The Facility has a stormwater drainage system with the closest storm water drain being located approximately *50 yards away from the used oil transfer area*. This storm drain is *covered during any used oil transfer activities*. The next closest storm drain is located approximately 200 yards away *from the used oil transfer area* and is not anticipated to be impacted in the event of a spill.”

k. Id., p. 23:

“4.3 Transfer Operations, Pumping, and In-Plant Processes (40 CFR

112.S(d)

Used oil unloading activities are performed at the Facility. Used oil is delivered by 6,800 gallon tank trucks operated by multiple vendors. Used oil is pumped from the bottom of the tanker truck to the top of the railcar. Prior to any receipt, the railcar is checked to insure sufficient capacity exists to accept the total contents of the delivery. During deliveries, BRT personnel:

- Constantly monitor the fuel level in all tanks, and
- Perform a physical inspection of the unloading area.

The Facility Manager *is responsible for all used oil transfers* but may designate a qualified person to manage this responsibility.

There is no aboveground piping which carries petroleum products at the Facility.”

1. Id., page after page 30:

“Spill Response Notification Form

Facility Capacity: 0 Gallons Permanent Storage

Up to 32,800 gallons of *temporary used oil storage*”.

Because of the far-reaching and potentially devastating environmental impacts from the “*temporary used oil storage*”, “*used oil transfer*”, and “*used oil processors*” activities now revealed in BRT’s Response, we also provide the attached environmental letter-report of the Town’s environmental consultants, hydrogeologist Stephanie O. Davis, CPG and engineer Rita Mody, P.E. of FPM Group Engineering and Environmental Science dated October 20, 2014 (Ex. C).

POINT I

BRT HAS FAILED TO COMPLY WITH THE ENVIRONMENTAL CONDITIONS

ENVIRONMENTAL CONDITION No. 2

“2. U S Rail shall develop and implement a spill prevention, control, and countermeasures plan (SPCC Plan) to ensure protection of the Nassau-Suffolk Sole Source Aquifer in the event of an accidental spill. The SPCC Plan shall be developed in accordance with Article 12 of the Suffolk County Sanitary Code and EPA regulations at 40 C.F.R. § 112.7.”

The Spill Prevention Plan submitted by BRT does not “ensure protection of the Nassau-Suffolk Sole Source Aquifer in the event of an accidental spill” as mandated by Environmental Condition No. 2. BRT’s use and planned use of the Terminal to transport massive quantities of “used oil” which if spilled will have catastrophic effects on the underlying Long Island Sole Source Aquifer, with insufficient or no regulatory oversight and a glaringly deficient Spill Prevention Plan, requires that the Board deem BRT out of compliance with its Environmental Condition No. 2.

- A. BRT did not previously inform SEA or this Board of the “used oil” transports, and no review or approval regarding such transports was ever made

As far as can be discerned, BRT’s September 29, 2014 Response is the very first time BRT has disclosed that it is already using, or plans to use, the 28-Acre Parcel Terminal to transport large quantities of liquid “used oil”. What is manifest is that at the time this Board and its Section of Environmental Analysis (“SEA”) reviewed the proposed uses of the 28-Acre Parcel, and at the time this Board in 2010 imposed Environmental Condition No. 2, there was no suggestion whatsoever, much less a disclosure by BRT that such environmentally dangerous activity was planned. The Board should accordingly strictly scrutinize BRT’s claim of

“compliance” with this Environmental Condition.

Environmental Condition No. 2 was proposed by SEA and imposed by this Board in an abundance of caution to protect the highly sensitive aquifer from minor refueling incidental to the disclosed operations of the Terminal, and there was no contemplation or environmental review of what is now happening or planned.

SEA’s July 26, 2010 Draft Environmental Assessment (“Draft EA”), and its August 20, 2010 Final Environmental Assessment which reaffirmed the findings of the Draft EA (“Final EA”), did not anticipate or consider the transfer of large quantities of contaminated used oil at the Terminal, but rather, assumed only the transloading of “*crushed stone aggregate*” and similar commodities. In fact, the Draft EA specifically indicated that SAE was proposing a condition that BRT have a spill prevention, control and countermeasures plan only as a further precaution because of the Nassau-Suffolk Sole Source Aquifer:

No surface waters are present on the proposed project site. The proposed project site is located over the Nassau-Suffolk Sole Source Aquifer. *The commodities handled on the BRT site would consist primarily of crushed stone aggregate, which should present minimal threat to the aquifer.* Nevertheless, to protect groundwater resources, U S Rail has committed to construct on-site stormwater basins to accommodate a five-inch rainfall and promote aquifer recharge. In addition, SEA is recommending mitigation requiring U S Rail to develop and implement a spill prevention, control and countermeasures (SPCC) plan to ensure protection of the aquifer in the event of an accidental spill.

Draft EA, ES -13.⁵ In response to the submitted comments of the EPA, which expressed concerns regarding the Long Island Aquifer, the Final EA made clear that the Spill Prevention

⁵ Moreover, SEA’s site visit report observed that “*There are no hazardous materials, sites, or spills associated with the proposed site*” (id. at ES-7).

Plan requirement was being imposed only because the sole fuel which would be on the site would be for “limited” refueling:

Safeguarding the Nassau-Suffolk Aquifer. U S Rail is proposing to have only limited storage of fuels on-site; refueling of yard vehicles would occur primarily via mobile refueling vehicles. Moreover, SEA is recommending a mitigation measure requiring that U S Rail have in place a spill prevention control and countermeasures plan (SPCC).

Final EA, p. 6 (emphasis supplied).

Additionally, as further discussed below, “used oil” is a “solid waste”, which under BRT’s 2010 Stipulation of Settlement with the Town BRT is prohibited from transporting, storing or processing. The restriction on transporting or handling “*solid waste*” was the very reason which the SEA gave for not having recommended other restrictions on the types of materials which the Terminal could be used to transport. Responding to the comment of a group named Civics United for Railroad Environmental Solutions (“CURES”) that “the Draft EA fails to define what type of freight might be handled and fails to specifically prohibit solid waste transport”, the Final EA indicated:

Freight to be Handled. As explained in the Draft EA, the purpose of this project is to handle aggregate. *U S Rail also has specifically agreed to not handle solid waste at the BRT site.* In its “Stipulation of Settlement” with the Town of Brookhaven, U S Rail has agreed that “operations at the Property shall not include the collection, sorting, separation, processing (including but not limited to, baling, crushing, compacting and shredding), incineration, treatment, management, disposal, *transport or transfer of solid waste* and construction and demolition debris unless required under federal law or regulations.”

- B. BRT's Spill Prevent Plan is 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
-

BRT's Response includes startling admissions, and its purported Spill Prevent Plain is utterly deficient.

(1) The purported Spill Prevent Plan states that over 100,000 gallons of used oil will be transferred weekly into and out of the facility (BRT's Spill Prevention Plan p. 10).

(2) The Plan does not state how much "biodiesel" will be transported, so as to provide a meaningful Spill Prevent Plan⁶ (BRT's Spill Prevention Plan, *passim*).

(3) It provides that in the event of a spill or overflow during pumping of the potentially hazardous liquids onto rail cars, a "portable drip pan" located underneath the rail cars will overflow in less than 45 seconds, with 70 gallons per minute of used oil and biodeisel contaminating the soil and the Sole Source Long Island Aquifer System which provides the drinking water for Long Island (Spill Prevention Plan p. 18). Given the calamitous effect on the surrounding soil and the Long Island Sole Source Aquifer which a spill of the large quantities of the potentially hazardous liquids would have, a less than 45 second buffer between a pumping operation spill and utter environmental disaster to the drinking water of millions of people, is woefully inadequate.

(4) Its purported Spill Prevention Plan references a "*used oil transfer area*"

⁶ The Town was previously made aware that the Terminal was transporting clean biodiesel. With respect to the biodiesel, the Town objects to the Spill Prevention Plan as insufficiently protective of the aquifer and that County permitting under Sanitary Code Article 12 is required. In contrast, the contaminated "used oil" will have a destructive impact on the aquifer in the event of a spill, is in direct violation of the Stipulation of Settlement, and should be prohibited.

located in the south-eastern portion of the 28-Acre Parcel . Exhibit 3(a) to Response, § 2.1.1. As far as can be told, this has never been disclosed before. None of BRT’s prior submissions appear to have ever disclosed a used oil transfer area.

(5) Additionally, we note that Figure 2 to its Spill Prevention Plan shows a shaded area in the south-western portion of that parcel as being the “*used oil transfer area*” (not the south-eastern portion), and it is not apparent where the actual proposed “*used oil transfer area*” will actually be located (Spill Prevention Plan, Figure 2).

(6) The Spill Prevention Plan does not address from where the biodiesel will be or has been transferred onto rail cars (Spill Prevention Plan, *passim*).

(7) Specification of what the used “*oil transfer area*” will involve, is limited to a single shaded box on the Spill Prevention Plan’s Figure 2. What will actually be placed in that mysterious shaded box—be it above or below ground holding tanks, floor barriers, equipment, etc.—is not indicated, rendering the Plan completely inadequate and allowing this Board and the public no ability to assess the Plan (Spill Prevention Plan, *passim*).

(8) What little the Response says on the subject reveals that BRT is potentially conducting non-railroad activities regarding the “*used oil*”, is not merely “transferring” it onto rail cars, and its Spill Prevention Plan does not deal with or provide safety measures for those activities.⁷ Thus, judging from the ascribed name of this area, “used oil transfer area”, it is clear

⁷ In raising the possibility that BRT may be doing more than merely transferring used oil onto rail cars, and may additionally be storing and/or processing the use oil on-site, the Town is not being overly suspicious under the circumstances. BRT has a history of hiding facts, including most recently its massive illegal mining operation of the 93-Acre Parcel, as the U.S. District Court recently found in both its Preliminary Injunction Order and in its subsequent order indicating that BRT’s failure to disclose in an affidavit pertinent and pivotal facts was, according to its lawyers, due to bad drafting. Here, the Spill Prevention Plan at p. 10 vaguely indicates that

that this area is not where the biodiesel and other substances and materials will be loaded onto rail cars. So, one might ask, if all that is occurring in this area is “transfer[ring]” of the material from transport trucks onto rail cars, why is used oil singled out as the only substance being transferred in that area; why are the biodiesel (which as far as can be told, arrives by truck containers) and other materials not also transferred from that area. There are also multiple references in the Spill Prevention Plan to “storage” of used oil, including that the Terminal has a “*Facility Capacity*” of “*Up to 32,800 gallons of temporary used oil storage*”. Spill Prevention Plan unnumbered page after p. 30; see additionally Spill Prevention Plan p. 3 (“*the SPCC Plan is used as a reference for used oil storage information*”). BRT’s Response further alleges that its unspecified activities comply with “NYSDEC regulation 6 N.Y.C.R.R. 374-2.6 – **Standards for Used Oil Processors and Refiners**”. Response at p. 8 (emphasis supplied); see also Spill Prevention Plan p. 8 (“This Plan has been prepared to meet ... the Contingency Plan requirements **for Used Oil Processors as outlined in 6 NYCRR Part 374-2.6(c)(2)**”). That regulation applies only to processors and refiners of “*used oil*”. 6 N.Y.C.R.R. § 374-2.6, subd. (a)(1) (“*The requirements of this section apply to owners and operators of facilities that process or re-refine used oil.*”); subd. (c)(2) (“*Contingency plan and emergency procedures. Owners and operators of used oil collection centers, transfer, processor, and re-refiner facilities must*”).

(9) Particularly given its unreliable prior history, BRT is manifestly concealing its actual activities regard the “*used oil*”, and it is clear that what is to take place in the “*used oil transfer area*” is more than mere transfer and will include matters which BRT has failed to even

used oil transfer “operations” “*include*” loading the used oil from trucks to rail cars; it does not state that this is the full extent of such “operations”.

disclose, let alone provide a plan for in the event of a catastrophic spill, such as large volume storage of the material and possibly even processing of the used oil. Moreover, without it indicating what is and will be located in the “*used oil transfer area*”, the Spill Prevention Plan does not provide this Board sufficient information from which it can assess whether the plan adequately complies with federal, state and county regulations pertaining to liquid fuel materials.

(10) Additionally, the plan to transport (and possibly store and process) “*used oil*” is prohibited by, and is in direct violation of the Stipulation of Settlement which was “So Ordered” by the U.S. District Court in the prior lawsuit. This Board mandated BRT’s compliance with that Stipulation of Settlement in its 2010 Decision. The Stipulation of Settlement provides:

6. Plaintiffs agree that, in the event the Project receives STB approval, operations at the Property shall not include the collection, sorting, separation, processing (including, but not limited to, baling, crushing, compacting and shredding), incineration, treatment, management, disposal, transport or transfer of solid waste and construction and demolition debris unless required under federal law or regulations. The term solid waste shall mean "solid waste" as defined in Section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903. Plaintiffs warrant and represent that neither they nor any of their respective affiliates, subsidiaries, successors or assigns shall make any application for permits to allow the activities prohibited by this paragraph, including but not limited to an application for a land-use exemption under 49 U.S.C. 10908 and 10909, and shall not petition or otherwise apply to the STB to have the Project or Property declared to be a solid waste rail transfer facility, without the prior consent of the Town. (Emphasis supplied).

Stipulation of Settlement, ¶6 (a copy of which was filed by the Town with this Board on April 26, 2010). “*Used oil*” irrefutably constitutes “*solid waste*” as defined in 42 U.S.C. 6903. See 42 U.S.C. 6903 (27) (solid waste), (36) (used oil); see additionally 42 U.S.C.A. § 6935 (directing

EPA to promulgate regulations for when used oil is more than simply a “*solid waste*” and amounts to “*hazardous waste*”); 40 CFR Part 279 (“Solid Wastes,” “Standards for the Management of Used Oil”). Moreover, BRT identifies no federal law or regulation obligating it to transport (as well as apparently store and process) “*used oil*”. The Board cannot deem BRT in compliance with Environmental Condition No. 2 without, at the same time, addressing BRT’s blatant violation of the Stipulation of Settlement which its 2010 Decision mandated BRT comply with. Moreover, as shown, the very reason identified by the SEA for imposing no other restrictions on use of the Terminal being proposed, was because the restriction that BRT must comply with the Stipulation of Settlement already imposed the limitation prohibiting “*solid waste*” transfers and other activities.

(11) The Response also does not indicate whether “*used oil*” has already been transported into and out of the Terminal since the 2011 date the Terminal commence operating. This is important because the Response admits that BRT to date has not obtained permits or approvals from the Suffolk County Health Commissioner and is only now allegedly first “discussing” with the Commissioner whether such permits are required. And, as shown below, the response makes clear that the Spill Prevention Plan, even in its deficient form, is just now first being implemented. A close reading of the Response reflects that it is artfully worded so as to avoid any temporal references to whether the large transfers of “*used oil*” has already occurred over the past several years.

(12) Relatedly, with the Town’s knowledge, BRT has already transported

“*biodiesel*” from the Terminal. See BRT’s April 3, 2014 Reply to this Board, p. 8.⁸ BRT is obligated to obtain permits from the Suffolk County Commissioner of Health under County Sanitary Code Article 12 to do so.

(13) Even though Environmental Condition No. 2 mandates that the Spill Prevention Plan “shall be developed in accordance with Article 12 of the Suffolk County Sanitary Code and EPA regulations at 40 C.F.R. § 112.7”, the Response admits that BRT does not have permits or any other approvals from the Suffolk County Commissioner of Health as mandated by Article 12 of the Suffolk County Sanitary Code.⁹ It alleges that BRT is now purportedly “*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)*” (BRT Response, p. 8). On behalf of the Town, we recently contacted the Suffolk County Department of Health Services, and have learned that there are in fact no “*discussions*” whatsoever concerning the matter as BRT claims, only that BRT’s representatives merely asked the Department of Health whether a permit is required, were informed that one is required, and that no permit has to date been issued. Additionally,

⁸ Specifically, BRT’s April 3, 2014 Reply to this Board, on its page 8, described its current operations as:

Since September 2011, Brookhaven Rail has operated BRT as a railroad facility. Brookhaven Rail and BRT’s current major rail customers include The Home Depot, Wenner Bread, one of the largest bakeries on Long Island, and Renewable Energy Group, Inc., a leading North American biodiesel producer and distributor.

⁹ The Suffolk County Sanitary Code is published online at <http://www.suffolkcountyny.gov/Portals/0/Documents%20and%20Forms/Health%20Services/sanitary%20code/Suffolk%20County%20Sanitary%20Code.pdf>. Its Article 12 includes permit obligations. See e.g. § 760-1207.

particularly when this Board mandated as Environmental Condition No. 2 that the Spill Prevention Plan include compliance with Article 12 of the Suffolk County Sanitary Code, the mandate of that Article that site inspection, approval, and permits be obtained, clearly apply and are not preempted. Permitting is especially necessary with regard to the contaminated used oil, which poses a severe risk to the Island's drinking water if spilled.

(14) The Spill Prevention Plan admits that two diesel fuel tanks, one 500-gallons and one 700-gallons, are located on the 28-Acre Parcel . However, it does not provide a spill prevention plan or claim compliance with County and EPA rules regarding the two large tanks. The Response instead contends that these are "owned" by "Watral Construction" (whose real name is Watral Brothers, Inc.) ("Watral"). Spill Prevention Plan p. 11. In fact, however, the fuel is on the site for the benefit of BRT and was required to be included in the Spill Prevention Plan and required to comply with EPA and County regulations specified in Environmental Condition No. 2. Watral is a defendant in the pending federal lawsuit, was a defendant to the prior federal lawsuit, is a signatory to the Stipulation of Settlement, and BRT stated in its April 3, 2014 filing with this Board (at p. 5) that Watral and another entity are constructing the Terminal for BRT.

(15) BRT's Response also reflects that the purported Spill Prevention Plan, deficient as it is, is first now supposedly being implemented (as a result of this Board's recent order that it show compliance), even though four years have already passed since Environmental Condition No. 2 was imposed and three years have passed since the Terminal commence operations. Thus, the Response alleges that the Spill Prevention Plan has been implemented "*including the SPCC training required by its SPCC Plan, with the next annual training to be conducted by P.W. Grosser scheduled for September 29, 2014*" (Response at p. 8). The

Response is dated the same date as the only actual date identified for any “*annual training*” which has ever been provided, September 29, 2014, and it does not actually allege that any prior training was ever given by any qualified personnel (notably, the Spill Prevention Plan itself was not promulgated until August 2013, see Spill Prevention Plan). The declaration of BRT’s Jim Newell further indicates that this same date, September 29, 2014, P.W. Grosser “*will also be surveying our current operations and site conditions, and will update the SPCC Plan as needed.*” The Response additionally alleges that “BRT recently acquired additional safety equipment” and attaches an indecipherable photograph as its exhibit 4(a) possibly depicting a truck of some sort (Response at p. 9) (emphasis supplied).

It is manifest that BRT’s Spill Prevention Plan is completely insufficient, and that BRT has been and plans to violate Environmental Condition No. 2 and the Stipulation of Settlement. A catastrophic spill of the large volumes of contaminated (“*used oil*”) liquid fuels will have a devastating impact on the sole source of drinking water for Long Island. The Spill Prevention Plan should be deemed defective and insufficient. BRT should be ordered to not transport or bring onto the Terminal used oil or other solid waste, and to provide a more protective Spill Prevention Plan with respect to the biodiesel.

ENVIRONMENTAL CONDITION No. 1

“(1) use best management practices before and during construction to minimize erosion, sedimentation, and instability of soils”

As shown above, BRT’s Response is vague and fails to provide any meaningful details.

ENVIRONMENTAL CONDITION No. 3

“(3) consult with the Natural Resources Conservation Service of the United States Department of Agriculture at its Syracuse, N.Y., office prior to initiating rail line construction activities.”

The Town is unable to address this issue.

POINT II

THE APPROPRIATE RELIEF FOR BRT’S NONCOMPLIANCE WITH THE 2010 ENVIRONMENTAL CONDITIONS SHOULD INCLUDE THAT USED OIL OR OTHER CONTAMINATED LIQUID FUEL TRANSFERS ARE PROHIBITED, AND THAT A MORE PROTECTIVE SPILL PREVENTION PLAN IS NECESSARY REGARDING THE BIODIESEL

This Board imposed the Environmental Conditions and other conditions as prerequisites to its issuance of an exemption under 49 U.S.C. § 10502 from the provisions of 49 U.S.C. § 10901 to construct and operate a line of railroad at the 28-Acre Parcel. September 10, 2010 Decision. As shown, BRT has utterly failed to comply with such Conditions. Under these circumstances, this Board may take corrective action, including but not limited to revoking the exemption, so as to carry out the policies of railroad regulations and/or “to protect the integrity of its processes”. Riverview Trenton Railroad Company–Petition for Exemption, STB Finance Docket 34040, decided November 28, 2007, 2007 WL 4217502 (citing 49 U.S.C. 10502(d); Minnesota Comm. Ry., Inc.-Trackage Exemp.- BN RR. Co., 8 I.C.C.2d 31 (1991)).

At the very least, the Board should direct that BRT cannot transport or bring onto the Terminal “*used oil*”, other contaminated “*solid waste*”, or other liquid fuels, other than “*biodiesel*”. And with respect to the biodeisel, the Board should obligate BRT to provide a more protective Spill Prevention Plan and obtain Suffolk County of Health permits and approvals under Article 12 of the County Sanitary Code.

POINT III

USES NOT DEPICTED OR ACCOUNTED FOR IN THE RESPONSE SHOULD BE PROHIBITED

The activities at the Terminal which the Spill Prevention Plan describes, and for which it purports to provide a spill prevention plan, bear little resemblance to the Plan depicted by BRT in its prior plans. Uses and structures which the Response does not identify, much less prove that their construction and use are in compliance with the Board's three Environmental Conditions, should be prohibited by this Board.

In objectionable plans which BRT provided as late as February and March 2014, BRT depicted on the subject 28 acre site (and not on the 93-acre expansion parcels which are the subject of the federal court's preliminary injunction), among other things, a "*POLYMER PLANT*" and an "*ASPHALT CEMENT TERMINAL*". These facilities are depicted on the P.W. Grosser plan prepared for BRT (a copy of which the Town filed with this Board as Exhibit B to its March 12, 2014 application), and on the cover page of the February 2014 alleged "Environmental Overview" prepared by Gannett Fleming Inc. for BRT (a copy of which the Town filed with this Board as the Exhibit to its April 3, 2014 supplemental submission). BRT's Response, and its Spill Prevention Plan, including Figure 2 to the Spill Prevention Plan, make no reference at all to these previously disclosed structures or to these uses, or show that their construction and operation comply with the three Environmental Conditions. The Board should prohibit BRT from constructing or operating of any of these uses or any other uses not disclosed in the Response.

Conclusion

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: October 20, 2014

ROSENBERG CALICA & BIRNEY LLP

By: _____


Robert M. Calica

Attorneys for Town of Brookhaven
100 Garden City Plaza, Suite 408
Garden City, New York 11530
(516) 747-7400

Of counsel:
Robert M. Calica
Judah Serfaty

EXHIBIT A

Newsday

<http://www.newsday.com/long-island/suffolk/heating-oil-rail-facility-opens-in-yaphank-1.3849245>

Heating oil rail facility opens in Yaphank

July 19, 2012 by SARAH CRICHTON / sarah.crichton@newsday.com



A company that imports biodiesel by rail for eventual use as heating oil in Long Island homes officially opened its facility at the Brookhaven Rail Terminal in Yaphank Thursday.

Ultra Green imports the renewable energy product from the Midwest, Canada and upstate Ontario by rail to the terminal, where it's loaded onto trucks and taken to terminals in New

Hyde Park and elsewhere on the Island via Long Island Rail Road lines for blending into home heating oil.

Company vice president Michael Cooper said the Yaphank truck-rail depot provides vital storage space for more than a dozen rail cars of the product, ensuring Ultra Green can provide reliable, on-demand supply to Long Island customers, as well as providing backup for the firm's supply to the critical New York City market.

"BRT gives us the lowest cost location anywhere to bring our biodiesel," Cooper said. "It eliminates the need to use trucks on city bridges and along almost 70 miles of Long Island -- we bypass every tollway, we're helping make the air cleaner."

Yesterday's opening comes as support for the private truck-rail depot, Long Island's first such facility, appears to be growing. Rep. Tim Bishop (D-Southampton), in whose district the Yaphank facility is located, said Thursday he would "absolutely support" a federal funding application on behalf of Brookhaven Rail Terminal.

"I strongly support infrastructure investments that lay the foundation for private sector growth and job creation, and these rail projects have the added benefit of reducing truck traffic on congested Long Island roads," Bishop said.

BRT representative Judy White said terminal operators would apply for federal funds "in the very near future."

The site's partners rounded up \$40 million in private investment to get the depot up and running last September and now hope public dollars might be made available to help build a 400,000-square-foot warehouse that would enable more commodities to come and go from the depot.

The terminal has applied for \$7 million in state grants.

Yesterday's event was attended by a gaggle of elected officials -- including representatives of Gov. Andrew M. Cuomo, New York City Councilman James Gennaro (D-Queens), Rep. Jerrold Nadler (D-Manhattan), as well as officials from Suffolk County and Brookhaven Town.

Nadler representative Robert Gottheim said the Yaphank facility could be a useful starting point for getting trucks off Long Island's congested roadways.

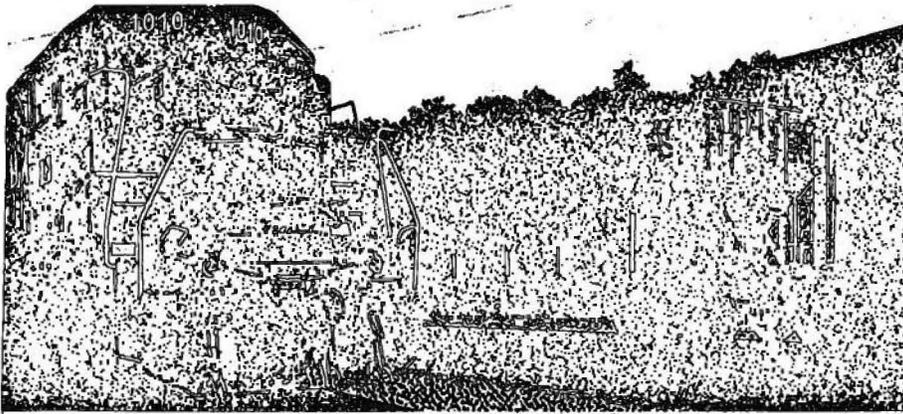
"But there is plenty of demand for more of these facilities," he said of the terminal, adding Nadler -- a longtime truck-rail depot proponent -- too would support federal dollars for the operation.

"We need this one, we need the Calverton project and we need Pilgrim State," said Gottheim referring to the state's stalled attempt to build a truck-rail yard in Brentwood.

The New York City Council earlier this year mandated that all heating oil within the five boroughs must contain 2 percent biodiesel effective Oct. 1. The Environmental Protection Agency has declared emissions from pure biodiesel as the sole fuel emissions nontoxic to human health.

[< back to article](#)

EXHIBIT B



FREIGHT HUB OF LONG ISLAND



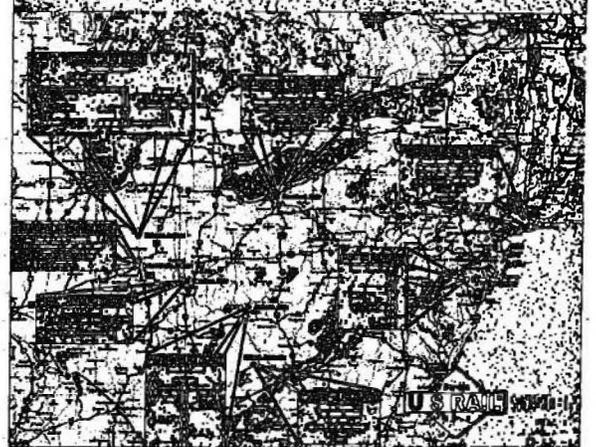
AT FULL ASSESSMENT,
BRT GENERATED
\$438,000
IN TAXES FOR 2013/2014,
INCREASING TO
\$815,000
NEXT YEAR IN THE TOWN
OF BROOKHAVEN & ITS
TAXING JURISDICTIONS

BRT **Brookhaven Rail Terminal** **Long Island**

"BROOKHAVEN RAIL TERMINAL – AN ENGINE FOR REGIONAL GROWTH."

BRT is located in Yaphank and is the first privately financed multi-modal rail freight facility on Long Island. Rail freight shipping will allow Long Island businesses to significantly reduce their shipping costs, which in turn will support the expansion of existing businesses and allow them greater access to national and international markets. It has an environmental benefit of improving air quality by taking trucks off the road and reduces the cost and the aggravation of congestion. Users of the facility include crushed aggregate that is brought to Long Island from upstate quarries, shipment of bio-diesel, and flour for Long Island's baking business. The shipping of the flour by freight takes about 2,700 trucks per year off the road.

- Long Island's first full service regional multi-modal transit depot
- 330-acre industrial site
- 5-rail sidings off the LIRR Ronkonkoma line
- \$40 million in private investment in phase 1
- \$20 million in land expansion costs
- 53 employees
- \$70,000 average employee salary
- Received over 1,118 rail cars of freight in 2013



BROOKHAVEN RAIL TERMINAL IS LONG ISLAND'S FIRST
MULTI-MODAL RAIL FREIGHT FACILITY TO PROVIDE
RAIL BASED AND LOGISTIC SERVICES THROUGH AN
EXTENSIVE NETWORK OF U.S. RAIL CARRIERS

EXHIBIT C

FPM Group, Ltd.
FPM Engineering Group, P.C.
formerly Fanning, Phillips and Molnar

CORPORATE HEADQUARTERS
909 Marconi Avenue
Ronkonkoma, NY 11779
631/737-6200
Fax 631/737-2410

VIA EMAIL

October 20, 2014

Robert M. Calica, Esq.
Rosenberg Calica & Birney LLP
100 Garden City Plaza, Suite 408
Garden City, NY 11530

Re: **Brookhaven Rail Terminal
205 Sills Road, Yaphank, NY
Used Oil Transfer Issues
FPM File No. 1151g-14-02**

Dear Mr. Calica,

The following information is provided regarding potential issues related to the contemplated use of a portion of Parcel A of the Brookhaven Rail Terminal (BRT) site for used (presumably waste) oil transfer operations. Based on the information provided we understand that the used oil transfer operations are proposed near the southwest corner of parcel A at a location on and adjoining existing railroad tracks. An aerial photograph of this area taken on May 13, 2014 is shown below with the general location of the proposed used oil loading area marked.



Used Oil Classification

The type of used oil for which the loading operation is proposed does not appear to have been specified. Based on the apparent need for spill containment, it appears that the used oil is anticipated to be a waste petroleum material. Waste petroleum oil contains petroleum constituents, typically also contains heavy metals, and may contain polychlorinated biphenyls (PCBs) and/or solvents, depending on the origin and use of the oil.

Discarded (used) oil is "solid waste" as per the definition of solid waste in NYSDEC Part 360-1. Onsite storage of waste oil in tanks or portable containers is typically subject to regulation under Article 12 of the Suffolk County Sanitary Code.

Potential Groundwater Concerns

We note that the type of surface in the proposed loading area (paved or unpaved) is not specified in the documents provided. The area generally surrounding the proposed loading area appears to be unpaved. We also note that a storm drain (which presumably discharges to groundwater) is located in proximity (within approximately 150 feet) of the proposed loading area and another storm drain is located nearby. Both of these conditions present potential concerns with respect to potential discharges to groundwater.

The aquifers beneath the BRT site, which include in descending order, the Upper Glacial (water table) aquifer, the Magothy Aquifer, and the Lloyd Aquifer, are designated as Sole-Source Aquifers under the Federal Safe Drinking Water Act of 1974 as they are the only potable water source for Long Island. As such, the US Environmental Protection Agency (EPA) has regulatory jurisdiction over activities above Long Island's aquifers. The New York State Department of Environmental Conservation (NYSDEC) prohibits incompatible uses over Sole Source Aquifers under New York's environmental law (NY Code, Section 15-0514). Incompatible uses include uses involving hazardous wastes or substances (including petroleum) that may ultimately be discharged to groundwater, or the storage of such substances that may contaminate the groundwater. The contemplated waste oil loading activities will, of necessity, involve management of a hazardous substance (used or waste oil) that may ultimately be discharged to or contaminate groundwater. As such, these activities may be in contravention of federal and/or New York environmental laws.

The BRT site is located in a deep flow recharge area (Hydrogeologic Zone III), as defined in the Long Island Comprehensive Waste Treatment Management Plan of 1978, developed pursuant to the Clean Water Act, Section 208 and referred to as the "208 Plan". Deep flow recharge areas are relatively undeveloped and contain groundwater of excellent quality; these are the areas through which the deeper portions of our aquifers are recharged and are necessary to the continued long-term health of our aquifer system. The NYSDEC regulates certain activities in deep flow recharge areas.

The BRT site (including Parcel A) also adjoins the south side of the Central Suffolk Pine Barrens Critical Environmental Area (CEA), established by Suffolk County in 1988 for the protection of groundwater resources. Potential groundwater impacts must be considered for activities subject to the State Environmental Quality Review Act (SEQRA) that are located within CEAs. No such

consideration of potential groundwater impacts appears to have been conducted for the contemplated industrial activity of used/waste oil loading on Parcel A.

Groundwater in the Upper Glacial Aquifer is the principal source of water in local wells and is found at an elevation of between 30 and 40 feet above mean sea level (MSL) beneath the BRT site, with flow to the east-southeast, towards the Carman's River (USGS Water Resources Investigations Report 01-4165, 2000). We note that the Carmans River is located within the South Haven County Park and Wertheim National Wildlife Refuge and portions of the river have been designated by the NYSDEC as a scenic river, with associated permit requirements and environmental concerns. Based on the water table elevation and flow direction, it appears that groundwater migrating beneath the BRT property eventually discharges to the Carmans River. If groundwater becomes impacted beneath the BRT site due to an oil release and migrates to the Carman's River, it has the potential to impact surface water quality in this designated scenic river.

SPCC Plan Concerns

The Spill Prevention Control and Countermeasure Plan (Plan) submitted by BRT was reviewed to evaluate whether it complies with USEPA 40 CFR Part 112.7 regulations and good engineering practices. The following are our comments:

- Section 2.1.1 of the Plan indicates that trucks with a maximum capacity of 6,800 gallons of used oil will transfer their contents to awaiting railcars with a maximum capacity of 26,000 gallons, with approximately 4 railcars (i.e., 104,000 gallons) shipped out weekly. The Plan, however, does not include any information on the frequency of the trucks (i.e., if trucks will be scheduled to come in simultaneously or periodically throughout the week) or whether the railcars will be stored at the site until all the four railcars are full or if they will be shipped out partially full. Information must be included in the Plan as to whether partially-full or full railcars are going to be stored at the BRT site for an extended period of time;
- The Plan and the facility diagram must include the location and contents of all the fixed oil storage container(s) at the facility (40 CFR Part 112.7(a)(3)). The Plan references two (2) diesel tanks onsite but no additional information on their locations or spill prevention methods is included;
- The facility diagram (Figure 2) included in Appendix A references a shaded box in the southwest portion of the BRT site as being the "used oil transfer area". It is not clear from the figure as to what features the "used oil transfer area" will include, whether pavement is present, and where the trucks, rail cars, connecting piping, and other appurtenances will be located in this area;
- The Plan indicates that a storm drain is located in close proximity to the loading area. However, the Plan does not include any specific details on how the storm drain will be protected during loading operations. Due to the close proximity of the storm drain (which presumably discharges to groundwater) and the large volume of used oil being handled at the facility, detailed information must be included as to how this storm drain will be

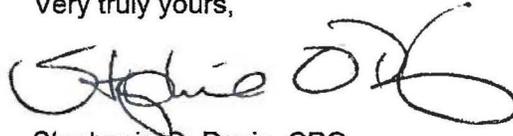
protected during loading operations and what measures will be taken in the event of a spill;

- In Table 3-2 and throughout the Plan, references are made to the use of a roll-out secondary containment system to contain spills from a rupture of the tank truck at the loading area. However, no specific details (i.e., material of construction, size, volume, etc.) are provided for the roll-out system. In addition, the Plan is not specific on how the roll-out system will be used and where will it be stored. The roll-out system is not listed in the list of onsite spill management equipment. The 50-gallon capacity portable drip pan to be used to contain any leaks/overflows during pumping operation also appears to be inadequate. The portable drip pan will overflow in less than 45 seconds (based on a 70 gpm pumping rate) which does not seem to be enough time to control/shut off the cause of the spill. In addition, there is no secondary containment for the railcar itself in case of a spill. Each railcar will hold approximately 26,000 gallons, with a reported total of over 100,000 gallons of used oil to be transferred into and out of the facility every week. In case of a catastrophic event, there is no provision for any secondary containment of this large quantity of used oil in the railcar(s). Given the close proximity of a storm drain and the location of the facility above a Sole-Source Aquifer, good engineering practice requires adequate secondary containment for all aspects of this proposed operation;
- Section 3.5 of the Plan states that no written records will be maintained of the visual inspections performed prior to, during, and immediately following loading/unloading operations. 40 CFR Part 112.7(e) requires record-keeping and that the records of any inspections and tests to be signed by the appropriate supervisor or inspector and retained for a period of three years;
- Section 3.8.3 of the Plan references a Standard Operating Procedure (SOP) to be followed during transfer operations performed at the facility. The SOP form is not included with the Plan;
- Section 3.10 of the Plan states that the facility conforms to applicable State and local requirements. It appears that the facility must have a permit under Article 12 of the Suffolk County Sanitary Code for this operation. No permit is evident.

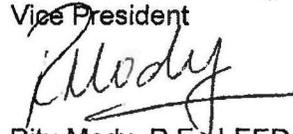
In summary, the contemplated use of a portion of Parcel A of the BRT site for used (waste) oil loading operations has the potential to significantly impact groundwater in this deep recharge zone. The deficiencies in the SPCC Plan seriously reduce the credibility of this document and indicate that the environmental impacts of the proposed used oil loading operation have not been adequately assessed or prepared for. The apparent absence of a permit for the onsite storage of over 100,000 gallons of used (waste) oil would appear to place this operation in violation of Suffolk County Sanitary Code.

If you have any questions, please do not hesitate to contact us at (631) 737-6200.

Very truly yours,



Stephanie O. Davis, CPG
Senior Project Manager
Vice President



Ritu Mody, P.E., LEED Green Assoc.
Engineer

SOD/RAM:sod/ram

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CERTIFICATE OF SERVICE

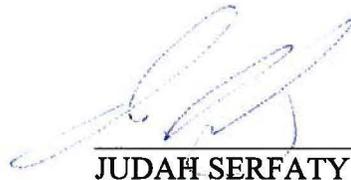
I, JUDAH SERFATY, hereby certify that on the 20th day of October, 2014, I caused to be served the within **REPLY TO BROOKHAVEN RAIL TERMINAL AND BROOKHAVEN RAIL LLC'S SEPTEMBER 29, 2014 RESPONSE** upon the attorneys/parties by E-mailing same to their email addresses:

TO: Vanessa L. Miller, Esq.
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and for Brookhaven Rail Terminal and Brookhaven Rail, LLC (in F.D. No. 35819)*
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Dated: October 20, 2014



JUDAH SERFATY