

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35141

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U S RAIL CORPORATION—CONSTRUCTION AND OPERATION EXEMPTION—
BROOKHAVEN RAIL TERMINAL

**BROOKHAVEN RAIL TERMINAL AND BROOKHAVEN RAIL, LLC REPLY
TO TOWN OF BROOKHAVEN'S REPLY
TO RESPONDENTS' RESPONSE TO BOARD DIRECTIVE TO FILE PROOF
OF COMPLIANCE WITH SPECIFIED ENVIRONMENTAL CONDITIONS**

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The Surface Transportation Board (“Board”), by decision served August 28, 2014, denied the March 14, 2014 motion by the Town of Brookhaven (“Town”) to re-open the above-titled matter. *U S Rail Corporation—Construction And Operation Exemption—Brookhaven Rail Terminal*, STB Finance Docket No. 35141 (STB served Aug. 28, 2014) (“2014 Decision”). The Board’s 2014 Decision also directed respondents Brookhaven Rail Terminal (“BRT”) and Brookhaven Rail, LLC, a Class III rail carrier (“Brookhaven Rail”)(collectively, “Respondents”), to file proof of compliance with three environmental conditions, 2014 Decision at 4, that were specified by the Board in its 2010 decision, *U S Rail Corporation—Construction And Operation Exemption—Brookhaven Rail Terminal*, STB Finance Docket No. 35141 (STB served Sept. 9, 2010)(“2010 Decision”).¹

¹ In the 2010 Decision, the Board granted an exemption under 49 U.S.C. § 10502 from the provisions of 49 U.S.C. § 10901 for U S Rail Corporation (“US Rail”) to construct and operate an 18,000-foot rail line on a 28-acre parcel (“Parcel A”) in Yaphank, Suffolk County New York. US Rail assigned its construction and operation authority, and underlying leasehold interest in Parcel A, to US Rail New York, LLC (“US Rail NY”). 2014 Decision at 1, n.2. Brookhaven Rail is the successor to US Rail NY as to Parcel A,

Respondents timely responded to the Board's directive by filing dated September 29, 2014, providing proof of compliance with the three environmental conditions specified in the 2010 Decision. *Response of Brookhaven Rail Terminal and Brookhaven Rail, LLC, To Board Directive To File Proof Of Compliance With Specified Environmental Conditions* (filed September 29, 2014)("Response").²

Thereafter, the Town filed a reply to the Response, *Town of Brookhaven's Reply To Brookhaven Rail Terminal and Brookhaven Rail, LLC September 29, 2014 Response* (filed October 20, 2014) ("Town Reply"). Respondents hereby reply to the Town's Reply to address three issues: (1) the Town Reply concedes Respondents' compliance with EC Nos. 1 and 3; (2) the Town's contentions concerning the SPCC Plan are

id., and will be referred to herein in lieu of US Rail NY. BRT is the trade name for Brookhaven Terminal Operations, LLC, and will be referred to with respect to the actual transload facility on Parcel A.

² The three pertinent environmental conditions were set forth in the Appendix, Environmental Mitigation Conditions, 2010 Decision at 9. For ease of reference, they are repeated here. They required that Brookhaven Rail would:

1. Employ best management practices before and during construction to minimize erosion, sedimentation, and instability of soils. ("EC No. 1").
2. 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 regulation at 40 C.F.R. § 112.7. ("EC No. 2").
3. Consult with the U.S. Department of Agriculture's Natural Resources Conservation Service at the Syracuse, NY office prior to initiating rail line construction activities at the Brookhaven Rail Terminal Site. ("EC No. 3").

Id. at Appendix Item Nos. 2, 3 and 4. Appendix Item No. 1 required compliance with the applicable terms of the Stipulation of Settlement ("Stipulation") entered in the federal court case of *Sills Road Realty, LLC v. Town of Brookhaven*, Civ. No. 07-CV-4584 (E.D.N.Y, filed April 21, 2010). The Stipulation was filed with the Board in this matter on April 26, 2010. Although the Board's 2014 Decision does not require that Respondents address compliance with the Stipulation, 2014 Decision at 4, because the Stipulation overlaps with the Board's requirements in EC Nos. 1-3, Respondents addressed the Stipulation in its Response.

inaccurate and premature, at best; and (3) the Town’s position that “used oil” is a solid waste for purposes of the Stipulation is plainly erroneous.³

1. The Town Concedes Respondents Have Complied Fully With EC Nos. 1 and 3, And Should Not Be Heard Further On Those Matters.

EC No. 1 required use of best management practices before and during construction to minimize erosion, sedimentation, and instability of soils, and EC No. 3 required a consultation with the Syracuse, NY office of the U.S. Department of Agriculture’s Natural Resources Conservation Service prior to initiating rail line construction activities. With respect to EC No. 1, the Response discussed in detail how BRT had established and implemented the Erosion and Sedimentation Control Plan for the BRT site (referenced in the Response as “Parcel A”)(with the plan referred to as the “Parcel A ESC Plan” or “Plan”), that covered Parcel A, Construction Phases 1, 2 and 3, fulfilling the requirements of EC No. 1. Response 4-7, Response Exhibits 1, 1(a), 2 and 2(a).

The Response further detailed that, commencing November 17, 2010, Sidney B. Bowne & Son, LLP (“Bowne”), a licensed professional engineering firm specifically referenced in the Stipulation, had conducted twice monthly inspections of BRT’s implementation of the overall Parcel A engineering plans, including the Parcel A ESC Plan, during the construction phases. Response Exhibit 1, ¶ 11. Bowne’s inspections were conducted jointly with Mr. Thomas Miller, BRT’s construction manager for Parcel A, and as part of the inspection process, Mr. Miller provided Bowne’s inspector with a written report on the Parcel A ESC Plan implementation, and in turn, Bowne submitted

³ Respondents recognize that Board Rule 1104.13(c), 49 C.F.R. § 1004.13(c), precludes a reply to a reply absent leave of the Board. By motion filed herewith, Respondents have sought leave to file this reply.

the Miller reports to the Town with Bowne's monthly inspection report. Response Exhibits 1 and 2. That process continues to the present, as construction on Parcel A is not quite completed. *Id.*

The Response also specifically stated that, so far as Bowne's representative and Respondents knew, the Town has not deemed Respondents' Parcel A project to be non-compliant with the Parcel A ESC Plan, nor had the Town issued citations or stop-work orders to Respondents directed at alleged Parcel A ESC Plan violations. Response 7, Exhibits 1 and 2. Consequently, Respondents stated they have to date complied with, and continue to comply with, EC No. 1. Response 7.

With respect to EC No. 1, the Town's Reply merely states: "As shown above, BRT's Response is vague and fails to provide any meaningful details." Town Reply 18. Notably, the Town Reply provides no citations, and in fact, the Town Reply does not make an earlier showing as to EC No. 1 that the Response is "vague" or "fails to provide meaningful details," despite the Town's claim to the effect. Moreover, contrary to the Town's claim, the Response is quite detailed and specific as to Respondents' compliance with EC No. 1, including almost four (4) years of regular reports to the Town. Response 4-7 and the pertinent exhibits.

In the face of the detailed showing in the Response as to Respondents' compliance with EC No. 1, and the specific statements that Respondents had complied with EC No. 1, Response 7, the failure of the Town Reply to even respond to this showing and those statements of compliance concedes that Respondents have complied with EC No. 1. Accordingly, the Town should not be heard further as to compliance with

EC No. 1. Upon Respondents' filing notice with the Board that construction is complete, this requirement should be deemed fulfilled.⁴

The situation is similar with respect to EC No. 3. The Response demonstrated Respondents' compliance therewith, Response 9, and the Town's Reply merely states: "The Town is unable to address this issue." Town Reply 19. The Town should be deemed to have conceded Respondents' compliance with EC No. 3, and should not be heard further as to EC No. 3.

2. As to EC No. 2, The Town's Reply Is, At Best, Inaccurate And Premature, As Respondents Indicated In The Response That An Assessment Of Current BRT Operations And Conditions Was Underway, And A Revised SPCC Plan, If Needed, Would Be Prepared, And Contrary to Town Assertions, Used Oil Is Not A Solid Waste Product.

a. Factual Recap and Initial Comments on Town's Reply

EC No. 2 concerns the development and implementation of the spill prevention, control, and countermeasures plan ("SPCC Plan"), and the Response demonstrated BRT has had in-place since August 2013 a SPCC Plan developed by P.W. Grosser Consulting, Inc. ("Grosser"), and approved by Theresa M. Colabella, Professional Engineer. Response 7-9, Exhibit 3 and Exhibit 3(a). Grosser is an environmental engineering, consulting and compliance firm headquartered in Bohemia, New York, holding the requisite New York licenses, that has served a wide variety of federal, state, municipal and private clients for more than 20 years, and is an approved contractor on the U.S.

⁴ The Response also observed that the Town's March 13, 2014 request to re-open the exemption proceeding had alleged generic violations of EC No. 1, but failed to provide specific facts in support of those allegations. Response 7, n 8. The Town Reply as to EC No. 1 does not respond to this point at all, Town Reply 18. Accordingly, it is a fair conclusion – if not conceded by the Town – that those allegations in the Town's March 13, 2014 request were without factual foundation.

General Services Administration Multiple Award Schedule for environmental consulting and remediation services. Response Exhibit 3.

The Response further demonstrated that 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, Response 8, SPCC Plan, Exhibit 3(a), at 8; Declaration of Jim Newell, Response Exhibit 4. BRT's SPCC Plan complies with U.S. Environmental Protection 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 3.⁵

The Response further indicated that on September 29, Grosser would be surveying Respondents' current operations and site conditions, would update the SPCC Plan as needed, and that BRT had not experienced a toxic or hazardous waste spill or incident of similar nature at the site. Response 8-9, Response Exhibits 4, 4(a). As 40 C.F.R. § 112.5(b) requires a review only once every five (5) years, the September 2014 review and potential revision is substantially accelerated compared to EPA requirements. Brookhaven Rail management and Grosser jointly undertook the indicated survey on September 29, and Grosser has prepared a draft revised SPCC Plan to address current BRT operations and conditions. Additionally, after the Town filed its Reply, Respondents received comments on the SPCC Plan from Board environmental staff, and

⁵ As BRT does not, in fact, perform services covered by used oil processing or refining, among the changes being contemplated in the revised SPCC Plan, discussed *infra*, is the deletion of this provision.

Respondents are working to address certain of those matters in the SPCC plan. Respondents will promptly file with the Board a response to staff's comments, along with the revised SPCC Plan once it is completed.

The Town's Reply, noted principally for the Town's customary and now tiresome hyperbole and verbosity (and – in several key respects – significant misstatements), in the main contends the SPCC Plan is inadequate for failing to address adequately the implications of transporting and storage of used oil, and that “used oil” is a solid waste that cannot, under the Stipulation, be transported via BRT. Town Reply 1-17.

Before turning to the substantive response, we first address the Town's wild-eyed claims that Respondents' transportation of used oil, which commenced in September 2013, was “almost buried within,” “nearly secreted” and “belatedly and half-heartedly disclosed” in the Response. Town Reply 1, 2. Just after making those assertions, the Town Reply contradicts itself by listing 29 instances in the Response where the terms “used oil” or “waste oil” are mentioned, *id.* 3-7, and in a parallel admission, expressly acknowledges that BRT's SPCC Plan “makes multiple references to “*storage*” of “*used oil*” (emphasis in original), which are then listed verbatim. *Id.* 3, 4-7; *see also id.* 13 (“multiple references” in SPCC Plan to “‘storage’ of used oil”). If, in the Town's view, 29 references to “used oil” or “waste oil,” and “multiple references” to those terms in the SPCC plan, constitute “burying,” “secreting” and “belated and half-hearted disclosure,” the Town holds a rather distorted concept of what those terms mean.⁶

⁶ Among other misstatements by the Town is that the “Spill Prevention Plan” is “completely insufficient,” has “little spill prevention control,” and was “first now supposedly being implemented (as a result of this Board's order that it show compliance).” Town Reply 18, 1, 17-18. As a simple review of the SPCC Plan and supporting declarations indicate, the SPCC plan was (1) prepared by Grosser as of *August*

The Board should also give short shrift to the Town's contention that BRT had a prior obligation to disclose to the Board the transportation of used oil, or having an oil transfer area on the BRT site, as the Town once again trips over its own misunderstanding of the import and nature of the Board's 2010 Decision. The 2010 Decision and Board approval therein do not limit Respondents to the transportation and transloading of crushed stone aggregate only; rather, Respondents are authorized to transport by rail (and thus transload) any goods except those limited commodities that may require additional authorization by the Board.

2013, adopted by Respondents' management on *September 20, 2013*, Response Exhibits 3(a), 4, (2) addressed BRT's spill prevention control needs as of August 2013, *id.*, and (3) the reference to September 29, 2014 in the Response referred to the pending assessment of the current plan, and the next annual training. Revision, Response 8-9, Response Exhibits (3)(a), 4, not the first implementation of the SPCC Plan.

Also contrary to the Town's contention, Town Reply 16-17, Respondents' SPCC consultant, on behalf of BRT, has been in direct discussions with the Suffolk County as to application of Article 12 of the Suffolk County Sanitary Code, and have already been advised that transportation/transloading of biodiesel is not covered by Article 12. Prior to the filing of the Response on September 29, 2014, Theresa Colabella of Grosser met with James Myers and Ken Clunie of Suffolk County's Office of Pollution Control to discuss the applicability of Article 12 to BRT operations. Ms. Colabella met again with that office on October 8, 2014, well before the Town Reply was filed on October 20, 2014, to clarify for Suffolk County that soybean oil transloaded at BRT is not mixed with diesel (or any other petroleum product), and on October 16, 2014, again, before the Town Reply was filed, the County confirmed to Grosser that unmixed soybean oil is not subject to Article 12.

Nor, contrary to the Town's allegations, Town Reply 1-2, do the Town's materials show that BRT "touted publicly" that it is *only* importing a "green fuel", (sic) specifically "biodiesel[.]" None of the Town's citations contains such a statement and the first citation, the *Newsday* article, *id.* 2, appears to be quoting the shipper Michael Cooper – not BRT. As to supposed BRT representations to the STB on this point, *id.*, the Town provides no citation whatsoever. *Id.*

Consequently, Brookhaven Rail does not have an obligation to return to the Board for approval of transporting other goods by rail unless required by the 2010 Decision or Board regulations, and concomitantly, does not have a generalized disclosure obligation. This very point was evidenced in the Board's EC No. 2, providing for the SPCC Plan, as the transportation of crushed stone aggregate alone would not have required such a plan, *see* Draft Environmental Assessment ("Draft EA"), ES-13 (noting that crushed stone aggregate "should present minimal threat to the aquifer"), thereby demonstrating the 2010 Decision obviously anticipated rail transportation of other commodities at BRT that could present a threat to the aquifer in the event of a spill. This point is actually conceded in the Town Reply itself when the Town notes the comment of Civics United for Railroad Environmental Solutions ("CURES") that the Draft EA was silent on the type of freight to be handled at BRT, Town Reply 10.

Thus, it is established beyond cavil that the Draft EA that was part of the 2010 Decision *did not even propose* a restriction on goods to be transported predicated on environmental grounds (or otherwise), and in like manner, the Final EA, despite the CURES comment on this very point, also *did not* suggest a restriction on the type of goods to be transported at BRT. Accordingly, the Board did not limit or restrict Brookhaven Rail's authority (other than the requirement that Brookhaven Rail (then US Rail) comply with the incorporated Stipulation., which does limit the transport or transfer of solid waste absent prior approval), and would have had no basis on environmental grounds to do so. (As discussed below, used oil is not a solid waste.) For the same reason, there is no basis to preclude the carriage of other goods or performing other

activities, as the Town requests, and no authority is cited by the Town in support of that position, Town Reply 20.

b. SPCC Plan

Turning to the adequacy of the SPCC Plan, as discussed above, BRT used Grosser, a well-established, federally recognized consulting firm specialized in spill prevention and control plans and applicable New York state and local regulations, to prepare the SPCC Plan, and the Grosser-prepared SPCC Plan specifically addressed New York requirements for the handling of used oil. Indeed, as discussed above, the Town admits the Response mentioned used oil on 29 occasions, and Respondents' current SPCC Plan addresses used oil on multiple occasions. Thus, it can hardly be contended that the current Grosser-prepared SPCC Plan did not take into account handling of used oil at the BRT site.

Moreover, as also noted above, BRT management and Grosser are working on a revision to the current SPCC Plan to address current BRT operations and conditions, as well as recent Board staff comments on the SPCC Plan, and the revision will be filed with the Board.⁷ Therefore, whatever additional measures are directed at the transportation and transloading of used oil at BRT, assuming for the sake of discussion that some may be required, those will be addressed in the revised SPCC Plan. Accordingly, the Town's "sturm and drang" concerns as to the SPCC Plan are, at best, premature. Once the revised SPCC Plan is filed with the Board, the Town can seek leave

⁷ We would note that the mere fact that the SPCC Plan is being updated does not mean that the original SPCC Plan was inadequate in August 2013, and Respondents would expressly contest such a conclusion.

of the Board to provide its comments – perhaps even thoughtful, measured and accurately-stated comments – on the revised SPCC Plan.

c. Used Oil Is Not Solid Waste For Purposes Of the Stipulation

The 2010 Decision incorporated the Stipulation, which provides at paragraph 6 that BRT will not undertake to transport or transfer “solid waste” unless required under federal law or regulation. The term “solid waste” was agreed for purposes of the Stipulation to be the same as the term “solid waste” as “defined in Section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.”⁸

While The Town contends “used oil” irrefutably constitutes “solid waste” as defined in 42 U.S.C. § 6903, Town Reply 14, Section 6903 and a relevant EPA rulemaking demonstrate exactly the opposite: Section 6903 does not define “used oil” under the definition of “solid waste” in Section 6903, which is defined at Section 6903(27).⁹ Instead, “used oil” is defined *separately* from “solid waste,” at Section 6903(36), a definition that was added to Section 6903 by the “Used Oil Recycling Act of 1980,” Pub. L. 96-463 (Oct. 15, 1980).¹⁰ As the term “solid waste” had already been

⁸ Section 1004 of the Solid Waste Disposal Act, as amended, is codified at 42 U.S.C. § 6903.

⁹ 42 U.S.C. § 6903(27):

The term “solid waste” means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended [42 U.S.C. 2011 *et seq.*].

¹⁰ 42 U.S.C. § 6903(36):

The term “used oil” means any oil which has been—

defined in Section 6903(27) prior to enactment of Pub. L. 96-463 in 1980, it is apparent Congress determined not to include “used oil” under the pre-existing definition of “solid waste” in Section 6903(27), but rather elected to have a separate, non-solid waste definition and approach for used oil.

Consistent with that view, EPA expressly noted, in a March 2011 Final Rulemaking concerning, *inter alia*, the waste status of “used oil,” that the Resource Conservation and Recovery Act (“RCRA”), which amended the Solid Waste Disposal Act and employs the definitions at Section 6903, is *silent* as to whether “used oil” is considered “solid waste”: “RCRA is silent on the issue of whether or not used oil is or is not a solid waste. This rulemaking effort *is the first* to determine in which situations used oil would be considered a solid waste.” *Identification of Non-Hazardous Secondary Materials That Are Solid Waste*, 76 Fed. Reg. 15456, 15503 (Mar. 21, 2011) (to be codified at 40 C.F.R. pt. 241), available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-03-21/pdf/2011-4492.pdf> (emphasis added). Thus, Section 6903(27), for purposes of the Stipulation, which was agreed to and entered in 2010, well before the cited EPA rulemaking in 2011, by its plain language and as expressly interpreted by the EPA (the agency charged with its implementation), was in 2010 (and remains today) silent as to whether the “used oil” constitutes “solid waste.” As such, *ipso facto*, “used oil” is not “solid waste” for purposes of the Stipulation.¹¹

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- (A) refined from crude oil,
 - (B) used, and
 - (C) as a result of such use, contaminated by physical or chemical impurities.

¹¹ While not directly relevant to the Stipulation, the Board’s regulation reflects that same position, 49 C.F.R. § 1155.2(b)(excepting “used oil” from the types of waste covered by “solid waste” in Section 1155.2(a)).

3. Conclusion

For the reasons stated herein:

- a. The Town of Brookhaven should be deemed to have conceded that Respondents have fully complied with EC Nos. 1 and 3, and should be heard no further on those matters. Upon Respondents filing a notice that construction is complete, EC No. 1 should be deemed fulfilled, and EC No. 3 already so.
- b. The Board should find:
 - i. BRT's SPCC Plan in conformity with EC No. 2, subject to such revisions as may be addressed in the pending revision.
 - ii. "Used oil" is not a solid waste for purposes of the Stipulation incorporated in the 2010 Decision, and therefore BRT's transportation, transloading and storage of used oil is not precluded by the 2010 Decision.

Respectfully submitted,

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