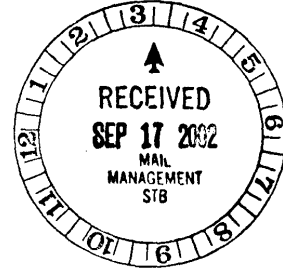


206208



August 31, 2002

VIA FAX: 202/565-9004 and Overnight delivery

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
ATTN: STB Finance Docket No. 34079
1925 K Street, NW
Washington, DC 20423-0001

ENTERED
Office of Proceedings

SEP 17 2002

Part of
Public Record

Dear Secretary Williams:
RE:

STB Finance Docket No. 34079
San Jacinto Rail Limited Construction Exemption and the Burlington Northern and
Santa Fe Railway Company Operation Exemption -
Build-out to the Bayport Loop near Houston, Harris County, TX

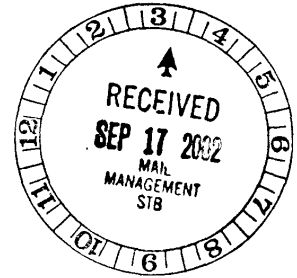
Motions to Sanction, Reopen, and Related Requests for Relief

Please find enclosed an original and 10 copies of the Galveston Bay Conservation and Preservation Association's (GBCPA's) 6 Motions and related requests for relief, as well as a certificate of service reflecting the latest available information provided by your office.

Sincerely,

ENTERED
Office of Proceedings
SEP 17 2002
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Public Record

Jim Blackburn
ATTORNEY
for Party of Record GALVESTON BAY
CONSERVATION AND
PRESERVATION ASSOCIATION



Before the Surface Transportation Board

STB Finance Docket No. 34079

San Jacinto Rail Limited Construction Exemption and the Burlington Northern and
Santa Fe Railway Company Operation Exemption -
Build-out to the Bayport Loop near Houston, Harris County, TX

The Galveston Bay Conservation and Preservation Association

Motion to Strike petitioners' environmental comment as petition revision

Motion to Sanction petitioners for ex parte communication

ENTERED Office of Proceedings Motion to Sanction Board staff employee(s) for ex parte communication

Motion to Sanction petitioners for failure to serve other parties

SEP 17 2002

Motion to Reopen 10502(b) exemption proceeding

Motion to Reopen environmental review scoping period

Part of
Public Record

and related requests for relief

On August 6, 2002, San Jacinto Rail Limited (SJR) and the Burlington Northern Santa Fe and Santa Fe Railway Company (BNSF) (collectively, "petitioners") attempted to dramatically alter, without notice to any other party, their petition for exemption under 49 U.S.C. §10502 in this proceeding.

To date, no other parties to this proceeding have received a revised petition for exemption, nor any information concerning the revision aside from that contained in the Board's recent decision.

According to that decision, served August 28, 2002, SJR and BNSF had modified their petition to move the final destination point from the New South Yard in Houston, Texas, to the CMC Railroad, Inc. Storage Yard in Dayton, Texas - a distance of roughly 50 miles.¹ Further, the decision notes that BNSF, acting for subsidiary SJR, failed to file and serve the petition modification, and instead notified only the Board's Section of Environmental Analysis (SEA):

This route is a change from the route described in BNSF's original petition and was brought to the Board's attention in a letter dated August 6, 2002, addressed to our SEA.

It is the exemption alone that permits the construction and operation of a new rail line in the process at hand. Likewise, the petition for exemption functions as a permit application.

¹ *Finance Docket No. 34079* - San Jacinto Rail Limited Construction Exemption and the Burlington Northern and Santa Fe Railway Company Operation Exemption -- Build Out to the Bayport Loop near Houston, Harris County, TX - Decision, served August 28, 2002. Document ID 32140, at 3 and n. 7.

Under the Board's own regulations, at 49 CFR 1121.3(a),

A party filing a petition for exemption shall provide its case-in-chief, along with its supporting evidence, workpapers, and related documents at the time it files its petition. [Emphasis added]

Filing before the Board is done through the Secretary (49 CFR 1104.1(a)). It follows then that any modifications to the petition require its re-filing with the Secretary and service on all the parties. At the very least, the modification must be brought to the Board, not to the SEA, because the Board alone grants the exemption. The Board, GBCPA submits, would encounter substantial legal difficulties if it regularly approved petitions for which SEA had done environmental analysis fifty miles away.

It is not difficult to determine the underhanded motives of the petitioners here. Knowing that the Board must serve the conditional exemption decision² by August 28th, and that a 20 day period for filing responses and motions would apply³ (49 CFR 1114.13(a)), they waited until the last possible day, August 6th, to send their petition revision letter to the SEA. They then hoped that SEA would transmit the letter to the Board, which it did. Since the Board chose not to notify the parties, and since petitioners had no intention of notifying them, GBCPA and other parties were irreparably harmed and deprived of due process.

Ex parte communications are prohibited at 49 CFR 1102.2(c)(1) and (2). The passage of the "environmental comment" letter from SEA to the Board, where it becomes a "revised petition", constitutes an *ex parte* communication of exceptional clarity and brazenness under the standard:

c) Prohibitions.

- (1) No party, counsel, agent of a party, or person who intercedes in any on-the-record proceeding shall engage in any *ex parte* communication concerning the merits of the proceeding with any Board Member, hearing officer, joint board member, employee board member or employee of the Board who participates, or who may reasonably be expected to participate, in the decision in the proceeding.
- (2) No Board Member, hearing officer, joint board member, employee board member or employee of the Board who participates, or is reasonably expected to participate, in the decision in an on-the-record proceeding shall invite or knowingly entertain any *ex parte* communication concerning the merits of a proceeding or engage in any such communication to any party, counsel, agent of a party, or person reasonably expected to transmit the communication to a party or party's agent.

A letter to SEA informing of significantly revised conditions is warranted only if the petition has actually been revised. SEA cannot revise its own work or revisit its own decisions until

² This deadline was listed as order #2 in the Board's decision served November 28, 2001 in this proceeding. Document ID No. 32325 at 1.

³ Starting the first full day after receipt.

the applicants file a petition revision with the Board. Applicant representations of impending revision, perhaps to save SEA some time and allow it to redirect the third-party contractor, do not replace the act of re-filing the petition itself. Such representations certainly cannot "transform" into re-filed petitions if a SEA employee walks a letter down the hall and hands it to the Secretary, who would properly receive such revisions directly from the petitioners.

Further, once in possession of this "revised petition" from SEA, the Board failed to file it for the applicants - which would have exceeded its authority. Nor did the applicants file it themselves and serve it on all parties - as required under 49 CFR 1104.12(a). This alone should invalidate the "revised petition". If petitioners had indeed filed a proper revision through SEA, they (petitioners) would have served it as well. Of course, petitioners had no intention of completing service obligations, and waited contently for the Board's August 28th decision to conditionally approve their "revised petition" for exemption.

We arrive now at a situation where the Board and the petitioners claim two different, completely exclusive rationales for the same decision:

BNSF and SJR apparently held that an environmental comment to SEA revised their petition, and that therefore filing before the Board and completing service obligations was not required.

The Board implicitly held that an environmental comment to SEA alone did not revise the petition, but that SEA's transmittal of the environmental comment, placing it before the Board, without either the petitioners or the Board filing or completing service obligations, did.

GBCPA holds that an environmental comment to SEA alone does not revise a petition. The Board's own rules require petitioners to file their petition with the Board's Secretary (49 CFR 1121.3(a)), and to serve all parties (49 CFR 1104.12(a)). The only possible way to revise a filed petition is to file an amendment or re-file the petition with the Secretary, and serve all parties. The Board, which must make its decisions based on the record (5 U.S.C. §556), must base its decisions on the petition as filed.

BNSF and SJR, on the face of it, never filed a revised petition. Only after SEA transmitted an environmental comment did the Board base a decision, improperly, on a petition that was never filed. Yet the petitioners clearly intended for their environmental comment letter to serve as a petition revision. That they have yet to file a proper revision with the Secretary remains the clearest proof. Perhaps they didn't get around to it in time for the conditional petition approval on August 28th.⁴ It strains any rational person's credulity to believe that exactly 20 days before the day when the Board would conditionally approve their petition, the petitioners would tell SEA they were altering the petition, and then not file a revision with the Secretary. The purpose was obviously to circumvent the required 20-day response and motion period (49 CFR 1114.13(a)) using SEA to do the dirty work of putting the letter

⁴ If filed now, the Board would clearly have to revisit its decision in the conditional exemption proceeding following a new 20-day response and motion period.

in the record and before the Board. Even then, SEA and the petitioners fail, since their communication with the Board is *ex parte* in nature and does not actually amend the petition.

GBCPA has suffered irreparable harm and denial of due process as result of the invalid petition revision, concurrent *ex parte* communications, and circumvention of the filing service process. As a result, the Board has made a arbitrary and capricious decision on the record for a petition that was never properly amended, and to their eyes, were it not for the subversion of process by the SEA and the applicant, never existed.⁵ For these reasons, the Board must reopen the §10502(b) exemption proceeding and await a properly filed petition revision from the petitioners. The exceptionally brazen actions of the petitioners here must not become the accepted procedural rule.

The Board must also, regardless of its decisions on other motions now before it, direct SEA to reopen the scoping process on the altered petition, once petitioners correctly re-file it. None of the over 800 lengthy and detailed comments submitted⁶ by GBCPA and other parties address the new route as described in the petitioners' August 6th environmental comment letter. Certain comments and concerns related to proposed operations in and around the original destination, New South Yard, are now either moot or require alteration. Most importantly, the Council on Environmental Quality (CEQ) regulations implementing the National Environmental Policy Act (NEPA) at 40 CFR 1501.7(c) specifically mandate reopening the scoping period given the substantial nature of petitioners desired changes:

An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts. -- 40 CFR 1501.7 "Scope" subsection (c)

The federal judicial circuit containing the proposed action is also quite clear on the need to supplement the record when a "new circumstance" arises presenting a "seriously different picture of the environmental impact of the proposed project from what was previously envisioned".⁷

For the information and reasons above, as well as those included below, GBCPA makes the following motions and requests that the Board provide the following relief consistent with its regulations and power to prevent irreparable harm under 49 U.S.C. §721(b)(4):

⁵ The fact that the Board did not pause upon receipt of the letter from SEA raises troubling questions that it must address internally during a reconsideration of the August 28, 2002 decision.

⁶ *Finance Docket No. 34079* - San Jacinto Rail Limited Construction Exemption and the Burlington Northern and Santa Fe Railway Company Operation Exemption -- Build Out to the Bayport Loop near Houston, Harris County, TX - Notice of Availability of Final Scope of Study for the Environmental Impact Statement (EIS), served July 19, 2002. Document ID 32892, at 12.

⁷ *Sierra Club v. Froehle*, 816 F. 2 d 205, 210 (5th Cir. 1987)

I. Motion to strike the "petition revision" environmental comment letter, from petitioners BNSF and SJR to the SEA, dated August 6, 2002, from the record in FD_34079.

The Galveston Bay Conservation and Preservation Association (GBCPA) moves to strike a letter, dated August 6, 2002, from Petitioners Burlington Northern Santa Fe Railway Corporation and/or on behalf of the San Jacinto Rail Limited Partnership to the Section of Environmental Analysis of the Surface Transportation Board, from the record of *Finance Docket Number 34079*.

1. Said letter is intended by petitioners to serve as a revision to the original petition filed with the Board Secretary.
2. Said letter fails to amend original filed petition as it was not filed by petitioners with Board Secretary, but instead as an environmental comment with the Section of Environmental Analysis.
3. Said letter is intended by petitioners to circumvent the 20-day response and motion period following the filing or re-filing of a petition with the Board Secretary (49 CFR 1114.13(a)).
4. Said letter or any subsequent restatement remains unfiled, well after the Board's August 28, 2002 decision, with the Board Secretary contrary to requirements of 49 CFR 1104 and 49 CFR 1121.3(a).
5. The original petition on file with Board Secretary therefore remains unrevised, and the letter therefore fails as a valid petition revision.
6. Without a valid petition revision on file with the Board Secretary, the Section of Environmental Analysis may not take action to modify the environmental review process in accordance with the terms in petitioners' environmental comment letter.
7. Petitioners' letter therefore also fails as an environmental comment, as petitioners have yet to file such a petition revision with the Board Secretary, and has no place in the record.
8. Neither the Section of Environmental Analysis nor petitioners filed said letter with Board Secretary, yet the Section of Environmental Analysis transmitted the letter into the record for *Finance Docket No. 34079*, where the Entire Board improperly considered it as a valid petition revision.
9. Said letter is referenced in note 7 of the Surface Transportation Board's August 28, 2002 decision conditionally approving the petitioners petition for exemption in proceeding *Finance Docket No. 34079*.
10. Said letter irreparably harms GBCPA if allowed to remain in the record as GBCPA has been denied due process to respond, comment on, and make motions to a new petition that, improperly, based on the letter's improper introduction to the record as a valid petition revision, the Board has already conditionally approved.

GBCPA therefore requests the following relief:

1. That said letter be stricken from the record in *Finance Docket No. 34079*.

II. Motion to Sanction Petitioners for *ex parte* communication

The Galveston Bay Conservation and Preservation Association (GBCPA) moves to request sanctions for Petitioners Burlington Northern Santa Fe Railway Corporation and San Jacinto Rail Limited Partnership, arising from *ex parte* communication with members of the Surface Transportation Board concerning matters in *Finance Docket No. 34079*.

1. Petitioners presented Section of Environmental Analysis with an environmental comment letter on August 6, 2002, describing desired changes to its original petition, including the relocation of the destination point by approximately 50 miles.
2. Petitioners failed to file their letter as a petition revision with the Board Secretary, therefore, the environmental comment letter does not qualify as a valid petition revision.
3. Filing the petition revision with the Board Secretary would have triggered a 20-day response and motion period (49 CFR 1114.13(a)).
4. Petitioners were aware of the impending Board deadline of August 28, 2002, approximately 20 full days after the Section of Environmental Analysis received their comment, to conditionally approve or deny their existing petition.
5. Petitioners were aware that impending Board action would conditionally approve or deny their petition as filed at the time.
6. Section of Environmental Analysis transmitted, petitioners' environmental comment into the record for *Finance Docket No. 34079*, yet said comment remained insufficient under Board regulations at 49 CFR 1121.3(a) to modify a petition on file.
7. Entire Board had no cause to become aware of such transmittal, as no filing had brought the petitioners' environmental comment letter to their attention.
8. Entire Board nevertheless, at prompting of the receipt of petitioners' environmental comment letter from Section of Environmental Analysis staff, reviewed and noted it in a decision conditionally approving a revised petition for exemption according to the terms in the petitioners' environmental comment letter.
9. Actions of Section of Environmental Analysis in transmitting petitioners' environmental comment to the Board through placement in the record and subsequent notification of the Board constitute *ex parte* communication between petitioners and the Board, an offense specifically prohibited under 49 CFR 1102.2(c)(1).
10. Petitioners clearly intended for Section of Environmental Analysis to serve as a conduit for *ex parte* communication with the Board, to avoid the required 20-day response and motion period after filing, as petitioners failed to file their revised petition or amendments with the Secretary and failed to serve them on other parties.
11. *Ex parte* communication alleged here irreparably harms GBCPA if allowed to stand, as petition revision was improperly incorporated into the record without filing, service, or comment required by Board regulations, and as *ex parte*

communications have compromised the integrity of this process under the Administrative Procedure Act.

GBCPA therefore requests the following relief:

1. That the Board apply sanctions to the petitioners and their representatives pursuant to 49 CFR 1102.2(f)(1), particularly with regard to public censure.
2. That the Board undertake an internal investigation to determine if more severe sanctions should apply, particularly if further evidence of collusion between the petitioners and Board staff arises.

III. Motion to Sanction Board staff employee(s) for ex parte communication

The Galveston Bay Conservation and Preservation Association (GBCPA) moves to request sanctions for Board staff employee(s), arising from their role in aiding and abetting *ex parte* communication between petitioners and members of the Surface Transportation Board concerning matters in *Finance Docket No. 34079*.

1. Petitioners presented Section of Environmental Analysis with an environmental comment letter on August 6, 2002, describing changes to its original petition, including the relocation of the destination point by approximately 50 miles.
2. Petitioners failed to file their letter as a petition revision with the Board Secretary, therefore, the environmental comment letter does not qualify as a valid petition revision.
3. Filing the petition revision with the Board Secretary would have triggered a 20-day response and motion period (49 CFR 1114.13(a)).
4. Petitioners and Board staff employee(s) were aware of the impending Board deadline of August 28, 2002, approximately 20 full days after the Section of Environmental Analysis received their comment, to conditionally approve or deny their existing petition.
5. Petitioners and Board staff employee(s) were aware of Board action that would be required to conditionally approve or deny their petition as it stood at the time.
6. A Section of Environmental Analysis employee or employees transmitted, petitioners' environmental comment into the record for *Finance Docket No. 34079*, yet said comment remained insufficient under Board regulations at 49 CFR 1121.3(a) to modify a petition on file.
7. Board or Section of Environmental Analysis staff employee(s) advised the Board, prior to or during their participation in the decision served August 28, 2002, of the existence of the petitioners' environmental comment letter in the record.
8. Entire Board had no other cause to become aware of such transmittal, as no filing had brought the petitioners' environmental comment letter to their attention.
9. Entire Board nevertheless, at prompting of the receipt of petitioners' environmental comment letter from Section of Environmental Analysis staff, reviewed and noted it in a decision conditionally approving a revised petition for

exemption according to the terms in the petitioners' environmental comment letter.

10. Actions of Section of Environmental Analysis and Board staff employee(s) in transmitting petitioners' environmental comment to the Board through placement in the record and subsequent notification of the Board constitute invitation and knowledge of *ex parte* communication between petitioners and the Board, an offense specifically prohibited under 49 CFR 1102.2(c)(2).
11. Board or Section of Environmental Analysis staff employee(s) failed to report *ex parte* communication as required under 49 CFR 1102.2(e).
12. Petitioners clearly intended for Section of Environmental Analysis to serve as a conduit for *ex parte* communication with the Board, as petitioners failed to file their revised petition or amendments with the Secretary and failed to serve them on other parties.
13. Actions of Board and/or Section of Environmental Analysis staff employee(s) willingly and knowingly aided petitioners in circumventing the 20-day response and motion requirement that follows the Board Secretary's receipt of a re-filed or amended petition.
14. *Ex parte* communication alleged here irreparably harms GBCPA if allowed to stand, as petition revision was improperly incorporated into the record without filing, service, or comment required by Board regulations, and as *ex parte* communications have compromised the integrity of this process under the Administrative Procedure Act.

GBCPA therefore requests the following relief:

1. That the Board apply sanctions to all staff involved in or furthering *ex parte* communication by transmitting petitioners' letter, informing Board members, and failing to report *ex parte* communication pursuant to 49 CFR 1102.2(f)(3), particularly by removal or reassignment of Section of Environmental Analysis staff members involved in informing the Board of petitioners' environmental comment.
2. That the Board undertake an internal investigation to determine if more severe sanctions should apply, particularly if further evidence of collusion between the petitioners and Board staff arises.

IV. Motion to Sanction Petitioners for Failure to Serve all Parties

The Galveston Bay Conservation and Preservation Association (GBCPA) moves to request sanctions for Petitioners, arising from their failure to properly file and serve various petitions, evidence, verified statements, and documents in *Finance Docket No. 34079*.

1. The Board Secretary has been designated in 49 CFR 1104.1 to receive all pleadings and filings.
2. Service of pleadings and filings on all parties is required under 49 CFR 1112.14(a).
3. Petitioners have failed to file a petition revision with the Board Secretary.

4. The Section of Environmental Analysis or any other Board employee(s) cannot file pleadings or other filings for or in place of petitioners.
5. Petitioners have failed to serve a filed petition revision on all parties, including GBCPA.
6. Petitioners have failed to serve numerous filed verified statements and other evidence on all parties, including GBCPA, including several statements cited in the Board's August 28th decision conditionally approving their petition for exemption, such as those from John O'Leary of Atofina Chemicals, Inc. and Mary E. Nave of Old World Industries, Inc.
7. Petitioners have repeatedly violated 49 CFR 1112.14(a) during this proceeding.
8. Failure to require proper service of filings irreparably harms GBCPA by denying the ability to respond and comment to the petition revision and petitioners' other materials. GBCPA has already been denied due process since the petitioners failed to serve what they claim is their "revised petition".

GBCPA therefore requests the following relief:

1. That the Board, regardless of whether it grants GBCPA's motion above to strike the petitioners' environmental comment letter dated August 6, 2002, orders the petitioners to serve either that letter or a properly filed petition revision with the Board Secretary on all parties.
2. That the Board order all parties in *Finance Docket No. 34079* to serve all filings, including motions, evidence, replies, responses, and verified statements on all parties on the Secretary's most recent service list, which GBCPA has separately requested.
3. That the Secretary, if the Board finds it necessary, review the filing record for *Finance Docket No. 34079* and advise parties of filings that may have been incompletely served.

V. Motion to reopen §10502(b) exemption proceeding

The Galveston Bay Conservation and Preservation Association (GBCPA) moves to reopen the Surface Transportation Board conditional exemption proceeding under 49 U.S.C. §10502(b), for *Finance Docket No. 34079*.

Coinciding with its claims and causes under this motion to reopen, GBCPA directs the Board to open an inquiry under 49 CFR 1115.4 "Petition to Reopen", and make determinations regarding the statements of material error, new evidence, and substantially changed circumstances contained in this document.

In particular, but not to the exclusion of any other fact or issue contained herein, GBCPA directs the Board to determine:

1. Whether a letter to the Section of Environmental Analysis alone, prior to its conveyance to the Board, constitutes a valid revision to a filed petition.
2. Whether the passage of the environmental comment letter to the Board from the SEA constitutes a valid revision and re-filing of the petition under 49 CFR 1121.3(a) or any other Board regulation.
3. Whether the passage of the environmental comment letter to the Board from the SEA in this circumstance constituted *ex parte* communication between petitioners, Board staff employee(s), and/or the Board.
4. Whether improper placement of the environmental comment letter before the Board alone constitutes a sufficient condition to reopen the §10502(b) proceeding.
5. On what basis, if any, can petitioners willfully circumvent Board regulations to file petition revisions and amendments with the Board Secretary and serve them on other parties, to avoid the 20-day response and motion period under 49 CFR 1114.13(a)?
6. Whether the petitioners' failure to file their petition revision with the Board Secretary and failure to serve it on all parties alone constitutes a sufficient condition to reopen the §10502(b) proceeding.
7. Whether the Board had a valid revised petition before it during deliberation of its decision served August 28, 2002, to conditionally approve the revised petition.
8. Whether any combination of conditions noted in this document constitute sufficient grounds to reopen the §10502(b) proceeding.

In support of this motion, GBCPA presents its preceding argument in this document and the following information:

1. Petitioners failed to file and serve a valid petition revision with the Board Secretary prior to the Board's decision in *Finance Docket No. 34079* served August 28, 2002.
2. Parties including GBCPA were irreparably harmed through the denial of their right to respond, make motions, and comment on the petition revision.
3. The Board may not substitute its own judgment for the comments parties are likely or not likely to make in light of a re-filed and revised petition.
4. The Board's decision served August 28, 2002 improperly allowed an environmental comment letter from petitioners to the Section of Environmental Analysis dated August 6, 2002 to enter the record through improper means and to serve as a valid petition revision.
5. Said environmental comment letter was transmitted from petitioners to the Board via an *ex parte* communication in which the Section of Environmental Analysis acted as a willing and knowing conduit, informing the Board and placing the comment in the record.
6. Said environmental comment letter fails to serve as a filed, valid petition revision in that:
 - (a) it was not filed with the Board Secretary (49 CFR 1104.1)

- (b) the Section of Environmental Analysis and other staff can place items in the record but not perform actual filings for petitioners (49 CFR 1104.12, 49 CFR 1104.4, 49 CFR 1121.3(a))
 - (c) petitioners have yet to file a copy of said letter with the Board Secretary (49 CFR 1104.6)
 - (d) petitioners have yet to serve all parties with a copy of said letter (49 CFR 1104.12(a))
 - (e) said letter is the subject of a forbidden *ex parte* communication between petitioners and the Board and between staff employee(s) and the Board (49 CFR 1102.2(c)).
7. The Board incorporated the substance of petitioners' environmental comment into its August 28, 2002, decision and clearly adopted it as a valid petition revision in deciding to conditionally approve the petition.
 8. Because a valid petition revision was never filed to amend the original, the Board could not justifiably base its decision to grant a conditional exemption on anything else than the original petition.
 9. Petitioners through their August 6, 2002 environmental comment letter clearly intended to describe a significantly modified route for their petition, which relocates the destination point of the action proposed for exemption by roughly 50 miles from that in the original petition.
 10. The Board's adoption of the petition revision, never previously filed, in its August 28, 2002 decision, allowed the petitioners to circumvent the required 20-day response and motion and period under 49 CFR 1114.13(a).
 11. Whether the Board was complicit in allowing the petitioners to circumvent 49 CFR 1114.13(a), or whether through *ex parte* communication, GBCPA has experienced irreparable harm and denial of due process by being excluded from the 20-day response period under 49 CFR 1114.13(a).
 12. GBCPA has also incurred irreparable harm and denial of due process by filing comments related to the §10502(b) proceeding, only to have many of those comments nullified by a significantly different and invalid petition revision that should have never appeared before the Board.
 13. Until a valid permit revision is filed with the Board Secretary and served, the Board must base its decision solely on the original petition filed, and therefore, it has made a decision based on a petition that does not exist before it, and must reconsider.

Therefore, GBCPA requests the following relief:

1. The reopening of the §10502(b) exemption proceeding and reconsideration of the decision served August 28, 2002, based on the original petition as filed.
2. Upon petitioners' filing, if any, of a proper petition revision with the Board Secretary, and subsequent service and 20-day response and motion period, the resumption of the §10502(b) exemption proceeding.
3. GBCPA refrains from requesting our right to otherwise proper relief in the form of a new notice of §10502(b) exemption proceeding, pending the reopening and continuation of the previous §10502(b) exemption proceeding.

VI. Motion to reopen scoping process under NEPA

The Galveston Bay Conservation and Preservation Association (GBCPA) moves to reopen the scoping process under 40 CFR 1501.7 of the Council on Environmental Quality regulations for implementing the National Environmental Policy Act, for *Finance Docket No. 34079*.

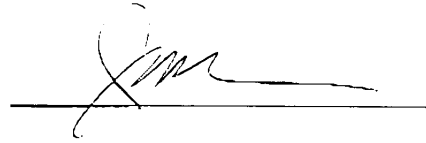
1. Petitioners' own environmental comment letter to the Section of Environmental Analysis dated August 6, 2002, indicates, on its face, significant new conditions that will, once the revised petition is properly filed and served, dramatically alter the environmental review process.
2. The Board, in a decision in *Finance Docket No. 34079* served August 28, 2002, confirms at 3 that petitioners desire to revise the destination point in their petition.
3. The distance of this new destination point from that in the original petition is approximately 50 miles.
4. By these terms alone, Council on Environmental Quality regulations at 40 CFR 1501.7(c) mandate a reopening of the scoping process in this proceeding.
5. Applicable precedent in the federal judicial circuit containing the petitioners' proposed action - *Sierra Club v. Froehle*, 816 F. 2 d 205, 210 (5th Cir. 1987) - upholds Council on Environmental Quality regulations finding for a reopening or supplementing of stages of the National Environmental Policy Act review where "new conditions" present a "seriously different environmental picture".
6. GBCPA will experience irreparable harm if the scoping process remains closed, as it and well over 1000 other commenters submitted detailed and lengthy comments on the original petition.
7. GBCPA will experience additional irreparable harm if an opportunity to comment on the "revised petition" does not occur prior to a Draft Environmental Impact Statement release; responses to such comments will appear as new information in a Final Environmental Impact Statement, where GBCPA cannot comment substantively on it prior to a Record of Decision.

Therefore, GBCPA requests the following relief:

1. That the Board order the Section of Environmental Analysis to reopen the scoping process for environmental review in *Finance Docket No. 34079*, for a minimum of 45 days.

GBCPA respectfully submits these motions to the Board in the hope of remedying obvious and brazen procedural violations that have compromised the process in *Finance Docket Number 34079*. In addition to these motions GBCPA preserves its right to challenge the

agency actions described herein under the Administrative Procedure Act, particularly at 5 U.S.C. §706(2).

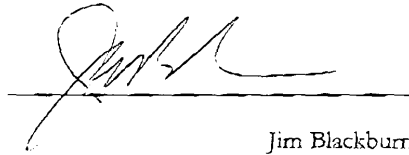
A handwritten signature in black ink, appearing to read 'Jim Blackburn', is written over a horizontal line.

Jim Blackburn
ATTORNEY
for Party of Record
GALVESTON BAY CONSERVATION
AND PRESERVATION ASSOCIATION

August 31, 2002

Certificate of Service

I hereby certify that the foregoing has been served on all Parties of Record in *Finance Docket Number 34079*, by first class mail or more expeditious means, on this 31st day of August, 2002.

A handwritten signature in black ink, appearing to read 'Jim Blackburn', is written over a horizontal line.

Jim Blackburn
ATTORNEY
for Party of Record
GALVESTON BAY CONSERVATION
AND PRESERVATION ASSOCIATION

BLACKBURN CARTER

A PROFESSIONAL CORPORATION

LAWYERS

2900 WESLAYAN, SUITE 400

HOUSTON, TEXAS 77027

(713) 524-1012

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