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October 15, 2002



VIA FAX: 202/565-9004 and certified mail

RRR# 7002 2030 0001 8123 1059

Mr. Vernon A. Williams

Secretary

Surface Transportation Board

ATTN: STB Finance Docket No. 34079

1925 K Street, NW

Washington, DC 20423-0001

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

Motion to compel the production of applicant-provided evidence

Enclosed are an original and 10 copies of the Galveston Bay Conservation and Preservation
Association's motion named above.

ENTERED
Office of Proceedings

OCT 2 2002

Part of
Public Record

Sincerely,

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 compel the production of applicant-provided evidence

and request for relief

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I. Introduction and Background

1. On August 26, 2002, the Galveston Bay Conservation and Preservation Association (GBCPA) made a formal request for data, comments, and evidence that had been provided to the Board's Section of Environmental Analysis (SEA) by the applicants in this proceeding, the Burlington Northern-Santa Fe Railway (BNSF) and the San Jacinto Rail limited partnership (SJR). This letter was addressed to Ms. Victoria J. Rutson, Chief of the SEA. It was sent by fax and certified mail, return receipt request # 70012510000162625527, and received at the SEA the same day by fax and on August 26, 2002 by mail.
2. The letter to Ms. Rutson requested that SEA "notify the parties of the data and comments that it has received from the applicant, and those that it will make available, immediately." In summary, the letter requested disclosure of all data and environmental comments submitted to SEA by SJR and BNSF, and specified reasonable methods (such as producing an inventory list). It did not request any internal deliberative materials from SEA.

3. The letter clarified that GBCPA's request did not seek the information through the federal Freedom of Information Act (5 U.S.C. §552) at this time. Rather, GBCPA sought the applicant-provided data as a matter of law under the Council on Environmental Quality's (CEQ) National Environmental Policy Act (NEPA) implementing regulations at 40 CFR §1506.6(f), the Board's evidence definition at 49 CFR 1114.1(a), and the Administrative Procedure Act generally.
4. The SEA has yet to respond to the letter.

II. The urgent need for the Board to grant relief

5. With the release date of the Draft Environmental Impact Statement (DEIS) approaching, GBCPA can wait no longer. GBCPA is permitted as a matter of law to view the materials submitted by the applicant to the SEA. It has the right to respond to that evidence in the evidentiary proceeding before the Board and in the sub-context of the environmental review process.
6. This is not a declaratory judgment request, which would be properly addressed as a request to the Director of Proceedings. GBCPA has already experienced harm as a result of the SEA's delay and for the reasons noted below. GBCPA seeks an immediate order to compel SEA to comply with our earlier request, particularly the portions noted in this motion.

III. BNSF and SJR have provided evidence that other parties have a right to see and that the public has a right to comment on.

7. As part of their participation, the applicant has provided, orally and in writing, data and environmental comments to the SEA that will support SEA's studies and conclusions in the DEIS.
8. These submissions began before the public had a chance to comment on the environmental review process, and have continued well after the most recent comment period was closed to the public on March 14, 2002. For instance, BNSF and SJR were allowed to modify both of the primary alternatives - which incidentally, BNSF and SJR created, and which were the only alternatives presented during the NEPA scoping - after the close of the scoping comment period. The Final Scope of Study¹ reflects the fact that BNSF and SJR continued to submit evidence and comments well after the deadline, in some cases developing new alternatives never presented during scoping, and in other cases rejecting routes that they developed and that were presented by the SEA as legitimate during the scoping process:

Alignment 1, the Applicants' preferred route, has been modified to include Alignment 1B, which crosses Taylor Bayou parallel to the Port Road and UP crossings. A spur would follow part of the original Alignment 1 route to serve potential shippers in the Bayport Loop. *The Applicants developed Alignment 1B* because of concerns expressed by the National Marine Fisheries Service over an area of Essential Fish Habitat associated with the original proposed crossing of Taylor Bayou. *Final Scope* at 8.

Alignment 2 was developed by the Applicants as an alternative to the Proposed Action... SEA dismissed the original Alignment 2 from detailed analysis for reasons that are discussed below.

- (1) *Alignment 2B, which now replaces Alignment 2, is a modification of Alignment 2... Final Scope* at 8.

The construction and operation of the Proposed Action along Alignments 1A, 2, and 2A. *The Applicants believe that these alternatives are not*

¹ Notice of Availability of Final Scope of Study for the Environmental Impact Statement (EIS) for STB Finance Docket 30479. Document ID 32892, served July 20, 2002 in this proceeding.

feasible because the construction of a single grade separation for Genoa-Red Bluff Road and Red Bluff Road is economically infeasible and would conflict with the City of Pasadena's plans to accommodate growth in traffic by extending Genoa-Red Bluff Road to the north/northeast to connect with Fairmont Parkway. *Final Scope at 10.*
(*emphasis added*)

9. To accomplish these and other modifications to the scope of study, BNSF and SJR had to submit information in some form to the SEA. This information was relied on and verified by the STB and the Cooperating Agencies when considering various alternative routings. It was alluded to in the Final Scope. It is evidence in this proceeding under the Board's regulation at 49 CFR 1114.1(a). That information is part of the administrative record and should have been made available to the public. It should have been disclosed and made available to GBCPA when it requested it from the SEA in the letter to Victoria Rutson. It has not been.
10. More graphically, BNSF and SJR have acknowledged, and the Board has acknowledged, that BNSF submitted a comprehensive letter to SEA commenting on its own petition on August 6, 2002. Among the provisions of this letter, which has still not been disclosed to the parties, was "a change from the route described in BNSF's original petition." Decision conditionally approving petitioners' exemption request, decided August 19, 2002 at fn. 7 (Document ID 32140). Further, the Board notes in its decision, "[this change] was brought to the Board's attention in a letter dated August 6, 2002, addressed to our SEA." *Id.*
11. This change altered the destination point of the proposed operation by approximately 50 miles. The public, during the scoping comment period which lasted from November 26, 2001 to March 14, 2002 and the merits comment period, which lasted from August 30, 2001 to August 19, 2002, neither saw nor commented on this plan, submitted a mere 2

weeks before the Board's decision². The public was not afforded this privilege to comment after the scoping deadline, and all of its submissions were available to BNSF and SJR as part of the administrative record.

12. On September 18, 2002, after GBCPA filed and served its motions to strike, sanction, and reopen on September 17th, SJR published a press release on the August 6 package of evidentiary materials that it submitted to the SEA, and that the Board referenced in its August 19, 2002 decision. This release later appeared as the basis for a short article on September 25, 2002, in the Clear Lake *Citizen* newspaper³. Though appreciative of these brief, after-the-fact public representations, GBCPA has not been provided with these evidentiary materials by BNSF, SJR through filing and service, or by the SEA, despite the request letter to Ms. Rutson.
13. It has been reported that BNSF and SJR's August 6, 2002 letter contained "voluntary" mitigation conditions for the petition. GBCPA notes that the Board did not adopt these conditions in its August 19, 2002 decision conditionally approving the petition on the merits. That decision would have been an ideal time to adopt such conditions as mandatory, which they now currently are not since they were never filed properly as a petition amendment with the Board Secretary. The public, and GBCPA in particular as a party, was denied the opportunity to review and comment on this evidence prior to the Board's August 19 decision. If GBCPA's September 17, 2002 motions to strike, sanction, and reopen are denied, this fact still renders the August 19 decision invalid.

² A major reason why was that the "petition revision" was not filed or served per Board regulations, and was an *ex parte* communication as detailed in GBCPA's motions to strike, sanction, and reopen dated September 17, 2002 in this proceeding (Document ID 206212).

³ "Mitigation offered by BNSF, San Jacinto Rail." Clear Lake *Citizen*, September 26, 2002.

14. GBCPA must have the full August 6, 2002 evidentiary submission by BNSF and SJR disclosed to comment adequately on mitigation measures, both now and during the DEIS comment period.
15. BNSF and SJR's commenting and submission of evidentiary materials has not been limited to the instances noted above. As stated in GBCPA's August 26, 2002 letter and shown above, "It is well-known that the applicant and its representatives have participated in the development of the scope and the DEIS to date, as is their right, but to the exclusion of other parties and the public." As part of these activities, BNSF and SJR have provided comments, data, and other forms of evidence that GBCPA requested in its August 26, 2002 letter and now requests as a matter of law here.

IV. GBCPA is entitled to the opportunity to review and comment on data, comments, and other submissions by BNSF and SJR to the SEA in this evidentiary proceeding as a matter of law and requests to do so immediately.

16. The STB has made it clear that it has a "responsibility to explore possible alternatives and to let the public comment on them." *Tongue River Railroad Co.—Rail Construction and Operation—Ashland to Decker, Montana*, 1996 WL 648614 (I.C.C.), *23, n. 24.
17. The STB has relied on this data in its August 19, 2002 decision to conditionally approve the petition on the merits, and will rely on it to complete the environmental review and issue a final record of decision.

CEQ Regulations

18. Under the CEQ regulations at 40 CFR 1506.6(f), the Board must direct the SEA to
(f) Make environmental impact statements, *the comments received*, and any underlying documents available to the public...*(emphasis added)*

19. All of BNSF and SJR's actions to suggest, amend, and advocate against various alternatives, to suggest mitigation conditions, and to participate in the development of the EIS outside of simply acting through their third party contractor, are comments on their petition. All evidence provided by employees or non-contractor representatives of BNSF or SJR to the SEA are comments. All of these documents must be made part of the administrative record if they are not already. All of these documents must be made available to the parties and the public upon request, including the request GBCPA has already submitted. These are not predecisional or privileged materials. These are environmental comments by BNSF and SJR submitted before, during, and apparently, as shown above, after the comment deadlines, that the parties and the public have not seen, but that the Board will consider as part of its final decision.

STB Regulations - Evidence

20. The STB's own regulations provide for the full disclosure of environmental information submitted by any party in the record, at the time of submission. The purpose of this, expressed at 49 CFR 1105.10(f), is clearly to provide the Board with all available information at any stage where it is necessary to review a proposal's environmental record. The Board must make decisions based on a complete record available to all parties; otherwise it has acted arbitrarily and capriciously, denying the parties the right to respond to an applicant's contention.

21. 49 CFR 1105.10(f) states:

(f) Consideration in decision-making. The environmental documentation (generally an EA or an EIS) and the comments and responses thereto concerning environmental, historic preservation, CZMA, and endangered species issues will be part of the record considered by the Board in the proceeding involved. The Board will decide what, if any, environmental or historic preservation conditions to impose upon the authority it issues based on the environmental record and its substantive responsibilities under the Interstate Commerce Act.

22. Proposals before the Board are part of an evidentiary, adversarial administrative law proceeding that differs from traditional internal agency action. As such, applicant-provided data and environmental comments are evidence, as defined at 49 CFR 1114.1(a):

Any evidence which is sufficiently reliable and probative to support a decision under the provisions of the Administrative Procedure Act, or which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States, will be admissible in hearings before the Board. The rules of evidence will be applied in any proceeding to the end that necessary and proper evidence will be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.

23. Evidence accepted and admitted by the SEA must be made part of the administrative record and must be made available to other parties in the evidentiary proceeding. It does not require a Freedom of Information Act request under 5 U.S.C. §552.
24. The Administrative Procedure Act at 5 U.S.C. §554(c)(1) specifically provides for the consideration of facts that serve as the basis for a decision from the record, stating "The agency shall give all interested parties opportunity for - (1) the submission and consideration of facts." The Board and SEA deny GBCPA this opportunity when the evidentiary submissions of BNSF and SJR are denied to the parties. They similarly deny the opportunity BNSF and SJR receive a right to comment through their direct participation in the scoping and EIS creation that is not reciprocated or disclosed to other parties.

Regulations prohibiting ex parte communications

25. Applicant-provided evidence and other communications that may advance its cause fall under the STB's ex parte communications regulation at 49 CFR 1102.2(a)(3). They address the merits of the case in contrast to case law or

procedural matters. 49 CFR 1102.2(c)(1) and (2) prohibit such communications.

The "merits" language denoted in 49 CFR 1102.2(c)(1) and in 49 CFR

1102.2(a)(3) does not exempt any information that would result in the

production of a more favorable environmental document for the applicant.

26. If admitted by the SEA as evidence under 49 CFR 1114.1(a), whether placed in the administrative record or not, the data and comments of BNSF and SJR constitute ex parte communications if other parties are forbidden access to them.

27. The Administrative Procedure Act plainly forbids decision-making from the record based on ex parte communications. As such, ex parte communications are not pre-decisional and not subject to privilege under 5 U.S.C. §552.

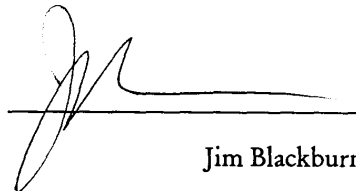
28. The Administrative Procedure Act provides at 5 U.S.C. §557(d)(1)(C) for the placement in the record of ex parte communications, memoranda relating to them, and any responses, written or oral. If denied to the parties as a matter of law under the Board's evidence regulations and procedures, these materials must be made available under a Freedom of Information Act request. There is no basis for withholding any evidentiary submission or comment from BNSF or SJR, as it is either evidence or ex parte communication.

V. Relief Requested

29. GBCPA requests that the Board advise SEA of a party's right, as a matter of law, to obtain applicant-provided evidence, comments, and data at any time in this proceeding.

30. GBCPA requests that the Board order SEA to place all past, present, and future data, comment, and evidentiary submissions made by BNSF and SJR in the administrative record for Finance Docket 34079 immediately or upon receipt.
31. GBCPA requests, as in its August 26, 2002 letter, that the Board order SEA to produce an inventory of evidence, data and comments on the petition submitted to date by BNSF and SJR, and that this list be made available to the parties upon request. If necessary, this list should include all evidentiary submissions to SEA by all parties, including correspondence.
32. GBCPA requests that the Board order SEA to provide GBCPA with such an inventory as it has requested.
33. GBCPA requests that the Board order SEA to provide an estimate of reproduction costs associated with the items it has requested through this motion.

October 15, 2002

A handwritten signature in black ink, consisting of a stylized 'J' and 'B' followed by a horizontal line.

Jim Blackburn

ATTORNEY
for Party of Record
GALVESTON BAY CONSERVATION AND
PRESERVATION ASSOCIATION