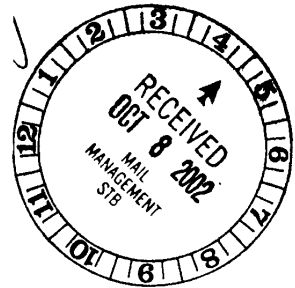


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BEFORE THE SURFACE TRANSPORTATION BOARD

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**

**Reply Of San Jacinto Rail Limited And
The Burlington Northern And Santa Fe Railway Company To
Galveston Bay Conservation and Preservation Association's
Motions To Sanction, Reopen, And Related Requests For Relief**

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October 8, 2002

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Pursuant to 49 C.F.R. § 1104.13, San Jacinto Rail Limited ("San Jacinto") and The Burlington Northern and Santa Fe Railway Company ("BNSF") (collectively, "Petitioners") hereby reply to the motions for sanctions, to reopen, and other relief filed by Galveston Bay Conservation and Preservation Association ("GBCPA").

GBCPA's submissions move to strike an August 6, 2002 letter written by one of Petitioners' outside counsel and submitted to SEA (hereinafter, the "August 6th Letter"); to sanction Petitioners for engaging in *ex parte* communications; to sanction Board employee(s) for *ex parte* communications; to sanction Petitioners for failing to serve all parties to the proceedings with various submissions; to reopen the exemption proceeding; and to reopen the environmental review scoping period. As we show below, GBCPA's motions are predicated upon fundamentally erroneous views of Board regulations and practice, as well as the purpose and effect of the August 6th Letter. Accordingly, all of the motions should be denied.

BACKGROUND

By petition filed on August 30, 2001, Petitioners sought an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10901 for the construction by San Jacinto and the operation by BNSF of a 12.8-mile line of railroad serving the Bayport Industrial District ("Bayport Loop") in southeast Houston, Harris County, TX. Pursuant to the Board's usual practice in rail construction cases, Petitioners requested that the Board conditionally grant the exemption, subject to the completion of the ongoing environmental review and the issuance of a further decision addressing the environmental issues and establishing an effective date for the exemption, if warranted, subject to any necessary conditions.

In October 2001, the STB's Section of Environmental Analysis ("SEA") issued a notice to prepare a full Environmental Impact Statement ("EIS") in the case. A draft scope of study was issued for public review and comment in November 2001, and scoping meetings were held in January 2002. Subsequently, in July 2002, a Final Scope of Study for the EIS was issued. A draft EIS now is in preparation. See 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*, slip op. at 1 (served Aug. 28, 2002) (hereinafter "August 28th Exemption Decision").

Numerous parties intervened and/or filed comments in the proceeding, and, on August 28, 2002, the Board served a decision conditionally exempting San Jacinto's construction and BNSF's operation of the line from the prior approval requirements of 49 U.S.C. § 10901, subject to the Board's further consideration of the anticipated environmental impacts of the proposal. August 28th Exemption Decision at 7-8.

Throughout the proceedings, Petitioners have responded to SEA's requests for information. In addition, Petitioners have met with interested persons and organizations, including local communities and interested federal, state and local agencies, in order to address concerns that had been raised about the project. As a result of these activities, Petitioners, on August 6, 2002, submitted proposed Voluntary Mitigation Measures ("VMM"), together with the August 6th Letter, which was addressed to the Chief of SEA.

The August 6th Letter elaborated upon one of the 76 proposed voluntary mitigation measures in the VMM. Specifically, the August 6th Letter discussed "a slight revision to the proposed routing for the Bayport traffic through the City's East End. In lieu of routing Bayport traffic into and out of New South Yard, Petitioners propose to route Bayport traffic along the [former Galveston, Henderson and Houston Railroad ("GH&H") line] and East Belt to Dayton Yard." August 6th Letter at 1. The August 6th Letter noted that this proposed route revision was intended to "address the concerns raised in this proceeding by the communities in and around New South Yard" about congestion in and around New South Yard. The letter clarified that the proposed "route revision pertains only to a shift in proposed operations within the East End area and does not affect the proposed route locations for the new line construction." *Id.*

In conditionally granting the exemption, the Board discussed the proposed routing mitigation measure, noting that it "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." August 28th Exemption Decision at 3-4 n.7. The Board went on to note that BNSF has stated that the proposed revision would "not

affect the proposed route location of the new line construction.” *Id.* Subsequently, GBCPA filed its motions.

ARGUMENT

GBCPA's motions are predicated on fundamental misunderstandings about STB regulations and practice. The foundation of GBCPA's position is the assumption that the proposed route revision described above constituted a *de facto* change in Petitioners' exemption petition and that Petitioners should have filed and served an amended petition. Petitioners' August 6th Letter, according to GBCPA, was an improper attempt to evade the filing and service requirements for pleadings before the Board, as well as an improper *ex parte* communication.

GBCPA's arguments are baseless. As we show below, Petitioners' route revision was a voluntary mitigation measure that did not require the filing of a new petition; Petitioners did not engage in *ex parte* communications; Petitioners did not violate STB service requirements; and the exemption proceeding and scoping process need not, and should not, be reopened.

I. PETITIONERS DID NOT IMPROPERLY FILE OR ATTEMPT TO FILE AN AMENDED PETITION, AND THE PROPOSED ROUTE REVISION DOES NOT REQUIRE THE FILING OF AN AMENDED PETITION

Although GBCPA's contentions are not entirely clear, it appears that GBCPA is arguing that Petitioners intended to amend their exemption petition by transmitting information about the proposed route revision in the August 6th Letter. GBCPA argues that this alleged amendment is ineffective and should be stricken; that Petitioners must file an amended petition through the Office of the Secretary of the STB and serve it on all parties to the proceeding; and that only after Petitioners have done so may SEA and the Board consider the new proposed routing.

The fundamental premise of GBCPA's argument is mistaken. The route revision described in the August 6th Letter did not amend, and did not require an amendment of, Petitioners' exemption petition.¹ The August 6th Letter merely was intended to explain one of 76 voluntary mitigation proposals being offered by Petitioners to address concerns that had been raised by local communities, agencies, and other interested parties.

In this respect, GBCPA finds itself in the same position as were the opponents of the Geismar construction proposal at issue in Finance Docket No. 32530, *Kansas City Southern Railway Co. – Construction and Operation Exemption – Geismar Industrial Area Near Gonzales and Sorrento, LA* (served June 30, 1995) (hereinafter "*Geismar Construction Decision*"). In that case, the parties opposing the construction proposal complained that the petition for exemption omitted information about how the petitioner would "move the traffic once it leaves the proposed new line" and why "changing the routes over which these commodities now move" was justified. *Geismar Construction Decision*, slip op. at 3. The Board rejected the contention that such matters, which are analogous to the proposed route revision in this case, must be considered in the conditional exemption decision. Such issues would "be addressed in the environmental review phase of this proceeding" and did not "require denial of the exemption or regulation under section 10901." *Id.* at 6.

¹ In fact, Petitioners are aware of nothing in Section 10502 or in the Board's regulations which require that a petition for exemption include the routing information set forth in Petitioners' August 6th Letter, particularly when such routing information is offered only as a potential mitigation measure.

Just as in the Geismar construction case, the proposed routing mitigation measure at issue here has no bearing on the transportation-related issues that are at the heart of the decision whether to grant a conditional exemption under 49 U.S.C. § 10502.² As the Board has repeatedly made clear, in assessing exemption petitions under Section 10502, the Board considers whether the proposal would foster competition, reduce the potential for abuses in market power, and reduce or eliminate barriers to entry. See *Geismar Construction Decision*, slip op. at 7-8. Here, GBCPA has not made any argument that the routing mitigation measure in the August 6th Letter would have any impact on the competitive factors described in the Geismar construction case. To the contrary, just as in the Geismar construction case, the proposed route revision presented in the August 6th Letter relates only to safety, congestion, and other environmental issues that can be addressed in the environmental proceeding, and do not require amendment of Petitioners' exemption petition and reopening of the conditional exemption decision. Thus, there is no reason to conclude that the proposed routing mitigation measure in the August 6th Letter requires an amendment to the exemption petition.

² Under Section 10502, the criteria for granting an exemption are (a) whether regulation of the proposed transaction "is not necessary to carry out the transportation policy of [49 U.S.C. § 10101]," and (b) whether "the transaction or service is of limited scope," or (c) whether regulation "is not needed to protect shippers from the abuse of market power." 49 U.S.C. § 10502(a). As the Board and the ICC before it have made clear, "[u]nder the exemption criteria, our analysis must focus on whether regulation of the proposed construction is necessary to carry out the [Rail Transportation Policy] of section 10101a. Congress in sections 10101a and 10901(d) articulated strong support for constructions that lead to increased competition." *Geismar Construction Decision*, slip op. at 7.

Other Board precedent also supports the conclusions that no amendment to Petitioners' exemption petition is required and that the Board and SEA may consider the proposed route revision even though no amended petition has been filed. For example, in Finance Docket No. 31717, *Iowa Power, Inc. – Construction Exemption – Council Bluffs, IA* (served April 17, 1995) (hereinafter "*Iowa Power*"), the petitioner changed the construction proposal during the environmental review process and *after* the grant of a conditional exemption. Nevertheless, the ICC did not require the petitioner to submit an amended petition and did not preclude SEA from considering the revised construction plans. See *Iowa Power*, slip op. at 1 n.3 (stating that "[e]ngineering considerations * * * resulted in an expanded estimate of the length of the line to 2.3 miles. A further 0.7-mile segment was added to mitigate safety concerns * * * . The changes in the proposed construction project were considered by the Commission's Section of Environmental Analysis (SEA) in preparing the environmental assessment, are relatively minor, and do not warrant additional findings under 49 U.S.C. 10505.").

Finally, there is no basis for GBCPA's unsupported assertion that SEA is precluded from considering revisions of proposals and projections that are not supported by revised applications or petitions. To the contrary, as the Board has made clear, SEA is expected to consider changes in proposals, such as voluntary mitigation actions, that occur during the environmental review process. See STB Finance Docket No. 33388, *CSX Corp. et al. – Control & Operating Leases/Agreements – Conrail Inc. & Consolidated Rail Corp.*, Decision No. 83 (served May 27, 1998) (hereinafter "*CSX Corp.*").

In *CSX Corp.*, the Board denied motions to strike various materials submitted by CSX to SEA that had not been served on the parties to the proceeding and were allegedly filed too late to give other parties an adequate opportunity to review and respond to them prior to the issuance of a final EIS. In rejecting the motions, the Board made a number of observations that are pertinent here. First, the Board noted that the "suggestion that SEA must provide a formal comment period and opportunity to respond every time an applicant updates or modifies its traffic projections is not correct." *CSX Corp.*, slip op. at 2. The Board also pointed out that there was no basis for the argument that the material should be rejected because of the late date on which it was filed. The Board noted that a party is not even required to submit material to SEA before the closure of the evidentiary phases of the proceeding. To the contrary, "[t]he environmental review process is a fluid and open one that encourages the broadest possible participation by the public throughout the process. As the environmental review process progresses, it is not unusual for an applicant to propose voluntary mitigation options and other changes to the applicant's original operating plans that can affect projected train traffic levels. SEA normally considers these types of changes as part of its ongoing environmental analysis and recommendations." *Id.* (footnote omitted). Finally, it is notable that in *CSX Corp.* there is no suggestion that changes in projected traffic required the filing of a new application.³

³ Although *CSX Corp.* concerned modified projections of traffic levels, and the August 6th Letter focused on a modified traffic routing, but did not indicate that there would be any changes in projected traffic levels, the fundamental premises of the *CSX Corporation* decision are applicable here: there is no requirement for a formal comment period every time an applicant modifies an operating plan or offers a new mitigation proposal; submissions of such modifications or proposals are acceptable at virtually any
(cont'd)

* * * *

Thus, there simply is no basis for GBCPA's arguments that the Petitioners revised, attempted to revise, or should have formally revised, their petition; that the Board and SEA are precluded from considering the proposed routing mitigation measure discussed in the August 6th Letter until Petitioners prepare, file, and serve an amended petition; or that the exemption proceeding should be reopened.⁴

II. **THE AUGUST 6 LETTER WAS NOT AN EX PARTE COMMUNICATION AND PETITIONERS WERE NOT REQUIRED TO SERVE IT ON THE PARTIES TO THE EXEMPTION PROCEEDING**

GBCPA argues that the August 6th Letter was a prohibited *ex parte* communication and that it should have been served on all of the parties to the proceeding. Both of these allegations are completely groundless.

A. **The August 6th Letter Was Not An Ex Parte Communication**

The Board's regulations define "*Ex Parte* communication concerning the merits" as "an oral or written communication by or on the behalf of a party which is made without the knowledge or consent of any other party that could or is intended to

(... cont'd)

stage of the environmental process; and there is no requirement that the submission of such modifications or mitigation proposals requires the filing of a new exemption petition.

⁴ Reopening is especially inappropriate here, because, as set forth more fully below (*see infra* at 17-18), all parties will have an ample opportunity to comment upon the proposed routing mitigation measure in response to the draft EIS. Moreover, the Board's August 28th Decision could not be clearer that the exemption decision is conditional and tentative, and that the proceeding remains open. *See* August 28th Decision at 1, 2, 7, & 8. Thus, the argument that this proceeding must be "reopen[ed]" (GBCPA Motions at 9-11) makes no sense on its own terms.

influence anyone who participates or could reasonably be expected to participate in the decision." 49 C.F.R. § 1102.2(a)(3). The Board's regulations prohibit parties, counsel, and other persons from engaging 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." 49 C.F.R. § 1102.2(c)(1). "The purpose of the Commission's regulations concerning *ex parte* communications * * * is to prevent parties from attempting improperly to influence the Commission's decisionmaking process in proceedings pending before it." *Ex Parte No. 392, Application Procedures for a Certificate to Construct, Acquire or Operate Railroad Lines*, 365 I.C.C. 516, 520 (decided Feb. 11, 1982).

The August 6th Letter was not an *ex parte* communication, as defined in 49 C.F.R. § 1102.2(a)(3), and certainly was not a prohibited *ex parte* communication under 49 C.F.R. § 1102.2(c)(1). First, as demonstrated in Section I, *supra*, the August 6th Letter did not relate to the merits of the exemption proceeding and, therefore, could not be construed as an attempt to "improperly to influence the Commission's decisionmaking process in proceedings pending before it." *Ex Parte No. 392*, 365 I.C.C. at 520.

In addition, the August 6th Letter was sent to SEA, which, as the Board well knows, gathers information and makes certain initial decisions and recommendations on environmental matters, but is not the decisionmaker or a direct participant in the ultimate decision on the merits of the transaction. See 49 C.F.R. § 1105.10(f) (environmental assessments and environmental impact statements, and the comments

and responses thereto "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.") (emphasis added).

Thus, Petitioners did *not* communicate with anyone at the Board who is in a position to make a decision on the merits.⁵ The August 6th Letter, therefore, was not an *ex parte* communication under the regulatory definition of 49 C.F.R. § 1102.2(a)(3), and was not a prohibited communication under 49 C.F.R. § 1102.2(c)(1).

B. Petitioners Were Under No Obligation To Serve The August 6th Letter On All Parties To The Proceeding

The Board has unequivocally stated that submissions to SEA do *not* have to be served on all parties of record: "During its environmental review, SEA frequently consults informally with appropriate federal, state, and local agencies, applicants, and communities and other interested parties to verify and evaluate the information provided by applicants. The environmental review process is an *informal one*. There is *no* requirement that persons filing environmental comments *serve copies* of those comments on the parties of record." *CSX Corp.*, slip op. at 2 n.3 (emphasis added).

⁵ Although GBCPA claims (GBCPA Motions at 2) that Petitioners secretly intended and expected that the letter would be communicated to the Board, Petitioners in fact expected that the letter would be considered by SEA as transmitting information about one of 76 voluntary mitigation measures set forth in Petitioners' VMM. There was nothing secret about the proposed routing change or any of the proposed mitigation measures in the VMM. To the contrary, the proposed route revision in particular was well publicized by Petitioners, who announced it in a press release. By the same token, the VMM (including the proposed routing change) clearly set forth proposals for possible environmental mitigation actions, not revisions to Petitioners' petition.

CSX Corp. is consistent with the Board's regulations and customary practice in environmental proceedings conducted by SEA. Except for designated environmental pleadings, such as "Environmental reports," which have specified service requirements (see 49 C.F.R. § 1105.7(b)), Board regulations generally require the service of environmental pleadings only upon SEA and the applicants themselves. See 49 C.F.R. § 1105.10(e). The lack of service requirements comports with the fact that the environmental review process engaged in by SEA requires constant engagement with various interested parties in gathering information, defining the appropriate scope, and analyzing proposed transactions and possible mitigation actions.⁶

Thus, parties routinely address communications directly to SEA without serving other parties – a practice engaged in by GBCPA itself, which apparently has not served its environmental comments on all other parties to the proceeding. Accordingly, there is no basis for GBCPA to complain that Petitioners failed to serve all parties to the

⁶ Consistent with this approach to communications with SEA, Board regulations *require* consultation with SEA six months prior to the initiation of a proceeding – at a time when service could not be effected because neither a docket nor a service list has yet been created. See 49 C.F.R. §§ 1105.10(a)(1); 1150.1(b). The absence of a service requirement is perfectly sensible in light of the Board's desire to encourage broad participation in environmental proceedings and the procedural protections afforded the public in connection with those proceedings. First, because many Board environmental proceedings have numerous participants, a service requirement for comments filed in such proceedings would have the perverse effect of *discouraging* public participation in the proceedings. Second, SEA publishes its draft environmental impact statements and environmental assessments, and the public is afforded adequate opportunities to comment on these, including opportunities to comment orally. Moreover, here, the Board summarized and responded to all of the comments it received during scoping when it issued the final scope. Thus, the fact that most environmental submissions are not served does not impede the public's ability to participate fully in the process of assessing the environmental consequences of proposed actions.

exemption proceeding with the August 6th Letter describing one of Petitioners' 76 proposed voluntary mitigation measures.⁷

* * *

Because the August 6th Letter was not a prohibited *ex parte* communication, and Petitioners were under no obligation to serve the letter upon the participants in the proceeding, GBCPA's request for sanctions against Petitioners should be denied.⁸

III. THERE IS NO BASIS FOR REOPENING THE SCOPING PROCESS

GBCPA asserts that Petitioners' August 6th Letter indicates "significant new conditions that will * * * dramatically alter the environmental review process," and which mandate a reopening of the scoping process pursuant to 40 C.F.R. § 1501.7(c). GBCPA Motions at 12.⁹ Specifically, GBCPA claims that it will suffer irreparable harm if

⁷ As to GBCPA's complaints about Petitioners' failure to serve all of the parties to the proceeding with supportive statements filed by Atofina and Old World Industries (see GBCPA Motions at 9), there is no basis for sanctioning Petitioners for the failure to effect service of these submissions. These statements were not submitted as part of Petitioners' pleadings or other comments, and GBCPA has offered no argument in support of the novel proposition that a petitioner is under an obligation to provide service to all parties of any and all statements made by third parties in support of Petitioners' petition. Moreover, because those statements were cited by the Board in its conditional exemption decision, and, as noted above, the proceeding remains open, interested parties to the proceeding now are aware of those comments, can obtain copies of them, and can respond to them in the proceeding. Thus, in these circumstances, the failure of Atofina and Old World Industries to serve their comments on the parties to the proceeding will not deprive any parties of an opportunity to review and respond to the comments.

⁸ Because no *ex parte* communication occurred, the motion for sanctions against Board employees and an internal investigation also is meritless.

⁹ GBCPA's not only exaggerates the significance of the proposed routing mitigation measure but also mischaracterizes it. Contrary to GBCPA's assertions, the proposed route revision does *not* change "the final destination point from the New South Yard" to Dayton." GBCPA Motions at 1; see also *id.* at 12 (referring to revision of

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it does not have an opportunity, prior to issuance of a draft EIS, to comment upon Petitioners' proposed routing mitigation measure. Because the applicable NEPA regulations do not require a new scoping period, and GBCPA would not be harmed by not having one, these arguments are unavailing.

The Council on Environmental Quality ("CEQ")'s NEPA regulations address the impact on an agency's scoping process of changes made to the proposed action: "[a]n 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 C.F.R. § 1501.7(c). Paragraphs (a) and (b) of that section outline the lead agency's responsibilities with respect to the process, including determination of the scope and significant issues to be analyzed in the EIS and elimination from detailed study of issues that are not significant. Paragraph (a)(1) directs that "[a]s part of the scoping process the lead agency shall * * * invite the participation of * * * interested persons."

As an initial matter, therefore, the CEQ regulation requires only that, if proposed changes to a project meet the criteria in (c), an agency revise its scoping determinations

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"destination point"). Neither New South Yard nor Dayton was ever designated as the "final destination" for Bayport traffic. To the contrary, regardless of whether the traffic were routed through New South Yard or Dayton, those locations would be intermediate handling points. Moreover, even if New South Yard were utilized, it would be possible that, based on storage needs, interchange requirements, and ultimate destination routing requirements, Bayport cars would be moved to or through Dayton. Accordingly, GBCPA's assertions that the proposed routing mitigation measure will "dramatically alter the environmental review process" (*id.* at 12) and change the "final destination" of the traffic (*id.* at 1) are groundless.

made pursuant to the scoping process outlined in (a) and (b)—such as what constitutes significant issues for study in the EIS—not that it “reopen” the scoping process itself. See *id.* Use of the term “scoping process” in other parts of the regulation suggests that “determinations” made pursuant to that process do not constitute the process itself.¹⁰ In this case, it is up to SEA to determine whether Petitioners’ proposed operational changes represent “substantial changes” to the proposed action or “significant new circumstances or information” bearing on the proposal or its impacts. *Id.* If so, it must revise its scoping determinations as necessary.

Even if “reopening” a scoping comment period otherwise were required by Section 1501.7(c), the proposed route revision in Petitioners’ VMM, which was discussed in the August 6th Letter, does not represent a “substantial change” to the proposal or “significant new circumstances or information” bearing on the impacts of the proposal. Although Dayton Yard may be further from the Bayport Industrial District than New South Yard, there is no indication that any additional resource areas would be impacted other than those which are already under study.¹¹ Moreover, the modification

¹⁰ For example, Section 1501.7 provides that “[t]here shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping.” (emphasis added). And, as noted above, Paragraph (a)(1) directs that “[a]s part of the scoping process the lead agency shall * * * invite the participation of * * * interested persons.” (emphasis added).

¹¹ In the Final Scope, SEA summarized and addressed the principal environmental concerns raised by the comments in the areas of infrastructure and operational conditions, risk of increased rail traffic, rail operations safety, hazardous materials transportation safety, pipeline safety, transportation, noise and vibration, climate and air quality, water resources, biological resources, topography, land use, socioeconomics, cultural resources, environmental justice and cumulative impacts. SEA indicated that it

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does not involve changes to construction or entry of rail traffic into new areas. Rather, the Dayton Yard proposal would utilize existing rail corridors in much the same manner as was proposed for operations at New South Yard, and the proposal mirrors the existing UP routing for some of UP's current Bayport traffic. Thus, the proposed routing mitigation measure does not warrant reopening an additional comment period.

Finally, GBCPA will not suffer any harm by being denied an additional comment period that is not required by CEQ or Board regulations. It will have ample opportunity to comment upon the proposed route revision in response to the draft EIS. Those comments will be considered by SEA in making its final recommendations to the Board concerning the proposed action.¹² This opportunity renders moot any alleged procedural injury to GBCPA. See *Muhly v. Espy*, 877 F. Supp. 294, 300 (W.D. Va. 1995) (noting that scoping marks the "infancy, not the termination, of the NEPA process" and that the remaining stages "require substantial input from the public, during which, the Plaintiffs could conceivably cure any of the defects in the NEPA process they believe have taken place so far"). Citing *Northwest Coalition for Alternatives to Pesticides v. Lyng*, 844 F.2d 588, 596 (9th Cir. 1988), the *Muhly* Court found that there

(... cont'd)

would analyze potential impacts in these resource areas in the draft EIS. See 67 Fed. Reg. 47604 (July 19, 2002).

¹² In fact, this proposed route revision was offered as a way to mitigate traffic congestion and East End community concerns, some of which were made known to Petitioners as a direct result of the comments raised during the scoping process.

is no prejudice to a party excluded from scoping where the opportunity exists for that party to participate in the NEPA process and present its views.¹³

CONCLUSION

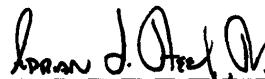
Contrary to GBCPA's baseless assertions, Petitioners did not file or attempt to file a revision to their exemption petition. Indeed, Petitioners' original route proposal is their preferred route. The August 6th Letter merely set forth a proposed mitigation measure developed by Petitioners to address community concerns about the original routing proposal. GBCPA, however, asks the Board to punish Petitioners for offering voluntary proposals that seek to address community concerns. This would have the perverse effect of discouraging petitioners from offering voluntary mitigation proposals and seeking to work with interested communities and agencies to address environmental concerns.

GBCPA also misconstrues the Board's rules on *ex parte* discussions and seeks to impose service rules on Petitioners that not only are not required by the Board's regulations and customary practices but also have not been observed by GBCPA itself in this proceeding.

¹³ The *Muhly* Court ultimately determined that it did not have jurisdiction to review the agency's scoping decision as there had been no final agency action. 877 F. Supp. at 299-300.

Accordingly, GBCPA's motions should be denied.

Respectfully submitted,



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Date: October 8, 2002

CERTIFICATE OF SERVICE

I do hereby certify that copies of the Reply of San Jacinto Limited and The Burlington Northern and Santa Fe Railway Company to Galveston Bay Conservation and Preservation Association's Motions to Sanction, Reopen, and Related Requests for Relief are being served on all parties of record via United States mail.


Adam C. Sloane