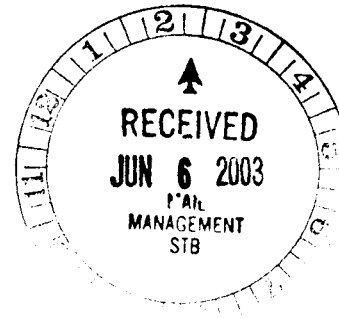


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2-7983

June 6, 2003



Via Hand Delivery

Secretary
Surface Transportation Board
1925 K Street NW
Washington, DC 20423

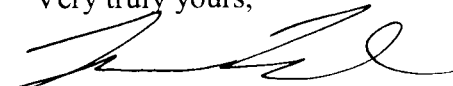
Re: Finance Docket No. 34079, San Jacinto Rail Limited Construction Exemption and the Burlington Northern and Santa Fe Railway Company Operation Exemption-Build Out to the Bayport Loop near Houston, Harris County, Texas

Dear Mr. Secretary:

Enclosed for filing in the above-captioned proceeding are the original and ten copies of the City of Houston, Texas's Petition to for Stay Pending Judicial Review.

I would appreciate it if you would date-stamp the enclosed extra copy of this submission and return it to our messenger for our files. Thank you for your assistance.

Very truly yours,



Benjamin S. Lippard

Enclosures

cc: Parties of Record

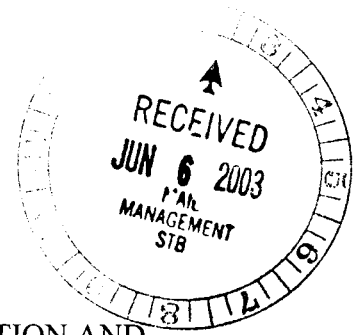
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Public Record

**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**

**PETITION OF THE CITY OF HOUSTON, TEXAS,
FOR STAY PENDING JUDICIAL REVIEW**

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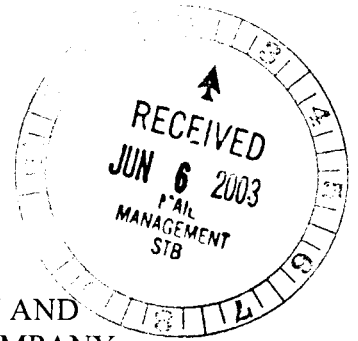
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

**PETITION OF THE CITY OF HOUSTON, TEXAS,
FOR STAY PENDING JUDICIAL REVIEW**

Pursuant to 49 C.F.R. § 1115.5(a), the City of Houston, Texas (the “City”), moves that the Surface Transportation Board (“the Board”) issue a Stay of its Order issued in Finance Docket No. 34079 on May 9, 2003, to allow judicial review of that order once the appellate review procedures have been completed.¹ The City contends that a Stay is appropriate for at least two reasons: (1) the action of a single member of the Board can not satisfy the requirements of the CEQ exemption in 40 C.F.R. § 1506.10(b), and (2) the Final Environmental Impact Statement (“FEIS”) fails to comply with the standards required by the National Environmental Policy Act, 42 U.S.C. §§ 4371 *et seq.* (“NEPA”).

STATEMENT OF FACTS

On May 9, 2003, the Board served a decision granting final approval for an exemption sought by San Jacinto Rail Limited (“San Jacinto”) to construct, and by the Burlington Northern and Santa Fe Railway Company (“BNSF”) to operate, a rail line in Harris County. This project involves the construction and operation of a 12.8 mile line of railroad connecting the Bayport Loop with the former Galveston, Henderson and Houston

¹ Although the appellate review process for these Orders is ongoing (Petitions for Reconsideration are due on June 16, 2003), the Board’s regulations at 49 C.F.R. § 1115.5 require that a motion for stay pending judicial review be filed at least ten days before the effective date of a decision. To ensure it is in compliance with this regulation, the City is filing its petition to stay in advance of the Petition for Reconsideration. *See* 49 C.F.R. §1115.3(f) (“A petition for stay may be filed in advance of a motion for reconsideration[.]”). The City will present its arguments on the merits more completely in its Petition for Reconsideration.

Railroad line. As the Board itself has recognized, this project has caused intense controversy and is strongly opposed by the people and communities of Houston.² On May 16, 2003, in recognition that the May 9 decision was made prior to the availability of the FEIS, the Board, acting with only one member, revised the effective date of the May 9 Order to June 16, 2003.³

While multiple routes are authorized by the Board's order, each potential route raises profound environmental concerns. For example, one route runs through Ellington Field, an airfield used in part by the Texas Air National Guard and the National Aeronautics and Space Administration ("NASA"). Another route cuts through the regional Drinking Water Plant. All of the proposed routes involve potential underground pipeline crossings (of which at least 300 have been identified), many of which are located near a public park. Each of these environmental issues, and many others, were identified in comments made by the City and other commentors. The FEIS, however, contains only conclusory responses to these issues, unreasonably minimizing, neglecting, or even ignoring entirely these profound environmental impacts.

ARGUMENT

The Board's Order should be stayed pending review. A decision regarding whether or not to issue a stay is based on four factors: (1) the petitioner's likelihood of success on the merits; (2) irreparable harm to the petitioner without a stay; (3) substantial harm to other parties if the stay is granted; and (4) the public interest.⁴ In this case, all

² See San Jacinto Rail Ltd. Construction Exemption and The Burlington Northern and Santa Fe Railway Co. Operation Exemption – Build-Out to the Bayport Loop Near Houston, Harris County, TX, Finance Docket No. 34079 (May 9, 2003) at 11, 16.

³ See San Jacinto Rail Limited, Finance Docket No. 34079 (May 16, 2003).

⁴ See Virginia Petroleum Jobbers Assoc. v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977);

four factors suggest that a stay is appropriate. Issuing a stay in this matter is essential to allow a full and thorough analysis of the legal and factual issues that underlie this important and highly-controversial decision. It would avoid irreparable harms to the City and its citizens associated with construction or condemnation activities moving forward. Indeed, the potential exists for the City to be deprived of any opportunity for meaningful review if a stay is not granted. Once the railroad track is constructed there is no realistic way to include any meaningful mitigation measures to the routes suggested. There is no substantial harm to other parties, merely a modest extension of a process that has already been pending for several years, with no obvious detriment to anyone. Finally, the public interest weighs strongly in favor of resolving these important issues completely before moving forward with a project that takes public land for private profit.

I. The City Is Likely to Prevail on the Merits

The City is likely to prevail on the merits for at least two reasons. The first is that the Board has failed to comply with the procedural requirements of NEPA because its grant of the exemption improperly relies on 40 C.F.R. § 1506.10(b). The Board is not legally able to act, given that it is currently composed of only a single member. This fact renders the Board's decision inadequate to qualify for the CEQ exemption on which the Board expressly relies. The second reason is that the FEIS fails to address important environmental issues, and is thus arbitrary, capricious, and not otherwise in accordance with law under the standards of the Administrative Procedure Act and fails to take the "hard look" required by the National Environmental Policy Act.

A. The Decision Failed to Meet the Procedural Requirements of NEPA

The Board's decision purports to qualify for an exemption to the CEQ's regulations under NEPA.⁵ It is well-settled, however, that attempts to qualify for a regulatory exemption are strictly construed against the party seeking the exemption.⁶ In this case, the CEQ Exemption requires that the exemption only applies in cases "where a *real opportunity exists to alter the decision*."⁷ Here, that opportunity does not exist for two reasons. The first is that the Board lacks legal authority to alter the decision because it has only one member. The second is that because there is only a single member of the board, there is essentially no opportunity for discourse, discussion, or give and take within the Board, significantly diminishing the "opportunity" to "alter the decision."

The Board is established by 49 U.S.C. § 701, which provides that "the Board shall consist of 3 members."⁸ This statute also provides that "*A vacancy* in the membership of the Board does not impair the right of the remaining *members* to exercise all of the powers of the Board."⁹ As a matter of plain language, this suggests that a minimum of two members is required to exercise the authority of the Board, in keeping with Congress's decision to appoint a *board*, rather than a unitary executive official, to exercise these important public functions. It is a fundamental principle of law that when the language of a statute is clear, that ends the inquiry.¹⁰ Indeed, the Board's own regulations confirm this understanding, for they provide a list of instances where the Board's authority may be delegated to a single member; appellate review of decisions is

⁵ See San Jacinto Rail Limited, Finance Docket No. 34079 (May 9, 2003) at 13.

⁶ See O'Neal v. Barrow Cty. Bd. of Comm'rs, 980 F.2d 674, 677 (11th Cir. 1993).

⁷ 40 C.F.R. § 1506.10(b) (emphasis added).

⁸ 49 U.S.C. § 701(b)(1).

⁹ 49 U.S.C. § 701(b)(7) (emphasis added).

¹⁰ "The first step of Chevron is straightforward; if the statutory language is clear, it controls." Arent v. Shalala, 70 F.3d 610, 619 (D.C. Cir. 1995)(Wald, J., concurring).

not among them.¹¹ In contrast, and supporting the City's view, the authority to issue a stay pending judicial review, like the one sought by the City, *is explicitly authorized for delegation* to an individual board member.¹²

The Board's sole, and recent, decision to the contrary¹³ is simply incorrect. This recent decision is based on 1 U.S.C. § 1 and Railroad Yardmasters of America v. Harris.¹⁴ The cited provision of 1 U.S.C. § 1 is qualified, however, with the preceding phrase "unless the context indicates otherwise."¹⁵ As explained above, the context of the statutory language in 49 U.S.C. § 701 indicates that more than a single member is required. Similarly, a close reading of Yardmasters reveals that the vacancy provision at issue there specifically allowed action in cases of multiple vacancies, unlike 49 U.S.C. § 701.¹⁶ There is no more significant showing of likely success on the merits than where the plain language of the statute supports the party seeking reconsideration.

B. The FEIS Fails the "Hard Look" Standard

In order to be adequate under NEPA, the FEIS *must* take a "hard look" at the environmental impacts of a proposed action, as the Board recognizes.¹⁷ The FEIS erroneously minimized, ignored, or dismissed without analysis the environmental comments raised by the City in response to the DEIS, and is thus legally inadequate. While due to space limitations, the City cannot fully present its arguments in this

¹¹ See 49 C.F.R. § 1011.4.

¹² 49 C.F.R. §1011.4(3).

¹³ The Burlington Northern and Santa Fe Railway Company – Trackage Rights Exemption – Union Pacific Railroad Company, Finance Docket No. 34345 (Sub-No. 1) (May 23, 2003).

¹⁴ 721 F.2d 1332 (D.C. Cir. 1983).

¹⁵ See 1 U.S.C. § 1.

¹⁶ "Vacancies in the Board shall not impair the powers nor affect the duties of the Board nor of the remaining members of the Board." 721 F.2d at 1334 (emphasis added).

¹⁷ See San Jacinto Rail Limited, Finance Docket No. 34079 (May 9, 2003) at 11.

pleading – these will be addressed fully in the Petition to Reconsider – a few examples suffice to demonstrate that the City is likely to succeed on the merits of this issue.

1. The FEIS Fails to Take a “Hard Look” at the Environmental Impacts on Ellington Field

The existence of the rail line proposed in this docket would create significant airport access and development issues at Ellington Field. In its Comments, the City pointed out that the presence of long, slow-moving trains could block off all three access roads to Ellington Field, and that the presence of a rail line through the Ellington Field parcels would substantially interfere with aviation-related industry.¹⁸ The FEIS simply ignores these impacts as “not substantiated,”¹⁹ a completely unjustified result since the FAA – a federal agency with far more expertise over aviation-related matters than SEA has– *itself substantiated* many of the City’s concerns.²⁰ Moreover, Ellington Field is an integral part of the operations of the Texas Air National Guard, the Coast Guard (now part of the Department of Homeland Security) and NASA, among others. Each of these agencies are critical links in homeland security. Dismissing these facts by stating that the project poses no security issues other than those facing the railroad industry generally,²¹ is absurd, particularly for a line intended to handle primarily chemical cargoes.

2. The FEIS Fails to Take a “Hard Look” at the Environmental Impacts on the Drinking Water Plant

The Drinking Water Plant currently provides potable water to approximately one million people and supplies much of the pressurized water used for firefighting in the

¹⁸ See Environmental Comments of the City of Houston, Texas, to the DEIS, San Jacinto Rail Limited, Finance Docket No. 34079, (February 7, 2003) at 31-35 (“Environmental Comments”). These comments are reproduced in Appendix B to the FEIS.

¹⁹ See FEIS at 4-120.

²⁰ See FEIS at 2-3.

²¹ See FEIS at 4-57.

region. In its comments to the DEIS, the City explained that this site, which is slated for considerable expansion, is of critical importance to the present and future water service to the citizens of Houston and surrounding communities and represents a significant investment of many millions of dollars by the City.²² The City explained that this *entire* site is planned for use as a water treatment plant, and that expansions are currently in the planning stages. The City also explained that construction of a railroad line through this site will cut the plant in half, increase costs of expansion and operation, and create difficulties with maintaining security at this critical infrastructure.

Given the importance of the facility, and the common sense proposition that putting a railroad through the middle of this kind of facility might materially affect its expansion and operation, these environmental impacts are precisely the type of impacts a FEIS must consider.²³ Instead of fulfilling this obligation, however, the FEIS admits that the rail line encroaches on facilities that are currently planned, but concludes without analysis that the presence of a rail line cutting through the plant would not interfere with additional expansion.²⁴ This is not the “hard look” required by NEPA.

3. The FEIS Fails to Take a “Hard Look” at Profound Pipeline Safety Issues

Following the DEIS, which largely understated the risks associated with railroad construction that crosses pipelines, the City made extensive comments regarding the number of pipelines in the area and the potential dangers they may cause.²⁵ The FEIS ignored these comments and only referred to the general state of pipelines and railroads throughout the country rather than focusing on the impact of this particular project. This

²² See Environmental Comments at 25-31.

²³ See *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975) (“The purposes of an environmental impact statement are to detail the environmental and economic effects of proposed federal action[.]”).

²⁴ See FEIS at 4-123.

²⁵ See Environmental Comments at 19-22.

is fundamentally flawed; NEPA requires the review of the environmental impacts of a specific project.²⁶ Merely representing that other, similar risks may be present in other areas does not disclose the impacts from this project. Of special concern to the City is the fact that the preferred route runs along a dense area of pipelines adjacent to Sylvan Rodriguez Park. The FEIS failed to consider the risks of placing the route over so many pipeline crossings in such close proximity to this important community resource.

4. The FEIS Fails to Take a “Hard Look” at the Reasonably Foreseeable Impacts of Increased Traffic

In reviewing the anticipated traffic, the FEIS must contemplate the environmental impacts that are reasonably foreseeable.²⁷ The City’s comments show that traffic and capacity significantly above the FEIS’s assumptions are a realistic possibility.²⁸ This is especially true since once the line is built, there will be little or no recourse should traffic continue to increase. The time to address that impact, therefore, is now. The FEIS flatly refused to “analyze the impact from” traffic levels that are certainly possible and are reasonably foreseeable, contrary to NEPA.²⁹

II. The City Will Suffer Irreparable Harm if a Stay Is Not Granted

Should the project be allowed to go forward at this date, when numerous serious concerns have not been addressed by the FEIS, the City and its citizens will suffer irreparable harm. A stay is essential to maintain the status quo, so that there is opportunity for review before the issues are rendered moot by the passage of time. If the Board’s decision is not stayed, condemnation proceedings will continue and major

²⁶ See Sierra Club v. Morton, 510 F.2d 813, 819 (5th Cir. 1975) (“The sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action.”).

²⁷ See Native Ecosystems Council v. Dombeck, 304 F.3d 886, 895 (9th Cir. 2002) (“NEPA always requires that an environmental analysis for a single project consider the cumulative impacts of that project together with “past, present and reasonably foreseeable future actions.”).

²⁸ See Environmental Comments at 4-9.

²⁹ See FEIS at 4-23 (“SEA did not analyze the impact of 100 car trains . . .”).

construction will soon begin. Before beginning this large scale construction project over 12.8 miles, the impacts of the project must be thoroughly considered. Reasonable mitigation must be included. Indeed, this is precisely what NEPA requires: a “hard look”³⁰ at the environmental consequences. Allowing the project to proceed while these issues are still in question constitutes irreparable harm.³¹

III. Lack of Substantial Harm to Other Parties

If the construction and operation of the Bayport Loop are stayed until the project can be reviewed by a court, San Jacinto and BNSF will not be harmed. A short delay while a court decides whether the project will have a detrimental effect on the environment will cause those parties only a temporary inconvenience, at worst. Indeed, the benefits described by the Board, in the form of increased competition, will not appear for quite some time, whether or not the Board’s decision is stayed. The harms and impacts would be much more immediate. When this temporary delay is weighed against the irreparable harm that may be suffered by the City should the project proceed without proper review, it is clear that the balance of interests favors a stay. Where the harms associated with a stay would be either non-existent or *de minimis*, and the benefits significant, the Board should grant a stay.³²

IV. The Public Interest

The public interest would also be served by staying the Board’s decision pending judicial review. As the Board itself has recognized, the project at issue in this docket is highly controversial, and has been opposed by many in the community affected by the

³⁰ See Mississippi River Basin Alliance v. Westphal, 230 F.3d 170, 174 (5th Cir. 2000).

³¹ See Save Our Ecosystems v. Clark, 747 F.2d 1240, 1250 (9th Cir. 1984) (irreparable injury presumed when NEPA requirements not met).

³² See Providence Journal Co. v. FBI, 595 F.2d 885 (1st Cir. 1979).

project. Indeed, the only parties before the Board that have not opposed the project are those that will directly benefit economically from the project. The Board has also recognized that its single-member composition is a unique, unprecedented situation that profoundly affects an agency entrusted with protecting the public interest. Maintaining the status quo while using established procedures to resolve all of the legal and factual issues associated with this project is in the best interest of all parties, both to ensure that the environmental concerns of the City and its citizens are fully and thoroughly considered as required by law, and that the legal basis of any decision made by the Board in this matter is clear. The public interest thus supports a stay.

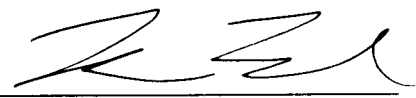
CONCLUSION

For the reasons given above, the City respectfully request that the Board stay its May 9, 2003 Order in this docket until the appellate procedures and subsequent judicial review are completed.

Dated: June 6, 2003

Respectfully submitted,

CITY OF HOUSTON, TEXAS

By: 

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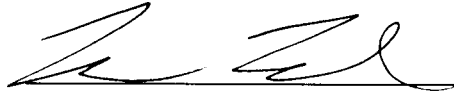
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Attorneys for Petitioner

City of Houston, Texas

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2003, I caused copies of the foregoing Petition for Stay to be served via express mail and First Class Mail on all parties of record in this proceeding.

A handwritten signature in black ink, appearing to read 'B. S. Lippard', written over a horizontal line.

Benjamin S. Lippard