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BLACKBURN CARTER
A Professional Corporation
Lawyers

James B. Blackburn, Jr.
Mary W. Carter
Richard R. Morrison, IV

2900 Westlayan, Suite 400
Houston, Texas 77027
Telephone (713) 524-1012
Telefax (713) 524-5165

June 12, 2003

Via Federal Express

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001



RE: *San Jacinto Rail Limited and The Burlington Northern and Santa Fe Railway Company Construction and Operation of a Rail Line from the Bayport Loop in Harris County, Texas*
Finance Docket No. 34079
Petitioners' Motion for Reconsideration

Dear Secretary Williams:

Enclosed please find an original plus eleven (11) copies of The Galveston Bay Conservation and Preservation Association and The League of United Latin American Citizens' Petition For Reconsideration in the above referenced proceeding and eleven (11) CD copies of the U.S. Army Corps of Engineers, Galveston District, Final Impact Statement for The Port of Houston Authority's Bayport Ship Channel Container/Cruise Terminal included as an attachment. Please return a filed stamped copy of this document to me in the enclosed self-addressed, stamped envelope.

If you have any questions or concerns, please do not hesitate to contact me at (713) 524-1012.

Respectfully submitted,

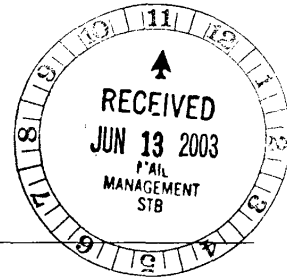
BLACKBURN CARTER, P.C.

by James B. Blackburn, Jr. *by permission*
James B. Blackburn, Jr.

Enclosure

CC: Enrique Dovalina, Esq. (without attachment)
Sharon Mattox, Esq. (without attachment)
Service List (without attachment)

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, TEXAS

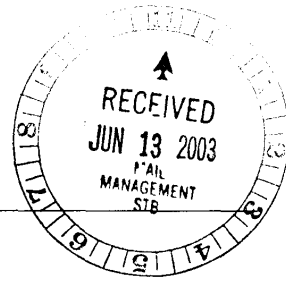
GALVESTON BAY CONSERVATION AND PRESERVATION ASSOCIATION AND
LEAGUE OF UNITED LATIN AMERICAN CITIZENS'
PETITION FOR RECONSIDERATION

JAMES B. BLACKBURN, JR.
Attorney in charge
TBA No. 02388500
Southern District of Texas Bar No. 7416
BLACKBURN CARTER, P.C.
2900 Wesleyan, Suite 400
Houston, Texas 77027
713/524-1012
713/524-5165 (fax)

***Counsel for GALVESTON BAY CONSERVATION AND
PRESERVATION ASSOCIATION
And of counsel for THE LEAGUE OF UNITED LATIN
AMERICAN CITIZENS***

DATED: June 12, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB FINANCE DOCKET NO. 34079

SAN JACINTO RAIL LIMITED CONSTRUCTION EXEMPTION AND
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**GALVESTON BAY CONSERVATION AND PRESERVATION ASSOCIATION AND
LEAGUE OF UNITED LATIN AMERICAN CITIZENS'
PETITION FOR RECONSIDERATION**

COME NOW, The Galveston Bay Conservation and Preservation Association ("GBCPA") and The League of United Latin American Citizens ("LULAC"), Petitioners, and submit their Petition For Reconsideration of the Surface Transportation Board's (the "Board") May 9, 2003, Decision granting the final approval of the exemption sought by San Jacinto Rail (SJR) to construct, and by The Burlington Northern and Santa Fe Railway Company ("BNSF") to operate, a rail line in Harris County, TX.

I. BACKGROUND

On August 30, 2001, SJR and BNSF filed a petition with the Board pursuant to 49 U.S.C. § 10502 to construct and operate a rail line in Harris County, Texas. In that petition, SJR/BNSF proposed to construct approximately 12.8 miles of new rail line to serve the petrochemical industries in the Bayport Industrial District.

On December 6, 2002, following a scoping and public hearing, the Board's Section of Environmental Analysis ("SEA") issued a draft environmental impact statement. On May 2, 2003, a final environmental impact statement ("FEIS") was issued. On May 9, 2003, the Board granted approval of SJR/BNSF's exemption. All appeals are due by, and including, June 16, 2003.

II. ARGUMENT

Pursuant to 49 C.F.R. 1115.3¹, Petitioners request that the Board reconsider its May 9, 2003, Decision. This Petition For Reconsideration focuses on the Board's erroneous environmental conclusions regarding pipeline safety; the assessment of build alignments north of Ellington Field; jurisdictional wetlands delineation; fine air particulates, e.g., PM 2.5; noise, rail congestion and land use changes. Additionally, Petitioners will show that, based upon the recently issued FEIS for The Port of Houston's Proposed Bayport Ship Channel Container/Cruise Terminal (hereinafter "Bayport FEIS"), which provides new evidence regarding certain area environmental conditions, the Board should reevaluate its environmental analysis. These new and existing environmental issues have a significant effect on the outcome of the Board's decision in this case.

Petitioners are filing its Motion For Reconsideration to be timely. Petitioners contend, however, that the Board, which is currently comprised of one member, cannot properly hear this appeal. First, pursuant to 49 C.F.R. § 1011.4, an individual member is not delegated the authority to hear, nor decide upon, any appeals. Second, in contravention to 40 C.F.R. § 1506.10(b), and since an individual member of the Board cannot hear an appeal, Petitioners will be denied a "real

¹ A motion for reconsideration should be granted if it is necessary to correct a clear error or to prevent manifest injustice. *Frascona v. Minnesota Mutual Life Ins., Co.*, 53 F. Supp.2d 1282, 1283 (N.D. Ga. Dec. 1, 1998).

opportunity" to alter the Board's decision.² Petitioners also contend that, since the Board is only currently comprised of one remaining member, the Board can only grant Petitioners' Motion For Stay filed June 6, 2003 and as such, stay the proceeding until a quorum exists.

A. Any Rail Construction and Operation Poses A Significant Threat To Known and Unknown Pipelines

1. Underground pipeline locations

The Board's FEIS discussion of pipeline safety, although expansive, fails at its base. To properly assess pipeline safety, the Board must first determine the location of the numerous pipelines that criss-cross the build alignment locations. The FEIS states that it is "standard railroad practice to field verify pipeline location information, . . . prior to construction activities." U.S. Environmental Protection Agency, Final Environmental Impact Statement San Jacinto Rail Limited and The Burlington Northern and Santa Fe Railway Company Construction and Operation of a Rail Line from the Bayport Loop in Harris County, Texas, 4-63 (May 2, 2003) (hereinafter "FEIS"). And that Respondents will hire "a qualified pipeline engineering firm that is familiar with the project area to assist in the ID and location of the various pipeline crossings necessary for project-related construction activities." *Id.* The Board has approved all of the build alternatives. Surface Transportation Board, Finance Docket N. 34079, Decision 22 (May 9, 2003) (hereinafter "STB Decision"). Just because waiting until construction is imminent is deemed to be standard practice does not mean it is the proper time to assess pipeline safety concerns. Determining the location of the underground pipelines prior to authorizing all build alternatives is paramount in creating a baseline assessment of pipeline safety. Such a determination could eliminate most, and probably all, of the build alternatives, making the

² Attempts to qualify for a regulatory exemption are strictly construed against the party seeking the exemption. *O'Neal v. Barrow City Bd. of Comm'rs*, 980 F.2d 674, 677 (11th Cir. 1993); *Valspar Corp. v. C.I.R.*, 172 F.2d 171, 175 (2nd Cir. 1949) (stating that burden is on taxpayer to show that he comes within the exemption).

Board's approval void. For instance, a proper mapping of the location of the pipelines could reveal that the pipelines are too close to the surface in order to properly construct rail lines. The Galveston Bay Conservation and Preservation Association, Comments Regarding the Draft Environmental Impact Statement 2 (Feb. 20, 2003) and attached Exhibit 1, on file, (hereinafter "GBPCA Comments"). A NEPA document's purpose is to fully and fairly disclose the impacts of a proposed action to the public. The public is certainly entitled to know about pipeline safety issues. And is entitled to review and comment upon a bona fide analysis of this issue. Indeed, there are public health and safety concerns regarding this issue. The Board is essentially requesting the public to blindly trust professionals to do their job after the permit is granted. That is not what NEPA requires. NEPA requires full disclosure, not trust. In this regard, the Board's decision should be reconsidered.

2. Maintenance of existing rail lines

The FEIS only addressed maintenance issues regarding the build alternatives and not existing lines. FEIS at 4-69. With the now permitted Shoal Point Container/Cruise Terminal Facility and the possible permitting of the proposed Bayport Ship Channel Container/Cruise Terminal looming on the horizon, traffic in the Bayport Industrial Loop area will increase dramatically. This will result in increased track maintenance of existing lines, meaning more potential risk of maintenance-related accidents. For instance, most railroads use graders to maintain right-of-way roads. GBPCA Comments, Exhibit 1. Buried pipelines lose a layer of soil covering each time the grader makes a pass. *Id.* Moreover, just the weight of maintenance equipment alone can cause ruptures to poorly buried pipelines. *Id.* This issue was ignored in the FEIS and provides a more-than-adequate reason for reconsideration.

B. Significant Landfill Issues Remain Regarding Approved Build Alternatives 2B and 2D

In approving all the build alternatives, the Board approved build alternatives 2B and 2D, both would be constructed over landfill sites. STB Decision at 22. In the FEIS, SEA, the environmental arm of the Board, failed to include comprehensive maps or studies of the waste disposal sites in the build areas for 2B and 2D. This area is well known for active and inactive sandpits, an active landfill and several inactive and capped landfills. GBCPA Comments, Exhibit 3 at 5. Indeed, the relationship between the alignments and past landfilling operations is not well document and a detailed account of the Farley Street landfill and clean-up operations is lacking. *Id.* at 5-7. It is absurd to authorize any construction of rail lines over landfill sites before a searching and detailed study of the area is conducted. Adding to this absurdity, SEA recommends that the Respondents wait until the time of construction to undertake such detailed analysis. FEIS at 4-130. This recommendation, moreover, if taken, will deny Petitioners the opportunity to meaningfully comment on those studies. Such a study should be held out for public review. Once again, the Board is asking the public to trust it. That is not what NEPA requires. NEPA requires full disclosure, not trust.

C. Reliance on The Galveston District's Wetlands Determination is Erroneous

In discussing the significance of the coastal prairie potholes, SEA relies upon the U.S. Corps of Army Engineers, Galveston District's, wholly erroneous determination that such wetlands are non-jurisdictional. FEIS at 4-92. As a result of this misplaced faith, SEA has incorrectly determined the acreage of jurisdictional wetlands. *Id.* By not including overland sheet flow as part of its delineation of jurisdictional wetlands, SEA has wholly underestimated the acreage of jurisdictional wetlands in the approved build areas. GBPCA Comments, Exhibit 6 at 17. SEA also alludes to design changes that would impact the acreage of jurisdictional

wetlands but has not provided Petitioners with such information. FEIS at 4-92. Such information, similar to the location of underground pipelines, should be held out for public review and comment.

D. Reevaluation of PM 2.5 is Warranted In Light of The Bayport Facility Violation in 2010

On May 16, 2003 the FEIS for the proposed Bayport Container/Cruise Terminal Facility was released. U.S. Army Corps of Engineers, Galveston District, Final Environmental Impact Statement For The Port of Houston Authority's Bayport Ship Channel Container/Cruise Terminal (May 16, 2003) (hereinafter "Bayport FEIS"), see attached CD. This FEIS stated that the Bayport Facility, by itself, will violate the 24-hour National Ambient Air Quality Standard for PM 2.5. Bayport FEIS at ES-31, 32; 3.12-18. PM 2.5 is particulate matter 2.5 microns in size and smaller. These are very small particles that go very deep into human lungs. The scientific literature contains recent articles linking PM2.5 to mortality as well as to sickness and hospital admissions. PM2.5 can kill you – it is a truly dangerous pollutant. This is new information that has recently been made public. As a result of this finding, the Board should reevaluate its PM 2.5 analysis.

E. Reevaluation of Noise Impacts Is Warranted In Light of The Bayport Facility FEIS

The Bayport FEIS now presents a new analysis of the noise impacts of the proposed Bayport Facility on adjacent neighborhoods. Bayport FEIS at ES-18, 19, 23, 26 This new analysis reveals that noise levels will violate in the City of Pasadena's noise ordinance. *Id.* at 3.8-31. Additionally, the Bayport FEIS reveals that noise impacts will impact property values in the area. *Id.* at ES-18, 19. And, as mentioned in GBCPA's comments to the DEIS, when property values decline, there is an inevitable transition to industrial purposes. GBCPA

6-7. Although, SEA has stated that "noise from the [b]uild [s]egments would not affect . . . other communities near the proposed Bayport Terminal." FEIS at 4-85. This analysis was conducted prior to the release of the Bayport FEIS. Noise impacts have significantly changed. As a result of this new analytical information, the Board should reevaluate its noise impacts of the proposed rail line.

F. The Board Inadequately Analyzed Rail Congestion

Both the DEIS and FEIS fail to adequately discuss rail congestion. With the possible addition of two container/cruise terminal ports on the Galveston Bay, rail congestion is a major concern. As discussed below, the Bayport Facility Port Terminal Railroad Association line ("PTRA") and the Shoal Point Facility will add increased congestion north along SH 146 and west along SH 225 into east and southeast Houston. GBCPA Comments, Exhibit 5 at 21. This area is already congested.

G. The Board's Land Use Analysis Is Incomplete

The Board's land use analysis does not go far enough. It only addresses the land use issues surrounding the build segments and not the existing lines. FEIS at 4-109-117. Nor does the FEIS address the cumulative impacts of the Bayport Facility or the Shoal Point Facility. The primary impacted land uses areas are existing residential communities, including the cities of Clear Lake, la Porte, Shoreacres, Seabrook, El Lago, Pasadena and Houston; local schools; recreational facilities and open space; sensitive environmental areas; economic growth and the overall quality of life. GBCPA Comments, Exhibit 5 at 20-21.

Additionally, in 2015, rail-related impacts from the extension of the PTRA Line and the Shoal Point Facility will create an impact corridor along at grade crossings from the container terminal site, north along SH 146, and west along SH 225 into east and southeast Houston.

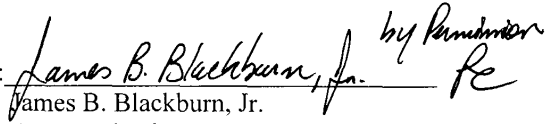
GBCPA Comments, Exhibit 5 at 21. As mention previously, the addition of these Facilities, Bayport and Shoal Point, to the already congested Galveston Bay area will magnify the cumulative air and noise impacts. *Id.* at 22.

III. CONCLUSION

The Board should reconsider its May 9, 2003 Decision in this proceeding to correct the errors discussed above and to prevent the injustices that will occur from this project.

Respectfully submitted,

BLACKBURN CARTER, P.C.

by:  *by permission*
James B. Blackburn, Jr.
Attorney in charge
TBA No. 02388500
2900 Wesleyan, Suite 400
Houston, Texas 77027
713/524-1012
713/524-5165 (fax)

***Counsel for GALVESTON BAY CONSERVATION AND
PRESERVATION ASSOCIATION
And of counsel for THE LEAGUE OF UNITED LATIN
AMERICAN CITIZENS***

DOVALINA & EURESTE, L.L.P.
Enrique Dovalina
TBA No. 06060300
3336 Richmond
Suite 100
Houston, Texas 77098
713/624-1000
713/624-1099 (fax)

COUNSEL FOR THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS

CERTIFICATE OF SERVICE

On this 12 day June, 2003, a true and correct copy of the foregoing instrument was served on all Parties of Record by the undersigned via regular U.S. Mail, and/or Certified Mail/Return Receipt Requested, and/or hand delivery, and/or facsimile transmission, and/or Federal Express Overnight Mail.

James B. Blackburn, Jr. by permission
James B. Blackburn, Jr. *JB*

SERVICE LIST

STB Finance Docket 34079

San Jacinto Rail

List of Parties of Record as of 09/17/02

Martin W. Bercovici
Keller and Heckman L.L.P.
1001 G Street NW ste.500 West
Washington, D.C. 20001
*For: Atofina Petrochemicals, Basell USA,
Equistar Chemicals, LP, Lyondell Chemical
Company*

David F. Zoll
Chemical Manufacturers Assoc.
Commonwealth Tower
1300 Wilson Blvd.
Arlington, VA 22209

Mary E. Nave
4066 Commercial Avenue
Northbrook, IL 60062-1851

Anthony W. Hall, Jr.
City Hall Annex
900 Bagby, 4th Floor
Houston, TX 77002
For the City of Houston

Adrian L. Steel, Jr.
Erika Z. Jones
Kathryn A. Kusske
Mayer, Brown, Rowe, and Maw
1909 K Street, N.W.
Washington, D.C. 20006-1101
*For Burlington-Northern Santa Fe, San
Jacinto Rail Limited*

John O'Leary
Atofina Chemicals
2000 Market Street, 24th floor
Philadelphia, PA 19103-3222

Michael L. Rosenthal
Covington & Burling
1201 Pennsylvania Ave. NW
Washington, D.C. 20004-2401
For Union Pacific

Gregory Rincon
Eastwood/ Broadmoor Area CDC
P.O. Box 230209
Houston, TX 77223

Amy Carruth
Houston Chamber of Commerce
120 Smith Street, ste.700
Houston, TX 77002-4400
For Greater Houston Partnership

Commissioner Jerry Eversole
1001 Preston, Ste. 924
Houston, TX 77002

Richard J. Schiefelbein
Woodharbor Associates
7801 Woodharbor Dr.
Fort Worth, TX 76179-3047
For the Port of Houston Authority

William W. Whitehurst, Jr.
W.W. Whitehurst & Associates, Inc.
12421 Happy Hollow Road
Cockeysville, MD 21030 -1711

Mayor Lee P. Brown
P.O. Box 1562
Houston, TX 77251-1562
For the City of Houston

Sam White
Southern Ionic Incorporated
P.O. Drawer 1217
201 Commerce Street
West Point, MS 39773

Port Terminal Railroad Association
Marvin Wells, General Manager
8934 Manchester
Houston, TX 77012

Jim Bilek
Omnova Solutions, Inc.
175 Ghent Road
Fairlawn, OH 44333-3300

Louise A. Rinn
Union Pacific RR Co.
1416 Dodge Street Room 830
Omaha, NE 68179
For Union Pacific

Daniel Elliott III
Asst. General Counsel
United Transportation Union
14600 Detroit Avenue
Cleveland, OH 44107-4250

Kathryn A. Kusske
Mayer Brown & Platt
1909 K Street NW
Washington, DC 20006-1101