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June 23, 2003

Via Hand Delivery

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

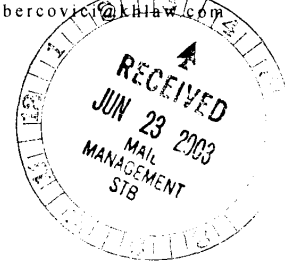
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WRITER'S DIRECT ACCESS

Martin W. Bercovici
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Re: Finance Docket No. 34079, San Jacinto Rail Limited and The Burlington Northern and Santa Fe Railway Company – Construction and Operation of A Rail Line From Bayport Loop in Harris County, Texas

Dear Secretary Williams:

Please find enclosed for filing in the above-captioned proceeding the original and ten (10) copies of the Reply of Bayport Producers Railway Company to City of Houston, Brian Pietruszewski and Galveston Bay Conservation and Preservation Association and The League of United Latin American Citizens' petitions to reconsider or reopen the above-captioned proceeding. Also enclosed is a 3.5 inch disk containing the text of the pleading in Word format.

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

Sincerely yours,

Martin W. Bercovici

Enclosures

cc: All Parties of Record

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WASHINGTON, D.C.

BRUSSELS

SAN FRANCISCO

Before the
Surface Transportation Board
Washington, DC



STB Finance Docket No. 34079
San Jacinto Rail Limited -- Authority to Construct -- And The Burlington Northern And Santa Fe Railway Company -- Authority to Operate -- Petition for an Exemption from 49 U.S.C. § 10901 -- Build-Out to the Bayport Loop Near Houston, Harris County, Texas

**REPLY OF ATOFINA PETROCHEMICALS, INC., BASELL USA INC.,
EQUISTAR CHEMICALS, LP AND LYONDELL CHEMICAL COMPANY
TO PETITIONS TO RECONSIDER OR REOPEN**

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**Attorneys for: ATOFINA Petrochemicals,
Inc., Basell USA Inc., Equistar
Chemicals, LP, and Lyondell Chemical
Company**

June 23, 2003

SUMMARY OF ARGUMENT

ATOFINA Petrochemicals, Inc., Basell USA Inc., Equistar Chemicals, LP and Lyondell Chemical Company (hereinafter the "Bayport Producers") respectfully urge the Surface Transportation Board to reject the petition for reopening of Brian Pietruszewski and to deny the petitions for reconsideration of the City of Houston and of Galveston Bay Conservation and Preservation Association of the exemption granted to San Jacinto Rail Limited ("SJRL") and The Burlington Northern and Santa Fe Railway to construct and operate a new rail line to serve the Bayport, Texas Industrial District. The Bayport Producers address the procedural arguments raised by the petitions to reopen or reconsider, and endorse and adopt the responses made by SJRL and BNSF regarding the Final Environmental Impact Statement.

Pietruszewski's petition is procedurally defective in that (i) as a resident of Portland, Oregon, Pietruszewski lacks standing to challenge the Board's Decision, (ii) Pietruszewski tenders new matter for the Board to consider which existed as of the comment due date for the draft Environmental Impact Statement and then could have been submitted, in violation of the Board's rules and policies, and (iii) Pietruszewski's petition substantially exceeds the Board's page limitation, and Pietruszewski neither has asked for waiver nor shown good cause therefore.

The challenge to the Board's Decision by the City and Galveston Bay based on failure to comply with NEPA procedures consists of make-weight arguments. The publication error of which the City complains was non-prejudicial, and the City had the full opportunity to address the FEIS as provided under NEPA regulation. Other complaints about the STB's procedures and authority are contrived and are not supported by statute or decisional law. Reliance on such arguments evidences desperation in searching for a basis to challenge the Board's Decision.

**Before the
Surface Transportation Board
Washington, DC 20423**

In The Matter Of:)
)
San Jacinto Rail Limited -- Authority to)
Construct -- And The Burlington Northern) Finance Docket No. 34079
And Santa Fe Railway Company--Authority)
to Operate -- Petition for an Exemption)
from 49 U.S.C. § 10901 -- Build-Out to the)
Bayport Loop Near Houston, Harris)
County, Texas)

**REPLY OF
ATOFINA PETROCHEMICALS, INC., BASELL USA INC.,
EQUISTAR CHEMICALS, LP AND LYONDELL CHEMICAL COMPANY
TO PETITIONS TO RECONSIDER OR REOPEN**

ATOFINA Petrochemicals, Inc., Basell USA Inc., Equistar Chemicals, LP and Lyondell Chemical Company (hereinafter the "Bayport Producers") respectfully submit this Reply to the petitions of the City of Houston, Texas (hereinafter "City"), Galveston Bay Conservation and Preservation Association and League of United Latin American Citizens (hereinafter "GBCPA"), and Brian Pietruszewski (herein after "Pietruszewski") (collectively "Petitioners") seeking reconsideration or reopening of the decision served May 9, 2003 in the proceeding captioned above approving the exemption for San Jacinto Rail Limited ("SJRL") and The Burlington Northern and Santa Fe Railway Company ("BNSF") to construct and operate a new rail line to serve Bayport, Texas ("Decision").¹ This Reply is submitted pursuant to 49 C.F.R. § 1115.3 and the Board's Decision in this proceeding served June 12, 2003.

¹ Pietruszewski characterizes his pleading as a petition for reconsideration but also refers to the Board's rules on reopening. The Board's web site shows the Pietruszewski petition as being filed May 17, 2003, one day after the due date for petitions for reconsideration. See Finance Docket No. 34079, Decision at 2 (served May 16, 2003). This would make the petition one for reopening. In any event, the Board's regulations governing petitions for reopening incorporate the Board's standards for reconsideration, 49 C.F.R. § 1115.4. In addition, Michael Flannigan submitted "comments on administrative appeals," directed to the Section of Environmental Analysis.

STATEMENT OF INTEREST

The Bayport Producers are partners in SJRL, and construction of the SJRL line will bring competitive rail service to the Bayport Industrial District in Harris County, Texas, and therefore to the Bayport Producers' petrochemical complexes.² The benefits of competitive rail service were spelled out in verified statements from each of the Bayport Producers submitted in support of the Petition for Exemption in this proceeding and in the Board's decision conditionally approving the requested exemption, subject to completion of the environmental review process.³ The harms which would result from any delay in implementation of the Board's Decision are described in the affidavits associated with the June 11, 2003 Replies of Bayport Producers and SJRL and BNSF to the GBCPA and City requests for stay of the Board's Decision pending judicial review. Those harms to Bayport Producers include additional costs in excess of \$1.5 million per month, as well as adverse customer and supply chain impacts.

STANDARD FOR RECONSIDERATION OR REOPENING

To justify reconsideration or reopening Petitioners must demonstrate: (1) the prior action will be materially affected by new evidence or changed circumstances, and/or (2) the prior action involves material error. 49 C.F.R. § 1115.3 (b). In the case of new evidence, petitioner must explain why it was not previously presented. *Id.* at § 1115.3 (c). Petitions may not exceed 20 pages in length. *Id.* at § 1115.3 (d). *See also id.* at § 1115.4. As set forth below, Petitioners have not satisfied the standards set forth by the Board to warrant reconsideration or reopening.

² Each of the Bayport Producers is described in further detail in their Verified Statements associated with the Petition for Exemption initiating this proceeding.

³ Finance Docket No. 34079, Decision (served August 28, 2002).

ARGUMENT

Petitioners City, GBCPA and Pietruszewski have raised both procedural and substantive arguments regarding the Board's Decision. In particular, Petitioners challenge the Board's Decision as it relates to the Final Environmental Impact Statement ("FEIS"),⁴ and also regarding compliance with the regulations of the Council on Environmental Quality ("CEQ") relating to the FEIS and final agency action.⁵ Bayport Producers are aware that SJRL and BNSF also will be responding to the petitions for reconsideration and reopening and will address the merits of Petitioners' arguments regarding the FEIS. As part of SJRL, Bayport Producers fully endorse and adopt the arguments of SJRL and BNSF as their own. This Reply focuses on three issues: (i) Pietruszewski's request that the Board reopen the proceeding to accept "new evidence," (ii) the argument of the City that the Board's procedures regarding adoption of the Decision violated National Environmental Policy Act ("NEPA") regulations, and (iii) the argument of the City that the Board lacks authority to act with only a single sitting member and therefore does not satisfy NEPA requirements regarding post-decision remedies.

Pietruszewski's Petition to Reopen Should Be Rejected by the Board

Pietruszewski's request to reopen should be rejected on three grounds. First, Pietruszewski submits his petition as an individual, not as a representative of any party.⁶ Pietruszewski is a resident of Portland, Oregon, as evidenced by the address on his pleading, a community located some 2200 miles from the Houston area. Contrary to Pietruszewski's claim,

⁴ The draft Environmental Impact Statement will be referred to as "DEIS".

⁵ GBCPA has raised an issue of the Board's authority to act with only a single sitting member, parroting in summary fashion an argument advanced by the City in its Motion for Stay. GBCPA Petition for Reconsideration at 2-3. The City again has advanced this issue in its Petition for Reconsideration. Bayport Producers will treat this argument as raised by the City and will not separately address the GBCPA argument. Pietruszewski does not join said arguments.

⁶ Pietruszewski Petition at 2. Pietruszewski also claims to having appeared on the Board's service list; however, that was as a representative of GBCPA, and not in his own right.

advanced in *ipse dixit* fashion, that he satisfies “prudential standing requirements of concrete, particularized, actual, and imminent injury in fact; causation; and redressability,”⁷ Pietruszewski demonstrates no substantive interest in this proceeding giving rise to standing; and the governing processes of administrative law do not recognize the right of an individual who is not directly impacted to act as a private “attorney general.”⁸

Second, by his own pleading Pietruszewski requests the Board to accept “new evidence,”⁹ and no adequate justification has been provided for tendering new matter at this stage of the proceeding.¹⁰

As set forth in his petition, Pietruszewski developed his arguments regarding the DEIS when he was assisting either GBCPA or its counsel in this proceeding.¹¹ GBCPA’s counsel rejected his arguments. Pietruszewski states that he “reasonably relied on GBCPA to submit them to the STB;”¹² however, the basis for his conclusion is not identified. To the contrary, he

⁷ Petition at 2.

⁸ See e.g. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); *Assn. of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150 (1970).

⁹ The matter tendered by Pietruszewski is not actually evidence, but rather is argument. “Evidence” is testimony, writings or other things offered to prove the existence or non-existence of a fact. Blacks’s Law Dictionary, West Pub. Co. (1990). Pietruszewski merely argues the facts of record as set forth in the DEIS.

¹⁰ There also is an issue of relevance. The Board has issued the FEIS, and any further proceedings must address the FEIS rather than the DEIS. The comment period on the DEIS closed three months ago. It is not the responsibility of the Board to sort through Pietruszewski’s claims and determine which still are relevant.

¹¹ Petition at 2-4. Pietruszewski submits as Exhibit B to his petition a proposed set of comments prepared for GBCPA. The relevance of Exhibit B is unclear, as is Pietruszewski’s authority independently to submit work product to the Board prepared on behalf of a party but not utilized by that party.

¹² Petition at 4. Pietruszewski’s claim that he relied upon his role “as an agent of party GBCPA,” *id.*, both lacks time perspective, especially in the context of the January 9, 2003 date when his draft comments were rejected, and also ignores the fact that if he were an agent of GBCPA, he had no independent role or position with regard to this matter. A principal is entitled to rely on its agent, not vice versa; and if the agent defaults, the principal’s remedy is to seek recourse from the agent and not from a third party.

states that “A conversation with GBCPA’s attorney-in-charge Blackburn on January 9, 2003 made it clear that no other attorney or person would be completing DEIS comments for GBCPA.”¹³ By implication, that message was not well received by Pietruszewski in that “This understanding was reinforced with several phone calls and emails.”¹⁴ These events occurred fully two months before the due date for comments on the DEIS.¹⁵ Apparently Pietruszewski let the matter rest for more than two months, and only then learned from GBCPA that it had not utilized his draft comments.¹⁶ Pietruszewski states that several weeks later he was informed through GBCPA’s office that the City of Houston had submitted “equivalent evidence.”¹⁷

Clearly, the matter Pietruszewski tenders to the Board is not “new.” The arguments he now seeks to advance were available and had been developed well before the due date for submission of comments on the DEIS. The fact that GBCPA’s counsel had rejected Pietruszewski’s draft should have placed him on notice that his views would not be advanced to the Board. According to his own pleading, however, he made no effort to pursue this matter for some 2 ½ months, until well after the comment period had closed.¹⁸ As the Board recently held:

As we recently explained (citation omitted), there must be a clearly defined cut-off point, after which the record of the proceeding is closed. Thus, if a party wishes to introduce further material at a later stage, it must file a petition to supplement the record. Such a petition should show that the information sought to be introduced is central to the

¹³ *Id.* at 3.

¹⁴ *Id.*

¹⁵ *See, Decision*, Finance Docket No. 34079 (served Feb. 13, 2003), extending the due date to March 14, 2003.

¹⁶ *Petition* at 4.

¹⁷ *Id.*

¹⁸ Pietruszewski does not allege one fact indicating that he had any basis for a “reasonable reliance on GBCPA and co-party City of Houston” to submit his views, *Petition* at 2. As to the latter, he claims no relationship with the City and only infers that it had advanced his arguments based on a telephone conversation with a GBCPA attorney more than 3 weeks after the comment filing date. *Id.* at 4.

petitioning party's case, could not reasonably have been introduced earlier, and would materially influence the outcome of the proceeding.

Carolina Power & Light Co. v. Norfolk Southern Ry Co., STB Docket No. 42072 (served May 12, 2003). Pietruszewski's petition clearly does not meet this standard, and particularly the requirement that "the information sought to be introduced . . . could not reasonably have been introduced earlier." This standard is firmly grounded in Board decisions.

Third, Pietruszewski's new evidence, attached as Exhibit A to his Petition, consists of a 40-page statement of argument concerning the DEIS. This Exhibit alone exceeds the Board's page limitation by 100%. Although labeled an "exhibit," Exhibit A is precisely the pleading described in 49 C.F.R. § 1115.3 (b) and (c) and so must count as part of the allowed 20 page pleading. Waiver of the page limitation, which has not been sought by Pietruszewski, is not lightly granted by the Board. *See PPL Montana, LLC v. BNSF*, STB Docket No. 42054 (served Aug. 29, 2002). For this reason too, the Pietruszewski pleading should be rejected.

Finally, contrary to the argument of Pietruszewski that applicants will not be harmed by reopening the record,¹⁹ Bayport Producers and SJRL and BNSF will suffer substantial economic harm from delay in achieving administrative finality in this proceeding as described in the Statement of Interest, *supra*.

The Board Fully Complied with NEPA Procedural Requirements

The maxim of litigators is that when you have the facts on your side, pound the facts; when you have the law on your side, pound the law; and when you have neither, pound the table. The City's petition is equivalent to pounding the table. Recognizing that it has a high standard to meet to merit reconsideration,²⁰ the City devotes approximately half of its argument to contriving

¹⁹ Petition at 9.

²⁰ City Petition at 11.

a case of procedural error rather than forcefully addressing whether the Board satisfied the National Environmental Policy Act ("NEPA") decisional standards.

A. The May 9, 2003 Decision Fully Complies with CEQ and NEPA Procedures

The Board voted on the SJRL exemption and issued its Decision on May 9, 2003, the same date that the Environmental Protection Agency ("EPA") published a notice of the EIS availability. This procedure is allowed under the CEQ regulations at 40 C.F.R. § 1506.10 (b). Unfortunately, an error was made in EPA's publication, misidentifying the EIS as a draft rather than a final document.²¹ That error was corrected by an amended notice issued with the next EPA publication of notice of availability of EIS documents.²² To assure there would be no issue as to the allowance of 30 days to seek reconsideration by the Board from EPA's notice of availability of the FEIS, the Board extended the date of administrative finality of the exemption granted to SJRL and BNSF and the due date of petitions for reconsideration to June 16, 2003.²³

The City does not allege it lacked notice of the issuance of the FEIS. Nor does the City allege it did not have the requisite minimum period of 30 days to seek reconsideration or to comment on the FEIS. It did not so allege because it could not do so. The FEIS was issued May 2, 2003, and according to the document was served on all parties of record, including the City.²⁴

²¹ 68 Fed. Reg. 25023 (May 9, 2003). The error in the Federal Register publication was not the fault of the STB. The STB properly notified EPA that the document was a FEIS: on the cover page and in the document as issued, and also in the transmittal letter to EPA; and EPA so acknowledged. *See* Exhibits A-1 and A-2 appended hereto.

²² 68 Fed. Reg. 26606-07 (May 16, 2003). EPA did not publish a new notice of availability of the FEIS, but rather issued an amended notice correcting the mis-description of the nature of the EIS document. It is understood from EPA that such errors previously have occurred and have been corrected in the same fashion. Telephone conversation between Martin W. Bercovici and Joseph C. Montgomery, Director, NEPA Compliance Division, Office of Federal Activities, EPA, June 18, 2003.

²³ Decision, Finance Docket No. 34079 (served May 16, 2003).

²⁴ The law firm engaged by the City to handle the appeal filed a multi-page Petition for Leave to Intervene on May 9, 2003. *See* [http://www.stb.dot.gov/filings/all.nsf/6084f194b67ca1c4852567d9005751dc/dcfb1d91737cfadd85256d2100691fca/\\$FILE/207783.pdf](http://www.stb.dot.gov/filings/all.nsf/6084f194b67ca1c4852567d9005751dc/dcfb1d91737cfadd85256d2100691fca/$FILE/207783.pdf). The City, however, already was a party of record, as a result of a Notice of Intent to Become a

Moreover, the Board on May 2, 2003 issued a news release announcing the availability of the FEIS,²⁵ and also a news release announcing the agenda for the voting conference scheduled for May 9, 2003, the lead item being consideration of final approval of the SJRL exemption.²⁶ The procedural error in the publication of the EPA notice of the FEIS availability, whether alone or coupled with the Board's action adopting the SJRL exemption on May 9, 2003, did not prejudice the City; and the City does not so allege.

The City's argument, reduced to legal principles, is that the CEQ regulations require letter-perfect procedural compliance by both the acting agency and by EPA, and that the ministerial error by EPA in mischaracterizing the FEIS in the May 9, 2003 notice of availability invalidated the Board's May 9, 2003 SJRL exemption decision notwithstanding (i) the Board was not responsible for the error, and (ii) the error was non-substantive and harmless in nature. The City offers no authority for its proposition of vicarious responsibility for an independent party's action. To the contrary, *de minimis non curat lex*.

The CEQ regulations themselves state that "it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action." 49 C.F.R. § 1500.3. Moreover, the courts routinely and unequivocally have rejected allegations of harmless error as serving to invalidate agency action. The "harmless error" rule applies to actions by

Party filed by the City Attorney on January 7, 2002, 16 months earlier, *see* <http://www.stb.dot.gov/filings/all.nsf/6084f194b67ca1c4852567d9005751dc/0956a321ffc3117485256b3a0073d45c?FILE/204315.pdf>.

²⁵

<http://www.stb.dot.gov/newsrels.nsf/13c1d2f25165911f8525687a00678fa7/5266873d8ed94fca85256d1a0051f71c?OpenDocument>

²⁶

<http://www.stb.dot.gov/newsrels.nsf/13c1d2f25165911f8525687a00678fa7/a5570d58e5cd9a0085256d1a007c4a4c?OpenDocument>

administrative bodies that do not significantly impact procedure or the substance of an administrative decision, and to situations where applicable notice requirements are fulfilled, even if the form of the notice is improper.²⁷

Directly on point is *County of Del Norte v. United States*,²⁸ in which the Ninth Circuit Court of Appeals held that an agency action was not invalid merely because the agency failed to comply with EIS timing regulations at 40 C.F.R. § 1506.10. In that case, the Department of the Interior distributed copies of an EIS on the same day that notice of filing of the EIS with the Environmental Protection Agency (“EPA”) was made in the Federal Register. This action violated NEPA procedures, which required notice to be published in the Federal Register one week after the filing, not on the same day. The *Del Norte* court concluded that violations of NEPA regulations pertaining to Federal Register notice were insignificant and an improper basis for an independent cause of action.²⁹ The court reasoned that the agency’s violations were trivial because the EIS itself was prepared in a timely fashion in accordance with applicable rules, the Federal Register notice accurately conveyed all necessary information, the agency took action within the timeframe specified by applicable regulations, and the intended result of the process ultimately was achieved.³⁰ Because individuals and agencies were afforded sufficient time to review and comment on the EIS, the timing error was harmless. The Ninth Circuit endorsed the general proposition recognized in numerous other appellate court decisions that “insubstantial

²⁷ See e.g., *Shelton v. Marsh*, 902 F.2d 1201, 1206-07 (6th Cir. 1990) (citations omitted), reciting a standard of “sufficient actual notice” which fulfills the purposes of the notice requirement.

²⁸ *County of Del Norte v. United States*, 732 F.2d 1462 (9th Cir. 1984), citing to 40 C.F.R. § 1500.3.

²⁹ *Id.* at 1464.

³⁰ *Id.* at 1465.

errors in an administrative proceeding that prejudice no one do not require administrative decisions to be set aside.”³¹

County of Del Norte is directly analogous to the procedural irregularity claimed by the City in this proceeding. EPA’s error was insubstantial and non-prejudicial. The publication error—which the Board did not commit—did not impact the ultimate decision reached by the Board. The FEIS was prepared in a timely fashion in accordance with applicable rules; the Federal Register notice as corrected accurately conveyed all necessary information, and the filing complied with the CEQ regulations in all other respects. In addition, the Board’s Decision was made following full actual notice to all parties of availability of the FEIS, including notice to the City. Regardless of whether the Board made a decision before or after publication of the notice, the important fact is that no party was adversely affected by the Federal Register publication error; the Board would have reached the same decision regardless of when notice of the FEIS was given, and the parties have had the prescribed time to invoke post-decision remedies.³²

Moreover, the U.S. Supreme Court has made it absolutely clear that federal administrative agencies have substantial latitude in fashioning procedures and fulfilling their statutory duties so long as basic statutory *minima* in terms of notice, due process and opportunity to comment and introduce views and evidence are provided. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*³³ The Court specifically eschewed rigid

³¹ *Id.* at 1467. The court cites for this proposition, among other cases, *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 705 F.2d 506 (D.C. Cir. 1983); *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980); *Consolidated Gas Supply Corp. v. Federal Energy Regulatory Commission*, 606 F.2d 323 (D.C. Cir. 1979); and *Greater Boston Television Corp. v. Federal Communications Commission*, 444 F.2d 841 (D.C. Cir. 1970).

³² See *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 705 F.2d 506, 549 (D.C. Cir. 1983) (“even if the agency has not given notice in the statutorily prescribed fashion, actual notice will render the error harmless.”).

³³ 435 U.S. 519 (1978).

adherence to formalistic procedures, and to elevating form over substance and procedural due process, holding that “[a]dministrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute. . . . And a single alleged oversight on a peripheral issue . . . must not be made the basis for overturning a decision properly made after an otherwise exhaustive proceeding.”³⁴

The cases cited by the City do not compel a different result. As recognized by the *Del Norte* court, if the City had been denied notice altogether a claim of prejudicial procedural error may lay,³⁵ but clearly this was not the case. Similar to its pleading in seeking a stay of the Board’s Decision, the City again generalizes and misstates the holdings of the cases it relies upon. Neither *Sierra Club v. United States Army Corps of Engineers*³⁶ nor *Idaho Watersheds Project v. Hahn*³⁷ stands for the proposition that courts “routinely reject agency action that does not comply with the NEPA requirements.” Both cases involved substantive denial of administrative process in NEPA proceedings. In *Sierra Club* the court rejected two agencies’ actions on the ground that their environmental investigations and disclosures were inadequate, and in *Hahn* the court found that an agency violated NEPA when it issued grazing permits to cattle ranchers without preparing required environmental documentation. Neither case concerned a non-prejudicial, harmless error of form rather than substance.

The City also asserts that the Board’s procedural rules governing reconsideration do not comply with the CEQ requirement for a “real opportunity” to alter the decision. For this argument, the City challenges both the Board’s standards governing reconsideration and its page

³⁴ *Id.* at 543-548, 558.

³⁵ *County of Del Norte*, *supra* at 1467 (citing *Buschmann v. Schweiker*, 676 F.2d 352 (9th Cir. 1982)).

³⁶ 701 F.2d 1011 (2d Cir. 1983).

³⁷ 307 F.3d 815 (9th Cir. 2002).

limitation.³⁸ The Board's procedures fully comply with the CEQ requirement. Moreover, had the STB followed the 40 C.F.R. § 1506.10 (b) (2) procedure of waiting for 30 days to elapse after publication of notice of availability of the FEIS to make its decision on the SJRL exemption, the City would be faced with exactly the same STB appellate process. The mere parsing of words does not give rise to a defect in the Board's procedures.

The CEQ condition is solely that the agency have a "formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement." 40 C.F.R. §1506.10 (b). This is the "real opportunity ... to alter the decision" which allows the agency to make its merits decision simultaneous with publication of the EPA notice. This does not require the opportunity either for a "second bite-at-the apple" or for a *de novo* review by the agency; rather, it only requires the agency to have a reconsideration procedure available to correct any errors.³⁹ The requirement that those seeking reconsideration demonstrate new or changed circumstances or material error is fully consistent with the "strong presumption of regularity" to which any agency order is entitled, *Busboom Grain Co., Inc. v. I.C.C.*⁴⁰

The City further assails the Board's 20 page limit on petitions for reconsideration, asserting the Board's regulations "simply do not allow the thorough analysis of environmental

³⁸ Petition at 10-11.

³⁹ See *County of Del Norte, supra* at 1466 ("This [40 C.F.R. § 1506.10] 30-day period is not for the purpose of additional public comment and review [citation omitted], but, in the words of one commentator, is 'to allow a sufficient review period for the final statement and comments and views of commenting parties 'to accompany the proposal through the existing agency review process.'" (Citation omitted).")

⁴⁰ 830 F.2d 74, 75 (7th Cir. 1987). The Board's requirements for reconsideration at 49 C.F.R. § 1115.3 are similar to those of other federal agencies. See e.g. 47 C.F.R. § 1.106 (b) (Federal Communications Commission).

impacts, and thus limit the facts presented for review.”⁴¹ Other than noting that its environmental comments ran to 43 pages in length, the City does not describe how the 20 page limit adversely impacts its ability to demonstrate material error. Certainly, the City did not intend to simply resubmit its prior comments—if so it could have cited to and incorporated them by reference. The Board’s page limitation is no different in nature than an appellate court’s limitation on pages or words in a brief.⁴² Henry David Thoreau is reported to have apologized for the length of a story, stating that if he had more time he could have made it shorter.⁴³ Here, the City had more than 6 weeks from issuance of the FEIS until petitions for reconsideration were due to prepare its pleading. Certainly, the prestigious law firm representing the City, with a budget of \$250,000 for the appeal,⁴⁴ is capable of justifying a waiver of the 20 page limitation if needed and/or setting forth all relevant arguments for reconsideration in order to preserve those issues for appeal.⁴⁵

B. The Board as Presently Constituted Has Full Authority to Carry Out Its Functions

The City advances a variation of the arguments proffered in its request for stay⁴⁶ that the Board’s Decision fails to meet the NEPA procedural requirement under the CEQ regulation regarding the concurrent notice by EPA of the FEIS and the agency’s decision that the agency’s rules provide “a real opportunity exists to alter the decision.” 40 C.F.R. § 1506.10 (b)(2). The

⁴¹ Petition at 11. And if the page limit is a burden, why not the time limit? Undoubtedly, the City would like this proceeding to continue *ad infinitum*.

⁴² Again, other federal agencies likewise place page limitations on petitions for reconsideration. *See e.g.* 47 C.F.R. § 1.106 (f).

⁴³ *Letter to Mr. B* (Nov. 15, 1857), cited in *Familiar Quotations*, J. Bartlett (Little, Brown & Co., 15th ed. 1980) at 299, n. 3.

⁴⁴ Pietruszewski Petition at 6.

⁴⁵ If not, perhaps the City better could have allocated the funds appropriated for appeal to preserving some of the jobs of City employees laid-off due to budget constraints.

⁴⁶ Petition of the City of Houston for Stay Pending Judicial Review (filed June 6, 2003).

City argues that no such opportunity exists since the Board now is comprised of only a single member (pending appointment(s) and confirmation or recess appointment(s) to fulfill the complement of members authorized by statute—a factor the City neglects to mention), and that said sole member is not empowered to make substantive decisions such as ruling on the reconsideration requests.⁴⁷ The City offers no case authority for this extraordinary position.

The City first argues that the Board is subject to a high standard in utilizing the CEQ procedure described above through characterization of that procedure as an “exemption,” and that “attempts to qualify for a regulatory exemption are strictly construed against the party seeking the exemption.”⁴⁸ This is the same argument advanced in the City’s stay petition, and the City again cites to Fair Labor Standards Act cases dealing with a statutory—not regulatory—exemption as support for its argument, including the case *O’Neal v. Barrow Cty Bd. of Comm’rs*.⁴⁹ Contrary to the contention of the City, the Board did not rely on an “exemption”; and the FLSA cases do not stand for the proposition claimed. The notice procedure is fully described in the CEQ regulations as an option available to the agencies. 40 C.F.R. § 1506.10 (b)(2). This alternative procedure is described in the regulations as “an exception to the [foregoing] rules on timing . . .” *id.*; it is not an “exemption” from either the regulation or the statute.⁵⁰ Moreover, the FLSA cases do not seek to lay down a general principle of administrative law. Rather, these

⁴⁷ The City appears to have somewhat modified its rather convoluted argument on this point advanced in its Petition for Stay. Such fancy footwork, following the replies of Bayport Producers and SJRL and BNSF to the stay requests, recalls the admonition of the Supreme Court in *Vermont Yankee* regarding the unreliability of parties’ positions where “‘in this Court the parties changed positions as nimbly as if dancing the quadrille.’” 435 U.S. at 540, citing to *Orloff v. Willoughby*, 345 U.S. 83, 87 (1953).

⁴⁸ Petition at 5.

⁴⁹ 980 F.2d 674, 677 (11th Cir. 1993).

⁵⁰ “Exemption” entails “Freedom from a general duty or service; . . .”, *Black’s Law Dictionary* (West Pub. Co. 1990). Unlike the STB, CEQ does not have an exemption procedure. Compare 40 C.F.R. Part 1507 with 49 C.F.R. Part 1121 and 49 U.S.C. §10502.

cases were narrowly focused on a statutory exemption to the Fair Labor Standards Act.⁵¹ These cases have no applicability to STB or CEQ procedures.

Having attempted to set-up its straw-man, the City argues that the Board chairman acting as the sole sitting member of the agency does not have the power to act alone and thus cannot satisfy the CEQ requirement that there be a real opportunity to alter the agency's decision. This argument has not grown in stature over the ten days elapsing between the City's two pleadings and the opportunity for the City to evaluate the responsive pleadings of Bayport Producers and SJRL and BNSF. Congress abolished the requirement for a quorum when it superceded the Interstate Commerce Act ("ICC") with the ICC Termination Act ("ICCTA").⁵² At the time, the ICC had three members out of the five authorized by statute, and Congress reduced the agency membership to three. Certainly Congress had a purpose in eliminating the quorum requirement; and it must be presumed that Congress, then faced with two vacancies on the ICC, envisioned the current situation.⁵³

Even when a quorum requirement existed, the courts interpreted the agency composition and quorum requirements to be based on the sitting members of the agency, not the number of

⁵¹ The *O'Neal* court stated: "Before we further consider this standard, we note that any exemption from the FLSA, including that set out in section 7 (k) and the implementing regulations, must be narrowly construed against the employer." *O'Neal* at 676-77, citing *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959), which also specifically concerned FLSA and was grounded in statutory policy. *Arnold v. Ben Kanowski, Inc.*, 361 U.S. 388 (1960), cited by the City at p. 5, n. 15, adds nothing to the inquiry since *Arnold* relies on the *Mitchell* case.

⁵² Former 49 U.S.C. § 10306 (a) was not carried forward to the ICCTA.

⁵³ The City quotes from Chairman Nober's May 20, 2003 testimony before the House Committee on Transportation and Infrastructure wherein the Chairman reflected his view that by authorizing a multi-member agency, Congress intended consensus decision-making. However, the City deliberately takes the statement out of context, consistent with its citation of case decisional authority, ignoring his preceding comments that both he and the General Counsel of the STB believe he has the power to act as a single member, and his following comments that "the industry must have an agency that can continue to function." The Chairman's remarks clearly were directed to the distinction between whether he "can" or "should" act as a single member, the latter a judgment call based on the case at hand.

members authorized by statute.⁵⁴ Moreover, the City acknowledges that the ICCTA expressly provides that “A vacancy in the membership of the Board does not impair the right of the remaining members to exercise all of the remaining powers.” 49 U.S.C. § 701 (b)(7).⁵⁵ The City further acknowledges 1 U.S.C. § 1, which states: “In determining the meaning of any Act of Congress, unless the context indicates otherwise-- . . . words importing the plural include the singular . . .”⁵⁶ 1 U.S.C. § 1 is meant, by its terms, to be read together with 49 U.S.C. § 701 (b)(7). These are the statutory terms which are to be interpreted, not solely the latter provision in isolation, under the first prong of the *Chevron*⁵⁷ test. In other words, there is no need to “interpret” Section 701 (b)(7); it only needs to be applied in accordance with the Rules of Construction adopted by Congress at 1 U.S.C. Chapter 1; and that application is clear on its face.⁵⁸ The City’s argument that the use of the plural in Section 701 (b)(7) satisfies the “unless

⁵⁴ See, e.g., *Assure Competitive Transportation, Inc. v. United States*, 629 F.2d 467 (7th Cir. 1980) (“From the explicit language of [Section 10301(e) of the Interstate Commerce Act—the direct predecessor of Section 701(b)(7) of the ICCTA] we are persuaded that Congress intended those Commissioners in office, however many there are, to be ‘the Commission’ for all purposes.” *Id.* at 473; “The problem, if there is one, lies not with the existing Commissioners, who have been validly appointed, or with the existing Commission, which is authorized by statute to act with vacancies. The only arguable illegality is on the part of the President [for] failing to appoint a full complement of Commissioners.” *Id.* at 475, *cert. denied*, 449 U.S. 1124 (1981); see also *Nicholson v. I.C.C.*, 711 F.2d 364 (D.C. Cir. 1983), in which the court dismissed petitioner’s challenge to the ICC’s authority due to vacancies and other reasons as “frivolous”, stating “The Act authorizes those [sitting] Commissioners to exercise the powers of the Commission irrespective of vacancies in the membership of the Commission.” *Nicholson* at n. 7. While none of these cases and the others cited by the City at 9-10 of its Petition addresses the circumstance of an ICC comprised of a single member, they do address decisions by an agency with less than a “quorum” as measured by the full complement of authorized members. The *Nicholson* and *Michigan DOT v. I.C.C.*, 698 F.2d 277 (6th Cir. 1983), commissions had 4 members and the *Assure* commission 5 members, out of 11 members authorized by statute.

⁵⁵ Petition at 7.

⁵⁶ *Id.*

⁵⁷ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

⁵⁸ Rather than apply the *Chevron* prong I test of construing the statute according to its terms (in accordance with the statutorily prescribed rules of construction), the City would have the Board look to other statutory terms and to regulatory provisions. This leads directly into the *Chevron* prong II test; and under this measure, the Board’s interpretation of its authority, see *The Burlington Northern & Santa Fe R.y. Co.—Trackage Rights Exemption—Union Pacific RR Co.* (served May 23, 2003) (“*BNSF*”), is entitled to substantial deference.

the context indicates otherwise” condition of 1 U.S.C. § 1 constitutes circular reasoning and would render nugatory the 1 U.S.C. § 1 rule of construction prescribed by Congress.

The City further argues that the Board’s recent decision in *BNSF* asserting the power of the Board to act through its sole member “is simply incorrect;”⁵⁹ however, it offers no rebuttal to the finding that a contrary position on the Board’s authority would eviscerate the powers of the agency in a manner in conflict with Congressional intent.⁶⁰ Moreover, where the City asserts that the Board is not entitled to *Chevron* deference regarding NEPA and CEQ’s implementing regulations,⁶¹ it implicitly concedes that the Board is so entitled to *Chevron* deference in interpretation of its own regulations and of the ICCTA in *BNSF*.

CONCLUSION

Neither has Pietruszewski justified reopening the record to accept new argument, nor has the City established any procedural grounds to warrant reconsideration. As to the latter, the hallmark of desperation in challenging an agency action, evidencing the bankruptcy of a party’s substantive arguments, is to devote a major part of one’s efforts to arguing non-prejudicial, non-substantive procedural error without any claim to adverse effect.

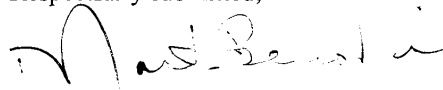
⁵⁹ Petition at 5.

⁶⁰ The City seeks to distinguish *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983), cited by the Board in *BNSF*. The statute being construed in *Yardmasters* requires two members of the agency to constitute a quorum—a requirement the court did not find inconsistent with action by a single member sitting alone, and uses the same plural phrase “remaining members” found in Section 701 (b)(7) of the ICCTA—of which the City argues for literal application. Further, the court in *Yardmasters* cited to 1 U.S.C. § 1, also conveniently ignored by the City. *Yardmasters* clearly supports the Board’s ruling in *BNSF*.

⁶¹ Petition at 5-6.

WHEREFORE, THE PREMISES CONSIDERED, Bayport Producers respectfully urge the Surface Transportation Board to REJECT the Petition for Reconsideration (i.e., to reopen) of Brian Pietruszewski and to DENY the Petitions for Reconsideration of Galveston Bay Conservation and Preservation Association and the City of Houston regarding the exemption granted to San Jacinto Rail Limited and The Burlington Northern and Santa Fe Railway Company to construct and operate a new rail line to serve the Bayport Industrial District.

Respectfully submitted,



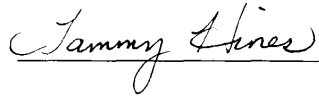
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Attorneys for ATOFINA Petrochemicals,
Inc., Basell USA Inc., Equistar Chemicals,
LP and Lyondell Chemical Company

June 23, 2003

CERTIFICATE OF SERVICE

I, do hereby certify that on this 23rd day of June, 2003, I am serving the foregoing Reply to Petitions to Reconsider or Reopen on all parties of record by first class mail, postage paid, or by another more expeditious means.

A handwritten signature in cursive script, reading "Tammy L. Hines", is written over a horizontal line.

Tammy L. Hines

EXHIBIT A-1



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

C0282

Section of Environmental Analysis

May 2, 2003

U.S. Environmental Protection Agency
Office of Federal Activities
EIS Filing Section
Mail Code 2252-A, Room 7241
Ariel Rios Building (South Oval Lobby)
1200 Pennsylvania Avenue, NW
Washington, DC 20460

RE: Filing of Final Environmental Impact Statement for Finance Docket No.
34079, San Jacinto Rail Limited – Authority to Construct – And The Burlington
Northern And Santa Fe Railway Company – Operation Exemption – Build-Out to
the Bayport Loop Near Houston, Harris County, Texas

Dear Madame or Sir:

Enclosed please find five copies of the above referenced Final Environmental Impact Statement (EIS) and five copies of the Draft Environmental Impact Statement for filing. The transmittal of the Final EIS to the public has been completed. The Final EIS is also available on the Board's website at www.stb.dot.gov. The Federal official within the Section of Environmental Analysis at the Surface Transportation Board who is responsible for the distribution and contents of the Final EIS is Dana White, Environmental Specialist/Program Manager. She can be reached at (202) 565-1552.

Sincerely,

Victoria Rutson
Chief
Section of Environmental Analysis

AM

EXHIBIT A-2



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

C0283

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Date 5/2/03

The US Environmental Protection Agency has received the

1 / 1 DRAFT X / 1 FINAL 1 / 1 SUPPLEMENTAL

Environmental Impact Statement prepared by the (Agency)

Surface Transportation Board

entitled

Construction and Operation of a Rail Line
from the Bypass Loop in Harris County, Texas

The above document has been hand carried to the USEPA for official filing purposes by the undersigned. The undersigned also verifies that complete distribution to all Agencies/persons has been made simultaneously with this filing.

sent by [unclear] on 5-2-03 will go in for on 5-9-03

NEIL SULLIVAN
Name of Person Filing EIS
SENIOR ASSOCIATE
Title
703-218-2533
Telephone Number