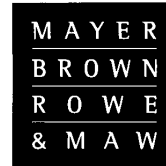
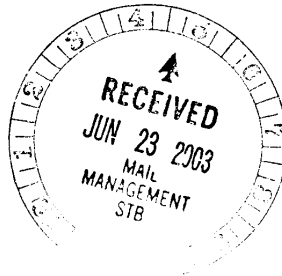


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June 23, 2003

By Hand

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
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Washington, DC 20423

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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 San Jacinto Rail Limited and The Burlington Northern and Santa Fe Railway Company to the Petitions for Reconsideration of the Galveston Bay Conservation and Preservation Association and The League of United Latin American Citizens, the City of Houston, Brian Pietruszewski and Michael Flannigan. Also enclosed is a 3.5 inch disk containing the text of the pleading in WordPerfect 9 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,

Adrian L. Steel, Jr.

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Enclosure

cc: All Parties of Record

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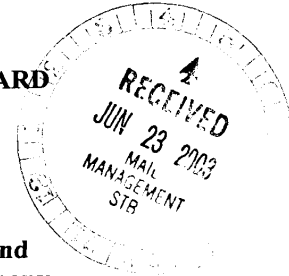
Brussels Charlotte Chicago Cologne Frankfurt Houston London Los Angeles Manchester New York Palo Alto Paris Washington, D.C.
Independent Mexico City Correspondent: Jauregui, Navarrete, Nader y Rojas, S.C.

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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 The Petitions For
Reconsideration Of The Galveston Bay Conservation And Preservation Association
And The League Of United Latin American Citizens, The City Of Houston,
Brian Pietruszewski and Michael Flannigan**

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June 23, 2003

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Summary of Argument

Appellants have not met their burden for obtaining reconsideration pursuant to 49 C.F.R. § 1115.3(b) as they have not shown the existence of new evidence, changed circumstances or material error in the Board's May 9, 2003 Decision in this proceeding. Appellants do not assert that the Board did not provide the opportunity for their views to be aired pursuant to the National Environmental Policy Act ("NEPA"); rather, their arguments represent differences of opinion, which are insufficient grounds for reconsideration. The Board has documented amply the environmental review process supporting its May 9 Decision, and its conclusions are reasonable. As such, no material error has been committed by the Board, nor is there new evidence or changed circumstances.

Appellants' contentions that the draft and final environmental impact statement ("DEIS" or "FEIS") are inadequate because the Board failed to disclose certain potential environmental impacts are meritless. As demonstrated by the record, the Board studied (with the extensive consultation and participation of the cooperating agencies) and disclosed to the public potential impacts to essential public services, including Ellington Field, the Southeast Houston Water Treatment Plant, and security at those facilities; potential impacts to public safety with respect to existing pipelines; potential impacts from reasonably foreseeable increased traffic; potential impacts to isolated wetlands; potential impacts from two alternatives' proximity to landfills; potential impacts to land use; potential impacts to flooding and potential impacts from releases from ordinary rail operations. In each and every case, the DEIS and FEIS contain fulsome discussions of SEA's methodology, including, *e.g.*, investigation of public sources of information, consultation with federal, state, and local agencies, field studies, and independent verification of applicants' data. Each of SEA's conclusions are supported by materials in the

administrative record and were concurred with by the cooperating agencies—the Federal Aviation Administration, the National Aeronautics and Space Administration and the United States Coast Guard.

Appellants also argue that the Board should have prepared a supplemental DEIS and that the Bayport Terminal facility project and the Bayport Loop Build-In should have been discussed in the same EIS. However, Appellants have not made any showing that any new circumstances or information warranted a supplemental EIS or that the two projects are connected or cumulative actions. These arguments also were considered, and rejected, by the Board during the NEPA process.

Finally, Appellants contend that some information contained in the Bayport Terminal facility FEIS, released since the May 9 Decision, and comments prepared but not submitted on the DEIS constitute “new evidence” pursuant to the Board’s reconsideration standard. However, each of the issues raised in these materials was thoroughly analyzed and documented by the Board during the NEPA process.

Therefore, Appellants have not demonstrated the existence of new evidence, changed circumstances or material error warranting reconsideration of the May 9 Decision by the Board.

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 The Petitions For
Reconsideration Of The Galveston Bay Conservation And Preservation Association
And The League Of United Latin American Citizens, The City Of Houston,
Brian Pietruszewski and Michael Flannigan**

Pursuant to 49 C.F.R. §§ 1115.3 and 1115.4, San Jacinto Rail Limited (“San Jacinto”) and The Burlington Northern and Santa Fe Railway Company (“BNSF”) (collectively, “Petitioners”) hereby reply to the petitions for reconsideration filed by The Galveston Bay Conservation and Preservation Association (“GBCPA”) and The League of United Latin American Citizens (“LULAC”), the City of Houston (“City”), and individuals Brian Pietruszewski and Michael Flannigan (collectively, “Appellants”).¹

Background

On May 9, 2003, the Surface Transportation Board (“Board”), pursuant to 49 U.S.C. §§ 10502 and 10901, granted final approval to Petitioners to construct and operate a 12.8-mile rail line (the “Bayport Loop Build-In”) in the Bayport Industrial District in Southeast Houston, Harris County (“May 9 Decision”). On June 6, GBCPA, LULAC and the City filed petitions for stay

¹ For ease of reference, throughout this reply, Petitioners will refer to all pleadings as “petitions for reconsideration” and will cite to each document as “Pet.”

pending judicial review with the Board, and Petitioners replied on June 11. As noted in Petitioners' reply to the petitions for stay at 2-3, the Board's May 9 Decision was made after nearly two years of environmental study during which the Board, through its Section of Environmental Analysis ("SEA"), compiled an extensive environmental record.

On June 12, the Board delayed the effective date of the May 9 Decision to July 11 "[t]o allow sufficient time for the Board to consider issues raised by any petitions for reconsideration that may be filed . . . and any replies thereto." *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*, STB Finance Docket No. 34079 (served June 12, 2003), slip op. at 1.

Petitioners adopt and incorporate herein the arguments of the Bayport Producers filed in response to the Appellants' petitions for reconsideration. To avoid redundancy, the Bayport Producers will address Appellants' procedural arguments, and Petitioners will address the adequacy of the Board's analysis of the potential impacts of the proposed project pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA"), and the Council on Environmental Policy's ("CEQ's") NEPA regulations, 40 C.F.R. Part 1500.

Argument

A petition for reconsideration will be granted only upon a showing that the "prior action will be affected materially because of new evidence or changed circumstances" or the "prior action involves material error." 49 C.F.R. 1115.3(b). In petitions based on alleged new evidence, that evidence "must not appear to be cumulative, and an explanation must be given why it was not previously adduced." *Id.* at 1115.3(c). The Board has cautioned that "[t]he limitations in [its] rules against the introduction of new evidence reflect the need for finality in the administrative

process.” *B. Willis, C.P.A., Inc.—Petition for Declaratory Order*, STB Finance Docket No. 34013 (served July 26, 2002), at 3. Appellants do not meet the standard for reconsideration.

A. The Board’s May 9 Decision Will Be Upheld Under NEPA Standards of Review.

Appellants substantively have challenged the Board’s decision solely on NEPA grounds. Thus, the standards for reviewing an agency’s environmental impact statement (“EIS”) should govern the Board’s consideration of Appellants’ petitions. While Appellants make much of the “hard look” standard in their petitions, their use of the phrase is largely rhetorical. None actually analyze the Board’s action according to the applicable NEPA standards.

NEPA’s procedures are in place to “insure that environmental information is available to public officials and citizens before decisions are made and actions are taken.” 40 C.F.R. § 1500.1(b). These “twin aims” of NEPA—agency decisionmaker consideration and public disclosure—are realized with the preparation of an environmental impact statement. *See Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97-98 (1983).²

As Petitioners set forth in their reply to the petitions for stay, courts apply a “rule of reason” standard in reviewing the adequacy of an EIS—a “pragmatic standard which requires good faith objectivity but avoids ‘fly specking’” the document. *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000) (internal citations omitted). Moreover, a court will defer to the “informed discretion of the responsible federal agencies” because of the “high level of technical expertise” required. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989), *citing Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976). In other words, a court will not do

² Thereafter, the “role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.” *Baltimore Gas & Elec.*, 462 U.S. at 98. To prevail in showing that an agency decision is arbitrary and capricious, a challenger must demonstrate that the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *See Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

what Appellants are requesting here: insert its judgment, or that of Appellants, in the place of the agency's where the agency has followed the appropriate procedures and its conclusions are reasonable.³

Nowhere in Appellants' papers do they assert that the Board did not provide the opportunity for their views to be aired. And in asserting that the Board "minimized, ignored, or dismissed without analysis" their views (City Pet. at 11), Appellants have not raised any alleged "failures" by the Board in the environmental review process that amount to anything more than a difference of opinion with the outcome of the analysis. As Petitioners will show, the Board has documented amply the environmental review process supporting its May 9 Decision, and its conclusions are reasonable. That Appellants find its conclusions not to their liking is an insufficient reason to reconsider that decision. As such, no material error has been committed by the Board, nor is there new evidence or changed circumstances.

B. No Material Error Was Committed By the Board.

1. The Board Analyzed the Potential Environmental Impacts On Essential Public Services As Required By 49 C.F.R. § 1105.7(e)(11)(vi).

The City contends that the final EIS ("FEIS") "completely fails" to disclose potential impacts on such essential public services as "[d]rinking water, air transportation and public recreational space." City Pet. at 12. Specifically, the City claims the potential impacts to Ellington Field and the Southeast Houston Water Treatment Plant ("Water Treatment Plant") were

³ The Fifth Circuit has developed three criteria for determining the adequacy of an EIS: (1) whether the agency in good faith objectively has taken a hard look at the environmental consequences of a proposed action and alternatives; (2) whether the EIS provides detail sufficient to allow those who did not participate in its preparation to understand and consider the pertinent environmental influences involved; and (3) whether the EIS explanation of alternatives is sufficient to permit a reasoned choice among different courses of action. *Mississippi River Basin Alliance*, 230 F.3d at 174. See also *Izaak Walton League of America v. Marsh*, 655 F.2d 346, 371 (D.C.Cir. 1981) ("[C]ourts must first determine whether the agency has complied with its 'procedural' obligations under Section 102, which establishes the environmental impact statement requirement: it must ensure that the statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a 'hard look' at environmental factors, and to make a reasoned decision.").

inadequately disclosed or considered in the EIS. *Id.* at 12-17. However, as acknowledged by Appellants, SEA did study—with the extensive consultation and participation of the cooperating agencies—potential impacts to Ellington Field and the Water Treatment Plant and responded to specific comments regarding those facilities submitted by the City.⁴

a. The Board’s Conclusions Regarding the Potential Environmental Impacts On Ellington Field Are Reasonable and Supported by the Record.

The City’s claims that the Board “ignores,” “dismiss[es]” or otherwise omits consideration of three impacts purportedly caused by trains or a rail line crossing airport property:⁵ (1) blocked vehicular access to Ellington Field, (2) interference with the development of aviation-related industry and (3) necessity for gated access to maintain security at the airport.⁶ City Pet. at 12-14. Even a cursory review of the Ellington Field discussion in the draft EIS (“DEIS”) and FEIS demonstrates that SEA carefully considered access, development and security issues related to the airport.⁷ SEA explained that, “[i]n evaluating potential impacts to Ellington Field and undeveloped airfield property, SEA reviewed the Draft Master Plan, the aviation activity forecasts, consulted with the HAS [Houston Airport System] and FAA, and toured Ellington Field.” FEIS at 4-118. From these sources and consultations, SEA determined that development of the southeast area of Ellington Field is “speculative” and, in any event, the proposed routes near Ellington Field

⁴ See, e.g., DEIS at 4-66 to 4-69, FEIS at 4-118 to 4-122 (Ellington Field); DEIS at 4-68, FEIS at 4-122 to 4-123 (Water Treatment Facility).

⁵ The City attempts to create the misimpression that the two routes proposed to run near Ellington Field cut through the middle of the airport property. See City Pet. at 13 (“the presence of a rail line *through* the Ellington Field parcels”) and 14 (“whether the existence of the railroad *running through the airport* impacts airport security”) (emphasis added). In fact, Petitioners’ Preferred Route runs mostly outside of the Ellington Field fenceline with only two short sections at the edges where the fence would need to be relocated. Alternative 1C—proposed by Petitioners at FAA’s request expressly to avoid impacting land that is currently used by the City for aviation—is entirely outside the Ellington Field fenceline.

⁶ In a further attempt to muddle the record and create misperceptions about the project, the City erroneously states that the Bayport Loop Build-In is “intended to handle primarily chemical cargoes.” City Pet. at 14. However, the record is clear that the line will carry primarily non-hazardous cargo, principally plastics. DEIS at 1-5 (a “majority of the shipments would consist of non-hazardous plastic pellets, transported in hopper cars”).

⁷ Security issues are discussed in Section B(1)(c) below.

“would have negligible impacts on the plans of the City of Houston’s Airport System to develop the property.” FEIS at 4-120. SEA also thoroughly examined vehicular access routes and evaluated existing conditions, noting that “[t]here is no evidence that the low volume of rail traffic on the GH&H line has affected access to Ellington Field.” *Id.*⁸

These conclusions are supported by the record.⁹ SEA’s review of the Draft Master Plan and aviation activity forecast, using FAA’s Terminal Area Forecast System, FEIS at 4-118, of no growth in traffic until 2020, led SEA to determine that “development of the southeast area of Ellington Field for aviation-related industry is speculative.” FEIS at 2-3. Further, in response to the City’s comments, Petitioners clarified how their Voluntary Mitigation Measures (“VMMs”) 61 and 62 would alleviate any access problems associated with stopped trains. FEIS at App. B (Letter to Dana White, dated April 10, 2003).¹⁰

In an attempt to bolster its contention that SEA “ignored” potential impacts on Ellington Field, the City implies that SEA alone reviewed Petitioners’ proposal. However, the FAA, as a cooperating agency, was intimately involved in every aspect of evaluating the project as it impacted Ellington Field. For example, FAA signed off on a study conducted by Petitioners finding no adverse impact to the instrument landing system at Ellington Field (DEIS at 2-30); approved Petitioners’ “Part 77” application demonstrating that there was no airspace conflict as a result of railway construction (DEIS at 2-29); and found that Petitioners’ proposed habitat

⁸ Table F.1-2 of Appendix F in the DEIS specifically calculates the impact to vehicle delay at each of the Ellington Field access crossings.

⁹ The City attempts to make much out of a phrase from the FEIS that the “FAA’s concerns about the Proposed Route are not environmental,” (City Pet. at 13) using the phrase to support its bald assertion that SEA treated the potential impacts on Ellington Field as irrelevant. In fact, SEA merely was characterizing the myriad issues presented by FAA in its April 17, 2003 letter (FEIS at App. B) that included an indenture on airport property and changes to the Airport Layout Plan, issues clearly unique to airport property and not within the typical environmental study of impacted resources conducted under NEPA.

¹⁰ That letter clarified that, “[i]n the case of Alignment 1, Petitioners will replace the existing turnout to Graham siding with a power operated turnout. The new power operated turnouts will allow trains heading south on the GH&H to continue to move at track speed onto the new line without stopping.” *Id.* at 2.

conservation and wetland mitigation sites do not pose a hazard to aviation at Ellington Field (FEIS at 2-1 to 2-2). In the end, FAA agreed with SEA that “there are no potentially significant environmental impacts” (FEIS at 2-3) but recommended against selection of the Petitioners’ Preferred Route (*i.e.*, the alignment designated the “Proposed Action” in the DEIS) because of potential adverse impacts on aviation. As a result of FAA’s view, SEA recommended, and the Board accepted, designation of Alternative 1C, not Petitioners’ Preferred Route, as the preferred alternative for the new rail line. FEIS at 2-3. Alternative 1C does not impinge on airport property at all and thus requires no action by FAA.

b. The Board’s Conclusions Regarding the Potential Environmental Impacts On the Water Treatment Plant Are Reasonable and Supported by the Record.

The City’s argument regarding SEA’s analysis of impacts to the Water Treatment Plant is similarly thin. The City simply repeats the mantra that SEA dismissed its concerns without analysis. City Pet. at 14-17. Yet, the City offers no evidence that SEA failed to consider its comments or to disclose potential environmental impacts to the public. With respect to the threat to public drinking water supplies, SEA analyzed potential impacts to rail operations safety and hazardous materials transportation safety, both of which encompassed potential impacts to the Water Treatment Plant. FEIS at 4-123. Moreover, it is a basic tenet of environmental impact statements that “the level of analysis should be commensurate with the impacts.” FEIS at 4-57. Here, because SEA determined that “the overall likelihood of a release is low and is even lower at a specific location,” SEA found that site-specific impact analysis—beyond that contained in the analysis of rail operations and hazardous materials transport—was not necessary. *Id.*

At the heart of the City’s complaint is its newly-created plan for plant expansion to be accomplished in separate phases in 2007, 2015 and 2040 (even though it would appear that the last

two phases in 2015 and 2040 have not yet been approved by the Houston City Council). *See* FEIS at 4-123; FEIS at App. B (City of Houston Comments on the DEIS dated February 21, 2003, and Exh. 4). The City repeats a theme presented in its Comments on the DEIS concerning the location of Alternatives 2B and 2D in relation to the Water Treatment Plant. SEA amply responded to the City's concern in the FEIS by recognizing that Alternatives 2B and 2D would merely separate the present plant facilities from a sludge lagoon and sludge disposal area that are located in the southern part of the 400-acre parcel. Having no information to suggest that such separation would impact the facilities, much less impose a "significant" impact, SEA determined this potential impact to be "negligible." FEIS at 4-122.

While the City argues that SEA reached this finding "without analysis," the record belies its contention. As explained in detail in the FEIS, SEA carefully considered the information offered by the City, but found that the rail line right-of-way would not be incompatible with or interfere with the City's future plans. FEIS at 4-122 to 4-123. In support of its reasoning, SEA determined that: (1) the "potential for an actual land use conflict is uncertain because the 2040 expansion plan will be subject to change over that long planning horizon"; (2) Alternatives 2B and 2D would require only 1.2 to 2.3 acres for the right-of-way out of the total 400-acre site, a loss of property that is negligible; and (3) the City already has plans for providing rail access to the facility and has existing rail spurs, and such "plans for rail access do not appear to conflict with the expansion of facilities." FEIS at 4-123. While the City is quick to criticize the FEIS as devoid of analysis, the City has never explained exactly what it claims are the significant impacts caused by the location of the new rail line or how the rail line will interfere with its future plans.

c. The Board Addressed Security Issues In the EIS.

Finally, contrary to the City's claim, SEA responded in the FEIS to the City's concerns relating to security issues in general and pertaining specifically to Ellington Field and the Water Treatment Plant. *See* FEIS at 4-57 to 4-59 (discussing the types of security plans being developed to assure rail security industry-wide and within individual railroads, including BNSF). In addition, SEA noted that it consulted with the new Transportation Security Administration ("TSA") (DEIS at 4-12 to 4-13) and the U.S. Coast Guard, which is a cooperating agency. SEA also provided copies of the DEIS and FEIS to TSA and the Texas Air National Guard for their review and comment. DEIS at 10-1; FEIS at 6-1. None of those agencies primarily responsible for homeland security issues lodged objections to SEA's environmental impact statement or the proposal itself. In fact, "TSA indicated that the situation [wa]s not of immediate concern." DEIS at 4-13.

Thus, the Board's study process and conclusions regarding potential impacts to essential public services are reasonable and supported by the record. Opponents of a proposed action must come forward with more than Appellants have in order to defeat the agency's exercise of its expert judgment in this area.

2. The Board Thoroughly and Objectively Analyzed Public Safety With Respect to the Proposed Project's Relationship to Existing Pipelines.

Appellants argue that the Board failed to disclose potential impacts to public safety as a result of the proposed rail line crossing existing pipelines. *See* GBCPA Pet. at 3-4; City Pet. at 17-18. They contend that SEA erred in analyzing pipeline risk by using nationwide historic accident data and by relying on the standard industry practice of identifying the precise location of existing pipelines as part of pre-construction activities. GBCPA Pet. at 3; City Pet. at 18.

Contrary to Appellants' allegations, SEA did not merely "accept" Petitioners' representations regarding pipeline safety during construction, operation or maintenance of the new line. Indeed, the DEIS and FEIS document SEA's independent study of pipeline safety, including independent field observations (DEIS at App. E), in-depth research, and contact with governmental agencies (federal, state and local) responsible for pipeline safety and industry groups that have established consensus standards recognized industry-wide.¹¹ In addition, SEA provided copies of the DEIS and FEIS to the Office of Pipeline Safety ("OPS") and The Railroad Commission of Texas, which together regulate the design, construction, inspection, testing, operation and maintenance of interstate and intrastate pipelines. DEIS at 10-1; FEIS at 6-1. Neither agency indicated concern over SEA's pipeline analysis.

Apart from the extensive study by SEA, the record contains substantial documentation relating to pipelines. Included in the information SEA utilized in its study and evaluation of pipeline safety is detailed information about pipeline locations and accident information. DEIS at App. E. SEA explained that, "as part of the preliminary engineering efforts, Applicants collected data on the locations of pipelines near the routes for the new construction that would be part of the Proposed Action and Alternatives." DEIS at App. E. Accident information from OPS for the period of 1985 through 2001 – six full years – was studied and analyzed to calculate a baseline for construction-related accidents and the frequency and consequences of accidents nationwide. DEIS at App. E. SEA also examined rail accident statistics to estimate the frequency for derailments under existing conditions. *See* DEIS at Sections 3-3 and 4-3 and App. D.

¹¹ Specifically, SEA studied and evaluated all applicable requirements and standards governing pipeline safety, including those of the Office of Pipeline Safety and The Railroad Commission of Texas. *See* DEIS at Section 3.3.1; FEIS at 4-67. SEA also noted that pipeline construction and operation are further controlled through consensus standards developed and distributed by the American Society of Mechanical Engineers, the American Petroleum Institute, and the American Railway Engineering Maintenance-of-Way Association. *Id.*

Based upon analysis of all the information, data and study conducted by SEA, it concluded that the likelihood of a pipeline accident during construction of the new rail line is very remote (one chance in 6,200 for hazardous liquid pipelines and one chance in 48,000 for hazardous gas pipeline construction). DEIS at 4-20. In finding that the impact of rail operations on pipeline safety would be minimal, SEA relied on the very low likelihood that rail operations would damage a pipeline and the relatively low probability that serious consequences would result even if such damage were to occur. DEIS at 4-22. The Board also conditioned its approval of the project on BNSF and SJRL's commitment to use the services of a qualified pipeline engineering firm that is familiar with the local project area to assist in the identification of the various pipeline crossings and to assist in the design of crossings as necessary for project-related construction activities. *See* DEIS at 6-13 (VMM No. 49).

Criticisms of the data on which SEA relied in the DEIS were made during the comment period by the City and others. FEIS at Section 4-6. In response, SEA fully documented its view that such data were "the best available for evaluating the potential likelihood and consequences of a pipeline accident." FEIS at 4-65. Just as SEA found in responding to comments on the DEIS, the allegations in the petitions for reconsideration "provide no support for the contention that use of national data dilutes the analysis." *Id.* This conclusion, and SEA's methodology, are reasonable and well-supported.

Another criticism lodged with SEA during the DEIS comment period is the purported risk presented by a rail line crossing pipeline corridors near a public park. City Pet. at 18. SEA rejected the City's criticism by finding, among other things: (1) the "risks" identified already "exist today because the Park was constructed near the intersection of and adjacent to both an Exxon pipeline corridor and the GH&H rail line, which is currently used for hazardous materials

transport;” (2) “the proximity to pipelines would be somewhat greater for Alternative 1C than for the Proposed Action,” but “the likelihood of a release was extremely low for all Alternatives;” and (3) because the “analysis is cumulative for the entire length of a route, the potential impacts (including the chance of an accident) at any one location along the route (*e.g.*, the park) would be substantially less than those presented in the Draft EIS for the route as a whole.” FEIS at 4-72.

Nor did the FEIS “assume,” as the City now contends, that the Texas One Call System will allow location of all pipelines. *See* City Pet. at 17-18. To the contrary, SEA agreed with comments that the environmental analysis of pipeline safety “should not be based on the assumption that the Texas One Call System will prevent all accidents.” FEIS at 4-64. That is precisely why SEA used OPS accident data to establish a baseline for construction-related accidents, applying rigorous analysis of the risk of accidents.

3. The Board Analyzed Reasonably Foreseeable Increased Rail Traffic.

Appellants assert that the DEIS’s estimate of 36 to 66 cars per train per day each way, on average, is too low. *See* GBCPA Pet. at 7; City Pet. at 19-20; Pietruszewski Pet. Exh. A at 9-12; Flannigan Pet. at 1. However, as SEA noted, it “investigated average train numbers on all the rail lines that would be affected by the Proposed Action and Alternatives.” FEIS at 4-35. SEA explained:

This investigation involved conducting field surveys, researching the Board’s Waybill Sample data, and consulting with UP, BNSF, PTR, and TxDOT to determine average number of trains per day on each line. SEA believes that the train counts are based on the best available data and that Proposed Action and Alternatives would have a negligible effect on the capacity of the GH&H.

In addition, SEA notes that trains over the GH&H have always been dependent upon seasonal traffic and the Port of Galveston. The average of 3.4 trains is an average over a year. Some days may experience nine or ten trains (such as during grain shipping season) while other days may experience only one or two trains. In addition, rail traffic to and from Galveston has recently been less than in some previous years.

FEIS at 4-35 to 4-36. From Applicants' own projections, which included leeway for growth in traffic over time and for the addition of build-outs to other shippers in Bayport besides the San Jacinto partners,¹² to Union Pacific Railroad Company's ("UP's") data about the traffic it handles today in the Bayport Loop,¹³ to SEA's analysis of the STB's carload waybill data for the Bayport Loop, all data verified that the Applicants' anticipated traffic levels were accurate. DEIS at 2-8 to 2-9; FEIS at 4.2.2.

The City simply mischaracterizes the record on traffic volumes, relying on unsubstantiated statements postulated by UP during local legislative hearings implying that, if BNSF were successful in handing two-thirds of all the chemical traffic from UP/BNSF competitive points along the Ship Channel, it could capture the same proportion of traffic at the Bayport Loop. *See* DEIS at App. N (Testimony of Joe Adams, Chairman's Special Representative, UP, at 5, attached to February 1, 2002 Letter from K. Kusske to STB).

In response, Petitioners showed SEA that, even if there were validity to UP's speculation, such a fanciful percentage of the Bayport traffic could still be handled on the projected two trains per day on average (DEIS at App. N (February 1, 2002 Letter from K. Kusske to STB)), thus undermining claims that the projected traffic levels were wrong. Justifiably, based on the extensive information showing that it was not reasonably foreseeable that BNSF could capture two-thirds of the Bayport Loop traffic (unlike the Ship Channel, BNSF would not have full access to all nineteen other shippers that UP serves located in the Bayport Loop), SEA decided not to analyze the impacts from the purely hypothetical 100-car trains. FEIS at 4-23. SEA observed,

¹² *See* DEIS at 2-9 to 2-10, App. N (Verified Statement of Katie M. Farmer, General Director of Sales for Chemical Products, BNSF, April 25, 2002 and BNSF and San Jacinto's Comments on the Draft Scope of Study dated February 1, 2002; *see also* San Jacinto Rail Limited and The Burlington Northern and Santa Fe Railway Company's Reply to Union Pacific Railroad Company's "Comments on Infrastructure and Safety for the Build-Out to the Bayport Loop" at 2-4 (dated Oct. 29, 2001).

¹³ *See* DEIS at App.C (Letter of Joe Adams, UP, to Vicki Rutson dated November 7, 2002).

nonetheless, that “[t]he operation of 100-car trains would have similar impacts to 66-car trains. The main difference would be a slight, but negligible increase in delay at grade crossings.” *Id.*¹⁴

4. The Board Analyzed the Potential Environmental Impacts On Each of the Other Resource Areas or Subject Matters Raised by Appellants.

Petitioners will briefly address the handful of additional contentions by Appellants, though for the most part their contentions are stated without foundation. First, GBCPA and LULAC argue that the Board’s determination of the acreage of jurisdictional and non-jurisdictional wetlands is erroneous. GBCPA Pet. at 5-6.¹⁵ First, the DEIS and FEIS clearly disclose the impacted wetlands acreage as delineated by Petitioners and verified in the field¹⁶ by the Corps, the federal agency with the technical expertise and jurisdictional responsibility for delineating wetlands. DEIS at 4-50; FEIS at 4-91 to 4-92; *see also* Public Notice of the U.S. Army Corps of Engineers, Galveston District Re: Permit Application No. 22823 (Revised), dated February 7, 2003.¹⁷ Petitioners also delineated non-jurisdictional, or isolated, wetlands, which work was independently reviewed and verified by SEA. FEIS at 4-92. The discussions in the DEIS and FEIS represent the detailed analysis and full disclosure of the potential minimal impacts to wetlands as required by NEPA.¹⁸

¹⁴ To the extent Appellants seek to attack the traffic volumes based upon speculation that the rail line will induce industrial development, SEA considered this issue and found that “building a new rail line does not automatically trigger industrial development.” FEIS at 4-26. In addition, in analyzing site-specific land use conditions, SEA observed that, “[g]iven the substantial amount of vacant land adjacent to rail spurs in the project area and economic factors, it would have been speculative for SEA to develop train projections based on possible industrial development along the new line.” *Id.*

¹⁵ Mr. Flannigan opines, with no factual support, that further wetlands loss due to future industrial development is not disclosed. Flannigan Pet. at 3. SEA noted in the FEIS that it addressed cumulative impacts to wetlands from reasonably foreseeable future actions, such as additional industrial development along the line, in Chapter 5 of the DEIS. FEIS at 4-93. Indeed, SEA noted in that discussion that cumulative impacts to wetlands were expected to be minimal. DEIS at 5-7 to 5-8.

¹⁶ GBCPA’s expert, John S. Jacob, Ph.D., concedes in his expert report that he never field-verified his wetlands determination. FEIS at App. B (GBCPA Comments on the DEIS, Exh. 6 at 3).

¹⁷ *See* <http://www.swg.usace.army.mil/>.

¹⁸ Petitioners also committed to mitigate these wetlands impacts, including impacts to non-jurisdictional wetlands, by setting aside 24 acres near Ellington Field and 24 acres near Armand Bayou for conservation, and creating 3.75 acres
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GBCPA and LULAC also argue that the FEIS fails to disclose “the relationship between the alignments and past landfilling operations.” GBCPA Pet. at 5. Specifically, GBCPA and LULAC fault SEA for not including “comprehensive maps or studies of the waste disposal sites in the build areas for 2B and 2D.” *Id.* SEA responded to these comments in the FEIS. FEIS at 4-128 to 4-130. SEA explained that, as a result of prior regulatory involvement by the agencies charged with oversight of waste disposal sites that resulted in no further operational or institutional controls over the Harris (Farley Street) site, SEA determined it was unnecessary to further document the process leading to the closure of the site. *Id.* at 4-129. SEA also concluded that “conditions described [in the comments] can be adequately addressed through appropriate design and engineering” and acknowledged that weekly track inspections will be required under FRA regulations. *Id.* at 4-130. These determinations, after detailed study, as described in the DEIS and FEIS are reasonable and supported by the record.

In addition, GBCPA and LULAC disagree with SEA’s conclusions as to land use impacts. They argue that the Board should have analyzed land use changes surrounding the existing lines, not just the build segments and that the FEIS failed to address cumulative land use impacts with other projects in the area. GBCPA Pet. at 7-8.¹⁹ In fact, SEA “carefully reviewed the existing land use conditions, area plans, and development constraints, and concluded that the Build Segments would neither stifle residential growth nor induce industrial growth along the rail line.” FEIS at 4-114. While the discussion refers to the “Build Segments,” it is clear from the discussion that SEA analyzed land use changes of the entire project area. *Id.* That discussion fairly and

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of riparian habitat and 0.4 acres of tidal marsh wetlands. These mitigation measures more than compensate for the loss of 6.86 acres of jurisdictional and non-jurisdictional wetlands due to the project.

¹⁹ Mr. Flannigan states that he finds unreasonable SEA’s conclusion that heavy industrial development in the project area is not foreseeable but does not specify any errors in SEA’s review process or analysis. Flannigan Pet. at 1-2.

accurately discloses potential land use impacts resulting from the proposed project. Moreover, the FEIS addressed cumulative land use impacts in a detailed response to comments on the subject. FEIS 4-115 to 4-117.

A different appellant suggests that a supplemental DEIS was required. *See Flannigan Pet.* at 2. CEQ regulations require preparation of a supplemental EIS when “(1) the agency makes substantial changes in the proposed action that are relevant to environmental concerns or (2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposal or its impacts.” 40 C.F.R. § 1502.9(c)(1). Mr. Flannigan points to no substantial changes to the proposed action or significant new circumstances or information between the issuance of the DEIS and the FEIS or since the conclusion of the review process. Indeed there were none; thus, a supplement was not required.

Another criticism is that the Board did not consider cumulative impacts and that the Bayport Terminal facility project and the Bayport Loop Build-In should be considered in the same EIS. *See Flannigan Pet.* at 2. These issues have been addressed many times over in this proceeding, and the record supports the conclusion, reached by both the Board and the U.S. Army Corps of Engineers, that the Bayport Terminal facility project and the Bayport Loop Build-In are not connected or cumulative actions requiring treatment in the same EIS. DEIS at A-25 (Notice of Availability of Final Scope of Study for the EIS) and 2-10. Moreover, as required by 40 C.F.R. § 1508.25(c), the Board addressed the cumulative impact of the proposed action on all past, present and reasonably foreseeable future actions in Chapter 5 of the DEIS and Section 4.18 of the FEIS.

An argument is made that the Board did not respond to his comments regarding the proposed project’s impact on flooding in the Houston area. *See Flannigan Pet.* at 3. However, the record supports that SEA carefully reviewed and evaluated storm surge events and impacts to

flood control. SEA noted that, “to ensure that the project provides adequate flood control and minimizes effects on floodplains, the design and specification for bridges, culverts, channels, and related structures would have to satisfy the HCFCD requirements” and that “the structures crossing the floodplains would conform to all applicable design standards required by the floodplain program administered by Harris County.” DEIS at 4-44 to 4-45. Thus, SEA reasonably concluded that “[g]ood design and compliance with the required regulatory programs would ensure that effects on floodplains would be minor” *Id.*

Finally, there is a contention that the Board has not examined “material releases” along the line from ordinary rail operations. *See* Flannigan at 3.²⁰ While it does not appear that this issue has been raised in this way before now, SEA did examine stormwater quality as part of its environmental review of the project. For example, SEA noted that “[s]tormwater discharges . . . would occur” and that such discharges “may contain low concentrations of pollutants such as oil and grease, TSS, metals, and nitrogen and phosphorus containing compounds.” DEIS at 4-49. SEA determined that “[m]inor impacts on surface waters are expected to result from the operations.” *Id.* SEA also disclosed that potential impacts to surface water as a result of rail operation and maintenance will be mitigated through the use of proper best management practices outlined in the VMMs. *Id.* This type of disclosure of potential environmental impacts is all that is required by NEPA. *See Baltimore Gas & Elec.*, 462 U.S. at 97-98.

²⁰ As an initial matter, the appellant’s “factual” contentions are erroneous. Material does not just spill from the outside of a rail car from overfills or thermal expansion. If material is on the outside of a rail car, the car is not placed into a train until it has been cleaned off. If there is an unusual occurrence of thermal expansion during transportation because the shipper overloaded the car, that is considered a “non-accidental release,” and the car is not moved until it has been corrected. Last year, BNSF had only 162 non-accidental releases out of 800,000 shipments of hazardous material. If there is any soil impacted from an accidental release, it is cleaned up immediately according to state and federal standards. Moreover, the cars themselves are very secure and do not have oils or greases dripping from them. The cars have sealed roller bearings and essentially no moving parts that would leak or drip oils from operations.

C. Appellants Have Not Demonstrated the Existence of New Evidence or Changed Circumstances Warranting Reconsideration.

1. The Port of Houston Authority's Bayport Ship Channel Container/Cruise Terminal Final EIS ("Port FEIS") Does Not Present "New Evidence."

GBCPA and LULAC contend that some information contained in the Port FEIS, released since the May 9 Decision, constitutes "new evidence" pursuant to the Board's reconsideration standard. GBCPA Pet. at 6-7. Specifically, they note that the Bayport Terminal facility "by itself, will violate the 24-hour National Ambient Air Quality Standard for PM_{2.5}," that it "will [violate] the City of Pasadena's noise ordinance," and that "noise impacts will impact property values in the area." *Id.*

First, with respect to PM_{2.5} air emissions, the record reflects that SEA considered the cumulative impact of the proposed Bayport Terminal facility and the Bayport Loop Build-In. DEIS at 5-7 ("the air quality impacts of the Bayport Loop Proposed Action and Alternatives can be assumed to be *de minimus* [*sic*], and hence, when combined with other planned or reasonably foreseeable projects, would not have a significant cumulative adverse impact on air quality"); FEIS at 4-89 (responding specifically to comment regarding PM_{2.5} and the Bayport Terminal facility). SEA's discussion in the DEIS and FEIS of PM emissions from diesel carefully outlines SEA's methodology and conclusions regarding particulates, including PM_{2.5}. DEIS at 4-38 to 4-41.²¹ As a result of SEA's conclusion that air emissions from the Bayport Loop Build-In are *de minimis*, its cumulative impact discussion regarding air quality is reasonable.²²

²¹ In reviewing the EIS for this project, EPA ratified SEA's conclusions with its highest rating of "lack of objections" (FEIS at 2) pursuant to its statutory obligation to review EISs. 42 U.S.C. § 7609.

²² Even if GBCPA's alleged "new evidence" on PM emissions were considered by the Board, no further environmental review would be required. The highest PM_{2.5} impacts predicted for the Bayport Terminal project are due to construction activity in 2010. The maximum PM_{2.5} emissions from the Bayport Loop project also will occur during its construction, which will be complete years before 2010. By 2010, the only emissions from the Bayport Loop will be operational emissions, due mainly to locomotives, which the Board has found to be *de minimis*. These will not be "new" emissions, but emissions that would otherwise occur on the UP rail line in the absence of the

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Second, SEA also considered the cumulative noise impact of the two projects (DEIS at 5-6 to 5-7; FEIS at 4-85) and concluded “there would be no cumulative noise impact from the Build Alternatives and the Bayport Terminal” because noise from the new rail line would not impact communities near the Bayport Terminal facility. FEIS at 4-85. This conclusion, supported by a description in the DEIS of SEA’s noise modeling (DEIS at 4-27 to 4-35)—including wayside, horn and construction noise—is not affected by the purportedly “new” conclusions in the Port FEIS because there are no sensitive receptors along the proposed rail line in the vicinity of the Bayport Terminal facility. Therefore, there is no “new information” in the Port FEIS that would affect SEA’s noise analysis or warrant reconsideration.

2. Mr. Pietruszewski’s Exhibit A Does Not Constitute or Contain “New Evidence.”

Irrespective of the legitimacy of Mr. Pietruszewski’s effort to justify late submission of his comments on the DEIS, his so-called “mathematically verified facts” are not “new evidence” as that term is interpreted by the Board. Rather, they are cumulative of comments that were before the Board when it made its decision and concern issues considered and analyzed by SEA during the environmental review process. Mr. Pietruszewski claims that the DEIS failed to analyze reasonable traffic levels and that SEA’s analysis of risk regarding the transport of hazardous materials is erroneous. He supplies his own lengthy analysis on this issue. Pietruszewski Exh. A at 9-23. In addition, he takes issue with the Board’s treatment of the impacts on vehicular traffic in the area. *See* Pietruszewski Exh. A at 24-33.²³

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Bayport Loop Build-In. Thus, because the construction periods during which the PM2.5 emissions are likely to be at their highest do not overlap, the two projects do not have a cumulative impact.

²³ Another appellant also commented upon impacts to vehicular traffic. Flannigan Pet. at 2-3. SEA based its analysis of the impact of grade crossing delay on the change in the Level of Service (“LOS”) (DEIS Table 4.4.1) at each affected grade crossing, not on average delay per vehicle, as Mr. Flannigan suggests. In addition to presenting the
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These potential impacts were raised, studied, disclosed in the DEIS and FEIS, and commented upon by the public at every stage of the environmental review process. Mr. Pietruszewski does not raise any “new” information, but instead disagrees with SEA’s methodology and conclusions. In each instance, the Board considered the issues and disclosed SEA’s analysis to the public in the DEIS and FEIS.²⁴ SEA’s assessments are reasonable and well-supported in the record.

Conclusion

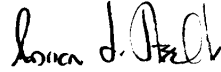
For the foregoing reasons, Petitioners respectfully request that the Board deny all petitions for stay pending judicial review and for reconsideration filed in this proceeding.

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LOS, the DEIS reported the range for the average delay per vehicle. Information relating to total blocked crossing time and average crossing delay per stopped vehicle was presented in the DEIS at App. F, Table F.1-2.

²⁴ With respect to Bayport Loop traffic levels, SEA thoroughly explained its methodology in the DEIS at App. C, and Petitioners analyzed that argument in Section B(3) above. With respect to hazardous materials transport and the contention that local accident data should be reported, the FEIS explained that “[t]he Draft EIS used national data to ensure that both numerators (number of incidents) and denominators (total train miles and total railcar miles) were available for the determination of accidents rates.” FEIS at 4-48. Accidents on a local level are infrequent enough that any overall trend in the data would be obscured by local noise and lead to erroneous conclusions. *See* Conrail DEIS at B-7. With respect to grade crossing delay, the FEIS explains that, “delay estimates in the Draft EIS are conservative (likely overstated) because they do not account for the reductions in delay due to the decreased length of UP trains that would accompany a shift of some Bayport Loop traffic from UP to BNSF trains.” FEIS at 4-76.

Respectfully submitted,



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Date: June 23, 2003

CERTIFICATE OF SERVICE

I do hereby certify that copies of the Reply of San Jacinto Rail Limited and The Burlington Northern and Santa Fe Railway Company to the Petitions for Reconsideration of the Galveston Bay Conservation and Preservation Association and The League of United Latin American Citizens, the City of Houston, Brian Pietruszewski and Michael Flannigan are being served on all parties of record via United States mail on June 23, 2003.

