

Mike Stafford
Harris County Attorney

Writer's Direct Numbers:
Phone: (713) 755-7872
Fax: (713) 755-2680

July 1, 2003

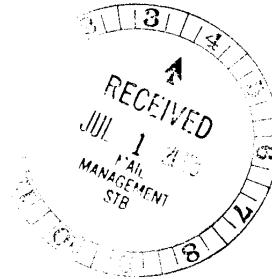
Via Hand Delivery

Secretary
Surface Transportation Board
1925 K Street NW
Washington, D.C. 20423

ENTERED
Office of Proceedings

JUL 02 2003

Part of
Public Record



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

Dear Mr. Secretary:

Enclosed for filing in the above-captioned matter are the original and ten copies of the following documents:

- 208258 (1) Petition of Harris County, Texas and the Harris County Flood Control District for Leave to Intervene;
208259 (2) Petition of Harris County, Texas and the Harris County Flood Control District for Stay Pending Judicial Review; and
208260 (3) Petition of Harris County, Texas and the Harris County Flood Control District for Reconsideration.

I would appreciate your date-stamping the enclosed extra copies of these documents and returning them to the messenger for our files. Thank you for your assistance.

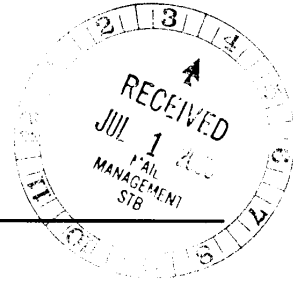
Sincerely,

Cathy J. Sisk /kmm

Cathy J. Sisk
Chief, Environmental Division

cc: Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



Finance Docket No. 34079

**San Jacinto Rail Limited Construction Exemption and the Burlington Northern and
Santa Fe Railway Company Operation Exemption-Build Out to the Bayport Loop
near Houston, Harris County, Texas**

**PETITION OF HARRIS COUNTY, TEXAS AND THE HARRIS COUNTY
FLOOD CONTROL DISTRICT FOR LEAVE TO INTERVENE**

208258

ENTERED
Office of Proceedings

JUL 02 2003

Part of
Public Record

MIKE STAFFORD
Harris County Attorney

CATHY J. SISK
Chief, Environmental Division
Harris County Attorney's Office

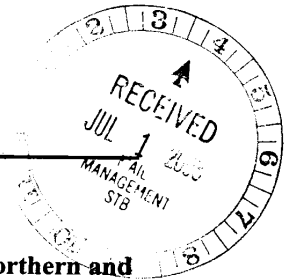
1310 Prairie, Suite 940
Houston, Texas 77002

Attorneys for Petitioners

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34079

**San Jacinto Rail Limited Construction Exemption and the Burlington Northern and
Santa Fe Railway Company Operation Exemption-Build Out to the Bayport Loop
near Houston, Harris County, Texas**



**PETITION OF HARRIS COUNTY, TEXAS, AND THE HARRIS COUNTY
FLOOD CONTROL DISTRICT FOR LEAVE TO INTERVENE**

Pursuant to 49 C.F.R. § 1112.4, Harris County, Texas (the "County") and the Harris County Flood Control District (the "District"), hereby petition the Board for leave to intervene in and become a party to this proceeding for the limited purpose of participating in appellate review of the Board's decision in this docket, and for requesting that the Surface Transportation Board issue a stay of its Order issued in Finance Docket No. 34079 to allow judicial review of that order.

At 49 C.F.R. § 1112.4(a), the Board's regulations provide that petitions to intervene "may be granted if intervention (1) will not unduly disrupt the schedule for filing verified statements, except for good cause shown; and (2) would not unduly broaden the issues raised in the proceeding." The County's and District's intervention will not unduly disrupt the schedule of this proceeding, as the record has been completed and Chairman Nober has issued a decision with an effective date of July 11, 2003. Nor will the County's or District's intervention broaden the issues raised in the proceeding; the County and District seek to participate in appellate review primarily to address environmental issues that are already at issue in this proceeding and that have been raised by them and by others, including the City of Houston. Both a draft and final EIS have

been prepared to evaluate the proposed exemption and numerous parties, including Harris County Commission Sylvia Garcia and the Harris County Public Health and Environmental Services Pollution Control Division, have already commented on environmental issues.

In support of its petition to intervene, the County and District state the following:

1. Statement Regarding Petitioner's Interest in the Proceeding (49 C.F.R. § 1112.4(b)(1)).

Like the City of Houston, who is already a party to this proceeding, Harris County and the Harris County Flood Control District have significant interests at stake. The City and County together are responsible for the well being of our citizens. Our citizens are at risk due to the location of the project so close to residential neighborhoods, Sylvan Rodriguez Park, Ellington Field Airport, the Southeast Water Purification Plant, and some 23 schools in the vicinity. Further, significant environmental and other impacts have not been properly analyzed or considered in the Final EIS. Among other issues, the proposed rail line will cross an undeveloped tract of Armand Bayou, an area important ecologically to Harris County. In addition, the project will have the effect of stifling the commercial growth of Ellington Field and the surrounding area. Finally, the proposed routes would impose direct burdens on County and District infrastructure, including roads and road appurtenances and flood control structures. The routes identified and approved in the Final EIS involve constructing the rail line on County and District-owned property. If the project goes forward, the Burlington Northern and Santa Fe Railway Company will institute condemnation proceedings for County and District properties. In fact, offers have already been made and rejected for several parcels.

2. Statement as to Whether Petitioner Supports or Opposes the Relief Sought or the Action Proposed or Is Otherwise Concerned with the Issues Presented in the Proceeding (49 C.F.R. § 1112.4(b)(2)).

The County and District oppose the granting of the exemption sought in this docket, because such a decision would be arbitrary, capricious, and not otherwise in accordance with law and would fail to take the “hard look” at environmental impacts required by the National Environmental Policy Act. Significantly, the Final EIS fails to take into account the comments made by Harris County, the City of Houston, and others regarding critical environmental issues. These issues, of great importance to the people of Houston and Harris County, either have not been addressed, or have been addressed inadequately, in the Final EIS.

3. Statement Regarding Petitioner’s Request for Relief (49 C.F.R. § 1112.4(b)(3)).

Harris County and the Harris County Flood Control District respectfully request that the Board grant them leave to participate in this proceeding as an intervener. Allowing the County and District intervener status will allow them to participate most efficiently in the appellate review of this decision. See generally 49 C.F.R. Part 1115. That in turn will ensure that the interests of the citizens of Harris County are fully considered on these important issues.

Allowing Harris County and the Harris County Flood Control District to intervene is also arguably required by the federal regulations promulgated by the Council for Environmental Quality. In this case, the Board is relying on 40 C.F.R. § 1506.10(b), which states that “No decision on proposed action shall be made or recorded” until thirty days after publication of the final environmental impact statement. While there is an exception to this rule for decisions that are “subject to a formal internal appeal” after the

issuance of an EIS – in those cases “the decision may be made and recorded at the same time the environmental impact statement is published” – that exception only applies in cases “where a real opportunity exists to alter the decision.” Id. Thus, the ability of interested parties to participate in a meaningful review of the final EIS is a core principle of federal law.

The CEQ regulations make it very clear that the touchstone of this requirement is the need for public participation in the review of an agency decision and the associated EIS: “Some agencies 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.” Id. Allowing interested parties to participate in the agency’s appellate process, especially public entities like the County and District that have significant responsibility to protect the interests of their citizens, is a hallmark of a procedure that provides “real opportunity” for appellate review.

The Board routinely grants petitions to intervene in circumstances where, as here, the petitioner demonstrates that it has an interest in the proceeding and intervention will not unduly broaden the issues. As the County and District have demonstrated their interest in this proceeding, the lack of undue issue broadening, and good cause for them to be allowed to intervene and become a party to this proceeding, this petition should be granted.

WHEREFORE, Harris County, Texas, and the Harris County Flood Control District respectfully request that the Board grant this petition to intervene in the above-referenced proceeding.

Dated: July 1, 2003

Respectfully submitted,

HARRIS COUNTY, TEXAS and
THE HARRIS COUNTY FLOOD
CONTROL DISTRICT

MIKE STAFFORD
Harris County Attorney

By Cathy J. Sisk /kmm
CATHY J. SISK
Chief, Environmental Division
Harris County Attorney's Office
1310 Prairie, Suite 940
Houston, Texas 77002
Phone: (713) 755-7872
Fax: (713) 755-2680

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2003, I caused copies of the foregoing Petition for Leave to Intervene to be served via express mail and First Class Mail on all parties of record in this proceeding.

Cathy J. Sisk / Kmm
Cathy J. Sisk