



Mike Stafford
Harris County Attorney

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

July 1, 2003

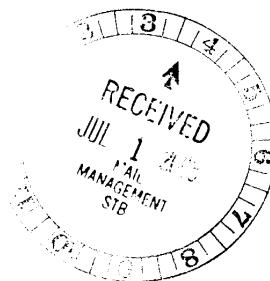
Via Hand Delivery

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.

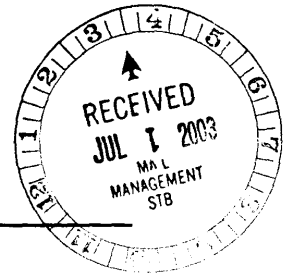
Sincerely,

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 RECONSIDERATION

208260

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

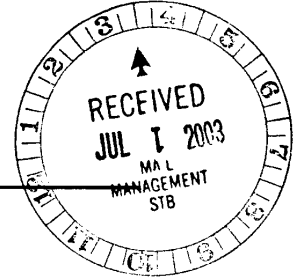
FILED

JUL 1 2003

OFFICE
SURFACE TRANSPORTATION BOARD

FILING FEE WAIVED

**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 RECONSIDERATION**

Pursuant to 49 C.F.R. § 1115.5(a), Harris County, Texas and the Harris County Flood Control District hereby request pursuant to 49 C.F.R. § 1115.3 that the Board reconsider its May 9, 2003 decision granting an exemption from the prior approval requirements of 49 U.S.C. § 10901 for the construction and operation of a rail line in Harris County Texas.

In support of this Petition, Harris County and the Harris County Flood Control District refer to and adopt in its entirety the Petition of the City of Houston, Texas for Reconsideration, which is attached hereto and incorporated herein for all purposes.

WHEREFORE, for the reasons stated in the attached Petition, Harris County and the Harris County Flood Control District respectfully request that the Board reconsider its May 9, 2003 Order in this docket.

Dated: July 1, 2003.

Respectfully submitted,

HARRIS COUNTY, TEXAS AND
THE HARRIS COUNTY FLOOD
CONTROL DISTRICT

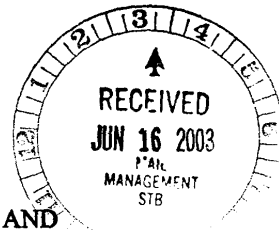
MIKE STAFFORD
Harris County Attorney

By Cathy J. Sisk /krm
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

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 34079



**SAN JACINTO RAIL LIMITED CONSTRUCTION EXEMPTION AND
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY OPERATION
EXEMPTION – BUILD-OUT TO THE BAYPORT LOOP NEAR HOUSTON, HARRIS
COUNTY, TX**

**PETITION OF THE CITY OF HOUSTON, TEXAS,
FOR RECONSIDERATION**

Anthony W. Hall, Jr.
City Attorney

Bertrand L. Pourteau, II
Deborah F. McAbee

City Hall Annex
900 Bagby, 4th Floor
Houston, TX 77002-4400

City of Houston, Texas

Sharon M. Mattox
Benjamin S. Lippard

Vinson & Elkins, L.L.P.
1455 Pennsylvania Ave. N.W.
Washington, DC 20004

Attorneys for Petitioner

**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**



**SUMMARY OF THE CITY OF HOUSTON, TEXAS'S,
ARGUMENT FOR RECONSIDERATION**

The City of Houston, Texas ("the City"), is moving pursuant to 49 C.F.R. § 1115.3 that the Board reconsider its May 9, 2003 decision granting an exemption from the prior approval requirements of 49 U.S.C. § 10901 for the construction and operation of a rail line in Harris County, Texas. This document summarizes the City's argument as required by 49 C.F.R. § 1115.3(d).

The City is entitled to reconsideration of the Board's May 9 Decision for three reasons. The first is that the Board's decision failed to comply with an important procedural requirement of NEPA. On May 9, when the exemption in this matter was approved by two members of the Board, the FEIS had not been published in the Federal Register and was not available to the public. This is a violation that strikes at the heart of both the letter and spirit of NEPA.

Second, the Board's decision improperly relies on the exemption contained in 40 C.F.R. § 1506.10(b). This exemption only applies when an agency decision "is subject to a formal internal appeal" and where "a real opportunity exists to alter the decision."¹ The context of the Board's enabling statute, 49 U.S.C. § 701, makes it clear that the Board does not have the authority to act with a single member, because the Board was intended

¹ 40 C.F.R. § 1506.10.

by Congress to be a deliberative body, an intention that is thwarted by the Board's single-member composition. This conclusion is also apparent from the Board's regulations. Similarly, the relevant cases establish that the Board is not legally authorized to act regarding substantive matters with only a single member. Additionally, the high standard for reconsideration denies the City a real opportunity to alter the decision. Because of this, the Board's decision does not qualify for the CEQ Exemption and is therefore in violation of NEPA.

Third, the FEIS fails to take the "hard look" required by the National Environmental Policy Act. In this case, the FEIS is flawed because it erroneously minimized, ignored, or dismissed without analysis numerous significant environmental issues, and is thus legally inadequate. Drinking water, air transportation and public recreational space are each essential public services supplied by the city to its citizens. The FEIS completely fails to disclose the impacts on these services that will result directly from the exemption decision, despite an express requirement for such disclosures in Board regulations.

The FEIS also failed to take a "hard look" at numerous specific issues. The existence of the rail line on two of the routes approved in this docket would create significant airport access and development issues at Ellington Field. Although the City's concerns were substantiated by the FAA, the Board erroneously dismissed them as not substantiated and not environmental. Similarly, the FEIS does not take a "hard look" at issues related to a significant Drinking Water Plant. Although several of the routes approved by the Board would sever the Plant in two, posing profound logistical, operational, and security issues, the EIS is silent on the impacts to the Plant and the City.

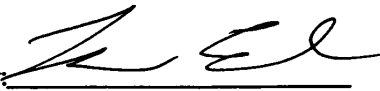
The FEIS also ignores the significant environmental risks associated with construction of a rail line over a route containing literally hundreds of pipeline crossings. The risk is compounded because the location of many of these pipelines is unknown and the approved route crosses a dense area of pipelines immediately adjacent to a public park. Finally, the FEIS flatly refused to analyze the impact from traffic levels that are reasonably foreseeable, but instead dismissed those impacts on the basis of unjustified assumptions. Because the FEIS failed to adequately consider each of these specific environmental impacts, it did not comply with NEPA.

For all of these reasons, the Board's decision did not comply with NEPA, and the City is entitled to reconsideration.

Dated: June 16, 2003

Respectfully submitted,

CITY OF HOUSTON, TEXAS

By: 

Anthony W. Hall, Jr.
City Attorney

Sharon M. Mattox
Benjamin S. Lippard

Bertrand L. Pourteau, II
Deborah F. McAbee

Vinson & Elkins, L.L.P.
1455 Pennsylvania Ave. N.W.
Washington, DC 20004

City Hall Annex
900 Bagby, 4th Floor
Houston, TX 77002-4400

Attorneys for Petitioner

City of Houston, Texas

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 34079

**SAN JACINTO RAIL LIMITED CONSTRUCTION EXEMPTION AND THE
BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY OPERATION
EXEMPTION – BUILD-OUT TO THE BAYPORT LOOP NEAR HOUSTON, HARRIS
COUNTY, TX**

**PETITION OF THE CITY OF HOUSTON, TEXAS,
FOR RECONSIDERATION**

The City of Houston, Texas (“the City”), hereby requests pursuant to 49 C.F.R. §1115.3 that the Board reconsider its May 9, 2003 decision granting an exemption from the prior approval requirements of 49 U.S.C. § 10901 for the construction and operation of a rail line in Harris County, Texas. The City is entitled to reconsideration and reversal of this decision because it violates the National Environmental Policy Act, 42 U.S.C. §§ 4371 *et seq.* (“NEPA”) and associated regulations. First, the Board’s decision of May 9th, 2003, (“the May 9 Decision”) did not comply with 40 C.F.R. § 1506.10, which requires that *no action* of this kind can be taken until publication of the notice of availability of the Final Environmental Impact Statement (“FEIS”). Second, the Board may not by subsequent action use the exception to § 1506.10. Third, the FEIS fails to take the requisite “hard look” at the environmental impacts of the Board’s decision.

FACTS

On May 9, 2003, the Board, which was on that date composed of two members, served a decision granting final approval for an exemption sought by San Jacinto Rail Limited (“San Jacinto”) to construct, and by the Burlington Northern and Santa Fe Railway Company (“BNSF”) to operate, a rail line in Harris County. This project involves the construction and operation of a 12.8 mile line of railroad connecting the

Bayport Loop with the former Galveston, Henderson and Houston Railroad line. In approving this exemption, the Board relied on a FEIS prepared by the Section of Environmental Analysis ("SEA"), which it characterized as meeting the requirements of NEPA.¹ The Board also relied on the publication of the Notice of Availability in the Federal Register on May 9, 2003 – which did not, in fact, occur. On May 15, 2003, Commissioner Morgan resigned from the Board, leaving the Board with a single member. On May 16, 2003, the date on which the Notice of Availability was finally published, the Board, acting with only one member, revised the effective date of the May 9 Decision to June 16, 2003 (the "May 16 Decision") in recognition that the May 9 Decision was made prior to publication of the FEIS and was therefore flawed.²

As the Board itself has recognized, this project has caused intense controversy and is strongly opposed by the people and communities of Houston.³ Multiple routes are authorized by the Board's decision, and each potential route raises profound environmental concerns. For example, two routes run through Ellington Field, an airfield used in part by the Army Air National Guard, the Texas Air National Guard, the Coast Guard, and the National Aeronautics and Space Administration ("NASA"). Other routes sever the regional Drinking Water Plant. All of the proposed routes involve potential underground pipeline crossings (of which at least 300 have been identified), many of which are located near a public park.

¹ San Jacinto Rail Limited Construction Exemption and the Burlington Northern and Santa Fe Railway Company's Operation Exemption – Build-Out to the Bayport Loop Near Houston, Harris County, TX, Finance Docket No. 34079 (May 9, 2003) at 11.

² See San Jacinto Rail Limited, Finance Docket No. 34079 (May 16, 2003). The effective date was subsequently extended to July 11 to allow for reconsideration.

³ See San Jacinto Rail Limited, Finance Docket No. 34079 (May 9, 2003) at 11, 16.

ARGUMENT

The City is entitled to reconsideration of the Board's May 9 Decision for three reasons. The first is that the Board has failed to comply with the procedural requirements of NEPA. Second, the Board's decision improperly relies on 40 C.F.R. § 1506.10(b). Third, the FEIS fails to take the "hard look" required by the National Environmental Policy Act, and the Board's decision is therefore arbitrary, capricious, and not otherwise in accordance with law under the standards of the Administrative Procedure Act.

I. The May 9, 2003 Decision of the Board Violates NEPA.

On May 9, when the exemption in this matter was approved by two members of the Board, an FEIS had not been published in the Federal Register and was not available to the public. This is a violation that strikes at the heart of both the letter and spirit of NEPA. Very clear regulations exist to guide federal agencies through the essential procedural steps of NEPA.⁴ These regulations are "applicable to and binding on all Federal agencies for implementing the procedural requirements" of NEPA.⁵ The "NEPA procedures must insure that environmental information is available to public officials and citizens *before decisions are made and before actions are taken.*"⁶ Accordingly, the CEQ regulations specifically define the timing required for agency actions. Minimum time periods are calculated from the date of publication of the Notice of Availability of an FEIS in the Federal Register.⁷ No decision on a proposed action can be made for 30 days after the Notice of Availability of an FEIS.⁸ It is undisputed that the May 9

⁴ Council on Environmental Quality ("CEQ") regulations, 40 C.F.R. Parts 1500 through 1508.

⁵ 40 C.F.R. § 1500.3.

⁶ 40 C.F.R. § 1500.1(b) (emphasis added).

⁷ See 40 C.F.R. § 1506.10(a).

⁸ See 40 C.F.R. § 1506.10(b)(2).

Decision was made before the publication in the Federal Register. Courts routinely reject agency action that does not comply with the NEPA requirements.⁹

Because NEPA requires that no action be taken until *after* the publication of the FEIS, the May 9th Decision is facially invalid, as it was taken *before* publication. Nor does the May 16 Decision even attempt to cure this error. The May 16 Decision only extends the administrative appeal period for the May 9 Decision. Indeed, it confirms that the decision had *already* been made: "By decision served May 9, 2003, the Board granted final approval . . ."¹⁰ This is the only decision of the Board approving the exemption, and it was not made in accordance with the law.

II. Subsequent Decisions by the Board Cannot Correct the Violation.

After the May 9 Decision, and before the publication of the FEIS in the Federal Register on May 16, Commissioner Morgan resigned her position with the Board. This left the board with a single member, Chairman Nober. Since the resignation, the Board has issued two decisions in this docket, one on May 16 and one on June 12. These decisions each stay the effect date of the May 9 decision, and clarify administrative filing deadlines. These decisions fail, however, in the attempt to exempt the Board from the requirements of the CEQ regulations. Whatever the legal status of the May 9 Decision (discussed above), the Board's single-member composition deprives it of legal authority to act in substantive matters and its appellate procedures therefore do not provide a "real opportunity" to alter the Board's decision.

⁹ See, e.g., Sierra Club v. Army Corps of Engineers, 701 F.2d 1011 (2d Cir. 1983) (upholding decision to enjoin construction project due to NEPA violations); Idaho Watersheds Project v. Hahn, 307 F.3d 815 (9th Cir. 2002) (upholding decision to enjoin issuance of grazing permits due to NEPA violations).

¹⁰ San Jacinto Rail Limited, Finance Docket 34079 (May 16, 2003) at 1.

A. The Board attempts to rely on an exemption to the 30 day rule.

The May 9 Decision attempts to rely on an exemption in the CEQ regulations that allows an agency decision to be contemporaneous with Federal Register publication of an FEIS.¹¹ The introductory letter to the FEIS makes the same claim and states that the Board “will consider any administrative appeals in a subsequent decision.”¹² The May 16 Decision, which was issued by a single Board member, extended the effective date of the decision until June 16, in a purported effort to comply with the CEQ Exemption. Thus, it is clear that the Board considers itself to be bound by the terms of the CEQ Exemption.

The CEQ Exemption only applies when an agency decision “is subject to a formal internal appeal” and where “a real opportunity exists to alter the decision.”¹³ The CEQ Exemption is therefore not simply a procedural hoop to jump through. Rather, it is a requirement with real force because it is tied to a “real opportunity” for the agency to rethink its decision.¹⁴ In the current case, because of the current single member composition of the Board, no such opportunity exists.

Importantly, the legal burden falls on the Board to demonstrate that it qualifies for the CEQ Exemption. It is well-settled that attempts to qualify for a regulatory exemption are strictly construed against the party seeking the exemption.¹⁵ Moreover, because in its analysis of the CEQ Exemption the Board is not construing its own regulation, but the regulation of an entirely different agency, the Board’s statement that its administrative procedures comply with the CEQ Exemption is not entitled to the principle of deference

¹¹ See C.F.R. § 1506.10(b)(2) (hereafter the “CEQ Exemption”); May 9 Decision at 13.

¹² FEIS at 3.

¹³ 40 C.F.R. § 1506.10.

¹⁴ 40 C.F.R. § 1506.10(b).

¹⁵ See, e.g., Arnold v. Ben Kanowski Inc., 361 U.S. 388, 392 (1960) (FLSA exemptions to be construed narrowly); O’Neal v. Barrow Cty. Bd. of Comm’rs, 980 F.2d 674, 677 (11th Cir. 1993) (same).

to agency interpretation set forth by Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984), and its progeny.¹⁶

B. This appeal provides no real opportunity to alter the decision.

The most salient requirement of the CEQ Exemption is that it only applies in cases “where a *real opportunity exists to alter the decision*.”¹⁷ In this case, however, there is no “real opportunity” to alter the decision. The Board is currently composed of only a single member, due to the resignation of Commissioner Morgan on May 15, 2003. In attempting to exercise its functions while there is only a single member, the Board is acting contrary to law. It is clear from the statutory language that the Board is intended to be a deliberative body, where the give and take of opposing views is a fundamental part of Congress’s scheme. Chairman Nober acknowledged this fact in his May 20, 2003 testimony to the House Committee on Transportation, saying “I am mindful that Congress created the Board as a bi-partisan, multimembered Board so that its decisions would reflect consensus among different points of view. Congress could have, and of course did not, create a unilateral decision-maker.”¹⁸ Congress intended bipartisan discussion, the critically important give and take between holders of different political philosophies, to shape the decisions of the Board. With only one member, this give and take is impossible, and the intent of Congress is thwarted.

The recent decision of the Board (acting through a single member) that it is able to exercise its decision making powers even though only constituted of a single member

¹⁶ See, e.g., Auer v. Robbins, 519 U.S. 452 (1997) (formulating deference principles as relating to agency interpretation of “its own regulation”); Louisiana Federal Land Bank Assoc. v. Farm Credit Admin., 180 F. Supp. 2d 47, 57 (D.D.C. 2001) (same).

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

¹⁸ Chairman Nober’s testimony is on the Board’s website, at <http://www.stb.dot.gov/NewItems.htm>.

is simply wrong.¹⁹ The Board focused solely on the language of a provision regarding a vacancy on the Board, and relied on 1 U.S.C. § 1 to argue that the singular “a vacancy” also encompasses the plural “vacancies,” leaving the Board’s authority unimpaired by “vacancies” in the membership. In reaching this conclusion, the Board ignored the statute’s use of the term “the *remaining members*.”²⁰ The Board also selectively read 1 U.S.C. § 1, leaving out an important qualifying phrase. Words importing the singular do include the plural, “*unless the context indicates otherwise*.”²¹

The context of the Board’s enabling statute, 49 U.S.C. § 701, makes it clear that the Board does not have the authority to act with a single member. In the Board’s enabling statute, Congress explicitly provided that the Board was to be made up of multiple members, requiring that “the Board shall consist of 3 members,”²² as befits the significant duties of the Board. Indeed, the very word “Board” necessarily implies a multiple member body.²³ Further, the vacancy provision considered by the Board in its recent decision clearly refers to “the *remaining members*”²⁴ as having the authority to act – a term the Board did not address in its discussion of vacancies.²⁵ Numerous other features of the statutory structure make it very clear that Congress intended that the decisions of the Board be made by more than a single individual. For example, Congress explicitly stated that “at any given time, at least 2 members of the board shall be individuals with professional standing and demonstrated knowledge in the fields of

¹⁹ The Burlington Northern and Santa Fe Railway Company – Trackage Rights Exemption - Union Pacific Railroad Company, Finance Docket No. 34345 (Sub.-No.1) (May 23, 2003) (the “May 23 Decision”).

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

²¹ 1 U.S.C. § 1 (*emphasis added*).

²² 49 U.S.C. § 701(b)(1).

²³ Black’s Law Dictionary (7th Ed. 1999) at 166 (“A group of persons having managerial, supervisory, or advisory powers[.]”).

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

²⁵ Burlington Northern and Santa Fe, Finance Docket No. 34345 (Sub.-No. 1) (May 23, 2003) at 2.

transportation regulation."²⁶ Similarly, the requirement that no more than two members be of the same political party offers evidence that Congress intended the Board to be a bipartisan body, with the attendant deliberations and compromises.²⁷

Moreover, the Board's regulations are consistent with Congress's view that the Board must be constituted of more than a single member in order to exercise its substantive functions. The Board's regulations provide a list of the Board functions that are delegated to a single member – appellate review of Board decisions is not among them,²⁸ and in fact this type of appellate review is explicitly reserved by the Board to the full Board itself.²⁹ This is distinct from the Board's procedural functions, such as its ability to *stay* this type of decision, which the Board's regulations allow a single member, the Chairman, to exercise.³⁰ This again suggests that the Board's view of its authority is consistent with Congress's – more than one member is required for substantive decisions.

Similarly, the relevant cases establish that the Board is not legally authorized to act regarding substantive matters with only a single member. In its May 23 Decision, the Board cites Railroad Yardmasters of America v. Harris³¹ to support its contention that it has the authority to act with a single member. This case is inapposite, and fairly read supports the City's position. In Yardmasters, the three-person National Mediation Board found itself temporarily with only one member. The most significant difference between this case and Yardmasters is that the statutory framework in that case explicitly authorized the Mediation Board to delegate its authority to an individual member of that

²⁶ 49 U.S.C. § 701(b)(2).

²⁷ See 49 U.S.C. § 701(b)(1).

²⁸ 49 C.F.R. § 1011.4.

²⁹ 49 C.F.R. § 1011.2(a)(3).

³⁰ 49 C.F.R. § 1011.4(a)(3).

³¹ 721 F.2d 1332 (D.C. Cir. 1983).

board.³² Critically, an unquestionably valid Mediation Board acted while it had the authority to delegate functions to a single member, unlike this proceeding, where a single member declared this authority unilaterally.

Moreover, the Yardmasters Court clearly articulated that the Mediation Board “is not principally engaged in substantive adjudication” but rather the “procedures” of its statute.³³ Thus, concerns such as “unaccountable concentrations of authority”³⁴ were not an issue there, but are substantially implicated in this case. Here, the Board’s authority is substantive in nature, and includes the authorization of construction projects that necessarily impinge on the rights of private or public entities (for example, condemnation of land or the environmental effects of major construction). The significant authority exercised by the Board, and Congress’s intent that the Board be deliberative, illustrate that the rationale of Yardmasters is not appropriate here.

No case specifically addressing the Board, or its predecessor the I.C.C., establishes that the Board’s substantive decision making power can be exercised by a single member. In their reply to the City’s motion for stay, San Jacinto and BNSF cite a number of cases for the proposition that the Board may act with any number of members, “however many there are[.]”³⁵ What San Jacinto and BNSF do not explain to the Board, however, is that *none* of these cases deal with a situation where the I.C.C. acted with only a single member, but are cases where *multiple* members of the Commission – six members, five members, and four members, respectively – acted to exercise the

³² “The Mediation Board is authorized by its order to assign, or refer, any portion of its work, business, or functions...to an individual member of the Board...” Yardmasters, 721 F.2d at 1339.

³³ Yardmasters, 721 F.2d at 1345. According to Yardmasters, the Mediation Board had little substantive authority, but primarily exercised procedural authority such as arranging for arbitrations and providing information to the President. Id.

³⁴ Yardmasters, 721 F.2d at 1347 (Wald, J., dissenting).

³⁵ Reply of San Jacinto and BNSF, San Jacinto Rail Limited, Finance Docket 34079 (June 11, 2003) at 5.

Commission's power.³⁶ A single-member commission is quite different from one with four, five, or six members, for the composition of those commissions allowed the deliberative process intended by Congress. Those cases are also consistent with the plural term "members" in the relevant vacancy provision, unlike in this case.³⁷

C. *The high standard for reconsideration denies the City a real opportunity to alter the decision.*

As noted above, the CEQ Exemption requires that the Board's appellate procedures provide a "real opportunity to alter the decision."³⁸ This is because NEPA requires that the final decision not be prejudiced before the environmental impacts are fully considered by the decision maker.³⁹ The Board, however, does not review motions for reconsideration without prejudice. Rather, the Board presumes that the decision is correct. A petition for reconsideration under 49 C.F.R. § 1115.3 is granted only if the petitioner shows "new evidence or changed circumstances" or that the prior action involves "material error."⁴⁰ By requiring an elevated showing of error or new evidence to justify reconsideration, the Board has diminished the chance of success on the merits to the point where it is inconsistent with NEPA, which requires that environmental impacts be weighed on the same basis as the other facts considered by the decision maker, not given diminished weight due to procedural standards on administrative appellate review.

³⁶ Union Pacific RR Co. v. United States, 637 F.2d 764, 766 (10th Cir. 1981) (six members); Assure Competitive Transportation, Inc. v. United States, 629 F.2d 467, 472 (7th Cir. 1980) (five members); Michigan Dep't of Transportation v. I.C.C., 698 F.2d 277, 279 (6th Cir. 1983) (four members).

³⁷ 49 U.S.C. § 701(b)(7).

³⁸ 40 C.F.R. § 1506.10(b).

³⁹ 40 C.F.R. § 1500.1.

⁴⁰ See Bulkmatic Railroad Corporation -- Acquisition and Operation Exemption -- Bulkmatic Transport Company, Finance Docket No. 34179 (May 9, 2003).

The truncated nature of appellate review is illustrated by the Board's procedural requirements. By limiting Petitions for Reconsideration to 20 pages,⁴¹ for example, the appellate review procedures simply do not allow the thorough analysis of environmental impacts, and thus limit the facts presented for review. By way of comparison, the City's environmental comments on the DEIS involved 43 pages of factual discussion. In a case like this one, where NEPA requires that the environmental information be fairly presented *before* a decision is made, the fact that the Board's procedures are slanted against reconsideration renders them inadequate to qualify for the CEQ Exemption.

III. The FEIS Fails the "Hard Look" Standard Set by NEPA.

In order to be adequate under NEPA, the FEIS *must* take a "hard look" at the environmental impacts of a proposed action, as the Board recognizes.⁴² In this case, the FEIS is flawed because it erroneously minimized, ignored, or dismissed without analysis numerous significant environmental issues. Moreover, the deficiencies in the FEIS are so severe as to compel the conclusion that the decision to grant the exemption is arbitrary and capricious. Due to space constraints the City cannot address all of the environmental comments it made on the DEIS. Thus, while the City focuses here only on the most significant environmental issues, it contends the totality of its comments on the DEIS were not adequately considered and in some cases were not considered at all, which renders the FEIS inadequate in many additional ways that are not addressed in detail in this petition.

⁴¹ 49 C.F.R. § 1115.3(d).

⁴² See San Jacinto Rail Limited, Finance Docket No. 34079 (May 9, 2003) at 11.

A. *The FEIS fails to disclose the impacts on essential public services.*

Drinking water, air transportation and public recreational space are each essential public services supplied by the City to its citizens. The FEIS completely fails to disclose the impacts on these services that will result directly from the exemption decision, despite an express requirement for such disclosures in Board regulations.⁴³ The DEIS explained that the only analysis conducted was of the effect of the decision on the “demand for” certain public services.⁴⁴ In response to the City’s comment on this omission, the FEIS merely repeats that the decision would “not place additional significant demands on public services.”⁴⁵ Time and again the FEIS dismisses the City’s comments for lacking “verified data,” as “not substantiated.”⁴⁶ This facile shift in the burden of disclosure from the agency to the impacted community is improper. The City provided detailed information on the impacts of this decision on city operations.⁴⁷ As discussed below, huge costs and enormous logistical difficulties are imposed on the City and these impacts are nowhere disclosed in the FEIS. The federal agency bears the burden to investigate and disclose the effects of its actions.⁴⁸

B. *The FEIS fails to take a “hard look” at the environmental impacts on Ellington Field*

The existence of the rail line on two of the routes approved in this docket would create significant airport access and development issues at Ellington Field. In its

⁴³ 49 C.F.R. § 1105.7(e)(11)(vi). “[D]escribe the effects, including impacts on essential public services . . .”

⁴⁴ DEIS at 4-71.

⁴⁵ FEIS at 4-128, 4-120.

⁴⁶ *Id.*

⁴⁷ See Environmental Comments of the City of Houston, Texas, to the DEIS, San Jacinto Rail Limited, Finance Docket No. 34079, (February 7, 2003) 27-37 (“Environmental Comments”). These comments are reproduced in Appendix B to the FEIS.

⁴⁸ See, e.g., Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068, 1073 (1st Cir. 1980) (“NEPA seeks to achieve substantive environmental improvement by requiring full disclosure of the basis for agency action.”); Sierra Club v. Morton, 510 F.2d 813, 820 (5th Cir. 1975) (“[NEPA] serves as an environmental full disclosure law.”) (quoting Silva v. Lynn, 482 F.2d 1282, 1284 (1st Cir. 1973)).

comments, the City pointed out that the presence of long, slow-moving trains could block off all three access roads to Ellington Field, and that the presence of a rail line through the Ellington Field parcels would substantially interfere with the development of aviation-related industry.⁴⁹ The FEIS simply ignores these impacts as “not substantiated,”⁵⁰ a completely unjustified result as the FAA – a federal agency with far more expertise over aviation-related matters than SEA has – *itself substantiated* many of the City’s concerns.⁵¹ This is a significant deficiency in the FEIS, compounded by the Board’s decision to treat these impacts as irrelevant because they are not environmental:

The FAA indicated that, based on its expertise, its review of the City of Houston’s comments on the Draft EIS (claiming that the southeast area of Ellington Field is “reasonably foreseeable for aviation-related industry”), and its forecasts for Ellington Field, the surplus property that would be crossed by the Proposed Route “is needed to protect and advance the civil aviation interests of the United States.” But the FAA’s concerns about the Proposed Route *are not environmental* and, as the Final EIS explains, SEA believes that development of the southeast portion of Ellington Field for aviation-related industry is speculative.⁵²

This is simply not consistent with the law. NEPA requires the consideration of all types of environmental issues. Developmental impacts affect the human environment.⁵³

Importantly, Ellington Field is an integral part of the operations of the Army Air National Guard, the Texas Air National Guard, the Coast Guard (now part of the Department of Homeland Security) and NASA, among others. Each of these agencies is a critical link in homeland security. Dismissing these facts by stating that the project poses no security issues other than those facing the railroad industry generally is absurd,

⁴⁹ See Environmental Comments at 31-35.

⁵⁰ See FEIS at 4-120.

⁵¹ See FEIS at 2-3.

⁵² San Jacinto Rail Limited, Finance Doc. 34079 (May 9, 2003) at 11 (emphasis added).

⁵³ See, e.g., Morgan v. United States Postal Service, 405 F.Supp. 413, 423 (W.D. Mo. 1975) (EIS was required in order to assess impacts on neighborhood character and drainage).

particularly for a line intended to handle primarily chemical cargoes.⁵⁴ The point is not whether the railroad itself faces novel security issues but whether the existence of the railroad running through the airport impacts airport security. The answer is most emphatically that it will. Surely, no one can dispute the need strictly to control access to an airport. A train entering and exiting the airport would at least require that gates into and out of the airport be opened to allow its passage, and then closed. A method to ensure that the open gate admits only the train must be developed and implemented. When the train halts for any reason within the airport, security for the open gates will also be required. All this will cost money; to build, operate, and maintain the gates and security. This is an impact on the airport. It is not mentioned in the EIS. This is error.

C. *The FEIS fails to take a "hard look" at the environmental impacts on the Drinking Water Plant*

Certain facts about the Drinking Water Plant are indisputable; that it provides potable water to approximately one million people and supplies much of the pressurized water used for firefighting in the region; that plans for the use of the 400 acre tract for a 720 MGD plant have been in place since the 1980's; and that the entire facility is critical to serve the future drinking water needs of the City and its co-participants.⁵⁵ It is also undisputed that several of the routes approved by the Board sever the Plant in two. The EIS is silent on the impacts to the Plant and the City. This is error.⁵⁶

The DEIS treatment of the Drinking Water Plant is brief indeed. The only specific mention states:

⁵⁴ See FEIS at 4-57. Moreover, it is yet another example of the failure of the EIS to disclose the impacts on an essential public service – the airport.

⁵⁵ Environmental Comments at 27-32.

⁵⁶ See *Sierra Club v. Morton*, 510 F.2d 813, 819 (5th Cir. 1975) ("The purposes of an environmental impact statement are to detail the environmental and economic effects of proposed federal action[.]").

Alternatives 2B and 2D would cross land owned by the Water Treatment Plant. The City of Houston has expressed concern of the proximity of a new rail line to its Water Treatment Plant and has stated that any new rail line that would be adjacent to, or divide the Plant creates unnecessary and unacceptable risk.⁵⁷

In response to comments pointing out the lack of analysis, the FEIS does no better, summarizing and dismissing all of the City's grave concerns in extremely short order.⁵⁸

For instance, while admitting that both routes "would separate present plant facilities from a sludge lagoon and sludge disposal area located in the southern part of the 400 acre parcel,"⁵⁹ the "SEA determined that the impact would be negligible,"⁶⁰ without analysis.

Another example of the conclusory dismissal of significant environmental impacts is apparent from the FEIS's response to comments regarding future expansions:

SEA reviewed Water Treatment Facility Expansion Plan exhibits that showed expansion plans for the years 2007, 2015, and 2040. . . . The exhibits showed the proposed alignment of Alternatives 2B and 2D (superimposed) avoiding any 2007-planned infrastructure and encroaching on one ground storage tank in the 2015-planned infrastructure. The routes encroach on numerous facilities identified for the 2040 expansion.⁶¹

The FEIS thus erroneously concludes, without analysis, that unless the rail line actually "encroaches" on the footprint of a planned structure, there will be no environmental impact. Similarly, the FEIS unreasonably minimizes the impact of the project on the Drinking Water Plant by stating that the impact area is "approximately 1.2 to 2.3 acres on the total 400-acre site."⁶² This description is misleading – the project does not involve a discrete area on the edge of the Plant, but rather cuts across the facility, and its impacts are far more significant than the amount of land alone would indicate.

⁵⁷ DEIS at 4-68.

⁵⁸ FEIS at 4-122-3.

⁵⁹ FEIS at 4-122.

⁶⁰ Id.

⁶¹ FEIS at 4-123.

⁶² FEIS at 4-123.

Even more important is the complete failure of the EIS to consider the impacts of a threat to public drinking water supplies, despite the detailed comments of the City on this issue.⁶³ The FEIS specifically notes that the DEIS:

Analyzed potential impacts on impacts to rail operations safety and hazardous materials transportation safety, both of which encompassed potential impacts to the Water Treatment Plant, although these sections of the Draft EIS did not name specific facilities.⁶⁴

The conclusion is that there would be “negligible impacts.”⁶⁵ It may be true that there will be negligible impacts on the railroad, but the document is silent about impacts to drinking and firefighting water for millions. Disclosure of this impact is critical.

CEQ regulations require the evaluation of reasonably foreseeable impacts.⁶⁶ “Reasonably foreseeable” includes impacts that have catastrophic consequences, even if their probability of occurrence is low, if it is within the rule of reason.⁶⁷ Clearly, in these post 9/11 times, a threat to drinking water is not “pure conjecture.”⁶⁸ Indeed, the Department of Homeland Security has identified water plants of this nature as critical infrastructure needing enhanced security.⁶⁹ If the Board does not have the information regarding the impacts the project will have on security at the Drinking Water Plant, it must get it, or explain why in the FEIS.⁷⁰ The FEIS fails this test.

Similar to the airport, the presence of a rail line through critical infrastructure like the Drinking Water Plant will substantially complicate the problem of securing this vital area, with significant additional cost. This cost will ultimately be borne by the citizens of

⁶³ Environmental Comments at 30-32.

⁶⁴ FEIS at 4-123.

⁶⁵ *Id.*

⁶⁶ *See, e.g.*, 40 C.F.R. §§ 1502.16, 1508.8.

⁶⁷ 40 C.F.R. § 1502.22(b).

⁶⁸ *Id.*

⁶⁹ National Strategy for Physical Protection of Critical Infrastructures and Key Assets (Feb. 14, 2003). This document is available at <http://www.whitehouse.gov/pcipb/physical.html>.

⁷⁰ 40 C.F.R. § 1502.22.

Houston and other areas served by the plant. The City identified the significant costs associated with replacing the capacity at the Drinking Water Plant that will be impacted by the project, capacity that the City has already invested hundreds of millions of dollars in. Yet these costs are never discussed or acknowledged in the FEIS. When a project designed for private profit shifts the burdens and costs for accommodating the project onto the public – the taxpayers – the decision maker should have this information clearly before it. Unfortunately, the FEIS forecloses this analysis by the ludicrous finding of “no impact.” At the very least NEPA requires a “hard look” at these impacts, not conclusory dismissals lacking any analysis. While NEPA does not compel a particular result, it forbids the Board from pretending that these impacts do not exist.

D. The FEIS fails to take a “hard look” at profound pipeline safety issues.

The FEIS is also flawed in its analysis of pipeline safety issues. It dismisses numerous environmental impacts without analysis and uncritically accepts the representations of the applicant regarding the environmental risks of railroad construction across pipelines. These specific risks were identified to SEA by the City. Following the DEIS, which understated these risks, the City made extensive comments regarding the number of pipelines in the area, the potential dangers they may cause, and the factors that made this project more susceptible to problems than typical railroad construction.⁷¹ Specifically, the area in which the project will be built has had pipelines since the early 1900’s. As a result, undefined easements, the passage of time, and the shifting corporate identities of pipeline companies make it likely that no one knows where these pipelines are. It is thus more likely that pipelines will not be found, posing real environmental risk and demonstrating the inadequacy of the FEIS’s assumption that the Texas One Call

⁷¹ See Environmental Comments at 19-22.

System will allow location of all pipelines. Of special concern to the City is the fact that the preferred route runs along a dense area of pipelines adjacent to Sylvan Rodriguez Park. The FEIS failed to consider the risks of placing the route over so many pipeline crossings in such close proximity to this important community resource.

The FEIS refers only to the general state of pipelines throughout the country rather than focusing on the impact of this particular project.⁷² For example, the FEIS concludes that because the applicant is “well aware” that it does not know the locations of all pipelines, and has a “substantial business interest” in avoiding accidents, there is nothing to worry about because the pipeline will hire a consultant to look for pipelines.⁷³ This is not a “hard look” – it is the dismissal of a significant environmental impact based on the assumption that “business incentives” will take care of everything. Similarly, the FEIS dismisses the concerns identified by the City because nationwide historic accident data somehow takes “all such factors (in combination)” into account.⁷⁴ According to the FEIS, if there is a nationwide background rate for pipeline accidents, it is reasonable to assume that will be the accident rate for this site as well, and site-specific conditions need not be addressed. This is irrational, because site-specific conditions can obviously alter the risks of a project. For example, constructing a railroad line across a nest of pipelines directly adjacent to a public park presents more risk than crossing an isolated pipeline. Yet, the FEIS refuses to address such considerations, despite the fact that these concerns were identified by the City. This is not a “hard look.” It is hardly a look at all.

⁷² See FEIS at 4-62.

⁷³ Id.

⁷⁴ See FEIS at 4-63.

E. The FEIS fails to take a "hard look" at the reasonably foreseeable impacts of increased traffic.

In reviewing the anticipated traffic, the FEIS must contemplate the environmental impacts that are reasonably foreseeable.⁷⁵ The City's comments show that traffic and capacity significantly above the FEIS's assumptions are reasonably foreseeable.⁷⁶ Moreover, once the line is built, there will be no recourse should traffic continue to increase. The time to address that impact, therefore, is now. The FEIS, however, flatly refused to analyze the impact from traffic levels that are reasonably foreseeable.

The City pointed out in its comments that rather than the 33-66 cars per day projected by the applicants, the real number could easily be as high as two 100-car trains per day. Even the applicant admitted that 100-car trains are foreseeable.⁷⁷ However, "SEA did not analyze the impact of 100 car trains[.]"⁷⁸ SEA attempted to justify this omission by stating that 100 car trains are not "reasonably foreseeable" because this traffic level would require BNSF to capture two-thirds of the traffic currently on the Bayport Loop. But this "resolution" of the issue depends on an unsupported assumption: that BNSF's capturing two-thirds of the traffic is speculative, because "over time, a market with two competitors would be split evenly, on average."⁷⁹ This statement is circular. A market with two competitors is *always* split evenly *on average*, because to *average* the market share of a market with two competitors simply means dividing the market by two. Where NEPA requires objective analysis, the FEIS supplies an empty

⁷⁵ See Native Ecosystems Council v. Dombeck, 304 F.3d 886, 895 (9th Cir. 2002) ("NEPA always requires that an environmental analysis for a single project consider the cumulative impacts of that project together with past, present and reasonably foreseeable future actions.").

⁷⁶ See Environmental Comments at 4-9.

⁷⁷ See FEIS at 4-23.

⁷⁸ See FEIS at 4-23. The FEIS also stated, without factual support, that the impacts would be "similar."

⁷⁹ See FEIS at 4-25.

truism. NEPA does not allow agencies to assume away problems in this way – it requires a “hard look.”

The FEIS’s failure in this regard is particularly egregious because there are many facts in the record suggesting that BNSF could obtain a much larger market share than 50%. BNSF has 66% market share in the Houston Ship Channel,⁸⁰ a competitive market, demonstrating the unreasonableness of the FEIS’s assumption that greater than 50% market share is “speculative.” In short, the FEIS assumes away an environmental impact based on a postulated future of perfect competition on this rail line, without factual support or analysis, and, indeed, in direct opposition to the facts in the record.

CONCLUSION

For the reasons given above, the City respectfully request that the Board reconsider its decision in this docket.

Dated: June 16, 2003

Respectfully submitted,

CITY OF HOUSTON, TEXAS

By: 

Anthony W. Hall, Jr.
City Attorney

Sharon M. Mattox
Benjamin S. Lippard

Bertrand L. Pourteau, II
Deborah F. McAbee

Vinson & Elkins, L.L.P.
1455 Pennsylvania Ave. N.W.
Washington, DC 20004

City Hall Annex
900 Bagby, 4th Floor
Houston, TX 77002-4400

Attorneys for Petitioner

City of Houston, Texas

246261_10.DOC

⁸⁰ See FEIS at 4-23.

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2003, I caused copies of the foregoing Petition for Reconsideration to be served via express mail and First Class Mail on all parties of record in this proceeding.

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

Benjamin S. Lippard

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2003, I caused copies of the foregoing Petition for Reconsideration 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