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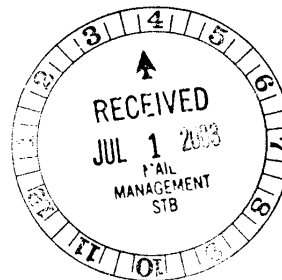
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July 1, 2003

Via Hand Delivery

Secretary
Surface Transportation Board
1925 K Street NW
Washington, DC 20423



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 proceeding are the original and ten copies of the City of Houston, Texas's Motion for Leave to File a Reply and the City's Reply in Support of Its Motion for Reconsideration.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "B. S. Lippard".

Benjamin S. Lippard

Enclosures

cc: Parties of Record

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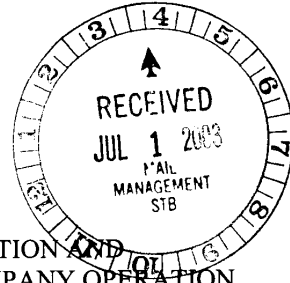
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**

**MOTION OF THE CITY OF HOUSTON, TEXAS, FOR LEAVE TO FILE
A REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION**

Anthony W. Hall, Jr.
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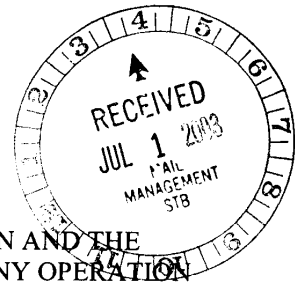
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY OPERATION
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**MOTION OF THE CITY OF HOUSTON, TEXAS, FOR LEAVE TO FILE A
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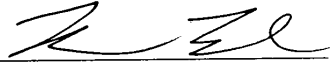
The City of Houston, Texas (“the City”), hereby requests, pursuant to 49 C.F.R. § 1110.9, that the Board waive the effect of its rule prohibiting replies to replies under 49 C.F.R. § 1104.13(c) and allow the City to file a brief reply in this matter. The City’s reply is attached to this motion. The City believes that good cause for such a waiver exists, so that the City can address incorrect statements of fact and law made in the pleadings filed by parties supporting this application, as well as to clarify misstatements regarding the City’s contentions, in the interests of having a complete record in this matter. Moreover, no party will be prejudiced by the filing of this reply, because the Board has stayed the effect of its order in this docket until July 11, 2003. Therefore this filing will not cause unnecessary delay in this proceeding. The Board has allowed supplemental replies in cases where good cause has been shown and no party would be prejudiced by a filing. See Norfolk Southern Railway Co. STB Docket No. 42078 (April 29, 2003), 2003 WL 1963547 at 1 n.1; West Texas Utilities Co. v. Burlington Northern Railroad Co., I.C.C. Decision No. 41191 (August 24, 1994), 1994 WL 455614 at 1; Chesapeake & Ablemarle Railroad Co., Finance Docket No. 31617, 31677 (January 24, 1991), 1991 WL 108117 at 1.

For the reasons given above, the City respectfully request that the Board allow it to file the attached Reply in support of its Motion for Reconsideration.

Dated: July 1, 2003

Respectfully submitted,

CITY OF HOUSTON, TEXAS

By: 

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City Attorney

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 34079

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**REPLY OF THE CITY OF HOUSTON, TEXAS,
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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COUNTY, TX

**REPLY OF THE CITY OF HOUSTON, TEXAS,
IN SUPPORT OF ITS MOTION FOR RECONSIDERATION**

The City of Houston, Texas (“the City”), hereby replies to the arguments by San Jacinto Rail Limited and Burlington Northern and Santa Fe Railway Company (collectively referred to as “BNSF”) and the Bayport Producers in their respective replies. Contrary to BNSF’s pleading, which responds to the City’s analysis of the NEPA regulations, the errors in this proceeding are not harmless or trivial. As the City points out, the errors in this proceeding are substantial and implicate core NEPA requirements. Similarly, the Bayport Producers’ pleading does not refute the fact that the FEIS failed to address key environmental issues. Given the Board’s general rule discouraging replies to replies, the City has chosen only to address a few key points in this pleading, and this should not be construed as a concession of any points not addressed.

ARGUMENT

I. The Board’s failure to comply with NEPA was not trivial.

In this case, the Board did not comply with the CEQ regulations, which require that no agency decision be made until more than 30 days after publication of the notice of availability of the FEIS in the Federal Register. Nor did the Board comply with the requirements of the CEQ’s exemption to this 30-day requirement, because there is no “real opportunity” alter the Board’s decision. These are not trivial violations of NEPA.

A. *The Board did not comply with the CEQ regulations in its May 9, 2003 Decision.*

Although BNSF styles its NEPA argument as “The Board Fully Complied with NEPA Procedural Requirements,”¹ this title is misleading. There is no dispute – indeed, BNSF itself does not contend – that the Board actually adhered to the NEPA requirements. Rather, BNSF only argues for a “no harm, no foul” approach, contending that because the Board’s error was “trivial,”² it does not suffice to render the Board’s decision invalid despite noncompliance with NEPA. This argument is based on a distortion of the NEPA regulations. BNSF attempts to recast NEPA’s key substantive requirement – the requirement that environmental review be completed before a decision is made – as a merely-trivial point of procedure.

BNSF improperly relies on County of Del Norte v. United States³ to bolster its contention of harmless error. The error alleged in Del Norte was a violation of the CEQ regulation that “[t]he EPA shall publish a notice in the Federal Register each week of the impact statements filed during the previous week.”⁴ BNSF states that in Del Norte “the Department of the Interior distributed copies of an EIS on the same day that notice of filing of the EIS with the Environmental Protection Agency (“EPA”) was made in the Federal Register.”⁵ What BNSF does not tell the Board, however, is that in Del Norte, “[d]istribution of the Final EIS by mail [was] completed” before the Federal Register notice was published, and copies of the EIS had been made available before publication

¹ BNSF Reply at 6.

² BNSF Reply at 11.

³ 732 F.2d 1462 (9th Cir. 1984); see also BNSF Reply at 9-10.

⁴ 40 C.F.R. § 1506.10(a).

⁵ BNSF Reply at 9.

at various agency offices.⁶ This publication defect was a minor error, an error made even more minor because in Del Norte, unlike in this case, the agency complied with the 30-day requirement that BNSF claims to be trivial.

The Ninth Circuit found “trivial error” in Del Norte because the agency decision was not made until 30 days after the publication of the EIS in the Federal Register: “Finally, when the Secretary designated the rivers . . . more than 30 days following publication had passed.”⁷ As the City pointed out in its Motion for Reconsideration, this 30-days-after-publication requirement is at the heart of NEPA. The “NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”⁸ No decision on a proposed action can be made for 30 days after the Notice of Availability of an FEIS.⁹ Indeed, the Ninth Circuit held the publication error in Del Norte to be harmless precisely because this substantive requirement had been met. In the current proceeding, it is undisputed that this requirement was not met: the Board’s decision was made before the 30-day period had run.

It is thus disingenuous to use Del Norte to argue that the 30-day requirement is trivial, when in that case the Ninth Circuit expressly relied on compliance with that very same requirement to excuse the failure to follow a procedural “precautionary measure” related to that 30-day requirement.¹⁰ This is compounded by the fact that Del Norte did not even address an important issue in this proceeding, which is under what

⁶ Del Norte, 732 F.2d at 1465.

⁷ Del Norte, 732 F.2d at 1465.

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

⁹ See 40 C.F.R. § 1506.10(b)(2).

¹⁰ 723 F.2d at 1466.

circumstances an agency decision is exempt from the 30-day period. BNSF's reliance on this case is therefore misplaced.

B. The STB administrative appeal procedures do not provide a "real opportunity to alter the decision."

The Board's attempt to rely on the CEQ's exemption from the 30-day period for decisions where an agency review process provides "real opportunity" to alter the decision is flawed,¹¹ because its administrative appeal procedures provide no such opportunity. BNSF is incorrect when it argues that that so long as there is any administrative review procedure for a decision, that decision complies with 40 C.F.R. § 1506.10(b). In fact, the text of the regulation itself makes it very clear that something more than that is required:

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. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published.¹²

BNSF hides from the clear import of this language, stating that this does not require the opportunity either for "a 'second bite-at-the-apple' or for a *de novo* review by the agency."¹³ But that is exactly what the regulation does require. Importantly, BNSF cites no real authority, merely taking Del Norte out of context once again.¹⁴ Del Norte did not even address this issue, because in that case the decision was made after the thirty-day period had run, so the "real opportunity" issue was not before that court. Essentially, BNSF's argument is that the language in 40 C.F.R. § 1506.10(b) regarding a "real

¹¹ 40 C.F.R. § 1506.10(b)(2).

¹² 40 C.F.R. § 1506.10(b)(2) (emphasis added).

¹³ BNSF Reply at 12.

¹⁴ BNSF Reply at 12 n.39.

opportunity . . . to alter the decision” has no meaning. Because BNSF’s argument cannot be reconciled with the text of the regulation, it must be rejected.

Nor does BNSF explain how, given the deferential standard applied by the Board in this proceeding, there is a “real opportunity” to change the decision. What BNSF cannot support with reason or authority, it attempts to justify with irrelevant commentary.¹⁵ Despite BNSF’s wholly gratuitous observations, the City’s point stands. The Board’s administrative appeals procedures are designed to provide cursory review of decisions that have already been made. The high standard for reconsideration, which the Bayport Producers invoke expressly to persuade the Board to reject the City’s arguments regarding the adequacy of the EIS itself, insulates this decision from being “altered” in cases of all but the most significant errors. Whatever the merits of this type of proceeding for other issues – and the City does not contend, nor does it need to, that these procedures are generally improper for other issues – NEPA requires more than this.

C. The Board lacks legal authority to act with a single member.

This issue has been thoroughly briefed and is before the Board, and the positions of the parties are clear. Still, however, given the misstatements made by BNSF in its Reply, the City must clarify several points. BNSF takes the position that 1 U.S.C. § 1 means that when 49 U.S.C. § 701 uses the term “A vacancy” that also means “vacancies” and that when it uses the term “remaining members” that also means the remaining “member.” BNSF, however, ignores the key language in 1 U.S.C. § 1, which provides

¹⁵ See BNSF Reply at 13 (citing Henry David Thoreau). Bartlett’s Familiar Quotations is a marginal source of legal authority, particularly when contrasted to the text of 40 C.F.R. § 1506.10(b)(2). See also BNSF’s Reply at 13 n. 45 (critiquing City’s litigation budget). The City does lament the necessity to expend scarce public resources to protect essential public services against a project proposed solely for private profit. BNSF’s irrelevant remarks about city layoffs, however, merely underscore the significance of the proposed project’s environmental impacts on the City and its citizens.

that this is only true “unless the context indicates otherwise.” This language, of course, calls for a review of the statutory context. That context includes numerous features that compel the conclusion that the Board is not authorized to render substantive decisions with only a single member. These include the plain meaning of the term “Board,” and the obvious Congressional intent to create a deliberative body instead of a unilateral decision maker, as Chairman Nober himself explained to Congress.

In its Opposition to the City’s Motion to Stay, BNSF and the Bayport Producers originally argued that case law established that the Board could act with any number of members, due to the absence of a formal quorum requirement.¹⁶ As the City pointed out, any number did not include “one,” because the cases cited by BNSF involved four, five, and six-member commissions. Now, BNSF admits that none of the authorities it cited earlier addresses the current situation.¹⁷ BNSF retreats to the position that “it must be presumed” that Congress intended a single member to act,¹⁸ despite the fact that Congress never said so. In reality, the cases cited by BNSF only involved the I.C.C. quorum requirement, which is not relevant to this case because the Board is not governed by a formal quorum requirement. Moreover, those quorum cases turned on the simple question of whether “quorum” means a majority of those commissioners actually sitting or a majority of the maximum number authorized to sit. This is a different issue from whether a single member could exercise the I.C.C.’s authority, a state of affairs that renders the very concept of a majority meaningless.

¹⁶ BNSF Reply to Motion to Stay, Doc. No. FD 34079 (June 11, 2003) at 4-5; Bayport Producers’ Reply to Motion to Stay, Doc. No. FD 34079 (June 11, 2003) at 5-6.

¹⁷ BNSF Reply at 16 n.54.

¹⁸ BNSF Reply at 15.

As the City explained, the statutory structure clearly indicates that a single member cannot exercise the Board's authority. Despite its efforts to spin the case law, BNSF cannot identify a single case stating that the Board or its predecessor the I.C.C. is authorized to act with a single member. BNSF also argues that Yardmasters provides the Board with this authority, but utterly fails to address the key distinction between Yardmasters and this case. The board at issue in Yardmasters lacked substantive authority, and this fact was the key factor the Yardmasters court used to support its decision.¹⁹ Moreover, in Yardmasters, the board had express authority to delegate its authority to a single member, and such a delegation had been enacted by an unquestionably-valid board.²⁰ BNSF supplies no answer to these points because it has none.

II. The Bayport Producers do not show that the EIS was adequate.

Curiously, while BNSF alleges that the Board's procedures provide a "real opportunity" to alter the Board's decision, the Bayport Producers emphasize the limited nature of the Board's review due to the "need for finality in the administrative process."²¹ This candid statement confirms what the City has argued to be true – the Board has effectively rendered a decision already, in violation of NEPA. Despite the Board's statement to the contrary, its decision does not qualify for the exemption contained in 40 C.F.R. § 1506.10(b)(2), because the Board's administrative appeal procedures provide no real opportunity to alter this decision. Rather, these procedures foreclose reconsideration in all but the most dire cases of error.

¹⁹ Railroad Yardmasters of America v. Harris, 721 F.2d 1332, 1345 (D.C. Cir. 1983).

²⁰ Id. at 1339.

²¹ Bayport Producers' Reply at 3.

Leaving this clear NEPA violation aside, the Bayport Producers contend that the City merely raises “differences of opinion” with the EIS and that this is insufficient to justify reconsideration.²² In its argument, the Bayport Producers primarily summarize the FEIS without engaging the City’s points directly. Importantly, the City articulates many environmental impacts that the EIS did not address. The Bayport Producers do not show how these issues are covered by the FEIS. Rather than summarize its earlier pleading in this reply, however, the City will focus on several examples to make the point. These examples, as well as other issues raised in its Petition and Environmental Comments, demonstrate the very real failures of the EIS, failures that represent far more than “flyspecking” of the document.

For example, in its Petition for Reconsideration, the City pointed out that the FEIS had not addressed the substantial costs and impacts associated with securing the Drinking Water Plant once it had a railroad line running through the middle of it.²³ The Bayport Producers’ Reply does not refute this but merely contends that the FEIS discussed “rail security,”²⁴ and submitted the issue of rail security to various administrative agencies. The mere fact the FEIS considered other security issues does not excuse it from failing to consider an important impact, presented by the City in its comments, then ignored by the FEIS. NEPA does not allow important environmental issues like this to be swept under the rug.²⁵

²² Bayport Producers’ Reply at 4.

²³ Petition for Reconsideration at 14-15.

²⁴ Bayport Producers’ Reply at 9.

²⁵ Nat’l Audubon Society v. Hoffman, 132 F.2d 7, 12 (the EIS requirement “insures the integrity of the agency process by forcing it to face those stubborn, difficult-to-answer objections without ignoring them or sweeping them under the rug[.]”) (quoting Sierra Club v. Corps of Engineers, 772 F.2d 1043, 1049 (2d Cir. 1985)).

Similarly, the FEIS neglected the impacts to the Drinking Water Plant that result from having a railroad line sever currently existing facilities from one another. The FEIS relies on the DEIS references to “rail operations safety” and “hazardous material transportation safety.” These references contain no mention of the existence of a drinking water plant.²⁶ The FEIS never discusses the operational impacts and impacts on expansion that this rail line would have, despite the fact that the City explained them in its comments. It merely states, without support, that the impact would be “negligible.”²⁷ The Bayport Producers take the incomprehensible position that SEA was justified in ignoring this obvious impact because there is no reason to expect running a rail line through the middle of a facility might “impact the facilities.”²⁸ Again, the FEIS merely sweeps these potentially catastrophic impacts under the rug.

The same is true for impacts on Ellington Field. While the City and the FAA both commented that the proposed project would adversely affect aviation-related development around Ellington Field, the FEIS dismisses this concern as “not environmental.”²⁹ This is inappropriate. Once something has been considered in the DEIS, it may not then be disregarded and ignored in the final EIS merely because the impacts are something that SEA would prefer not to consider. And dismissal of these impacts as “not environmental” is simply a misapplication of NEPA, which defines the human environment quite broadly indeed.³⁰ Nor can the Bayport Producers change this fact by focusing on other issues, such as whether the project would affect the runway

²⁶ FEIS at 4-123.

²⁷ FEIS at 4-122.

²⁸ Bayport Producers’ Reply at 8.

²⁹ May 9 Decision at 11.

³⁰ See Sierra Club v. Morton, 510 F.2d 813, 819 (5th Cir. 1975) (“The sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action.”).

lighting system at Ellington or whether the heights of trains presented an airspace conflict.³¹ Indeed, the Bayport Producers' arguments that the FEIS did indeed consider certain impacts of railway operations on airport operations undermines its argument that the development impacts identified by the City and the FAA were "not within the typical environmental study of impacted resources conducted under NEPA."³² It remains true that SEA summarily ignored the opinions of the City and the FAA at the proposed project would adversely affect development of the Ellington Field area, for no reason other than its unsupported view that such development is "speculative."

These examples suffice to make the point, and the City will not address the other issues in this Reply. The Bayport Producers' argument on the other environmental issues, such as pipelines and traffic, contain similar flaws, as the Board will see from its careful review of these issues.

CONCLUSION

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

Dated: July 1, 2003

Respectfully submitted,

CITY OF HOUSTON, TEXAS

By: 

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³¹ Bayport Producers' Reply at 6.

³² Bayport Producer's Reply at 6 n.9.

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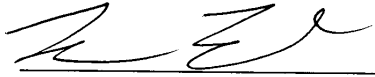
Attorneys for Petitioner

City of Houston, Texas

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2003, I caused copies of the foregoing Motion for Leave to File a Reply and the City's Reply in Support of Motion 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. S. Lippard', written over a horizontal line.

Benjamin S. Lippard