

SURFACE TRANSPORTATION BOARD

DECISION

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

Decided: May 9, 2003

We are 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) (collectively petitioners) to operate, a rail line in Harris County, TX, subject to certain environmental conditions. In doing so, we identify a preferred routing alternative (the alternative designated as “1C”), but explain that the other routing alternatives considered in detail during the environmental review process also would be fully acceptable from an environmental standpoint and therefore are also approved.

BACKGROUND

The August 2002 Decision. By decision served August 28, 2002 (August 2002 Decision),<sup>1</sup> we tentatively found, subject to later consideration of the environmental impacts, that petitioners met the standards of 49 U.S.C. 10502 for exemption from the prior approval requirements of 49 U.S.C. 10901 for the construction by San Jacinto, and the operation by BNSF, of a 12.8-mile line of railroad serving the Bayport Industrial District (Bayport Loop) in southeast Houston, Harris County, TX, near Galveston Bay. In our transportation analysis in the August 2002 Decision, which we incorporate by reference, we concluded that the requested exemption would promote the rail transportation policy (RTP) of 49 U.S.C. 10101 by providing an alternative rail service option to shippers in the Bayport Loop and by increasing competition. August 2002 Decision at 6. Further, we found that this proposal fulfills a condition we imposed on the Union Pacific Railroad Company (UP)/Southern Pacific

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<sup>1</sup> Notice was published in the Federal Register on August 28, 2002 (67 FR 55308).

Transportation Company (SP) merger to preserve pre-merger competition between UP and SP. We addressed UP's concerns about loss of UP traffic to the proposed BNSF line and inadequate rail infrastructure in the Houston area. We stated that the effect of the proposed build-out on UP's traffic is simply a consequence of BNSF's exercise of the trackage rights it acquired as a condition to our approval of the UP/SP merger. We noted that should BNSF not make sufficient infrastructure improvements to enable it to offer shippers a superior service, traffic would stay on UP. In short, we determined that BNSF's proposed line would result in an additional service option for Bayport Loop shippers and require BNSF and UP to compete for their traffic. We found these goals to be fully consistent with the public interest and the RTP. *Id.* at 5-6. Finally, we noted that the United Transportation Union (UTU) opposed the petition on the ground that BNSF could hire a non-union carrier to operate the line using underpaid and inexperienced workers, contrary to the RTP. We found these concerns to be premature because, if a carrier other than BNSF were to conduct operations on the line, that carrier would have to seek operating authority from us and UTU would have the opportunity to object at that time.

The August 2002 Decision was a preliminary decision addressing transportation-related issues. We stated that, upon completion of the environmental review process required by the National Environmental Policy Act, 42 U.S.C. 4321-43 (NEPA), we would issue a final decision addressing the environmental impacts and, if we continued to find approval of the proposed line to be appropriate, make the exemption effective at that time.

Nature of This Proposal. As explained in more detail in the August 2002 Decision (at 2-4), the line will connect the Bayport Loop with the former Galveston, Henderson and Houston Railroad (GH&H) line, now owned by UP, near Ellington Field, a former Air Force base now used for general aviation and commercial operations, with some use by the military and the National Aeronautics and Space Administration (NASA). The Bayport Loop contains the chemical and plastics production facilities of many petrochemical companies that rely heavily on rail transportation for raw materials, movement of product, and storage.<sup>2</sup> Currently, the Bayport Loop producers are served only by UP.

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<sup>2</sup> Each of the four San Jacinto-partner Bayport Loop producers (ATOFINA Petrochemicals, Inc., Basell USA, Inc., Equistar Chemicals, LP, and Lyondell Chemicals Company) submitted a statement in support of the proposal, explaining the importance of the line to its business success. In addition, two customers of Bayport Loop producers (OMNOVA Solutions, Inc. and Southern Ionics, Inc.) have submitted comments in support of the proposed rail line.

BNSF anticipates running an average of two 36-to-66-car trains per day on the line.<sup>3</sup> Most of the cargo will consist of non-hazardous plastic pellets moved in covered hopper cars. The remainder will be chemicals moved in tank cars.

BNSF intends to reach the proposed line from the storage yard of CMC Railroad, Inc. in Dayton, TX, approximately 30 miles northeast of Houston. From the Dayton Yard, BNSF will operate trains in a southwesterly direction via a combination of trackage rights over UP lines and over a joint BNSF/UP track segment to Tower 85. At Tower 85, BNSF trains will turn south on UP's GH&H line to the proposed build-out. BNSF states that it intends to seek authority to operate over the GH&H line pursuant to trackage rights stemming from the UP/SP merger condition discussed above, which gave BNSF a right to travel over the GH&H line to reach a build-in/build-out point. As noted in the August 2002 Decision, the Dayton Yard routing constitutes a shift in proposed operations on the existing lines described in petitioners' original petition.<sup>4</sup> Petitioners notified us of this change—which did not affect the route of the proposed new rail line itself—in a letter to our Section of Environmental Analysis (SEA) dated August 6, 2002.

Subsequent Proceedings. In response to petitioners' letter, the Galveston Bay Conservation and Preservation Association (Galveston Bay) filed various motions and related requests for relief, including a motion to compel to obtain certain environmental materials supplied to Board staff by petitioners. In a decision served on December 3, 2002 (December 2002 Decision), we found that Galveston Bay's various motions were groundless and denied them. We explained that, under NEPA, the environmental review process is necessarily informal and all-inclusive and depends on cooperative consultations with the railroad as well as other agencies and parties with expertise, so that all possible environmental information, issues, and points of view will come before the agency.<sup>5</sup> We stated that

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<sup>3</sup> BNSF will initially provide service to the four San Jacinto-partner Bayport Loop producers, but it plans to offer service to other shippers located in the Bayport Loop.

<sup>4</sup> Initially, petitioners had proposed routing Bayport Loop traffic into and out of New South Yard and over UP's Glidden Subdivision (upon which BNSF has trackage rights) and the GH&H line. In response to community concerns about potential congestion impacts near New South Yard, petitioners ultimately proposed routing the traffic to and from Dayton Yard along the GH&H line and the East Belt, Terminal, Lafayette, and Baytown Subdivisions.

<sup>5</sup> See City of Auburn v. United States, 154 F.3d 1025, 1033 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999) (opportunity for public participation provides necessary checks and balances). Indeed, the regulations of the President's Council on Environmental Quality (CEQ) implementing NEPA specifically anticipate the continuing involvement and participation of the applicant throughout  
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petitioners' letter was not, as claimed by Galveston Bay, an ex parte communication, but was instead environmental correspondence that merely proposed, in response to community concerns about potential congestion impacts near New South Yard, another means by which BNSF trains would move over existing lines to reach the proposed new line. Moreover, because the communication was part of the environmental review process, petitioners' letter was properly sent directly to SEA.<sup>6</sup> We explained that SEA acted properly in accepting the letter, placing it in the public files in the Board's public reading room,<sup>7</sup> and in bringing it to our attention so that it could be mentioned in the August 2002 Decision.

In the December 2002 Decision, we also found no basis to reopen the evidentiary record on non-environmental matters. We explained that petitioners' letter did not seek to revise the construction proposal itself and did not have any bearing whatsoever on the transportation-related issues addressed in the August 2002 Decision. We noted that Galveston Bay and other interested parties would have the opportunity to comment on the proposed shift in operations over existing lines after issuance of the Draft Environmental Impact Statement (EIS)<sup>8</sup> that SEA was then preparing.<sup>9</sup> Finally, we explained that

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<sup>5</sup>(...continued)

the process, so long as the agency independently evaluates the information submitted and is responsible for its accuracy. See, e.g., 40 CFR 1506.5(a)-(c). Our environmental rules also provide that the railroad may "participate in the preparation of environmental documents." 49 CFR 1105.4(j).

<sup>6</sup> Because the letter was environmental correspondence, we concluded that petitioners were not required to serve it on other parties. See 49 CFR 1105.10(e).

<sup>7</sup> Thus, the letter was made available to all interested parties and became part of the administrative record in this case.

<sup>8</sup> An EIS is the detailed written statement required by NEPA for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). See 40 CFR 1508.11; 49 CFR 1105.4(f).

<sup>9</sup> Copies of all correspondence between SEA and petitioners in this case were included as an appendix to the Draft EIS (Appendix N) to assure that the information was readily available to all interested parties.

the CEQ regulations at 40 CFR 1501.7(c) did not require that we reopen the environmental “scoping” process for a change of this nature.<sup>10</sup> See December 2002 Decision at 4 & n.8.<sup>11</sup>

## DISCUSSION AND CONCLUSIONS

As discussed above, in our August 2002 Decision, we tentatively found, subject to completion of the environmental review process, that petitioners have met the standards of 49 U.S.C. 10502. No party has challenged our findings on the transportation-related aspects of this case, and our December 2002 Decision properly addressed the various motions and other requests for relief filed by Galveston Bay. With the assistance of SEA, we have now analyzed the environmental impacts associated with petitioners’ construction proposal and reasonably foreseeable rail operations by fully considering the Draft EIS, the Final EIS, and the entire environmental record. We will now address the environmental issues to determine whether to grant final approval to the exemption and, if so, what route or routes to approve and what environmental mitigation to impose.

### The Requirements of NEPA.

NEPA requires Federal agencies “to the fullest extent possible” to consider the environmental consequences “in every recommendation or report on major federal actions significantly affecting the quality of the human environment.”<sup>12</sup> Under NEPA and related environmental laws, we must consider significant potential beneficial and adverse environmental impacts in deciding whether to approve a railroad construction as proposed, deny the proposal, or grant it with conditions (including environmental mitigation conditions). The purpose of NEPA is to focus the attention of the government and the public on the likely environmental consequences of a proposed action before it is implemented, in order to minimize or avoid potential negative environmental impacts. Marsh v. Oregon Natural Resource Council, 490 U.S. 360, 371 (1989). While NEPA requires that we take a “hard look” at the environmental consequences of our licensing decisions, it does not mandate a particular result. Thus,

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<sup>10</sup> “Scoping” identifies the specific topics, issues, and environmental resources to be discussed in an EIS.

<sup>11</sup> On January 21, 2003, Galveston Bay submitted a request for production of various documents and records by the Board. By letter sent to Galveston Bay on February 11, 2003, our Secretary stated that, because the agency is not a party to this or any proceeding before it, discovery is not available from the Board. The letter also explained that much of the material sought was available either through the filing of a request under the Freedom of Information Act or was in the public docket.

<sup>12</sup> 42 U.S.C. 4332(2)(C). CEQ has defined “major federal actions” to include projects regulated or approved by Federal agencies. 40 CFR 1508.18.

once the adverse environmental effects have been adequately identified and evaluated, we may conclude that other values outweigh the environmental costs. Robertson v. Methow, 490 U.S. 342, 350-51 (1989).

The EIS Process in this Case.

SEA, in cooperation with the Federal Aviation Administration (FAA), NASA, and the United States Coast Guard<sup>13</sup> conducted a detailed environmental review evaluating the potential impacts of the proposal and its reasonable alternatives. Given the substantial public controversy generated by other pending transportation proposals in the Houston area, and the perceived relationship of those projects to the instant proposal, SEA determined that preparation of a full EIS was warranted here,<sup>14</sup> even though petitioners' proposal was not expected to result in potentially significant environmental impacts. In conducting its environmental review, SEA undertook extensive public outreach activities, including meetings and consultations, numerous site visits, and use of the Board's official website, to give interested agencies, organizations, and members of the general public the opportunity to learn about the project, define issues, and actively participate in the environmental review process.<sup>15</sup>

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<sup>13</sup> Except as otherwise noted, further references to SEA in this decision encompass the efforts of the cooperating agencies.

<sup>14</sup> SEA frequently prepares a more limited Environmental Assessment in rail line construction cases.

<sup>15</sup> On October 1, 2001, SEA served and distributed a Notice of Intent to Prepare an EIS to approximately 500 citizens, elected officials, Federal, state, and local agencies, and interested organizations, and initiated a toll-free project hotline that provided and accepted information about petitioners' proposal in Spanish and English. On November 26, 2001, SEA served and distributed a Notice of Availability of Draft Scope of Study for the EIS, Notice of Scoping Meetings, and Request for Comments to more than 500 citizens, elected officials, Federal, state, and local agencies, and interested organizations. Following scoping meetings held in the Houston area, a Final Scope of Study for the EIS was issued on July 19, 2002.

The Draft EIS. On December 6, 2002, SEA issued for public review and comment a detailed Draft EIS<sup>16</sup> addressing a broad range of environmental issues and alternatives.<sup>17</sup> The “build” alternatives analyzed in detail in the EIS were the route proposed by petitioners (hereafter the Proposed Route) and minor variations to it, which would involve new rail line construction along slightly different routes.<sup>18</sup> All of these alternative routes would connect with the GH&H line near Ellington Field, either from the south of Ellington Field (the Proposed Route and the alternative designated as “1C”),<sup>19</sup> or from the north (the alternatives designated as “2B” and “2D”). Another alternative route, designated as the Original Taylor Bayou Crossing, would cross Taylor Bayou to the north and east of where the Proposed Route would cross Taylor Bayou.<sup>20</sup>

In addition to the “build” alternatives, the EIS assessed an alternative that would require no new rail construction, but would involve BNSF’s use of UP’s existing lines—the Strang Subdivision and the Bayport Loop Industrial Lead—to serve the Bayport Loop.<sup>21</sup> SEA also considered the no-action alternative, which would deny petitioners’ proposal, in which case shippers in the Bayport Loop would continue to rely solely on service by UP.

During preparation of the Draft EIS, petitioners submitted for SEA’s consideration 76 proposed voluntary mitigation measures addressing a broad range of potential environmental and

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<sup>16</sup> The Draft EIS included an evaluation of the shift to Dayton Yard of trains destined to/from the proposed line that petitioners had proposed in their August 6, 2002 letter, discussed above.

<sup>17</sup> The issues analyzed included the impacts of petitioners’ proposal on rail operations and safety, hazardous materials transportation safety, pipeline safety, grade crossing delay, noise and vibration, climate and air quality, water and biological resources, topography, geology and soils, land use, energy, hazardous materials/waste sites, “environmental justice” demographics, cultural resources, socioeconomics, and navigation.

<sup>18</sup> During the early stages of the environmental review process, SEA considered certain other alternative routes, which were rejected in the Draft EIS. Those alternatives are no longer at issue.

<sup>19</sup> Alternative 1C is a modification of the Proposed Route developed to avoid potential impacts to Ellington Field.

<sup>20</sup> Maps of each of these alternative routes and a complete discussion of them can be found in Chapter 2 of the Draft EIS.

<sup>21</sup> SEA evaluated this alternative even though petitioners do not have the trackage rights needed to allow operations over those lines.

community concerns.<sup>22</sup> In the Draft EIS, SEA recommended that we impose this extensive voluntary mitigation as conditions to any final approval of this project.<sup>23</sup> SEA also concluded that all of the “build” alternatives would have moderate impacts on surface water, wetlands, and plant communities<sup>24</sup> and negligible or no impacts on all other environmental resources.

The Comments Received. The United States Environmental Protection Agency (EPA) Region 6 reviewed the Draft EIS and classified the Draft EIS and the proposed action as “lack of objections,” which is EPA’s highest rating. EPA stated that the Draft EIS “demonstrates the Proposed Action would have no significant impact on the human environment and would have negligible impacts in all other areas.” No agencies (including the cooperating agencies) have raised objections to SEA’s environmental analysis or suggested that any of the “build” alternatives would result in potentially significant environmental impacts.

Over 500 written comments on the Draft EIS were received from elected officials, Federal, state, and local agencies, organizations, companies, and concerned citizens.<sup>25</sup> SEA also held two public meetings on the Draft EIS in the project area, at which 115 interested parties commented orally. SEA retained a transcriber to record the oral comments and also employed a Spanish translator.

Throughout the environmental review process, SEA conducted extensive public outreach programs to identify the public’s environmental concerns related to the project. This included meetings and consultations, numerous site visits, use of the Board’s official web site, and a toll-free Environmental Hotline that provided and accepted information about petitioners’ proposal in Spanish and English.

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<sup>22</sup> We encourage railroads to develop appropriate voluntary mitigation in consultation with local communities and interested agencies because it should be satisfactory to the parties and often is more far reaching than the mitigation we could unilaterally impose.

<sup>23</sup> Because SEA did not recommend any mitigation in the Draft EIS other than petitioners’ voluntary mitigation, SEA specifically requested comments, not only on the voluntary mitigation, but also on whether there was any additional mitigation that might be warranted.

<sup>24</sup> Petitioners’ voluntary mitigation includes conditions addressing surface water, wetlands, and plant communities.

<sup>25</sup> Comments on the Draft EIS originally were to be submitted by January 27, 2003. However, in response to a number of requests for an extension of the comment period, SEA extended the comment period until February 21, 2003.

The Final EIS. On May 2, 2003, SEA served and filed the Final EIS with EPA. The Final EIS responds to public comments on the Draft EIS; makes some corrections and minor changes (principally related to data concerning environmental justice demographics); and reflects additional work and consultations conducted by SEA after publication of the Draft EIS, to confirm conclusions presented in the Draft EIS concerning potential noise and vibration effects and wetlands impacts, complete consultation on essential fish habitat, and further evaluate potential impacts to Ellington Field. The Final EIS discusses SEA's conclusions about the environmental analysis and alternatives and includes SEA's final environmental mitigation recommendations (comprising petitioners' extensive voluntary mitigation and four new conditions developed by SEA following issuance of the Draft EIS).

Specifically, SEA's recommended conditions address concerns raised by the Port of Houston Authority regarding a rail crossing at Port Road. In response to concerns raised by Congressman Gene Green and others, the conditions require that petitioners' community liaison (as provided in petitioners' voluntary mitigation number 42) be fluent in Spanish, to facilitate communication with Spanish-speaking citizens in the project area, particularly Houston's East End. The conditions also require petitioners to consult and work with the Galveston, TX office of the National Marine Fisheries Service to successfully create a 0.4-acre fringe of intertidal marsh along Taylor Bayou shoreline, as requested by the National Marine Fisheries Service, and call for petitioners to retain an independent third-party contractor to assist SEA in reviewing petitioners' reports on habitat restoration (which will be filed during the period of construction and thereafter, as provided in petitioners' voluntary mitigation).<sup>26</sup>

In the Final EIS, SEA reaffirmed the conclusion reached in the Draft EIS that neither the Proposed Route nor any of the other "build" alternatives—Alternatives 1C, 2B, 2D, and the Original Taylor Bayou Crossing Alternative—would have potentially significant environmental effects.<sup>27</sup> As the

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<sup>26</sup> Chapter 3 of the Final EIS contains all of SEA's final mitigation recommendations, as well as information that petitioners submitted after issuance of the Draft EIS in a letter dated April 10, 2003, clarifying some of the 76 voluntary mitigation measures.

<sup>27</sup> For example, SEA determined that an error in the maps illustrating minority populations in the project area, discovered as a result of comments on the Draft EIS, did not affect the conclusion of the Draft EIS that the Proposed Route, as well as the other "build" alternatives, would have a negligible impact on the environmental justice populations (low and minority income populations) in the area. (The Final EIS, in Chapters 4 and 5, explains the mapping error and contains corrected maps.) Moreover, as the EIS explains, all of the "build" alternatives have low risks associated with the transportation of hazardous materials and there is minimal chance of damage to pipelines. With respect to security concerns related to potential terrorism in the Houston area, the EIS concludes that there do not appear to be any security issues associated with the proposal and that the alternatives examined in  
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Final EIS explains, all of the “build” alternatives have different pros and cons.<sup>28</sup> However, SEA found that none of these differences stood out enough to persuade SEA that any one of the “build” alternatives is either measurably superior or inferior.<sup>29</sup> In these circumstances, SEA concluded in the Final EIS that no single alternative had emerged as markedly environmentally preferable. Rather, SEA determined that all of the “build” alternatives are fully acceptable from an environmental standpoint.

As the Final EIS explains, however, the CEQ rules require that a Final EIS identify a preferred alternative.<sup>30</sup> Here, all of the various “build” alternatives would result in generally similar impacts, none

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<sup>27</sup>(...continued)

the EIS are separate and distinct from security issues facing the railroad industry generally. The EIS describes many actions to enhance the security of the rail industry as a whole that have been and are being taken by Federal agencies with jurisdiction over interstate rail transportation safety. Furthermore, the EIS concludes that, in addition to being unpredictable, an act of terrorism or sabotage would not be a natural or inevitable by-product of approving this construction proposal.

<sup>28</sup> For example, the EIS explains that the Proposed Route would cross a small portion of Ellington Field. Alternative 1C would avoid impacts to Ellington Field, but would be near NASA’s Neutral Buoyancy Laboratory (NBL). Alternatives 2B and 2D would avoid potential impacts to Ellington Field and the NBL. But the City of Houston is concerned about the proximity of those alternatives to its Southeast Water Treatment Plant. And Alternative 2B would require taking the property of certain businesses along that route. The Original Taylor Bayou Crossing Alternative has certain engineering advantages, but would affect essential fish habitat more than the other “build” alternatives.

<sup>29</sup> As previously noted, during the environmental review process the City of Houston and others expressed concerns about the proximity of Alternatives 2B and 2D to the City’s Southeast Water Treatment Plant. However, the Final EIS concludes that construction and operation of either of those alternatives would not impede the City’s expansion plans, cause adverse vibration impacts, or create an unacceptable risk. SEA’s analysis also showed that Alternative 2D has some advantages over Alternative 2B, as Alternative 2B would require the taking of some businesses, would be somewhat closer to other businesses, churches, and residences, and would potentially affect a proposed road expansion project. (Petitioners also have stated that they prefer Alternative 2D over Alternative 2B.) As indicated earlier, the Original Taylor Bayou Crossing has certain engineering advantages, but would affect essential fish habitat more than the other “build” alternatives.

<sup>30</sup> See 40 CFR 1502.14(e). However, in making our final determination as to which, if any, alternative to approve, we are not limited to the environmentally preferred route, as we must take into  
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of which would be significant. During the preparation of the Final EIS, one of the cooperating agencies (the FAA) raised concerns about the Proposed Route. Specifically, on April 17, 2003, the FAA indicated to SEA in a letter included in the Final EIS that the FAA recommends against selection of the Proposed Route as the preferred alternative due to potential adverse impacts on aviation. 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. Moreover, as stated in the Draft EIS, the FAA could release the property at issue. Therefore, notwithstanding the FAA's current aviation-related concerns, it is still possible that the Proposed Route could ultimately receive the FAA's approval and be built.

Given the concerns expressed by the FAA regarding the Proposed Route, SEA identified Alternative 1C as the preferred alternative in the Final EIS. (As previously indicated, Alternative 1C is a modification of the Proposed Route developed to avoid impacts to Ellington Field.) At the same time, in light of the moderate or negligible environmental impacts associated with all the "build" alternatives (including the Proposed Route), the Final EIS also recommends that, if we grant final approval for this project, we should grant permission for petitioners to construct and operate any one of the "build" alternatives, subject to the extensive environmental mitigation recommended in the Final EIS.<sup>31</sup>

#### The Board's Analysis of the Environmental Issues.

We have thoroughly reviewed the EIS, and we adopt all of SEA's analysis and recommendations, including those not specifically discussed here. We are satisfied that the EIS took the requisite "hard look" at potential environmental impacts and accurately identified and independently evaluated the potential environmental effects associated with this project. As indicated in the EIS, petitioners' proposal has generated substantial controversy and opposition. But, as the environmental analysis in the EIS demonstrates, all of the potential environmental impacts (including the environmental

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<sup>30</sup>(...continued)  
account other factors as well. See 40 CFR 1505.2(b); Friends of Yosemite Valley v. Norton, 194 F. Supp.2d 1066 (E.D. CA 2002).

<sup>31</sup> As the Final EIS explains, further approvals will be required before any of these routes could be built. Only when that approval process is completed will it be known which route petitioners will construct and operate.

impacts to Ellington Field) will be minimal, and it is appropriate for us to give our final approval to the proposal at this time.

We agree with SEA's recommendations regarding alternatives. As SEA recommends, we identify Alternative 1C as the preferred alternative, but find that petitioners may construct and operate any one of the "build" alternatives to reach the Bayport Loop. We will also impose petitioners' extensive voluntary mitigation and SEA's recommended conditions,<sup>32</sup> which together are fully adequate to address the minimal environmental effects associated with this construction proposal.<sup>33</sup> A list of all of our conditions is attached in the Appendix to this decision.

Turning briefly to other issues discussed in the Final EIS,<sup>34</sup> we concur with SEA's determination that petitioners' traffic projections (an average of two trains per day) are reasonable, given the nature of the commodities to be shipped, the amount of traffic to and from the Bayport Loop, and the amount of that traffic likely to be captured from UP (roughly half of UP's existing traffic). In response to numerous comments suggesting that no new construction here is necessary because BNSF could access the Bayport Loop by using UP's Strang Subdivision and the Bayport Loop Industrial Lead, SEA properly noted that this alternative could not be implemented without an agreement between BNSF and UP.<sup>35</sup> Evidently, there have been some negotiations between UP and BNSF, but the

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<sup>32</sup> We have made minor changes to the conditions recommended in the Final EIS to clarify them.

<sup>33</sup> As discussed in the Final EIS, some of the comments to the Draft EIS raised concerns about environmental problems in the Houston area (i.e., air quality and highway/rail at-grade crossing safety) that might exist even if there were no new line built. However, in preparing environmental documentation, SEA properly focused on the potential environmental impacts resulting from construction-related changes. Moreover, our general practice is to mitigate only those impacts resulting directly from a proposed transaction, and not to require mitigation for existing conditions and existing railroad operations. See 49 CFR 1180.1(f)(1); CSX Corp. et al.–Control–Conrail Inc. et al., 3 S.T.B. 196, 356 (1998).

<sup>34</sup> Rather than discuss each of the environmental issues and SEA's assessment here, we will instead rely on the EIS itself, and we are adopting the analysis contained in it as our own.

<sup>35</sup> Some comments on the Draft EIS argued that we could use our terminal trackage rights authority in 49 U.S.C. 11102 to force UP to allow BNSF access to the Bayport Loop over UP's Strang Subdivision and Bayport Loop Industrial Lead. However, the EIS correctly explained that terminal trackage rights under section 11102 is a remedy only for anticompetitive practices. See

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parties have not reached an agreement. Accordingly, as the EIS explains, the only way to provide shippers in the Bayport Loop with an alternative to UP's existing service is to construct and operate one of the "build" alternatives identified in the Final EIS.<sup>36</sup>

Finally, we note that comments to the Draft EIS suggested that petitioners' rail line construction project and the proposed Bayport Channel Container/Cruise Terminal (Bayport Terminal) are interconnected, and therefore, the EIS should have evaluated the two projects together. (The Bayport Terminal, if approved, would be constructed in close proximity to part of the Bayport Loop build-out.) However, as discussed in Chapter 2 of the Draft EIS and in Chapter 4 of the Final EIS, the United States Army Corps of Engineers (the lead permitting agency on the Bayport Terminal) has concluded that the two projects are not connected. Moreover, petitioners submitted a verified statement explaining that there are no plans to serve the Bayport Terminal over the new rail line. Petitioners have explained that their proposed rail line construction is designed to move and interchange chemical and hopper cars originating from shippers in the Bayport Loop, which would be incompatible with the movement of the double-stack container cars that typically carry port traffic from port terminals. Therefore, as the EIS concludes, the two projects are unrelated.

Timing of the Issuance of This Decision and 30-Day Period for Administrative Appeal.

The CEQ regulations at 40 CFR 1506.10(b) provide that an agency shall not make a decision on a proposed action less than 30 days from the publication of a notice of a Final EIS in the Federal Register unless the agency's decision is subject to a formal administrative review process after publication of the Final EIS. In such cases, the CEQ regulations provide that the period for an appeal before the agency of the agency's decision and the 30-day period prescribed in 40 CFR 1506.10(b) may run concurrently.

The Board has an established administrative review process. Under our rules, parties who wish to file an administrative appeal of our final decision (including our analysis of the environmental issues and any environmental mitigation that we impose) may do so within 20 days of the service date of our

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<sup>35</sup>(...continued)

Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988). Here, there has been no showing of anticompetitive behavior on the part of UP. Thus, the circumstances surrounding the Strang Subdivision are totally different from petitioners' ability to use UP's GH&H line, where, to preserve competition, we granted BNSF trackage rights over a line as part of our approval of a merger.

<sup>36</sup> We agree with SEA that the no-action alternative—denial of this project—would not meet petitioners' purpose and need, which is to provide additional, competitive rail service in the Bayport Loop.

final decision, or within any further period, not to exceed 20 days, that we might authorize. 49 CFR 1115.3(e). Given the CEQ regulations at 40 CFR 1506.10(b), we will provide for the filing of administrative appeals in this case 30 days from the publication of EPA's notice of availability of the Final EIS in the Federal Register.

In this case, on May 2, 2003, the Final EIS was served, filed with EPA, issued to parties of record as well as appropriate government agencies, elected officials, and community groups, and made available on our website.<sup>37</sup> Therefore, consistent with its regulations, EPA will publish a notice of availability of the Final EIS on May 9, 2003.

We are voting on whether to give final approval to this proposal on the same day (May 9th). This course of action is appropriate here because (1) the Final EIS confirms the conclusion of the Draft EIS that the potential environmental impacts associated with this rail construction project under any of the "build" alternatives are minor; (2) there are no significant changes between the Draft EIS and the Final EIS; (3) SEA's recommended mitigation (consisting of petitioners' voluntary mitigation and SEA's four additional mitigation measures) will address the moderate impacts on wetlands, surface water, and plant communities, as well as a range of additional issues of interest to the community; (4) no agencies, including the cooperating agencies, have raised objections to SEA's environmental analysis or suggested that any of the "build" alternatives would result in potentially significant environmental impacts; and (5) EPA raised no objections to the Draft EIS (and indeed, gave it its highest rating) in its comment letter dated February 21, 2003.

In accordance with the CEQ regulations at 49 CFR 1506.10(b), the deadline for filing administrative appeals in this case will be June 9, 2003. Moreover, our final decision here will not become effective until that date. This schedule, which is consistent with the CEQ regulations, will afford the public adequate time to pursue administrative review of all aspects of our final decision.<sup>38</sup> We will consider any administrative appeals in a subsequent decision.

## CONCLUSION

In sum, we are adopting SEA's conclusions and recommendations in the Final EIS. For the reasons discussed above, we are identifying Alternative 1C as the preferred alternative. We are also

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<sup>37</sup> The Final EIS was also made available to all interested persons for review in the reference section of public libraries in the project area.

<sup>38</sup> Interested parties and the general public actually will have more than 30 days to review the Final EIS, as it has been available on our website since May 2, 2003, the date the Final EIS was served on parties of record and other appropriate agencies and entities.

giving final approval to all the other “build” alternatives, thereby permitting petitioners to build any one of these routes, subject to petitioners’ compliance with the environmental mitigation listed in the Appendix to this decision.

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. We adopt the environmental mitigation measures set forth in the Appendix to this decision.
2. The exemption conditionally approved in our decision served on August 28, 2002, is effective June 9, 2003, subject to the condition that petitioners comply with the mitigation measures adopted in the Appendix to this decision.
3. The due date for filing any administrative appeals in this case will be June 9, 2003.

By the Board, Chairman Nober and Commissioner Morgan. Commissioner Morgan commented with a separate expression.

Vernon A. Williams  
Secretary

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Commissioner Morgan, commenting:

This decision granting final approval to petitioners San Jacinto Rail Limited and The Burlington Northern and Santa Fe Railway Company reflects the input of many interested Federal, state, and local agencies, as well as concerned members of the public, their Congressional representatives, and environmental, business, and community organizations. Public outreach is important to good decision-making in the environmental area and, in this case in particular, I believe that the hard work undertaken by the Board’s staff has done much to make the process inclusive for all interested parties, including both the English and Spanish speaking communities in the Houston area.

This project has generated considerable controversy in the local region. However, the 80 mitigation measures, 76 of which petitioners developed in consultation with local interested parties, are responsive, I believe, to concerns raised during the environmental review process. In this regard, I am particularly pleased that petitioners, in recognition of their responsibilities under the environmental laws, have taken the initiative in formulating the 76 mitigation measures they presented. Petitioners' action is consistent with Board policy of encouraging privately negotiated agreements, rather than governmentally mandated solutions, especially as has evolved in recent years in the environmental area. As noted in today's decision and in prior Board decisions, mitigation agreed to by the private proponents of actions before this agency is both satisfactory to those proponents and often times more far reaching than mitigation that the Board otherwise could impose.

This decision also is another example of the Board's continuing efforts to strike the proper balance between a full, fair, and legally sound environmental process and the need for a timely resolution of proposals brought before the Board. Over the last several years, the Board has been presented with several rail consolidation and construction proposals that have involved significant environmental issues. In reviewing these proposals, the Board has developed and refined its processes for evaluating environmental issues to provide for a more timely resolution of the matters before it while at the same time ensuring that the essence of NEPA is upheld. This decision is yet another step forward in this ongoing effort, as part of the overall decision-making process for matters that come before the Board, to improve upon the environmental review process.

**APPENDIX**

**ENVIRONMENTAL MITIGATION MEASURES**

**Measures Developed by the Section of Environmental Analysis**

1. In the event the proposed Bayport Channel Container/Cruise Terminal project is approved and constructed, at the point in time that the average daily traffic on Port Road east of SH 146 exceeds 7,000 vehicles per day, Petitioners will consult with the Port of Houston Authority (PHA) to develop an operating plan to minimize interference with roadway traffic at the Port Road grade crossing during Port daytime operating hours. Pending consultation of the parties, the operating plan shall, to the extent consistent with The Burlington Northern Santa Fe Railway Company's (BNSF) common carrier obligations, restrict rail operations across the Port Road grade crossing during Port operating hours (7:00 a.m. to 6:00 p.m.), except in unusual situations, such as derailments, severe weather, unusual customer needs, or in the event volume swings during peak demand periods cannot be accommodated during non-Port operating hours, in which case BNSF shall provide advance notice to PHA and work with PHA to minimize adverse impacts. Notwithstanding the foregoing, in the event the operating plan causes BNSF service to become noncompetitive with other rail service on the Bayport Loop or otherwise results in unreasonable interference with BNSF's joint operations with the Union Pacific Railroad Company (UP) in the Bayport Loop area (i.e., crossings of UP right-of-way), BNSF may, on advance notice to and coordination with PHA, revise its operating plan to the extent necessary.
2. In response to concerns raised by Congressman Gene Green and others, Petitioners' community liaison, to be established in accord with Petitioners' Voluntary Mitigation Measure 42, shall be fluent in Spanish to facilitate communication with Spanish-speaking citizens in the project area, particularly Houston's East End.
3. Petitioners shall retain an independent third-party contractor to assist the Section of Environmental Analysis (SEA) in reviewing Petitioners' submittals under Petitioners' Voluntary Mitigation Measure 80 regarding habitat conservation and wetland mitigation site reporting, and as necessary, during implementation of this project.
4. To offset adverse project impacts to essential fish habitat, Petitioners shall successfully create a 0.4-acre fringe of intertidal marsh along Taylor Bayou shoreline utilizing the same mitigation plan as proposed in Petitioners' U.S. Army Corps of Engineers' (USACE) Permit Application 22823.

## Petitioners' Voluntary Mitigation Measures (VMM)

### SAFETY

#### Grade-Crossing and Speed

5. Petitioners shall consult with appropriate Federal, State, and local transportation agencies to determine the final design and other details of the grade-crossing warning devices. Implementation of all grade-crossing warning devices on public roadways shall be subject to the review and approval of the Texas Department of Transportation and Harris County (see Table 1). Petitioners shall consult with appropriate Federal, State, and local transportation agencies to determine the final design of grade separations on the new rail line.

**Table 1 – Proposed Highway/Rail Grade-Crossing Mitigation**

Roadway	Type of Crossing	Warning Device
Space Center Boulevard	Grade-Separated	N/A
Red Bluff Road	Grade-Separated	N/A
Bay Area Boulevard	At-Grade	Active Warning Devices
SH 146 accesses (2)	At-Grade	Active Warning Devices
SH 146	Grade-Separated (existing)	N/A
Port Road	At-Grade	Active Warning Devices
Old SH 146	At-Grade	Active Warning Devices

6. Petitioners will limit the speed of the trains on the new line to 20 miles per hour.

#### Emergency Response

7. At least one month prior to initiation of construction activities in the area, Petitioners shall provide the information described below regarding project-related construction of the new rail line, as well as any additional information, as appropriate, to fire departments and the Local Emergency Planning Commissions (LEPCs) for communities within the project area.

- The schedule for construction throughout the project area, including the sequence of construction of public grade crossings and approximate schedule for these activities at each crossing.
  - A toll-free number for Petitioners' contact, who shall be available to answer questions or attend meetings for the purpose of informing emergency-service providers about the project construction and operation.
  - Revisions to this information, including changes in construction schedule, as appropriate.
8. Before the start of operations, Petitioners shall contact the LEPCs to provide them with information concerning the proposed operations to allow the LEPCs to incorporate the information into local response plans.
9. For each of the public grade crossings on the new and existing rail line, Petitioners shall provide and maintain permanent signs prominently displaying both a toll-free telephone number and a unique grade-crossing identification number in compliance with Federal Highway Regulations (23 CFR Part 655). The toll-free number shall be answered 24 hours per day by Petitioners' personnel. At the Bay Area Boulevard crossing and the crossing of the northbound on-ramp to SH 146, where Petitioners' right-of-way is close to another rail carrier's crossing, Petitioners shall coordinate with the other rail carrier to establish a procedure regarding reported accidents and grade-crossing device malfunctions.

### **Hazardous Materials Handling Issues**

10. Prior to initiating any project-related construction activities, Petitioners shall develop a spill prevention plan for petroleum products or other hazardous materials during construction activities. At a minimum, the spill prevention plan shall address the following:
- Definition of what constitutes a reportable spill.
  - Requirements and procedures for reporting spills to appropriate government agencies.
  - Methods of containing, recovering, and cleaning up spilled material.
  - Equipment available to respond to spills and location of such equipment.
  - List of government agencies and Petitioners' management personnel to be contacted in the event of a spill.

In the event of a reportable spill, Petitioners shall comply with their spill prevention plan and applicable Federal, state, and local regulations pertaining to spill containment and appropriate clean-up.

11. Petitioners shall incorporate the new rail line into the existing BNSF Emergency Response Process.
12. Petitioners shall continue the ongoing efforts with community officials to identify the public emergency response teams located in the project area and shall provide, upon request, hazardous material training.
13. Petitioners shall continue ongoing efforts with National Aeronautics and Space Administration (NASA) to facilitate emergency response plans for NASA facilities located in the vicinity of the new rail line.
14. In accordance with Petitioners' System Emergency Response Plan, Petitioners shall make the required notifications to the appropriate Federal and state environmental agencies in the event of a reportable hazardous materials release. Petitioners shall work with the appropriate agencies such as the U.S. Fish and Wildlife Service (USFWS), Texas Parks and Wildlife Department (TPW), and the Texas Commission on Environmental Quality to respond to and remediate releases with the potential to affect wetlands or wildlife habitat(s), particularly those of Federally threatened or endangered species.

#### **NATURAL/BIOLOGICAL RESOURCES**

15. Subject to coordination with the USACE, TPW, and other appropriate Federal and state agencies, Petitioners shall negotiate for the purchase of approximately 24 acres of bottomland hardwood habitat for conservation. This habitat will be acquired to mitigate for the impacts to riparian habitats of Armand Bayou and Big Island Slough at a ratio of 2 to 1 for the approximately 12 acres of bottomland hardwoods, and a ratio of 3 to 1 for the approximately 0.5 acres of gilgai wetland depressions.
16. To compensate for impacts to non-jurisdictional isolated wetlands associated with remnant coastal prairie habitat along the new line, Petitioners shall purchase 24 acres of coastal prairie habitat including five to six acres of isolated wetlands for conservation and open space to protect the remnant coastal prairie habitat and Texas prairie dawn (*Hymenoxys texana*) populations.
17. Petitioners have modified the Proposed Action and Alternatives 1C, 2B and 2D in the west portion of the project area to avoid all known populations of the Texas prairie dawn. Before construction, Petitioners shall temporarily fence the Texas prairie dawn sites to prevent construction-related impacts.

18. If either Alternative 2B or 2D is selected for construction, Petitioners will survey the route to determine if the northern caracara (*Caracara cheriway*) is nesting along the right-of-way. Should a northern caracara nest be located, Petitioners will implement appropriate measures to reduce impacts prior to new rail line construction or the nest site will be removed during the non-nesting period.
19. Petitioners will implement the current BNSF noxious weed control program during construction and operation of the new line. All herbicides used by BNSF shall have been approved by the Environmental Protection Agency (EPA).
20. During construction, temporary barricades, fencing, and/or flagging will be used in sensitive habitats and potential Texas prairie dawn habitat (as identified in the Environmental Impact Statement) to contain project-related impacts to the area within the construction right-of-way. Staging areas will be located in previously disturbed sites and not in sensitive habitat areas such as bottomland hardwood or remnant coastal prairie.
21. If any new populations of Texas prairie dawn are identified within the construction area, Petitioners shall consult with USFWS and TPW.
22. Petitioners shall, to the extent practicable, revegetate the bottom and sides of the drainage ditches using natural recruitment from the native seed sources in the stockpiled topsoil.

#### **WATER RESOURCES/WETLANDS**

23. To avoid impacts to 1.4 acres of tidal wetlands associated with Taylor Bayou, Petitioners have changed their preferred alternative from the Original Taylor Bayou Crossing Alternative to the Proposed Action, paralleling Port Road.
24. Subject to coordination with the USACE, Harris County, Armand Bayou Nature Center, TPW, and National Marine Fisheries Service (NMFS), Petitioners shall address slope conditions and perform clean-up of areas impacted by debris, in order to develop 0.4 acres of marsh wetlands east of Taylor Bayou and to mitigate impacts to approximately 0.35 acres of essential fish habitat adjacent to Taylor Bayou.
25. Where there is a potential for the railroad drainage ditch to influence wetland hydrology, Petitioners shall construct low permeability clay berms (wetland berms as depicted in the Environmental Impact Statement) adjacent to the drainage channels that would be proximal to the isolated wetlands and the Texas prairie dawn populations.

26. Petitioners shall install permanent rock check dams within railroad parallel drainage ditches and within 1,000 feet of perennial waters to provide stormwater retention and filtration. Petitioners shall maintain drainage ditches as permanent vegetated swales to provide stormwater retention and treatment. Removal of accumulated sediments shall be conducted only as necessary to maintain stormwater retention capacity and function.
27. To minimize sedimentation into streams and waterways during construction, Petitioners shall use best management practices, such as silt screens and straw bale dikes, to minimize soil erosion, sedimentation, runoff, and surface instability during project-related construction activities. Petitioners shall disturb the smallest area possible around any streams and shall conduct reseeded efforts to ensure proper revegetation of disturbed areas as soon as practicable following project-related construction activities.
28. In order to control erosion, Petitioners shall establish staging and lay down areas for project-related construction material and equipment at least 300 feet from jurisdictional waters and in areas that are not environmentally sensitive. Petitioners shall not clear any vegetation between the staging area and the waterway or wetlands. To the extent practicable, areas with non-jurisdictional isolated waters will not be used for staging and lay down and will only be impacted when necessary for construction. When project-related construction activities, such as culvert and bridgework, require work in streambeds, Petitioners shall conduct these activities, to the extent practicable, during low-flow conditions.
29. During construction, Petitioners shall require all contractors to conduct daily inspections of all equipment for any fuel, lube oil, hydraulic, or antifreeze leaks. If leaks are found, Petitioners shall require the contractor to immediately remove the equipment from service and repair or replace it.
30. Petitioners shall design all project-related drainage crossing structures to pass a 100-year flood. Petitioners shall construct the new rail line in such a way as to maintain current drainage patterns to the extent practicable and not result in new drainage of wetlands.
31. Petitioners shall coordinate with the TPW and Harris County to establish a mowing and maintenance plan for the railroad drainage ditches that will balance water quality benefits with the storm water flow characteristics of the ditches.
32. Petitioners shall employ best management practices to control turbidity and disturbance to bottom sediments during project-related construction of Petitioners' bridge over Taylor Bayou.

33. Petitioners shall ensure that any herbicides used in right-of-way maintenance to control vegetation are approved by the EPA and are applied by licensed individuals who shall limit application to the extent necessary for rail operations. Herbicides shall be applied so as to prevent or minimize drift off of the right-of-way onto adjacent areas.
34. Petitioners shall coordinate with the local Floodplain Administrators (City of Houston, City of Pasadena, and Harris County Flood Control District) to ensure that new project-related stream and floodplain crossings are appropriately designed to minimize impacts.
35. During construction, Petitioners shall prohibit project-related construction vehicles from driving in or crossing streams at other than established crossing points.
36. Petitioners shall, to the extent practicable, ensure that any fill placed below the ordinary high water line of wetlands and streams is appropriate material selected to minimize impacts to the wetlands and streams. All stream crossing points shall be returned to their pre-construction contours to the extent practicable and the crossing banks will be reseeded or replanted with native species immediately following project-related construction.
37. Petitioners shall obtain all Federal permits, including the Clean Water Act Section 404 and Rivers and Harbors Act of 1899 Section 10 permits, required by the USACE for project-related encroachment of jurisdictional waters of the U.S., including wetlands, prior to initiation of any project-related construction.
38. Petitioners shall obtain a National Pollutant Discharge Elimination System stormwater discharge permit from EPA for project-related construction activities.
39. Petitioners shall obtain a Section 9 Bridge Permit from the U.S. Coast Guard for any project-related activities for construction of new rail bridges over Armand Bayou and Taylor Bayou.

## **LAND USE**

### **General Land Use**

40. Petitioners shall restore land areas that are directly disturbed by Petitioners' project-related construction and are not owned by the Petitioners (such as access roads, haul roads, and crane pads) to their original condition, as may be reasonably practicable, upon completion of project-related construction.

41. Petitioners shall require contractors to dispose of waste generated during project-related construction activities in accordance with all applicable Federal, State, and local regulations.

### **Community Outreach**

42. Prior to initiation of construction activities related to this project, Petitioners shall establish a Community Liaison to consult with affected communities, businesses, and agencies; develop cooperative solutions to local concerns; be available for public meetings; and conduct periodic public outreach. Petitioners shall establish a Community Liaison to consult with businesses and agencies for a period of one year following start-up of operations on the new rail line. Petitioners shall provide the name and phone number of the Community Liaison to mayors and other appropriate local officials in each community through which the new rail line passes.
43. Petitioners shall continue their ongoing community outreach efforts by maintaining, throughout the period of construction of the new line, a website about the project.

### **Residential**

44. Petitioners' project-related construction vehicles, equipment, and workers shall not access work areas by crossing residential properties without the permission of the property owners.
45. In the unlikely event of any inadvertent damage, Petitioners shall work with affected landowners to appropriately redress any damage to each landowner's property caused by Petitioners' project-related construction activities.

### **Business and Industrial**

46. Petitioners' shall ensure that project-related construction vehicles, equipment, and workers shall not access work areas by crossing business or industrial areas, including parking areas or driveways, without Petitioners' advance notice to the business owner.
47. In business and industrial areas, Petitioners' project-related equipment and materials shall be stored in established storage areas or on Petitioners' property. Parking of Petitioners' equipment or vehicles, or storage of materials along driveways or in parking lots, is prohibited unless agreed to by the property owner.
48. Petitioners shall work with affected businesses or industries to appropriately redress project-related construction activity issues affecting any business or industry.

49. To the extent practicable, Petitioners shall ensure that entrances and exits for businesses are not obstructed by project-related construction activities, except as required to move equipment.

#### **State Lands**

50. Petitioners shall consult with the General Land Office of Texas and TPW to coordinate an Easement Agreement for crossing State-owned waters, including Armand Bayou Coastal Preserve and Taylor Bayou.

#### **Federal Lands**

51. Petitioners shall coordinate with NASA on an appropriate design for crossing NASA's private roadway leading to Ellington Field to ensure large, oversized objects may cross the rail line without unreasonable interference.

#### **Utility Corridors**

52. Petitioners shall make reasonable efforts to identify all utilities that are reasonably expected to be materially affected by the proposed construction within its existing right-of-way or that cross its existing right-of-way. Petitioners shall notify the owner of each such utility identified prior to project-related construction activities and coordinate with the owner to minimize damage to utilities. Petitioners shall also consult with utility owners to design the rail line so that utilities are protected during project-related construction activities.
53. Petitioners will use the services of a qualified pipeline engineering firm familiar with the project area to assist in the identification of the pipeline crossings and to assist in the design of crossings as necessary for project-related construction activities.

#### **GEOLOGY AND SOILS**

54. Petitioners shall limit ground disturbance to only the areas necessary for project-related construction activities.
55. During project-related earthmoving activities, Petitioners shall remove topsoil and segregate it from subsoil. Petitioners shall also stockpile topsoil for later application during reclamation of disturbed areas along the right-of-way. Petitioners shall place the topsoil stockpiles in areas that would minimize the potential for erosion and use appropriate erosion control measures around all stockpiles to prevent erosion.

56. Petitioners shall commence reclamation of disturbed areas as soon as practicable after project-related construction ends along a particular stretch of rail line. The goal of reclamation shall be the rapid and permanent reestablishment of native ground cover on disturbed areas. If weather or season precludes the prompt reestablishment of vegetation, Petitioners shall use measures such as mulching or erosion control blankets to prevent erosion until reseeding can be completed.
57. Prior to initiating project-related construction activities, Petitioners shall consult with the local offices of the Natural Resource Conservation Service, TPW, and Texas Department of Transportation to develop an appropriate plan for restoration and revegetation of the disturbed areas (including appropriate seed mix specifications).
58. During construction activity, Petitioners shall take reasonable steps to ensure contractors use fill material appropriate for the project area.

## **RECREATION**

59. Petitioners shall coordinate with the U.S. Coast Guard and TPW to provide adequate clearances for navigation of recreational boats on the Armand Bayou and Taylor Bayou at the location of any project-related construction of the Petitioners' bridge across the bayous.
60. During construction, Petitioners shall install warning devices to notify boaters of project-related bridge construction activities and the location of an alternative navigation route.
61. To minimize impacts where the new rail line crosses a proposed bike trail at Red Bluff Road, Petitioners shall coordinate with the City of Pasadena to modify the bike trail either by rerouting it under the Armand Bayou bridge or by building a crossing for the bike trail as part of the Red Bluff Road overpass.
62. If Petitioners build either Alternative 2B or 2D, Petitioners will work with the City of Pasadena to design and construct a new entrance to the Pasadena Municipal Golf Course to improve the ingress and egress of the entrance.

## **TRANSPORTATION**

63. To the extent practicable, Petitioners shall confine all project-related construction traffic to a temporary access road within the right-of-way or established public roads. Where traffic cannot be confined to temporary access roads or established public roads, Petitioners shall make necessary arrangements with landowners to gain access from private roadways. The

temporary access roads shall be used only during project-related construction. Any temporary access roads constructed outside the rail line right-of-way shall be removed and restored upon completion of construction unless otherwise agreed to with the landowners.

64. Petitioners shall work with Harris County to build grade-separated crossings at Space Center Boulevard and Red Bluff Road. The Space Center Boulevard grade separation is contingent upon approval of the Federal Aviation Administration.
65. If Petitioners build either the Proposed Action or Alternative 1C, Petitioners shall install power switches at Graham Siding to minimize traffic congestion on the existing UP's GH&H line and major highway intersections, especially around Ellington Field.
66. If Petitioners build either Alternative 2B or 2D, Petitioners shall install a power switch at the turnout on the GH&H to minimize traffic congestion on the existing UP track and major highway intersections.
67. Subject to the acquisition of trackage rights or trackage rights modifications that may be needed, BNSF shall revise its routing of train traffic leaving the Bayport Loop between Bayport Rail Terminal through the City of Houston's East End in order to:
  - Bypass and avoid use of New South Yard;
  - Avoid reverse movements of Bayport traffic into and at T&NO Junction that affect local traffic at the intersection of Griggs and Mykawa Roads; and
  - Divert Bayport Loop train traffic away from a concentrated area of at-grade crossings on the East Belt between New South Yard and Polk Street (including avoidance of East Belt road crossings at Telephone Road, Lawndale, Pease, Leland, Bell, Clay and Polk Streets). Outbound trains containing Bayport traffic would run from the Bayport Rail Terminal to the GH&H line, interchanging to the East Belt trackage near Tower 85, for movement to Dayton Yard. Inbound trains destined to the Bayport Rail Terminal from Dayton Yard would operate over the same route.

## **AIR QUALITY**

68. To minimize fugitive dust emissions created during project-related construction activities, Petitioners shall implement appropriate fugitive dust suppression controls, such as spraying water or other approved measures. Petitioners shall also regularly operate water trucks on haul roads to reduce dust.

69. Petitioners shall continue to remain a party to and continue participation under Statement of Principles – Houston Galveston Ozone Non-attainment Area Railroad Program, December 4, 2000, addressing air emissions from train operations.
70. Petitioners shall work with their contractors to make sure that construction equipment is properly maintained and that mufflers and other required pollution-control devices are in working condition in order to limit construction-related air emissions.

### **NOISE AND VIBRATION**

71. Petitioners shall work with their construction contractors to minimize, to the extent practicable, construction-related noise disturbances near any residential areas.
72. Petitioners shall use continuously welded rail and rail lubricants, as appropriate, on the newly constructed line in order to reduce wheel/rail wayside noise.
73. Petitioners shall work with the community and Harris County to install quad gates, or other supplementary safety measures, in order to provide the level of warning necessary to allow the community to request a waiver from Federal Railroad Administration of the requirement to sound the horn if the crossing of Space Center Boulevard cannot be grade separated.
74. Petitioners shall maintain project-related construction and maintenance vehicles in good working order with properly functioning mufflers to control noise.

### **CULTURAL/PALEONTOLOGICAL RESOURCES**

75. Although no significant impacts should occur to cultural resources as a result of this project, Petitioners shall inform construction supervisors of the importance of protecting archaeological resources, graves, and other cultural resources and how to recognize and treat the resources.

### **ENVIRONMENTAL JUSTICE**

76. Petitioners shall continue to participate as a member of the East End Mobility Task Force to review transportation impacts on East End neighborhoods.
77. Petitioners shall continue ongoing efforts with community officials to identify elementary, middle, and high schools within 0.5 miles of the rail line over which BNSF will operate between the Bayport Industrial District and Tower 30. Petitioners shall provide, upon request, informational materials concerning railroad safety to such identified schools.

**MISCELLANEOUS**

78. During project-related construction of at-grade crossings, when practicable, Petitioners shall provide for detours and associated signage, as appropriate, or maintain at least one open lane of traffic at all times to allow for the quick passage of emergency and other vehicles.
79. In undertaking project-related construction activities, Petitioners shall use practices recommended by American Railway Engineering and Maintenance of Way Association (AREMA) and recommended standards for track construction in the AREMA Manual for Railway Engineering. Petitioners shall maintain the track and provide for track inspection in compliance with Federal Railroad Administration requirements under 49 CFR Part 213.

**MONITORING AND ENFORCEMENT**

80. With respect to the habitat restoration discussed in VMM 15, 16, and 24, Petitioners shall submit to SEA annual reports on the status of their mitigation compliance during the period of construction through the first three growing seasons or until satisfactory restoration has occurred.