

CHAPTER 2 MODIFICATIONS TO THE DRAFT EIS

SEA has reviewed the comments received on the Draft EIS. In response to the comments, SEA has made some corrections, principally to some of the environmental justice maps, and some minor changes to information presented in the Draft EIS, which are described below. However, SEA determined that no changes to the conclusions presented in the Draft EIS are required.

As explained in detail in Chapter 4 of this Final EIS, SEA received many comments on the inaccuracy of maps presented in the Draft EIS that illustrated the distribution of minority populations. In its environmental justice analysis, and despite SEA's conclusion that the Proposed Action and Alternatives would have negligible impacts on communities along the existing rail network, SEA made a good faith effort to disclose the environmental justice populations living in the project area. SEA's omission of portions of the Spanish/Hispanic/Latino population in the minority population counts was the result of an unintentional error. The mapping error occurred because SEA accidentally selected the wrong data element in the U.S. Census data. Revised maps are presented in Chapter 5 of this Final EIS (Errata). However, the conclusion reached in the Draft EIS concerning impacts to environmental justice populations remains unchanged, i.e., the Proposed Action and Alternatives would result in negligible impacts on environmental justice populations.

Since publication of the Draft EIS, SEA has continued to evaluate the Proposed Action and Alternatives and has conducted two studies that confirm the conclusions stated in the Draft EIS. These studies were requested by the cooperating agencies and include a vibration study at NASA's SCTF and a wetlands assessment for the FAA to support FAA's compliance with EO 11990 on Protection of Wetlands. In addition, the FAA requested a study of the Applicants' proposed habitat conservation and wetland mitigation sites to assess their potential to attract wildlife and birds that could become a hazard to aviation at Ellington Field.

At the SCTF, SEA conducted additional specialized field tests in cooperation with NASA as an added confirmation of the conclusions reached in the Draft EIS, which were based on data from the literature concerning the potential effect of train activity on this facility. The field tests confirm the conclusions in the Draft EIS, namely, that trains operating over the Proposed Action or Alternative 1C would result in minimal, if any, noise or vibration impacts on the SCTF.

FAA requested the preparation of a wetland assessment as part of FAA's compliance requirements under EO 11990 on Protection of Wetlands. EO 11990 directs Federal agencies to consider alternatives to avoid adverse effects and incompatible development in wetlands. It also directs Federal agencies to avoid new construction in wetlands unless the agency finds that there is no practicable alternative to construction in the wetland and the proposed action incorporates all possible measures to limit harm to the wetlands.

The wetland assessment conducted by SEA¹² shows that the Proposed Action and Alternative 1C would impact the fewest wetland functions and values and that the Proposed Action would impact slightly fewer principle functions/values than Alternative 1C. The reduced impact to wetland functions and values and the smaller impact to jurisdictional wetlands from the Proposed Action relative to Alternative 1C offsets the slightly greater impact to wetland acreage by the Proposed Action. Therefore, the wetlands assessment concludes that there is no material difference between the wetland impacts of the Proposed Action and Alternative 1C.

The FAA Advisory Circular 150/5200-33, Hazardous Wildlife Attractants On or Near Airports, provides guidance on locating certain land uses having the potential to attract hazardous wildlife to or in the vicinity of public-use airports. FAA needed to determine whether the Applicants' proposed habitat conservation and wetland mitigation sites had the potential to attract wildlife and birds that could become a hazard to aviation at Ellington Field. At FAA's request and designation, a biologist from the Texas Wildlife Damage Management Service of the U.S. Department of Agriculture surveyed the affected sites, evaluated the proposed plan, and concluded in an April 11, 2003, memorandum that the affected sites do not pose a hazard to aviation using Ellington Field.

Errata includes SEA's changes and corrections to the Draft EIS. These changes resulted from either public comments, agency correspondence, or SEA's independent review. None of the changes affect the conclusions of the Draft EIS.

2.1 PREFERRED ALTERNATIVE

Section 1502.14(e) of the CEQ regulations requires that the Final EIS identify the preferred alternative, if one had not been identified in the Draft EIS. However, in making its final decision as to which, if any, alternative to approve, the agency is not limited to the environmentally preferred alternative, but may take into account other factors as well.¹³

SEA has conducted an extensive and detailed evaluation of the potential environmental impacts associated with the Proposed Action and Alternatives. This evaluation has demonstrated that all of the Alternatives, including the Build Alternatives, the No-Build Alternative, and the No-Action Alternative, would result in generally similar impacts, none of which would be significant.

As discussed in the Draft EIS, the Build Alternatives would each result in moderate impacts on surface water, wetlands, and plant communities. The Build Alternatives would have negligible or no impact on all other environmental resource categories. The No-Build Alternative (use of the UP Strang Subdivision) would have negligible or no impact on all the environmental resource categories, but it could not be implemented without UP's approval. The No-Action

¹² The wetland assessment was prepared following the protocol of The Highway Methodology Workbook – Wetland Functions and Values, A Descriptive Approach (USACE, 1999).

¹³ 40 CFR 1505.2(b); CEQ, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, Question 4a and 6a, March 16, 1981; Friends of Yosemite Valley v. Norton, 194 F.Supp.2d 1066 (E.D. CA 2002).

Alternative would not result in any change to the impacts that currently occur. However, under the No-Action Alternative, the benefits of this project would not occur.

Given the similarity of most of the impacts associated with the Build Alternatives and the moderate to negligible nature of the potential impacts, no single Alternative is markedly preferable. While the various Build Alternatives have different pros and cons, none of the differences stand out enough to persuade SEA that one of the Build Alternatives is measurably superior or inferior. SEA, if it were acting on its own, would designate the Applicants' Proposed Action as the preferred alternative.¹⁴

While agreeing with SEA that there are no potentially significant environmental impacts, on April 17, 2003, FAA indicated in a letter to SEA that FAA recommends against selection of the Proposed Action as the preferred alternative due to potential adverse impacts on aviation. The letter (which is included in Appendix D) refers to the Surplus Property Act, recodified at 49 U.S.C. 47151-47153, and states that FAA has determined that, based on FAA's expertise, review of the City of Houston's comment letter on the Draft EIS (claiming that development of the southeast area of Ellington Field is "reasonably foreseeable for aviation-related industry"), and the FAA's aviation activity forecasts for Ellington Field, the surplus property to be crossed by the Proposed Action is "needed to protect and advance the civil aviation interests of the United States."

Based on its review of available information relevant to the potential future uses of the southeast area of Ellington Field, including the Draft Master Plan and the aviation activity forecast of no growth in traffic out to 2020, SEA believes that development of the southeast area of Ellington Field for aviation-related industry is speculative. Moreover, as stated in the Draft EIS, FAA could release the property at issue (which would allow the Proposed Action to be built) if the City of Houston requested that FAA change the Airport Layout Plan to accommodate construction of this route and the FAA determined that the requirements of 49 U.S.C. Section 47151 - 47153 had been met and decided to release the affected airport property from the City's grant obligations. Therefore, notwithstanding FAA's current concerns, it is still possible that the Proposed Action could ultimately be approved and built.

In light of FAA's concerns regarding the Proposed Action and to satisfy the requirements of the CEQ regulations at 40 CFR 1502.14(e), SEA now designates Alternative 1C as the preferred alternative. As described in Chapter 2 of the Draft EIS, Alternative 1C is a modification of the Proposed Action based on SEA's consultations with the FAA and the City of Houston. SEA had

¹⁴ CEQ guidance states that "Because the EIS is not the Record of Decision [ROD], but instead constitutes the information and analysis on which to base a decision, disagreements about conclusions to be drawn from the EIS need not inhibit agencies from issuing a joint document, or adopting another agency's EIS, if the analysis is adequate. Thus, if each agency has its own "preferred alternative," both can be identified in the EIS. Similarly, a cooperating agency with jurisdiction by law may determine in its own ROD that alternative A is the environmentally preferable action, even though the lead agency has decided in its separate ROD that Alternative B is environmentally preferable." CEQ, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, Question 14b, March 16, 1981.

requested that the Applicants develop Alternative 1C to address potential concerns associated with Ellington Field under the Proposed Action.

However, as all of the various Build Alternatives would result in generally similar impacts, none of which would be significant, SEA recommends that the Board find that all the other Build Alternatives - the Proposed Action, Alternatives 2B, 2D, the Original Taylor Bayou Crossing - are fully acceptable from an environmental standpoint, and should also be approved.

During the environmental review process, the City of Houston and others expressed concern about the proximity of the new rail line under Alternatives 2B and 2D to the City's Southeast Water Treatment Plant. Specifically, the City expressed concern that Alternatives 2B and 2D would create a risk of hazardous materials release adjacent to the Water Treatment Plant, cause vibration impacts, and impede plant expansion. After carefully considering the matter in the Final EIS, SEA has concluded that construction and operation of either Alternative 2B or 2D would not impede the City's expansion plans, cause adverse vibration impacts or create an unacceptable risk.

SEA's analysis in the EIS also revealed that there are some factors which demonstrate that Alternative 2D would be preferable to Alternative 2B. Specifically, Alternative 2B would require the taking of some businesses along Genoa-Red Bluff Road, would be somewhat closer to other businesses, churches, and residences, and would potentially affect Harris County's proposed expansion of Genoa-Red Bluff Road. The Applicants have stated their preference for Alternative 2D over Alternative 2B.

Finally, the Original Taylor Bayou Crossing, would have certain engineering advantages, but would affect more Essential Fish Habitat than the other Build Alternatives.

In sum, SEA designates Alternative 1C as the Preferred Alternative, but recommends that the Board approve all of the other Build Alternatives, as well, thereby permitting Applicants to build any one of these routes.

2.2 ADDITIONAL MITIGATION MEASURES

The Draft EIS presented the Applicants' proposed voluntary mitigation, which included an extensive and comprehensive list of 76 mitigation measures. The Applicants have provided SEA with additional information regarding their voluntary mitigation. The additional information, in the form of a letter to Dana White dated April 10, 2003, clarifies several voluntary mitigation measures. The clarifying information is described in Chapter 3 of this Final EIS. The April 10, 2003 letter is included in Appendix D. The Applicants' 76 voluntary mitigation measures go beyond the mitigation that SEA would normally recommend to the Board, given the low level of potential impacts associated with the Proposed Action and Alternatives. The Board would only impose mitigation that is related to the impacts of the project and it is the Board's practice to mitigate impacts that result directly from a project. Therefore, SEA does not believe that extensive additional mitigation measures are required, in this case.

Since publication of the Draft EIS, SEA has identified four additional mitigation measures in response to comments received on the Draft EIS and developed during SEA's independent

environmental review. SEA recommends that the Board impose these measures along with the Applicants' voluntary mitigation measures, presented in full in Chapter 3 of this Final EIS. The additional mitigation measures include an arrangement between the Port of Houston Authority (PHA) and the Applicants with respect to rail operations along Port Road in the event that both the Bayport Loop Build-Out and the Bayport Channel Container/Cruise Terminal (Bayport Terminal) projects are approved and constructed. In response to concerns raised by Congressman Green and others regarding Houston's East End, a second mitigation measure augments the Applicants' VMM #38 and requires the Applicants' community liaison to be fluent in Spanish to facilitate communication with Spanish-speaking citizens. The third mitigation measure requires the Applicants to retain a third-party contractor to assist SEA in reviewing the Applicants' submittals under VMM #76 regarding habitat restoration, and as necessary, during implementation of this project, should the Board grant final approval. The fourth measure requires the Applicants to consult and work with the Galveston, Texas office of the NMFS to successfully create a 0.4-acre fringe of intertidal marsh along Taylor Bayou shoreline.

[this page intentionally left blank]