

**APPENDIX D
ADDITIONAL CORRESPONDENCE**

Appendix D contains the following documents:

- The letter from NMFS (Rickey Ruebsamen) to SEA (Dana White), dated March 31, 2003
- The letter from the Applicants (Kathryn Kusske) to SEA (Dana White), dated April 10, 2003
- The letter from SEA (Victoria Rutson) to NMFS (Rickey Ruebsamen), dated April 18, 2003
- The letter from FAA (Nan Terry) to SEA (Victoria Rutson), dated April 17, 2003



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

Surface Transportation Board
Southeast Regional Office

9721 Executive Center Drive N
St. Petersburg, Florida 33702

March 31, 2003
OFFICE OF ECONOMICS
DIRECTOR'S OFFICE

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SURFACE TRANSPORTATION
BOARD

2003 APR -7 A 2:10

OFFICE OF ECONOMICS
DIRECTOR'S OFFICE

Ms. Dana White
Surface Transportation Board
Section of Environmental Analysis
1925 K Street, NW
Washington, D.C. 20423-0001

Dear Ms. White:

The Surface Transportation Board (Board) is currently considering a petition filed jointly by San Jacinto Rail Limited and the Burlington Northern Santa Fe Railway Company requesting authorization to construct and operate 12.8 miles of new railroad between the Bayport Loop petro-chemical and plastic production facilities and the former Galveston, Henderson, and Houston line in Harris County, Texas. The National Marine Fisheries Service (NOAA Fisheries) has previously submitted letters dated October 22, 2002, and January 27, 2003, written in response to the Board's Essential Fish Habitat (EFH) Assessment Report and the Draft Environmental Impact Statement (DEIS) for this proposed rail line. These two letters stated that NOAA Fisheries would submit EFH Conservation Recommendations after reviewing the final detailed mitigation plan to be submitted during the upcoming standard comment period for the required Corps of Engineers (COE) Clean Water Act Section 404 permit.

The proposed project would impact estuarine emergent wetlands at a crossing of Taylor Bayou that is located in an area identified as EFH by the Gulf of Mexico Fishery Management Council (GMFMC) for subadult Spanish mackerel (*Scomberomorous maculatus*) and postlarval, juvenile, and subadult white shrimp (*Litopenaeus setiferus*), brown shrimp (*Farfantepenaeus aztecus*), and red drum (*Sciaenops ocellatus*). Detailed information on red drum, Spanish mackerel, shrimp, and other Federally managed fisheries and their EFH is provided in the 1998 amendment of the Fishery Management Plans for the Gulf of Mexico prepared by the GMFMC. The 1998 EFH amendment was prepared as required by the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) (P.L. 104 - 297).

In addition to being designated as EFH, the estuarine emergent wetlands at the project site provide nursery, foraging, and refuge habitats that support various recreationally and economically important marine fishery species, such as spotted seatrout (*Cynoscion nebulosus*), flounder (*Paralichthys spp.*), Atlantic croaker (*Micropogonias undulatus*), black drum (*Pogonias cromis*), gulf menhaden (*Brevoortia patronus*), striped mullet (*Mugil cephalus*), and blue crab (*Callinectes sapidus*). Such estuarine-dependent organisms serve as prey for other fisheries



managed under the MSFCMA by the GMFMC (e.g., red drum, mackerels, snappers, and groupers) and highly migratory species managed by NOAA Fisheries (e.g., billfishes and sharks).

NOAA Fisheries has now reviewed the mitigation plan proposed in COE Permit Application 22823, which would require the creation of a 0.4-acre fringe of intertidal marsh along the Taylor Bayou shoreline. Section 305(b)(4)(A) of the MSFCMA requires that NOAA Fisheries provide EFH Conservation Recommendations for any Federal agency action or permit that may result in adverse impacts to EFH. Accordingly, to ensure conservation of EFH and associated fishery resources, NOAA Fisheries recommends that final action by the Board require the following:

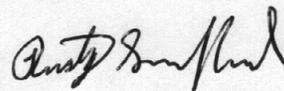
EFH Conservation Recommendations

To offset adverse project impacts to EFH, San Jacinto Rail Limited and Burlington Northern Santa Fe Railway Company should successfully create a 0.4-acre fringe of intertidal marsh along the Taylor Bayou shoreline. Utilizing the same mitigation plan as proposed in the enclosed COE Permit Application 22823, would be acceptable to NOAA Fisheries.

Consistent with Section 305(b)(4)(B) of the MSFCMA and NOAA Fisheries's implementing regulation at 50 CFR 600.920(k), your office is required to provide a written response to our EFH Conservation Recommendations within 30 days of receipt. Your response must include a description of measures to be required to avoid, mitigate, or offset the adverse impacts of the proposed activity. If your response is inconsistent with our EFH Conservation Recommendations, you must provide a substantive discussion justifying the reasons for not implementing those recommendations. Inclusion of the attached 0.4-acre mitigation plan and receipt of your response to our EFH Conservation Recommendations will adequately compensate for the proposed unavoidable impacts to EFH and will satisfy the procedural requirements of both the MSFCMA and its implementing regulations.

If we may be of further assistance, please contact Ms. Heather Young or Mr. Rusty Swafford of our Galveston Facility at (409) 766-3699.

Sincerely,



Rickey N. Ruebsamen
Acting Assistant Regional Administrator
Habitat Conservation Division

Enclosure

Wetland Mitigation Monitoring and Success Parameters

Taylor Bayou Tidal Wetland/Essential Fish Habitat Site: The following mitigation measures and success parameters will be implemented for the proposed 0.4-acre (approx. 500 ft. by 30 ft.) tidal marsh creation located east of Taylor Bayou on Harris County property managed by Armand Bayou Nature Center.

1. A transplant survival survey of the planted mitigation area will be performed within 60 calendar days following the initial planting effort. If at least 50% survival of transplants is not achieved within 60 calendar days of planting, a second planting effort will be completed within 60 calendar days of completing the initial survival survey. If optimal seasonal requirements for re-planting targeted species is not suitable when replanting would be required, the applicant will coordinate with the Corps Galveston District (Corps) for approval of a re-planting schedule.
2. Written reports detailing plant survival shall be submitted to the Corps within 30 calendar days of completing the initial survival survey and any subsequent replanting effort.
3. If after one year from the initial planting effort (or subsequent planting efforts) the site does not have at least 35% areal coverage of targeted vegetation, those areas that are not vegetated will be replanted using the original planting specifications.
4. If after three years from the initial planting effort (or subsequent planting efforts) the site does not have at least 70% areal coverage of targeted vegetation, those areas that are not vegetated will be replanted using the original planting specifications.
5. In addition to the initial survey report, annual progress reports will be submitted to the Corps the first day of the month of permit issuance during the 3-year monitoring period following the initial transplanting effort or subsequent replanting efforts. Photos of the mitigation site will be included.

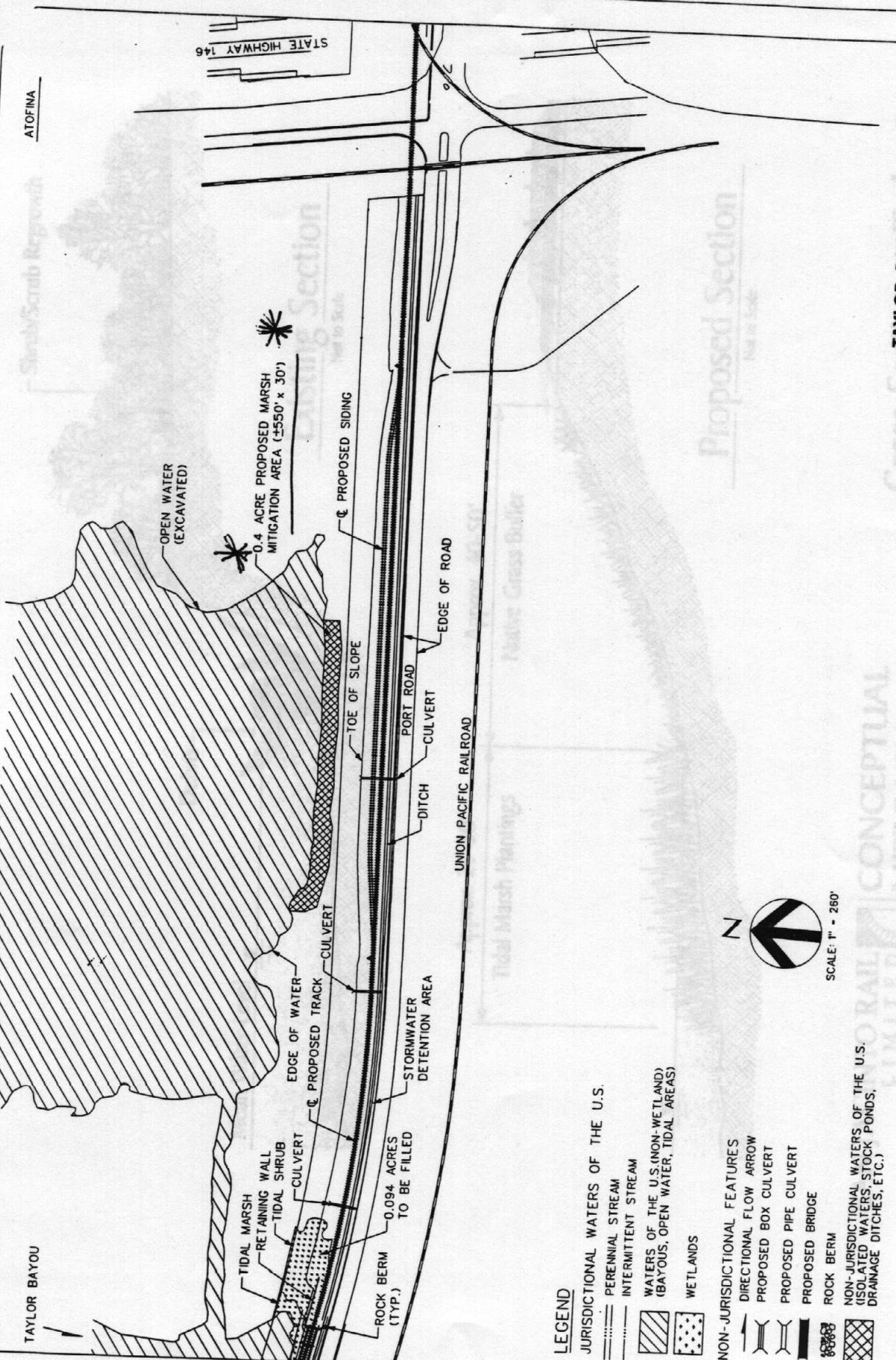
Taylor Bayou - Mitigation Location Map

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HOUSTON

TAYLOR BAYOU

ATOFNA



LEGEND

- JURISDICTIONAL WATERS OF THE U.S.
 - PERENNIAL STREAM
 - INTERMITTENT STREAM
 - WATERS OF THE U.S. (NON-WETLAND) (BAYOUS, OPEN WATER, TIDAL AREAS)
 - WETLANDS
- NON-JURISDICTIONAL FEATURES
 - DIRECTIONAL FLOW ARROW
 - PROPOSED BOX CULVERT
 - PROPOSED PIPE CULVERT
 - PROPOSED BRIDGE
 - ROCK BERM
 - NON-JURISDICTIONAL WATERS OF THE U.S. (ISOLATED WATERS, STOCK PONDS, DRAINAGE DITCHES, ETC.)



SCALE: 1" = 260'

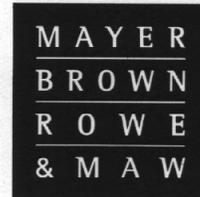
TAYLOR BAYOU TO SH 146	
22823	DATE
PROPOSED BAYPORT INDUSTRIAL BUILD-OUT (HARRIS COUNTY)	MARCH 2003
PRELIMINARY - NOT FOR CONSTRUCTION	REVISED SHEET 18 OF 22



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Kathryn A. Kusske
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Direct Fax (202) 263-5223
kkusske@mayerbrownrowe.com

April 10, 2003

Ms. Dana G. White
Environmental Specialist/Program Manager
Section of Environmental Analysis
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 34079, San Jacinto Rail Limited and The Burlington Northern and Santa Fe Railway Company – Construction and Operation of A Rail Line From the Bayport Loop in Harris County, Texas

Dear Ms. White:

On August 6, 2002, San Jacinto Rail Limited (“SJRL”) and The Burlington Northern and Santa Fe Railway Company (“BNSF”) (hereinafter collectively referred to as “Petitioners”) submitted to the Surface Transportation Board (“Board”) a set of 76 voluntary mitigation measures (“VMMs”) intended to respond to public and agency concerns and issues. A Draft Environmental Impact Statement (“Bayport DEIS”) was served by the Board’s Section of Environmental Analysis (“SEA”) on December 6, 2002. SEA published and solicited comments on the VMMs. Bayport DEIS at § 6.3. SEA preliminarily concluded that construction and operation of the proposed rail line under any of the Build Alternatives¹ would have no significant environmental impacts if the Board were to impose and Petitioners were to implement the proposed VMMs. Bayport DEIS at ES-16.²

¹ The Build Alternatives were defined as the Proposed Action, the Original Taylor Bayou Crossing, Alternative 1C, Alternative 2B, and Alternative 2D. Bayport DEIS at ES-5-ES-7.

² The public comment period on the Bayport DEIS closed on February 21, 2003. During the comment period two public meetings on the Bayport DEIS were held by SEA. The public comments on the Bayport DEIS, as well as the
(cont’d)

Ms. Dana G. White
April 10, 2003
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After reviewing the public comments on the Bayport DEIS including written and oral comments on the VMMs, Petitioners would like to take this opportunity to clarify how certain of the VMMs address public concerns that have been raised in this proceeding.

VMM #3 – Emergency Response. It is BNSF's customary practice on its system network to provide a toll-free number that is staffed seven days a week, twenty-four hours a day to respond to emergencies. That emergency number is typically posted at grade-crossings and will be available to area residents and emergency-service providers in the event of an emergency. In addition to that emergency number, Petitioners also included in this VMM an additional resource to the community – a contact, also available via a toll-free number, to provide information about project construction and operation as may be needed by emergency-service providers. This resource is not intended to supplant the emergency number, but rather to provide a non-emergency contact to facilitate the flow of information about project construction and operation.

VMM #12 – Coastal prairie habitat site. Petitioners recently acquired this 24-acre site, and are negotiating with interested local stakeholders on the long-term management and maintenance of the site. Petitioners anticipate that the property deed for this site will be restricted so as to preserve its conservation in perpetuity.

VMM #38 – Community Liaison. Petitioners would like to clarify that staffing of the community liaison position will change depending upon whether the proposed rail line is under construction or during operations after the line is constructed. During construction, the community liaison will be either the project engineer or his designee as such individual will be able to address issues related to construction activities. Upon completion of the construction of new rail line, the community liaison will be either the General Manager of the Gulf Division or his designee as such individual will be able to address issues related to rail operations.

VMM #61 and 62 – Connection to the GH&H. Petitioners intend to install a No. 15 power operated turnout onto the new rail line. In the case of Alignment 1, Petitioners will replace the existing turnout to Graham siding with a power operated turnout. The new power operated turnouts will allow trains heading south on the GH&H to continue to move at track speed onto the new line without stopping. This will eliminate the need for the train to stop before the turnout, reducing the amount of time that any crossing of the GH&H near the turnout is blocked.

(... cont'd)

transcripts of the oral comments and written comments submitted during the public meetings, are available to the public in the environmental record in this proceeding.

MAYER, BROWN, ROWE & MAW

Ms. Dana G. White
April 10, 2003
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Please let me know if you have any questions or need additional information.

Sincerely,


Kathryn A. Kusske

cc: Victoria J. Rutson
Alan Summerville
All Parties of Record

SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Section of Environmental Analysis

April 18, 2003

Mr. Rickey N. Ruebsamen
Acting Assistant Regional Administrator
Habitat Conservation Division
National Marine Fisheries Service
9721 Executive Center Dr, North
St. Petersburg FL 33702

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. Ruebsamen:

Thank you for your letter to Dana White of my staff, dated March 31, 2003, concerning the Essential Fish Habitat (EFH) conservation recommendations for the proposed Bayport Loop Build-Out in Harris County, Texas. As you know, the proposed project includes the construction, operation, and maintenance of a railroad line and associated facilities. A petition to construct and operate the 12.8-mile rail line was filed with the Surface Transportation Board (Board) by San Jacinto Rail Limited and The Burlington Northern Santa Fe Railway Company (the Applicants) on August 30, 2001. The Section of Environmental Analysis (SEA) is the office within the Board that is responsible for completing the environmental review process.

The construction of the railroad would require the crossing of Taylor Bayou in Harris County, Texas. The Draft Environmental Impact Statement (published December 6, 2002) and the Essential Fish Habitat Assessment Report submitted to you August 23, 2002, included an evaluation of the environmental consequences of the No-Action, the Proposed Action, and four other Build Alternatives. The Proposed Action and all of the Build Alternatives would include a bridge crossing of Taylor Bayou, which has designated EFH for the white shrimp, brown shrimp, red drum, and Spanish mackerel.

In your letter you asked for a description of the measures proposed to avoid, mitigate, and offset the adverse impacts to EFH from the proposed activity. The Proposed Alternative and Alternatives 1C, 2B, and 2D would cross Taylor Bayou just north of Port Road. The other Build Alternative (the Original Taylor Bayou Crossing) would cross Taylor Bayou west of Highway

146. All Build Alternatives would cross Taylor Bayou with a bridge supported by piles, therefore, reducing the direct impacts to EFH. Both possible bridge locations are proposed at relatively narrow sections of the bayou and are adjacent to existing utility, road, and rail crossings. These locations were selected to minimize the impact to EFH/tidal wetlands.

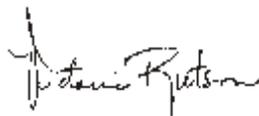
The Proposed Action and Alternatives 1C, 2B, and 2D would include a retaining wall on the east side of Taylor Bayou, which would reduce the impact to EFH/tidal wetlands from about 0.25 acres to 0.11 acres. Finally, the Applicants have prepared a mitigation plan that would remove concrete debris from the channel/shoreline along Taylor Bayou and would create a 0.4-acre tidal marsh along the shore to compensate for the impacts to EFH. As you are aware, this mitigation plan was submitted with the Section 404 permit application and has been reviewed by Ms. Heather Young of your staff in the Galveston office.

SEA accepts the EFH Conservation recommendations described in your March 31, 2003, letter and will recommend an additional mitigation in the Final Environmental Impact Statement generally as follows:

To offset adverse project impacts to EFH, SEA recommends that the Applicants be required to successfully create a 0.4-acre fringe of intertidal marsh along Taylor Bayou shoreline utilizing the same mitigation plan as proposed in the COE Permit Application 22823. The Wetland Mitigation Monitoring and Success Parameters and figures included as attachments in your letter will be incorporated and attached.

We understand that acceptance of your EFH Conservation recommendations will satisfy the procedural requirements of both the Magnuson-Stevens Fishery Conservation and Management Act and its implementing regulations. Thank you for your assistance in this project. If you have any questions, please feel free to telephone Dana White, or SEA's independent third party contractor, Ian Frost of EEE Consulting at 804-883-0016.

Sincerely,



Victoria Rutson
Chief
Section of Environmental Analysis

cc: Heather Young, NMFS



U.S. Department
of Transportation
**Federal Aviation
Administration**

Southwest Region
Arkansas, Louisiana,
New Mexico, Oklahoma,
Texas

Fort Worth, Texas 76193-000

April 17, 2003

Ms. Victoria Ruston
Chief, Section of Environmental Analysis
Surface Transportation Board
Washington, DC 20423

Dear Ms. Ruston:

The Federal Aviation Administration (FAA) has reviewed the impacts to aviation regarding the Finance Docket No. 34079, San Jacinto Rail Limited and the Burlington Northern and Santa Fe Railway Company, the Construction and Operation of a Rail Line from the Bayport Loop in Harris County, Texas.

The Proposed Alternative crosses surplus property, which is owned by the City of Houston and subject to restrictions contained in the 1984 Indenture between the U.S. and the City of Houston based on the Surplus Property Act (recodified at 49 U.S.C. 47151-47153) and Federal regulations (14 C.F.R. Part 155). As stated in the DEIS, the City of Houston, as primary owner of Ellington Field would have to request the FAA to change the Airport Layout Plan (ALP) to accommodate the Proposed Action and to request release of the affected airport property, because it would cross two edges of the airport. The Federal Aviation Administration would determine if the requirements in Title 49 Section 47151-47153 have been met. The FAA can only release the restriction on such property if we determine such release could be done without materially and adversely affecting the development, improvement, operation or maintenance of the airport at which the property is located. In addition, as stated in the Draft Environmental Impact Statement (DEIS), "... to release the land in the Runway Protection Zone (RPZ), the FAA has to decide whether to release the affected airport property from the City of Houston's obligations under the grants that FAA gave to the city to purchase the land (i.e., grant assurances contained in grant agreements.)" Based on the agency's expertise, and reviewing the City of Houston's comment letter on the DEIS and the latest forecasts for Ellington Field, the FAA has

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determined that the surplus property impacted by the Proposed Alternative is needed to protect and advance the civil aviation interests of the United States. Due to these adverse impacts on aviation, FAA recommends against the selection of the Proposed Alternative. Although FAA would not have a Federal action regarding Alternative 1C, FAA notes that the City of Houston's comments on the DEIS indicated that this alignment would adversely impact possible future development plans at Ellington Field. The remaining alternatives do not impact any aviation uses.

If you have any questions, please do not hesitate to contact me at (817) 222-5607.

Sincerely,



Nan L. Terry
Airport Environmental Specialist
Texas Airport Development Office

cc:
Mr. Alan Summerville
ICF Consulting
9300 Lee Highway
Fairfax, Virginia 22031