

# MAYER, BROWN & PLATT

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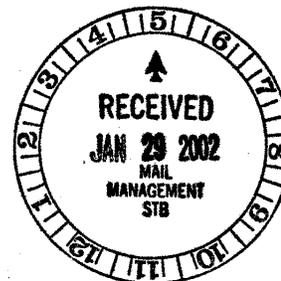
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Part of  
Public Record

January 29, 2002

By Hand Delivery

Mr. Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, DC 20423-0001



Re: Finance Docket No. 34079, San Jacinto Rail Limited—Authority to Construct—  
and The Burlington Northern and Santa Fe Railway Company—Authority to  
Operate—Petition for an Exemption from 49 U.S.C. § 10901—Build-In to the  
Bayport Industrial Loop Area Near Houston, Harris County, Texas

Dear Secretary Williams:

This is the response of The Burlington Northern and Santa Fe Railway Company (BNSF) and the San Jacinto Rail Limited (SJRL) to the January 9, 2002 letter of the Galveston Bay Conservation and Preservation Association (GBCPA) submitted in this proceeding. GBCPA contends without legal precedent that “the Board should set infrastructure and operating conditions on the [BNSF and SJRL’s] application [for Exemption] at this stage of the proceeding.” GBCPA Letter at 1. However, the “conditions” requested by GBCPA concern matters that properly are subject to the environmental review process the Surface Transportation Board (STB or the Board) is conducting pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, (NEPA) and therefore should be considered, if at all, in the NEPA process.

Furthermore, under the Board’s regulations and prior decisions, imposition of reasonable mitigation conditions occurs after completion of an environmental record and analysis by the STB’s Section of Environmental Analysis (SEA). Finally, to the extent that GBCPA’s suggested “conditions” involve pre-existing infrastructure, and thus are not directly related to the proposed action, the Board’s recent pronouncement indicates that where a condition “would remedy an existing situation rather than minimize an impact caused by [a rail construction] proposal, such a

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condition would be beyond the Board's authority to require."<sup>1</sup> BNSF and SJRL respectfully request that the Board reject GBCPA's request and refer GBCPA's comments to SEA for consideration, as appropriate, in the NEPA process.

*Procedural Background*

BNSF and SJRL filed their Petition for Exemption for the construction and operation of the Bayport Build-In (the Project) on August 30, 2001. Under the Board's regulations, 49 C.F.R. § 1104.13(a), replies and motions addressed to the Petition were due on September 19, 2001. No such replies or motions were filed, including by GBCPA. Since this pleading was filed almost four months late, and no good cause exists for the delay, it should be dismissed without prejudice to refile these comments in the environmental docket. Alternatively, these comments should be placed in the environmental record which remains open for public comment at this time.

As part of scoping, SEA prepared and published a draft scope of study for the EIS. 66 Fed. Reg. 59046 (Nov. 26, 2001). Public scoping meetings were held January 14 and 15, 2002 during which interested parties could interact directly with SEA personnel and submit written or oral comments. The public and interested agencies also have until February 1, 2002 to submit written comments on the draft scope of study. After finalizing the scope of study, SEA will prepare and issue a Draft EIS (DEIS) for the project. 49 C.F.R § 1105.10(a)(3). The DEIS will discuss environmental concerns identified during the scoping process (including safety and environmental justice issues) and present SEA's preliminary recommended environmental mitigation measures.

The DEIS will be issued to the public for review, with written comments due not less than 45 days from the issuance of the DEIS. *Id.* A final EIS (FEIS) then will be prepared by SEA taking into account comments on the DEIS and conducting further analysis or amending mitigation measures as necessary. In reaching its final decision on the project, the Board will consider the entire environmental record, including the DEIS and FEIS. *Id.* at § 1105.10(f).

*Conditions Sought By GBCPA Directly Related To The Project Should Be Considered, If At All, In The NEPA Process*

GBCPA requests imposition of a host of what it terms "infrastructure improvement" and "operational" conditions. However, each of them address quality of the human environment in three basic areas: traffic, safety, and environmental justice. The draft scope of study states that the EIS will analyze impacts of both construction and operation associated with the Project and its impact on the human and natural environment. 66 Fed. Reg. 59047. Traffic, safety, and environmental justice specifically have been included as areas of study in the draft scope of study. 66 Fed. Reg. 59047-48. Moreover, CEQ regulations require, 40 C.F.R. § 1508.25(c)(3), and the draft scope of study includes, 66 Fed. Reg. 59048, review of cumulative impacts. Any

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<sup>1</sup> *Final Environmental Impact Statement, Dakota, Minnesota & Eastern Railroad Corporation Construction Into the Powder River Basin, Powder River Basin Expansion Project*, Fin. Dkt. No. 33407, at 12-7 (served Nov. 19, 2001).

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incrementally significant traffic and/or safety issues will be studied and assessed as part of SEA's NEPA process.

To the extent GBCPA seeks to expand the scope of study,<sup>2</sup> it has ample opportunity to submit written comments to SEA during the comment period. Indeed, GBCPA participated at the scoping meetings held by SEA on January 14 and 15, providing oral comments to the Board. It is through such opportunities provided by the Board for "extensive public participation" in the environmental review process that "the environmental document will reflect multiple points of view and reduces the possibility of one-sided or applicant-biased environmental analyses." STB's *Policy Statement on the Use of Third-Party Contracting in Preparation of Environmental Documentation* at 5 (served March 19, 2001).

Significantly, "[n]o construction may begin until the Board has completed its environmental review and issued a final decision." 49 C.F.R. 1150.36(c)(5). Thus, the Board's regulations governing the exemption proceeding provide that the EIS and the comments and responses to it will provide the Board with the basis to decide "whether to allow the particular construction project to proceed under the class exemption and whether to impose appropriate mitigating conditions upon its use . . . ." 49 C.F.R. 1150.36(c)(4). Likewise, the Board's NEPA regulations provide that such environmental documentation shall be the grounds for "what, if any, environmental or historic preservation conditions to impose upon the authority it issues based on the environmental record and its substantive responsibilities under the Interstate Commerce Act." 49 C.F.R. 1105.10(f).

In a recent construction exemption proceeding, the Board consistently and repeatedly refused to allow an objecting party to disrupt the Board's procedures by injecting environmental concerns into the proceeding before the conclusion of the environmental review process. *See Illinois Central Railroad Company—Construction and Operation Exemption—In East Baton Rouge Parish, LA*, Fin. Dkt. No. 33877, at 2 (served May 25, 2001). Subsequently granting a conditional exemption in that proceeding, the Board again addressed and further clarified its procedures:

We will not resolve here [the objecting party's] environmental and public safety concerns. Those issues will be addressed in the ongoing environmental review

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<sup>2</sup> It is well-established that pre-existing conditions in a community that are not a direct result of the action before the agency, such as "existing railroad operations or land development in the vicinity of the railroads," are not appropriate matters for review. *Environmental Assessment, Riverview Trenton Railroad Company—Petition for Exemption from 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County Michigan*, Fin. Dkt. No. 34040, at ¶ 7.1.1 (served Oct. 15, 2001); *see Final Environmental Impact Statement, Dakota, Minnesota & Eastern Railroad Corporation Construction Into the Powder River Basin, Powder River Basin Expansion Project*, Fin. Dkt. No. 33407, at 12-7 (served Nov. 19, 2001). Any conditions imposed by the Board "must relate directly to the transaction it is licensing or exempting, must be reasonable and must be supported by the record." *Riverview Trenton* at ¶ 7.1.1. Here, GBCPA attacks "intolerable mobility restrictions on residents" and "intolerable rail safety risks" resulting from "the condition of east Houston's rail infrastructure." GBCPA Letter at 2. Clearly, these concerns pertain to existing conditions that are not a direct result of the proposed action.

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process in this proceeding. We have consistently handled rail construction applications or exemption requests by first considering the transportation issues and later addressing the environmental issues. This approach does not diminish our capacity to consider environmental matters when we issue a final decision following the completion of the environmental review. Because no construction may begin until our final decision has been issued and has become effective, all environmental matters raised in this proceeding will be fully considered.

*Illinois Central Railroad Company—Construction and Operation Exemption—In East Baton Rouge Parish, LA*, Fin. Dkt. No. 33877, at 6 (served Oct. 25, 2001). In this case, the matters GBCPA raises as requested “conditions” are properly considered only after completion of the environmental review.

In summary, GBCPA requests an unwarranted and anomalous procedure that would disrupt the normal Board process for analyzing environmental considerations. Both the Board’s regulations and prior decisions discourage this result. Moreover, it seeks remedies for pre-existing conditions in the community not directly related to the Project.<sup>3</sup> BNSF and SJRL urge the Board to reject GBCPA’s request or, in the alternative, have these comments considered as part of the environmental record, as appropriate.

Sincerely,



Kathryn A. Kusske

cc: Victoria J. Rutson  
Dana G. White  
Alan Summerville

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<sup>3</sup> While BNSF is concerned about GBCPA’s allegations about the existing condition of the GH&H trackage and potential deferred maintenance on this trackage, which already accommodates some of UP’s chemicals traffic, there is a process for BNSF and UP to resolve such matters through various agreements and conditions imposed in the UP/SP merger proceeding. See *Union Pacific Corp. et al.—Control and Merger—Southern Pacific Rail Corp. et al.*, Fin. Dkt. No. 32760.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29<sup>th</sup> day of January, 2002, I have caused to be served by first-class mail, postage prepaid, or a more expeditious means a true and correct copy of the foregoing Request to the following parties of record and others parties in STB Finance Docket case No. 34079.

  
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