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 July 9, 2003

The Board considers and denies petitions for stay pending judicial review and for administrative reconsideration of its prior decision at 6 S.T.B. 821 (2003). That decision gave final Board authorization for the construction and operation of a 12.8-mile rail line in Harris County, TX, subject to 80 environmental mitigation measures.

BY THE BOARD:

By a decision in *San Jacinto Construction–Build-Out Bayport Loop*, 6 S.T.B. 821 (2003) (*Final Decision*), the Board, following nearly 2 years of environmental study, gave its final authorization[1] for San Jacinto Rail Limited (San Jacinto) to construct, and The Burlington Northern and Santa Fe Railway Company (BNSF) to operate, a 12.8-mile line of railroad in Harris County, TX, subject to 80 environmental mitigation measures. Construction of the line will bring competitive rail service to the Bayport Industrial District (Bayport Loop) in southeast Houston, TX, near Galveston Bay.

By petition filed on June 6, 2003, the City of Houston (the City), as well as The Galveston Bay Conservation and Preservation Association (GBCPA) and The League of United Latin American Citizens (LULAC), jointly, filed petitions under 49 CFR 1115.5 asking the Board to stay the effectiveness of the *Final Decision* pending judicial review.[2] In addition, GBCPA and LULAC, jointly, as well as the City, Brian Pietruszewski,[3] and Harris County, TX,[4]

[1] The Board granted an exemption under 49 U.S.C. 10502 from the requirements of 49 U.S.C. 10901.

[2] On June 11, 2003, BNSF and San Jacinto, jointly, as well as the Bayport Producers, filed replies in opposition to the stay petitions. The Bayport Producers are ATOFINA Petrochemicals, Inc., Basell USA, Inc., Equistar Chemicals, LP, and Lyondell Chemical Company, all of which intend to ship raw materials and/or products on the newly constructed line. The Bayport Producers are partners in San Jacinto.

[3] Mr. Pietruszewski, a resident of Portland, OR, who files here as an individual, formerly participated with GBCPA in this proceeding. Bayport Producers object to consideration of Mr. Pietruszewski's petition for reconsideration and the two exhibits attached to it. They assert that, as a resident of Oregon, Mr. Pietruszewski lacks standing in a proceeding concerning the construction of a rail line in Texas. However, administrative agencies are not as constrained as the courts and the Board, like the Interstate Commerce Commission (ICC) before it, does not require that those who seek to participate in agency proceedings demonstrate standing. Moreover, it has been the Board's practice to consider all comments involving environmental matters. In addition, Bayport Producers properly object to the tendering of new evidence that could have and should have been (continued...)

individually, asked the Board to reconsider the *Final Decision* or reopen the proceeding to receive new evidence.[5] (In addressing both sets of petitions, the City, GBCPA, LULAC, Mr. Pietruszewski, and Harris County will be referred to collectively as petitioners.)

Finally, the Board has received comments from citizens of Houston[6] and members of the Texas legislature,[7] raising general environmental concerns about the proposal and the adequacy of the Environmental Impact Statement (EIS). The EIS was prepared by the Board and by three cooperating agencies (the Federal Aviation Administration (FAA), the National Aeronautics and Space Administration (NASA), and the United States Coast Guard).

In this decision, both sets of petitions are considered and denied. In addition, the comments that have been received are addressed.

BACKGROUND

As explained in more detail in the prior decisions in this proceeding, San Jacinto is a partnership of chemical manufacturers in the Bayport Loop and BNSF. Currently, Union Pacific Railroad Company (UP) is the only railroad serving the Bayport Loop. On August 30, 2001, San Jacinto and BNSF filed a petition seeking authority to construct and operate the proposed line in order to provide competitive rail service to the Bayport Loop. The new line will extend from 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

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[3](...continued)
submitted by the due date for comments on the Draft Environmental Impact Statement. Mr. Pietruszewski's statement that he expected GBCPA to timely submit his Exhibit B comments in its name, and that GBCPA represented that the City had submitted comments similar to those he had prepared, does not excuse his failure until now to himself submit any comments that he wished to have considered. The Board properly posted on its website all comments received on the Draft EIS, including those of the City, and Mr. Pietruszewski could have readily determined that the City's comments did not parallel his own. The Board will consider Mr. Pietruszewski's arguments, but Exhibit B will not be accepted into the record because it constitutes comments prepared for submission by GBCPA, which that entity declined to submit.

[4] On July 1, 2003, Harris County filed a petition for leave to intervene, a petition for stay, and a petition for administrative reconsideration. San Jacinto and BNSF replied in opposition to the petition on July 3, 2003, arguing that the County could have filed earlier and, by adopting the City's arguments, adds nothing to the record. Harris County's petition for leave to intervene is granted because doing so allows the County to express its views without burdening the record or prejudicing any party.

[5] On June 23, 2003, the Bayport Producers, as well as BNSF and San Jacinto jointly, opposed the requests for administrative reconsideration. On July 1, 2003, the City filed a motion for leave to file a reply in support of reconsideration. San Jacinto and BNSF asked the Board to strike the proposed reply to a reply on July 3, 2003, arguing that the filing contravenes the regulations at 49 CFR 1104.13(c) and conflicts with Board precedent, including our earlier order in this case. The City's motion for leave to file the reply will be denied. The pleading adds little or nothing to arguments the City has already made. The City does not argue that San Jacinto or BNSF did anything in their reply except address arguments that the City made in its petition. The City's motion adds nothing to the proceeding and has served only to instigate another round of pleadings, an unjustifiable burden to the processing of this case.

[6] Michael Flannigan, William Kelly, D. Marrack, M.D., and Daniel Henn.

[7] The Honorable Rick Noriega and John E. Davis of the Texas House of Representatives.

aviation and commercial operations with some use by the military and NASA. BNSF intends to reach the proposed line via its trackage rights over connecting UP lines.[8]

These trackage rights fulfill a condition that the Board imposed on UP in connection with its merger with Southern Pacific Transportation Company (SP).[9] The condition gives BNSF a right to use UP lines to reach a "build-in/build-out" point. The condition thus preserved the potential for the creation of competitive rail service to the Bayport Loop, which the BNSF petition in this case sought to realize.

In a decision served on August 28, 2002, the Board addressed transportation related issues and tentatively found, subject to later consideration of the environmental impacts, that this proposal met the exemption standards of 49 U.S.C. 10502.[10] The Board stated that, upon completion of the environmental review process, it would issue a final decision addressing the environmental impacts and whether to authorize the proposal.

The Board's Section of Environmental Analysis (SEA)[11] then conducted a detailed environmental review of the proposal and its reasonable alternatives, as required by the National Environmental Policy Act, 42 U.S.C. 4321-43 (NEPA). SEA undertook extensive public outreach, including meetings and consultations, several site visits, a toll-free telephone line, 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. Given the substantial public controversy generated by other pending transportation proposals in the Houston area, including the Bayport Container/Cruise Terminal Facility (Bayport Terminal), and the perceived relationship of those projects to the instant proposal, SEA determined that preparation of a full EIS was warranted here even though the proposal was not expected to result in potentially significant environmental impacts.[12]

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[8] Initially, BNSF and San Jacinto had proposed routing Bayport Loop traffic into and out of a BNSF facility called New South Yard and over UP's Glidden Subdivision and the GH&H line. In response to community concerns and potential congestion impacts near New South Yard, BNSF and San Jacinto ultimately proposed routing the traffic to and from CMC Railroad's Dayton Yard along the GH&H line and the East Belt, Terminal, Lafayette, and Baytown Subdivisions. BNSF and San Jacinto notified the Board of this change—which did not affect the route of the proposed new rail line itself—in August 2002.

[9] *See Union Pacific Corp., Union Pacific R.R. Co., and Missouri Pacific R.R. Co– Control and Merger–Southern Pacific Rail Corp., Southern Pacific Transp. Co., St. Louis Southwestern Ry. Co., SPCSL Corp., and The Denver and Rio Grande Western R.R. Co.*, 1 S.T.B. 233, 419 (1996), *aff'd sub nom. Western Coal Traffic League v. STB*, 169 F.3d 775 (D.C. Cir. 1999).

[10] Under 49 U.S.C. 10502(a), the Board shall exempt a proposed construction from the requirements of 49 U.S.C. 10901 when it finds that: (1) the application of that provision is not necessary to carry out the national rail transportation policy, and (2) either (A) the transaction is of limited scope, or (B) the application of the provision is not necessary to protect shippers from the abuse of market power.

[11] References to "SEA" in this decision encompass the efforts of the cooperating agencies.

[12] SEA frequently prepares a more limited Environmental Assessment in rail construction cases.

On December 6, 2002, SEA issued for public review and comment a detailed Draft Environmental Impact Statement (Draft EIS) addressing a broad range of environmental issues and alternatives. During preparation of the Draft EIS, BNSF and San Jacinto submitted for SEA's consideration 76 proposed voluntary mitigation measures addressing a broad range of potential environmental and community concerns.[13] In the Draft EIS, SEA recommended that the Board impose this extensive voluntary mitigation as a condition to any final approval of this project. SEA also concluded that all of the "build" alternatives analyzed in detail in the Draft EIS[14] would have only moderate impacts on surface water, wetlands, and plant communities, and negligible or no impacts on all other environmental resources.

SEA received over 500 written comments by mail, e-mail, or telephone on the Draft EIS from elected officials, organizations, companies, concerned citizens, and federal, state, and local agencies.[15] SEA also held two public meetings on the Draft EIS in the project area, at which 115 interested parties commented orally.

On May 2, 2003, SEA served and filed the Final Environmental Impact Statement (Final EIS) with EPA. The Final EIS was also issued to all parties of record, as well as appropriate government agencies, elected officials, and community groups, and was made available on the Board's website on that date.

The Final EIS responded to public comments on the Draft EIS, made some corrections and minor changes, drew final conclusions on the proposal's environmental impacts, and recommended 80 environmental conditions to mitigate the proposal's minor environmental effects (comprising BNSF's and San Jacinto's 76 voluntary conditions and 4 new conditions developed by SEA following issuance of the Draft EIS). *See Final Decision*, 6 S.T.B. at 828-30, 837-50. 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 would have potentially significant environmental effects, and that all are fully acceptable. Therefore, SEA recommended that the Board authorize the construction and operation of several specific "build" alternatives, subject to the extensive environmental mitigation measures included in the Final EIS. Nevertheless, SEA identified the alternative known as "1C," a modification of

[13] The Board encourages railroads to develop appropriate voluntary mitigation in consultation with local communities and interested agencies. The resulting arrangements are often more satisfactory to the parties and more far reaching than the mitigation the agency could impose unilaterally.

[14] The "build" alternatives, which would require new construction, included the route proposed by BNSF and San Jacinto (hereafter the proposed route), and alternatives designated as "1C," "2B," "2D," and the Original Taylor Bayou Crossing route. SEA also analyzed a route requiring no new rail construction that would involve BNSF's use of UP's existing lines to serve the Bayport Loop–even though BNSF does not have the trackage rights needed to allow operations over those lines. Finally, SEA assessed the no-action alternative, which would leave shippers to rely solely on service by UP. *See Final Decision*, 6 S.T.B. at 827.

[15] The United States Environmental Protection Agency (EPA) gave the Draft EIS its highest rating, "lack of objections."

the proposed route developed to avoid impacts to Ellington Field, as the preferred alternative.[16]

On May 9, 2003, the Board served the *Final Decision*, adopting all of the conclusions and recommendations in the Final EIS. The Board was satisfied that the EIS took the requisite "hard look" at the environmental consequences of this project and adopted the Final EIS's conclusion that all potential environmental impacts would be minimal. The Board identified Alternative "1C" as the preferred alternative, but found that all of the "build" alternatives were permissible. Therefore, the Board granted final approval for San Jacinto to build, and BNSF to operate over, any of the "build" alternatives to reach the Bayport Loop. The grant was subject to compliance by San Jacinto and BNSF with all of SEA's recommended environmental mitigation measures, which the Board found would be "fully adequate to address the minimal environmental effects associated with the construction proposal." *Final Decision*, 6 S.T.B. at 831-32.

EPA regulations required it to publish a notice of the Final EIS's availability in the *Federal Register* on May 9, 2003. In issuing the *Final Decision* the same day, the Board invoked CEQ's regulation at 40 CFR 1506.10(b), which allows an agency to make a decision on a proposed action less than 30 days from EPA's publication of a notice of a Final EIS in the *Federal Register*, if the agency's decision is subject to formal administrative review after publication of the Final EIS. In such cases, the rule provides that the period for an administrative appeal of the agency's decision and the 30-day administrative review period prescribed in 40 CFR 1506.10(b) may run concurrently.[17] *See Final Decision*, 6 S.T.B. at 833.

Although EPA published notice of the EIS's availability on May 9, 2003, the notice misidentified the document as a draft rather than a final EIS. *See* 68 Fed. Reg. 25,023 (2003). That error was corrected by an amended notice issued as part of EPA's next notice of availability of NEPA documents. *See* 68 Fed. Reg. 26,606-07 (2003).[18] To preclude any concern about shortening the 30-day period for seeking administrative reconsideration, the Board, by decision served May 16, 2003, extended the due date for petitions for administrative reconsideration, as well as the effective date of the *Final Decision*, to June 16, 2003. Subsequently, to allow additional time for it to consider any petitions, the Board, by decision served June 12, 2003, further extended the effective date of the *Final Decision* to July 11, 2003.

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[16] A Council on Environmental Quality (CEQ) regulation requires that the Final EIS identify a preferred alternative. 40 CFR 1502.14(e).

[17] This concurrent period for administrative review and public availability of the Final EIS will be referred to here as "the alternate procedure" for reaching a final decision.

[18] The Board was not responsible for the error in publication, as SEA had properly notified EPA that the document was a Final EIS in its transmittal letter, and EPA had so acknowledged. See Exhibits A-1 and A-3 of the Bayport Producers' reply to the petitions to reconsider or reopen.

DISCUSSION AND CONCLUSIONS

The Petitions For Stay

To obtain a stay pending judicial review, a petitioner must show that: (1) there is a strong likelihood that the petitioner will prevail on the merits; (2) the petitioner will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports granting the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*Virginia Petroleum*). On a motion for stay, "it is the movant's obligation to justify the * * * exercise of such an extraordinary remedy." *Cuomo v. United States Nuclear Regulatory Comm.*, 772 F.2d 972, 978 (D.C. Cir. 1985). The parties seeking a stay carry the burden of persuasion on all of the elements required for such extraordinary relief. *Canal Authority of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

Likelihood of success on the merits. None of the petitioners here challenge the Board's findings on transportation issues. Rather, their concerns relate to the Board's consideration of environmental impacts. NEPA requires federal agencies to examine the likely environmental effects of proposed federal actions and to inform the public concerning those effects. *See* 42 U.S.C. 4332; *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983) (*Baltimore Gas*). Under NEPA, the Board must consider the potential significant environmental impacts in deciding whether to authorize a railroad construction proposal as submitted, deny the proposal, or approve it with mitigation conditions. NEPA's procedures are in place to "insure that environmental information is available to public officials and citizens before decisions are made and actions are taken." 40 CFR 1500.1(b).[19] Here, the Board fully complied with NEPA's requirements by preparing a detailed EIS, evaluating in detail the environmental effects of the proposed construction project, and providing a fair opportunity to interested persons, entities, and agencies to voice their concerns about the project.

In its request for a stay, the City argues that the Board has not complied procedurally with CEQ regulation 1506.10(b), which allows the alternate

[19] The role of a court in reviewing the adequacy of an EIS is limited. *Isle of Hope v. Corps of Engineers*, 646 F.2d 215, 220 (5th Cir. 1981). The court's role is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious. *Baltimore Gas*, 462 U.S. at 98. Moreover, courts apply a "rule of reason" standard in reviewing the adequacy of an EIS—a "pragmatic standard which requires good faith objectivity but avoids 'fly specking' the document." *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000) (citations omitted). A court will defer to the "informed discretion of the responsible federal agencies." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989). The courts will not insert their judgment (or that of petitioners), in the place of the agency's where the agency has followed the appropriate procedures and its conclusions are reasonable.

procedure of making a final decision concurrently with making the Final EIS available where there is an administrative appeal process that provides "a real opportunity to alter the decision." The City argues that no such opportunity exists now, because one of the two Board members who participated in the *Final Decision* has since resigned and has not yet been replaced, temporarily leaving the Board with only one sitting member.[20] The City argues that the remaining member lacks legal authority to act alone and that, in any event, the lack of an "opportunity for discourse, discussion, or give and take within the Board * * * significantly diminish[es] the 'opportunity to alter the decision.'" City Stay Petition at 4.

The fact that the Board temporarily has only one sitting member does not incapacitate the agency. The Board's governing statute expressly provides that the Board's authority to act is not impaired by a "vacancy." 49 U.S.C. 701(b)(7). As the City concedes, under 1 U.S.C. 1, the general rule of construction of federal statutes is that use of the singular includes the plural, "unless the context indicates otherwise." *See Railroad Yardmasters of America v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983) (*Yardmasters*). Here, there is no indication that Congress intended to preclude the Board from acting with two vacancies. Indeed, when Congress created the Board in the ICC Termination Act of 1995 (ICCTA),[21] it expressly repealed the quorum provision that had applied to the Board's predecessor—the ICC.[22] Thus, there is no impediment to the Board acting while it temporarily has only one sitting member.[23]

Moreover, the public interest would not be served if the Board were unable to act with one member. The Board has exclusive authority over most aspects of the railroad industry, with action under other laws and in other forums expressly preempted. *See* 49 U.S.C. 10501(b). Without Board approval, railroads could not construct or acquire new lines or sell or abandon existing lines, use another carrier's track, or consolidate operations. Nor could the Board resolve rail rate and service disputes or address service disruptions. In other words, much of the

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[20] The City cannot contest the validity of the Board's determination in the *Final Decision* decision to invoke the alternate procedure, because two members unanimously voted to do so. The City also does not allege that it lacked notice of the issuance of the Final EIS, which was served on all parties of record, including the City, on May 2, 2003. Nor does (or could) the City contend that it did not have a full 30 days to seek administrative review since the Board extended the time for filing a petition to June 16th, 30 days after EPA published its corrected notice. Rather, the City's argument is that an intervening event (the resignation of Commissioner Morgan) precludes a meaningful administrative review of the *Final Decision*.

[21] Pub. L. No. 104-88, 109 Stat. 803.

[22] Former 49 U.S.C. 10306(a) was not carried forward in ICCTA. But even under former 49 U.S.C. 10306(a), a quorum was a majority of the *sitting* ICC commissioners, not a majority of the number of commissioners authorized by the statute. *See Assure Competitive Transportation, Inc. v. United States*, 629 F.2d 467, 473 (7th Cir. 1980) ("Congress intended those Commissioners in office, however many there are, to be 'the Commission' for all purposes. 'A majority of the Commission,' the phrase used in the quorum provision, accordingly must mean a majority of those Commissioners in office.")

[23] *Cf. Yardmasters*, 721 F.2d. at 1341 ("The vacancies provision provides for the continued *existence* of power, while the quorum provision [at issue in that case] condition[ed] the *exercise* of that power," necessitating the advance delegation of authority to the sole remaining member that was upheld in that case (emphasis in original)).

regular activity of railroads would grind to a halt during periods when the Board has only one sitting member, if the Board were unable to act during these times. And in carrying out many of its responsibilities, the Board is required to act within a time established by statute.[24] Thus, it is reasonable to conclude that Congress intended that the Board's statutory obligations not languish in regulatory limbo when the Board temporarily has only one sitting member.[25] For these reasons, a finding that the Board can act with one member is, contrary to the City's position, fully consistent with public policy.

The City argues that the statutory requirement for bipartisan Board membership, and the Board's own rules delegating certain functions to a single member, together require a multiple-member decision on a petition for administrative review. By its terms, however, the bi-partisanship requirement means that, when there is a full Board complement, all three members may not be of the same party.[26] And the fact that the Board has designated certain functions for resolution by a single Board member when there is more than one member does not preclude Board action on other matters when the Board temporarily has only one member.

Thus, there is no merit to the City's contention that a one-member Board lacks authority to act on a petition for administrative review, or any other matter. In short, the opportunity for meaningful review, as contemplated by CEQ rule 1506.10(b), clearly is present.[27]

Petitioners also contend that they will prevail on their argument that the EIS failed to take the "hard look" at environmental impacts required by NEPA. As discussed below (see the discussion of the petitions for reconsideration), none of their arguments is well founded. As the EIS and the Board's *Final Decision* demonstrate, the environmental effects of this project were thoroughly analyzed

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[24] *See*, *e.g.*, 49 U.S.C. 10704(c), 10904(d), (f), 11325, 11701(c).

[25] The City points out that the only other case in which a single sitting member was found able to act on behalf of a multi-member agency—*Yardmasters*—involved the National Mediation Board (NMB), an agency whose authority was principally procedural in nature. But the lack of directly applicable precedent is not surprising, as neither the Board nor the ICC has ever been in this position before. And the fact that the Board's authority, in some respects, is more "substantive" than that of the NMB makes a more compelling case that the Board should not be disabled from acting even with two vacancies. Given the importance of the Board's duties to the Nation's rail system, and the serious disruption that the rail industry would face, here, as in *Yardmasters*, "the consequences could be catastrophic if such vacancies were completely to disable the Board for any period of time." 721 F.2d at 1342.

[26] The relevant statutory provision states, at 49 U.S.C. 701(b)(1): "The Board shall consist of 3 members, to be appointed by the President, by and with the advice and consent of the Senate. Not more than 2 members may be appointed from the same political party."

[27] The City suggests that the Board's well established standards in 49 CFR 1115.3 for granting administrative reconsideration (material error, newly discovered evidence, or changed circumstances) are so high as to preclude meaningful review. However, the CEQ requirement is that the agency have "a formally established appeal process." 40 CFR 1506.10(b). Nothing in the CEQ regulation suggests that, to be meaningful, there must be a *de novo* review by the agency. Similarly, the 20-page limitation on petitions for administrative consideration, decried by the City, does not adversely impact its ability to petition for administrative reconsideration. The 20-page limit—like an appellate court's limitation on pages or words in a brief—is intended to encourage parties to focus on important issues. Moreover, nothing precluded the City from seeking a waiver of the page limitation, or incorporating by reference lengthier documents, had it wished to exceed the limitation.

and considered, the agency responded to the comments received on the Draft EIS, and the agency's logic and methodology were fully explained. Petitioners have failed to make the "powerful showing of probable administrative error" required for a stay. *Busboom Grain Co. v. ICC*, 830 F.2d 74, 75 (7th Cir. 1987).

Irreparable Harm. Petitioners describe the harm they allegedly will suffer only in general, conclusory terms. *See* City Pet. at 8-9; GBCPA Mot. at 4. This falls short of the demonstration of particularized irreparable injury that would be needed to warrant a stay.[28] Petitioners argue that the public has a strong interest in ensuring that the environment is protected prior to allowing construction to begin. But as discussed in more detail below, the agency's thorough environmental analysis in this case shows that this project will not have significant environmental impacts. Moreover, even the moderate impacts that would otherwise occur will be mitigated to a great extent by the 80 conditions with which San Jacinto and BNSF must comply that address wetlands, surface water, and plants, as well as a range of additional issues of interest to the community. As part of that mitigation, BNSF and San Jacinto must obtain appropriate federal, state, and local environmental permits. Thus, any environmental impacts will be minimal.

Other Stay Criteria. In contrast, a stay would delay the benefits of the proposal—competitive rail service for the Bayport Loop[29] and strengthening of the critical rail infrastructure in Houston[30]—benefits that would inure not simply to the Bayport Loop Producers and other potential shippers, but to the public generally. In sum, there is little likelihood that petitioners will prevail on the merits of a court challenge to the Board's environmental review process in this case, and petitioners have not met their burden of showing that a stay pending judicial review is warranted. Accordingly, the stay requests will be denied.

Petitions For Reconsideration

As discussed below, none of petitioners' challenges to the Board's environmental review process or *Final Decision* demonstrates a material error in the conduct of this proceeding or the Board's decision. Nor have the petitioners presented new evidence or changed circumstances that will materially affect the prior action.

1. *Trackage Rights Issue*. Mr. Flannigan suggests that the Board should analyze the environmental impacts of additional alignments for the Bayport

[28] Indeed, the record indicates that, before construction on this line can even begin, additional permits must be obtained and San Jacinto and BNSF must still select the actual route to be constructed.

[29] The Bayport Producers submitted affidavits stating that jointly they pay an additional $1.5 million monthly in increased transportation costs because of the lack of competition for these rail shipments.

[30] *See UP/SP Merger* Oversight Decision No. 10, 3 S.T.B. 1030 (1998) (citing the need for investment in the Houston area rail infrastructure).

Loop, called "Alignment 3" and "Alignment 4" in the Draft EIS.[31] However, as SEA explained, Draft EIS at 2-21 and 2-22, these alignments were not feasible alternatives. The alignments could be built only if the rail operator, BNSF, could obtain trackage rights over a rail line of the Port Terminal Railroad Association (PTRA), to which the alignments would connect. The PTRA line at issue was built in a right-of-way owned by UP. The Draft EIS properly determined that there was no need to evaluate the environmental effects of these alignments because they could not be built; a private 1995 agreement precludes PTRA from allowing its line to be used by BNSF to serve Bayport Loop shippers.

This agreement was entered into by what were then two separate rail carriers (UP and SP) with the Port of Houston Authority, as part of a negotiated agreement to facilitate the planned merger of UP and SP.[32] The agreement provides that, if the Port of Houston allows the PTRA line to be used for BNSF to serve Bayport Loop shippers, UP will void PTRA's right to operate over the UP right-of-way.

Mr. Flannigan asserts that the UP-SP-Port of Houston agreement is anticompetitive and that the Board should compel UP and PTRA to permit BNSF to operate over the PTRA line. However, Mr. Flannigan has not shown that the agreement UP made with the Port of Houston is improper anticompetitive behavior. UP was simply protecting its own property (its right-of-way) from being used by a competitor to take business away from UP—a sound business practice that does not contravene antitrust principles.

2. *Adequacy of the Environmental Analysis.* Petitioners and commenters present a plethora of claims that the Draft and Final EIS either did not address, or did not adequately evaluate, the environmental effects of this rail construction project.[33] In both the Draft and Final EIS, however, SEA took the "hard look" at environmental impacts required under NEPA, and none of the petitioners or commenters has raised issues that have not already been considered adequately.[34] Petitioners and commenters simply disagree with the outcome of SEA's extensive analysis.

A. *Bayport Terminal Final EIS.* GBCPA/LULAC argue that the Board should reevaluate the impact of this rail construction and operation in light of the issuance, on May 16, 2003, of the U.S. Army Corps of Engineers' Final EIS on the proposed Bayport Terminal. The issuance of the Bayport Terminal Final EIS does not make the EIS prepared in this case incomplete or inadequate, as the Bayport Terminal project was fully considered in SEA's cumulative impact analysis, *see* Draft EIS, Chapter 5 and Final EIS, Section 4.18. No need has been

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[31] *See also* the comments of Mr. Henn.

[32] That merger has since occurred and, after a difficult start-up period, it has provided substantial benefits in both the Houston area and, more generally, throughout the West.

[33] *See, e.g.*, the comment letters of Dr. Marrack, Mr. Kelly, Mr. Henn, and Mr. Flannigan. These concerned citizens raised issues similar to those presented in comments on the Draft EIS, and thus the concerns were already addressed in Chapter 4 of the Final EIS.

[34] For example, Harris County argues that the EIS ignored the potential impacts on Armand Bayou. But the Armand Bayou was fully considered in the Draft EIS at 4-16 to 4-48 and 4-94.

shown for additional environmental analysis based on any information that was not available when the Board's Final EIS was prepared. *See, generally, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-55 (1977). *See also Western Coal Traffic League v. ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984) (an agency must be able to rely on the record presented to it and cannot be expected to "behave like Penelope unraveling each day's work to start the web again the next day."); *City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002) (Supplemental EIS only required where new information "provides a *seriously* different picture of the environmental landscape.") (emphasis in original).

B. *Air Quality*. Based on the Bayport Terminal Final EIS, GBCPA/LULAC argue that SEA must reconsider its air quality analysis. These parties contend that, by itself, the proposed Bayport Terminal would violate the 24-hour National Ambient Air Quality Standards (NAAQS) for PM2.5 (particulate matter of 2.5 microns or less). But petitioners overstate the findings in the Bayport Terminal Final EIS, which explained that 80% of the potential PM2.5 emissions would come from fugitive dust during construction (construction emissions would peak in 2010)—rather than operations—and that such emissions could be controlled. Further, the calculation of emissions in the model used in the Bayport Terminal Final EIS assumes a worst-case scenario. In any event, the Bayport Terminal Final EIS states that it is likely that the impact of operations in the vicinity of the terminal following its construction would not exceed the NAAQS. *See* Bayport Terminal Final EIS, Executive Summary at 32 and Section 3.12-18.

Like the Bayport Terminal project, this rail line construction project will cause more PM2.5 emissions during construction than during operations on the line. *See* Draft EIS at Table 4.6-1 and Final EIS at Table 4.6-5. But construction of the rail line will long since have ended when construction emissions peak at the Bayport Terminal in 2010. Moreover, as the Final EIS indicates at 4-89, the levels of PM emissions that would be generated by this rail construction are extremely low, and even lower levels would result from the operation of any of the "build" alternatives. Thus, GBCPA/LULAC have not presented new evidence that would require a reevaluation of the effect of this rail project on the basis of air quality.

C. *Noise*. Again referring to the recent Bayport Terminal Final EIS, GBCPA/LULAC claim that the Bayport Terminal will violate the noise ordinance of the City of Pasadena, TX, requiring the Board to reevaluate noise impacts of the rail construction project. However, in response to a similar request to evaluate the cumulative noise impacts if both the rail line and the Bayport Terminal projects were constructed, SEA determined that the noise from the "build" alternatives for the rail line would not affect communities near the proposed Bayport Terminal. *See* Final EIS at 4-85. Thus, reopening is not warranted.

D. *Rail Operations*. GBCPA/LULAC contend that the Final EIS did not adequately discuss the cumulative impact of the Bayport Terminal and another

proposed marine terminal at Shoal Point on congestion in the rail corridors along two state highways—SH 146 and SH 225. But SEA did analyze the cumulative impacts of both proposed port projects in the Draft EIS at 5-2 through 5-4. As explained there, UP already has a railroad right-of-way in the SH 146 corridor, and PTRA plans to build a new rail line in that right-of-way to serve the proposed Bayport Terminal. None of the "build" alternatives for this project is in the SH 146 or SH 225 corridors, and therefore the Final EIS properly concluded that this project will not increase congestion in those corridors. *See also* Final EIS at 4-28 and 4-29.

The City argues that the actual level of rail traffic on the proposed line could be as high as two 100-car trains per day. But as the Final EIS (at 4-22 to 4-28) and the *Final Decision* (6 S.T.B. at 832) explain, BNSF's traffic projections (an average of two trains per day, with 36 to 66 cars per train) 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. Additionally, neither BNSF nor San Jacinto has stated that BNSF would actually operate 100-car trains or that doing so is reasonably foreseeable.[36] Thus, there was no need to analyze the impact of 100-car trains.

Mr. Pietruszewski asserts that the analysis in the Draft EIS of predicted rail traffic over this line failed to account for the majority of the traffic moving today from the Bayport Loop.[37] But BNSF properly developed an estimate of the number of carloads that it thought it could capture, based on its assessment of the Bayport Loop market (including the constraint that the new line would not allow BNSF to physically reach all of the shippers in the Bayport Loop). *See* Final EIS at 4-23. SEA then determined that BNSF's estimates appeared reasonable, as explained in Appendix C of the Draft EIS. While Mr. Pietruszewski would estimate expected train traffic levels differently, he has not demonstrated that SEA's analysis of the expected train traffic was unreasonable.

E. *Pipelines and Public Safety*. There are numerous pipelines, both above and below ground, that are used to transport natural gas, petroleum, water, and wastewater in the area of the various "build" alternatives. GBCPA/LULAC and the City claim that SEA did not disclose potential impacts that would arise because the newly constructed rail line will cross existing pipelines. GBCPA Pet. at 3-4; City Pet. at 17-18. To the contrary, as the EIS demonstrates, SEA examined, evaluated, and disclosed the extremely low potential that this rail construction will have for causing releases from these pipelines, focusing on pipelines carrying materials whose release would pose the most serious risk.

Petitioners claim that SEA erred in analyzing pipeline risk for this construction by using nationwide historic pipeline-accident data. But the data, obtained from the federal Office of Pipeline Safety (OPS), covered 16 years of actual experience. Draft EIS at Appendix E. Moreover, rather than solely

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[36] The City asserts that BNSF and San Jacinto have admitted that 100-car trains are foreseeable. All BNSF and San Jacinto said, however, was that it would be physically possible to handle 100-car trains on the line (*see* Final EIS at 4-23 and 4-26).

[37] Mr. Flannigan raises similar concerns.

relying on this data, SEA sought additional verification by providing copies of the Draft EIS to both OPS and the Railroad Commission of Texas, which together regulate interstate and intrastate pipelines. *See* Draft EIS at 10-1; Final EIS at 6-1. Neither agency raised any concerns about SEA's methodology for predicting accidental releases. Thus, SEA's approach clearly was acceptable.

Contrary to the City's claim that no one knows where pipelines are buried, SEA obtained very detailed information from BNSF and San Jacinto on the location, contents, and ownership of pipelines in the project area that could be affected by any of the "build" alternatives. *See* Draft EIS at 3-8 and Appendix E and Final EIS at 4-62 (indicating that detailed pipeline information has been available in the public docket since August 2002). Nor did SEA simply make the assumption that the "Texas One Call System" will prevent all accidents to buried pipelines, as the City contends. *See* Final EIS at 4-64. Rather, BNSF and San Jacinto volunteered two conditions, imposed by the Board, to ensure pipeline safety. Pursuant to these conditions, the railroad's engineers, in cooperation with the pipeline owners and a qualified pipeline engineering firm, will determine a specific engineering solution at each pipeline crossing to eliminate the risk of an accidental release. *See* Conditions 52 and 53 at *Final Decision*, 6 S.T.B. at 846.

The City expresses concern about locating the proposed rail line near a city park that is adjacent to a dense area of pipelines. But SEA fully evaluated this concern in the Final EIS at 4-72, explaining that the risk of a release was extremely low for the entire length of all of the "build" alternatives, and that the potential risk of a release at any one location would be even less.

GBCPA/LULAC assert (as did GBCPA in its comments on the Draft EIS) that increased rail traffic from proposed marine terminals in the area would increase track maintenance of existing lines and increase the potential risk of maintenance-related accidents affecting pipelines. As noted in the Final EIS at 4-69, however, SEA found no historical information indicating any railroad maintenance-related accidents affecting pipelines.

F. *Landfills*. GBCPA/LULAC repeat a concern, also raised in various comments on the Draft EIS, that SEA did not include a comprehensive study of waste disposal sites in the area of Alternatives "2B" and "2D." However, as explained in the Final EIS, at 4-128 to 4-130, SEA surveyed the area and extensively searched databases to identify both existing and past waste disposal sites along these alignments and all others. *See also* Draft EIS, Section 4.13 and Appendix K.

G. *Wetlands and Flooding*. Contrary to petitioners' claims, SEA extensively examined the effect of this project on wetlands in the area. GBCPA/LULAC (Pet. at 5) criticize SEA for relying on the determination of the U.S. Army Corps of Engineers concerning the acreage of wetlands covered by Section 404 of the Clean Water Act ("jurisdictional wetlands"). But as explained in the Final EIS (at 4-92), the Corps has regulatory responsibility to determine jurisdictional wetlands in Texas, and therefore SEA's reliance on the Corps was entirely reasonable. In any event, the EIS evaluated the impacts to non-

jurisdictional wetlands as well. *See* Final EIS at 4-92, referring to Draft EIS at 4-50 to 4-54.

Mr. Flannigan claims that additional analysis is needed to ascertain whether this rail construction would increase flooding in the Houston area. But responding to similar claims, the Final EIS explained at 4-93 and 5-7 that the impacts would be minor because of appropriate drainage design and compliance with the flood control requirements of the appropriate federal, state, and local agencies.

H. *Grade-Separated Crossings*. Mr. Pietruszewski faults the analysis of grade-crossing delay and safety presented in the Draft EIS. In particular, Mr. Pietruszewski contends that SEA's analysis should have used a longer train length,[38] a longer delay time for warning signal equipment,[39] a lower vehicle departure rate for some rail and roadway intersections,[40] and a slower train speed for one intersection.[41] In addition, he argues that the analysis did not take into

[38] Mr. Pietruszewski's argument that traffic levels are understated is based on a flawed understanding of projected rail traffic levels, as explained above. But even if the approach Mr. Pietruszewski recommends had been used in the EIS, the resulting difference in delay would be small (on the order of 0.1 seconds of more delay for most intersections and less than 0.5 seconds at all of the intersections he mentions), and the EIS conclusions would be unchanged.

[39] Mr. Pietruszewski argues that the Draft EIS analysis understates delay because the 30 seconds allowed for crossing gates to open and close was inconsistent with the FRA requirement that warning systems (e.g., lights and crossing gates) provide at least 20 seconds of warning time before a train arrives at a crossing. In making this argument, however, he evidently assumed that delay after a train passes through an intersection must be equal to the warning time required before the train arrives at the intersection. This is simply not the case. Once a train has passed through a crossing, the warning system ceases operation within seconds and vehicle traffic flow resumes. Thus, 30 seconds is a reasonable and appropriate estimate of the total delay time for warning systems if crossing gates are present. If crossing gates are not present, the delay time would be less, as discussed in Appendix F (at F-2) of the Draft EIS.

[40] The vehicle departure rate is the number of vehicles per hour that flow across a certain point. According to Mr. Pietruszewski, the 1,400 vehicles figure used in the EIS for some intersections is not appropriate for urban street crossings in Houston. (Texas Representatives Noriega and Davis share this concern.) However, even if Mr. Pietruszewski were correct and his proposed vehicle departure rate of 900 vehicles per hour per lane were more accurate, the resulting increase in average delay for vehicles at these grade crossings for the proposed project would still be small—less than a hundredth of a second (0.01) at many of the crossings, and for any of the affected crossings, at most a tenth of a second (0.1). Such a small difference would not affect the EIS's conclusion that this project will not result in significant grade-crossing delays.

[41] Mr. Pietruszewski claims that the train speed used in the analysis of traffic delay at the Harrisburg Boulevard rail crossing is too high and, thus, the EIS underestimated delay. Mr. Pietruszewski bases this claim on the assertion that trains cannot move at 15 mph, as the EIS determined, and that, therefore, grade-crossing delay will be significant. However, the calculations of estimated train speed in the EIS used Federal Railroad Administration (FRA) data on typical train speed on this existing line segment. Because the FRA has primary jurisdiction over railroad safety, it was entirely appropriate for SEA to rely on FRA's train-speed data in its analysis. Further, even if the BNSF trains carrying Bayport Loop traffic (an average of 2 trains per day) were to travel more slowly across Harrisburg Boulevard than the 15 mph used in the Draft EIS analysis, the overall change in average delay per vehicle would be minimal given the current high traffic levels on that track (approximately 25 trains per day). Accordingly, SEA properly determined that the level of service would not change.

account existing delay conditions[42] and the future addition of rail traffic resulting from the Bayport Terminal and the Shoal Point Terminal.[43] Further, he asserts that SEA's safety analysis was based on incomplete information and failed to fully disclose safety impacts.[44]

The material Mr. Pietruszewski presents, however, is not new information, and it does not reveal any material error. *See* notes 37-43 above. Further, as discussed in the Draft EIS at 3-21 and the Final EIS at 4-4, SEA consulted with the Texas Department of Transportation (TxDOT), which has primary jurisdiction over grade crossings in Texas, during preparation of the EIS. Neither TxDOT nor FRA expressed any concerns regarding the approach or conclusions of the EIS, which are entirely reasonable.

Finally, Mr. Flannigan claims that SEA should have analyzed grade-crossing delays according to time of day. But as explained in the Final EIS at 4-75, delay can only be evaluated on a daily basis because it is not possible to predict the arrival times of the two additional trains that will result from this project at any particular grade crossing.

I. *Land Use*. GBCPA/LULAC assert that SEA should have analyzed land use changes surrounding existing rail lines, instead of only the new construction segments. As cogently explained in the EIS, however, some of the existing rail lines that would be used by the proposed route and the other "build" alternatives were constructed more than 100 years ago, and the addition of two trains per day to these existing lines will not alter land use patterns near those lines. *See* Draft EIS at 3-62. Mr. Flannigan claims that the new construction would attract medium and heavy industry to this area. But, as explained in the Final EIS (at 4-112 to 4-117), there is no evidence to suggest that industrial development is reasonably foreseeable in the undeveloped areas along the proposed right-of-way.

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[42] Mr. Pietruszewski argues that the Draft EIS underestimated delay because it did not account for delay due to lengthy blockages of intersections. Contrary to Mr. Pietruszewski's assertion, there is no evidence in the record that stopped trains currently block road intersections on the route analyzed for the "build" alternatives (*see* Final EIS at 4-75). Thus, as described in the Draft EIS at 3-22 and the Final EIS at 4-74, SEA reasonably used FRA data on typical train speed for the delay analysis.

[43] Contrary to Mr. Pietruszewski's claims, the potential cumulative impacts of the two port projects on highway/rail crossing delay are thoroughly discussed in the Draft EIS at 5-5. In asserting that the potential port traffic should have been included in the quantitative delay analysis, Mr. Pietruszewski ignores that the routes used for such traffic may be entirely different than the route BNSF proposes to use for Bayport Loop traffic. In addition, other future changes may reduce traffic on the rail lines that BNSF proposes to use. For example, a Texas A&M University's Texas Transportation Institute study issued in February 2003 notes that BNSF is making infrastructure investments that will reduce traffic on the existing East Belt Subdivision by four trains per day.

[44] Mr. Pietruszewski argues that SEA's safety analysis should have used all available years of grade crossing accident data. This suggestion is flawed, however, because conditions that affect the frequency of highway/rail crossing accidents, such as road surface, traffic volumes, train signaling and control practices, and type of crossing protection (e.g., signals, gates), change over time, so older accident data are an unreliable indicator of current conditions (and the chance of an accident). Accordingly, the Draft EIS analysis properly used 5 years of accident data (*see* the Draft EIS at 3-23), which is consistent with FRA's standard practice.

Contrary to GBCPA/LULAC's assertion, SEA analyzed the cumulative effect of the proposed Bayport Terminal on land use, in the Draft EIS at 5-9, and again in the Final EIS at 4-115 and 4-116. SEA reasonably declined to analyze the cumulative land use impacts of the proposed Shoal Point Terminal because the impacts do not overlap, given its 22-mile distance from the Bayport Loop.

J. *Ellington Field.* Under any of the proposed "build" alternatives, the newly constructed rail line would connect to the existing GH&H line near Ellington Field. The City contends that long, slow-moving trains could simultaneously block all three access roads to Ellington Field. In responding to the same concern in the Final EIS at 4-78 and 4-79, SEA acknowledged that it is physically possible for trains running on the GH&H line to block all three access roads at once, but explained that comments on the Draft EIS presented no evidence that this has ever been a problem. Accordingly, SEA reasonably concluded that the addition of an average of two trains per day to the current average of 3.4 trains per day on the GH&H line (at the anticipated speed of 17.5 mph) would not create new conditions that would likely lead to all three gates being blocked at the same time. Moreover, BNSF and San Jacinto volunteered mitigation, that the Board adopted, which requires BNSF to install power switches at the GH&H turnout under the relevant "build" alternatives, thereby allowing trains to maintain speed and clear these crossings as quickly as possible. The City and Harris County argue that the presence of a rail line through parcels in the southeast portion of Ellington Field would substantially interfere with the development of aviation-related industry. This concern, which only applies to the proposed route,[45] was also thoroughly addressed in the Final EIS at 4-118 to 4-120. After careful study of the Draft Master Plan for Ellington Field and the aviation activity forecasts underlying the Draft Master Plan, SEA determined that development of these Ellington Field parcels for aviation-related industry is not reasonably foreseeable.[46] FAA, one of the cooperating agencies, was closely involved in all aspects of SEA's evaluation of Ellington Field.[47]

The City further claims that the presence of a railroad intended to transport primarily hazardous chemicals near Ellington Field would harm airport security.

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[45] Alternative "1C"—developed by BNSF and San Jacinto at SEA's request because of concerns raised by FAA to avoid impacting Ellington Field's Runway Protection Zone and concerns raised by the City that the proposed route would run between Ellington Field and a 240-acre parcel purchased by the City as buffer land—is entirely outside the Ellington Field fence line.

[46] There is no information in the Draft Master Plan or in any of the City's comments that provide a market analysis or any other analysis to support the City's assertion that aviation-related industry in this area is reasonably foreseeable. Simply designating the parcels as suitable for heavy industry, aviation, or aviation industry uses does not make these uses reasonably foreseeable.

[47] After SEA asked the cooperating agencies for any position they might have on a preferred alternative for the Final EIS, FAA indicated, in a letter dated April 17, 2003, that it recommended against the selection of the proposed route. Given FAA's concerns, both the Final EIS and the *Final Decision* designated Alternative "1C" as the preferred alternative. At the same time, since none of the information referred to in FAA's letter indicated that aviation-related industry is reasonably foreseeable in the portion of Ellington Field that the proposed route would cross—and because none of the "build" alternatives would have potentially significant environmental impacts—all of the "build" alternatives were approved. *See Final Decision*, 6 S.T.B. at 830-31.

But this factual premise is incorrect, as the majority of the expected traffic will be non-hazardous plastic pellets. *See* Draft EIS at 2-9 and Final EIS at 4-57.

Finally, the City raises for the first time the claim that, for airport security, gates would be required for trains entering and leaving airport property on the proposed route, which is the only alignment that would cross any airport property. SEA thoroughly addressed in the Final EIS, at 4-57 to 4-59, every comment on security that it received.[48] As for the City's new concern regarding the proposed route, if the City were to agree to move the airport fence slightly, no gates would be required, as the rail line would cross only the southeast corner of airport property.[49]

K. *Water Treatment Plant.* The Final EIS responded, at 4-56 to 4-59 and 4-122 to 4-123, to the comments of the City and others that the Draft EIS failed to take a "hard look" at impacts on the City's Water Treatment Plant. As the Final EIS explained, Alternatives "2B" and "2D"—the only alternatives that cross water treatment plant property—would have negligible impacts on it. Indeed, as noted in the Final EIS, Exhibits 4 and 5 to the City's comments on the Draft EIS show both existing and planned rail lines and sidings at the Water Treatment Plant, and therefore, the City cannot successfully argue that rail operations are incompatible with it. Moreover, the City has not explained how any potential impacts from Alternatives "2B" or "2D" would differ from those of its own existing and planned rail lines and sidings. For all of these reasons, the EIS reasonably concluded that this project would not threaten the City's water supply or its plans for plant expansion.

L. *Hazardous-Materials Releases from Train Cars*. Finally, Mr. Pietruszewski argues that the calculation in the Draft EIS (at Tables D.3-4, D.3-5, and 4.2-2) of the intervals between expected releases of hazardous materials (hazmat) from rail cars is flawed. Specifically, Mr. Pietruszewski asserts that hazmat releases will occur far more frequently than the EIS predicted. But he has not shown that the values and results in the EIS tables fail to reasonably represent how often both accidents and hazmat releases are expected to occur.[50]

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[48] The Final EIS responded to the City's concerns relating to security issues in general and pertaining specifically to Ellington Field and the City's Water Treatment Plant.

[49] The proposed route runs mostly outside of the Ellington Field fence line, with only two short sections at the edges where the fence would need to be relocated.

[50] As explained in the Draft EIS at D-13, the frequency of hazardous materials release (releases/year) was calculated by multiplying the accident frequency (all derailments/year, with or without hazardous materials) by the chance that a hazardous material release would occur in a derailment. For example, if derailments were estimated to occur once each year, and there were a 20% chance that a hazardous materials release would occur in the event of a derailment, then the hazardous materials release frequency would be 0.2 releases per year (1 x 0.2), or stated another way, a hazardous materials release would be expected once every 5 years. Mr. Pietruszewski's comments appear to result from confusion about this relationship between the accident frequencies and release frequencies shown in Tables D.3-4 and D.3-5 of the Draft EIS.

Mr. Pietruszewski errs in his statement concerning data for actual rail accidents[51] in Houston. He asserts that there were 100 accidents in Houston in 2001. But Mr. Pietruszewski ignores the fact that some accidents generated multiple accident reports, thus reducing the total number of rail accidents to 76. Moreover, none of the 76 accidents in 2001 (or the 61 accidents in 2002) involved hazardous materials releases.

SEA properly focused its analysis on accidents on main lines.[52] The FRA data on main lines showed that there were 11 accidents in Harris County in 2001, and only five in 2002,[53] and these statistics closely approximate the accident frequencies predicted in the Draft EIS. Thus, the conclusions in the EIS were reasonable.

Conclusion

In sum, the purported shortcomings in the EIS and the *Final Decision* do not exist. The Board here conducted a comprehensive analysis of all aspects of this rail construction project and reasonably concluded that neither the construction nor the operation of any of the "build" alternatives would result in potentially significant environmental impacts. Petitioners have not shown that the Board failed to consider any of the relevant issues, or that the methodologies in the EIS were unreasonable. Because the Board acted well within its discretion, the petitions for stay and for administrative reconsideration of the *Final Decision* are denied.

It is ordered:

1. The petitions for stay pending judicial review are denied.
2. The petitions for administrative reconsideration are denied.
3. The petition of Harris County to intervene is granted.
4. The motion of the City to reply to the reply of BNSF is denied.
5. This decision is effective on the service date.

By the Board, Chairman Nober.

[51] Texas Representatives Noriega and Davis also raise this issue.

[52] As explained in the Draft EIS at 4-12, safety statistics and operational information were not available for the relevant rail yards, so it was not possible for SEA to estimate the degree of reduction or increase in the likelihood of a hazardous materials release at those facilities. However, any change in the potential for a release should be small, given the relatively large volumes of hazardous materials already handled in those yards and the small amount of hazardous materials transportation associated with this proposal.

[53] Again, none of these accidents involved hazardous materials releases.