Appendix B

SGR's Petition for Exemption, Related Filings, and Board's Decision

Contents

SGR's Petition for Exemption B-1
Board's May 19, 2003 Decision B-14
MCEAA's Petition to Revoke B-18
SGR's Reply to Petition to Revoke B-22
Board's August 21, 2003 Decision B-47
Notice of Intent to Become a Party in Proceeding B-53
Letter for Placement in the Record B-55
SGR's Reply to MCEAA's Filing B-72

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SURFACE
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February 27, 2003

207315

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, DC 20423-0001

Re: Finance Docket No. 34284, Southwest Gulf Railroad Company -- Petition for an Exemption from 49 U.S.C. § 10901 to Construct and Operate a Rail Line in Medina County, Texas

Dear Secretary Williams:

Enclosed for filing please find an original and ten copies of a verified petition of Southwest Gulf Railroad Company for exemption filed in the above docket. A check in payment of the $55,000.00 filing fee is also enclosed.

Sincerely,

David H. Coburn
Attorney for Southwest Gulf Railroad Company

DHC:dyj
Enclosures

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BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34284

SOUTHWEST GULF RAILROAD COMPANY --
PETITION FOR AN EXEMPTION FROM 49 U.S.C. § 10901
TO CONSTRUCT AND OPERATE A RAIL LINE
IN MEDINA COUNTY, TEXAS

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VERIFIED PETITION OF
SOUTHWEST GULF RAILROAD COMPANY
FOR EXEMPTION

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February 27, 2003

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BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34284

SOUTHWEST GULF RAILROAD COMPANY – PETITION FOR AN EXEMPTION FROM 49 U.S.C. § 10901 TO CONSTRUCT AND OPERATE A RAIL LINE IN MEDINA COUNTY, TEXAS

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VERIFIED PETITION OF SOUTHWEST GULF RAILROAD COMPANY FOR EXEMPTION

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INTRODUCTION

Southwest Gulf Railroad Company (SGR), a Texas corporation headquartered in San Antonio, Texas, seeks an exemption to construct and operate an approximately seven mile long rail line in Medina County, Texas. SGR is a new railroad company and does not at present own or operate any other rail lines.

I. FACTS[1]

SGR is affiliated through common ownership with Vulcan Materials Company, a Birmingham, AL-based corporation and one of the nation's largest producers of aggregate, composed primarily of crushed stone, sand and gravel used for highway and other construction

[1] This Petition has been verified by Thomas Ransdell, SGR's President.

purposes.[2] One of Vulcan Material Company's subsidiary companies, Vulcan Construction Materials, LP (jointly, "Vulcan") is working toward the development of a quarry, at which stone would be mined, in a relatively undeveloped area of Medina County, Texas. Medina County is located just west of Bexar County, where San Antonio is located. Despite its proximity to San Antonio, Medina County is a rural area with a population of about 33,000 persons. The quarry would be located in the north central part of the County, on a site that will be in excess of 1,700 acres. The site was chosen on the basis of its geologic character, which will allow the efficient access to the type of rock that is uniquely suited to the development of an aggregate quarry.

While there is some local market in the San Antonio area for the aggregate that would be produced at the planned Medina quarry, the primary market for that aggregate is in the eastern part of Texas, including the Greater Houston area. To get the Medina County aggregate to market most efficiently, Vulcan intends to rely on rail transportation from the quarry to the market destinations, just as Vulcan does at other quarry sites that it has developed in Texas and several other states. In that regard, Vulcan has determined that rail transportation is not only more efficient, but also a more cost effective and more environmentally friendly means of transporting significant volumes of crushed stone between quarry and market.

To serve the needs of Vulcan, and of any other shippers that may locate on or near its planned line, SGR proposes to construct, and operate, a single-track rail line between the planned quarry site and the nearest Class I railroad line, which is the Del Rio Subdivision of Union Pacific Railroad Company ("UP"). That UP line is located approximately seven miles south of

[2] Vulcan, an S&P 500 company, is also a major chemical manufacturer, but that aspect of its business is not pertinent to the SGR project. In 2001, Vulcan's net sales exceeded $2.7 billion. Additional information about Vulcan is available at its website, vulcanmaterials.com.

the quarry site. The SGR line would meet the UP line at approximately milepost 250 of the UP line, at a point near Dunlay, TX. See Exhibit I, which depicts the approximate proposed alignment of the SGR line.[3]

SGR anticipates that its annual revenues will qualify it as a Class III rail carrier. SGR may enter into an agreement with an existing rail carrier to operate the line for SGR. However, no such agreement has been negotiated to date and SGR does not anticipate reaching any decision on whether it will enter any such agreement until after this Petition has been acted on by the Board. SGR has met with UP concerning its plans, and UP is fully aware of the project. Financing for the construction of the rail line will be provided by Vulcan.

SGR intends to hold itself out as a common carrier, and thus intends to offer its services to transport freight for any other shipper that may locate in the area in the future. In that regard, SGR believes that the area in which it proposes to construct its line, while largely undeveloped at the current time, should prove to be attractive for future economic development by other businesses which may locate in the area. Among its other attractions (in addition to rail access) are relatively low property values, availability of open area for development and proximity both to a major market in the next county (Bexar, which includes San Antonio) and to Mexico, which is only approximately 150 miles away and the source of increasing trade. Further, the area is also not far from major interstate highways.

Prior to forming SGR, Vulcan retained a professional rail engineering firm, Trax Engineering and Associates, Inc., to perform an initial engineering study of the feasibility of its

[3] The precise alignment will be fashioned based on environmental reviews and final engineering work.

rail proposal. On the basis of that work, Vulcan and SGR have developed and refined the plans to construct the line at issue here. The proposed line would not traverse any incorporated or densely populated areas and will not cross any other rail lines. Further, the proposed line has been planned so that it will not cross any major highways, but rather only some lightly traveled paved and unpaved roads.[4] The area is composed primarily of relatively dry and flat farmland and pastureland. No federal lands will be traversed and, apart from the road crossings, no state-owned property will be traversed. SGR has communicated with the Board's Section of Environmental Analysis ("SEA") about its project, as discussed further below.

II. ARGUMENT

A. The Board Has Jurisdiction Over the Construction of the SGR line

The Board has jurisdiction over the construction and operation of the SGR line. Specifically, "the Board has jurisdiction over transportation by rail carrier... ." 49 U.S.C. § 10501(a)(1). Pursuant to the Interstate Commerce Act, as amended by the Interstate Commerce Commission Termination Act of 1995, "rail carrier" is defined as a "person providing common carrier railroad transportation for compensation... ." 49 U.S.C. § 10102(5); *see also Paducah & Louisville Ry., Inc. -- Control Exemption -- Paducah & Illinois R.R. Co.*, STB Finance Docket No. 33362, 1997 STB LEXIS 204, at *5 n.7 (served Aug. 25, 1997)("Under 49 U.S.C. 10102(5), a rail carrier is defined as a person providing common carrier railroad transportation for compensation."). The proposed build-out from the planned limestone quarry to the UP will be a common carrier line. While Vulcan will initially be the only shipper served by the line, SGR

[4] Specifically, the line is expected to cross one paved state farm-to-market road; one paved county road and three unpaved county roads. Each of these roads has a very low traffic density.

will hold itself out as a common carrier to serve other shippers who may wish to transport freight over the line. The Board has previously found that it has jurisdiction over similar, initial one shipper rail projects. *E.g., Midwest Generation LLC - Exemption From 49 USC 10901 - For Construction in Will County, IL*, STB Finance Docket No. 34060, slip op. at 6 (served Mar. 21, 2002) ("The proposed line would be 'available to provide common carriage to other shippers who could be served by the proposed project.' The proposed build-out would be a common carrier line of railroad, subject to the Board's licensing authority pursuant to 49 U.S.C. 10901... .") (footnote omitted); *Public Serv. Co. of Colorado--Construction Exemption--Pueblo County, CO*, STB Finance Docket No. 33862, 2000 STB LEXIS 483 (served Aug. 23, 2000) (finding Board jurisdiction over rail line that would serve a single power plant initially and noting that line would be available for future shippers that might locate on it); *Effingham R.R. Co.--Petition for Declaratory Order--Construction at Effingham, IL*, STB Docket No. 41986, 1998 STB LEXIS 253, at *9 (STB served Sept. 18, 1998) ("because it was ERRC's initial railroad operation, this track segment became ERRC's entire line of railroad and was not, as to ERRC, a siding or spur.") (emphasis in original).

B. The Board Should Exempt this Transaction from the Prior Approval Requirements of 49 U.S.C. 10901

In order to construct and operate a rail line, a railroad must obtain prior approval from the Board under Section 10901.[5] Section 10901 provides that a rail carrier may construct and operate a railroad line if the Board issues a certificate approving such construction. While SGR's proposed construction and operation of the new line would be otherwise subject to

[5] 49 U.S.C. § 10901(a)(2); (3).

approval under Section 10901,[6] the Board should exempt the proposal under the exemption procedures established at 49 U.S.C. § 10502, as it has similar rail construction projects. Under Section 10502, the Board *shall* exempt construction projects from the more time consuming prior approval procedures of section 10901 and 49 C.F.R. Part 1150 when it finds that (1) regulation is "not necessary to carry out the transportation policy of section 10101" and (2) the transaction or service is of limited scope or regulation is not necessary to protect shippers from the abusive use of market power. 49 U.S.C. § 10502(a); *see also Simmons v. ICC*, 760 F.2d 126, 132 (7th Cir. 1985)(Posner, J.) ("Congress wanted the exemption power to be wielded boldly... .").

1. Regulation of SGR's Construction and Operation Proposal is Not Necessary to Carry out the Rail Transportation Policy at 49 USC 10101

The Board does not need to apply Section 10901 to the construction of the SGR line in order to carry out the federal rail transportation policy of Section 10101. In fact, exempting this transaction from regulation will further the goals of federal transportation policy as it will "ensure effective competition...between rail carriers and other modes", "reduce regulatory barriers to entry into...the industry", and "provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part." 49 U.S.C. § 10101(5),(7) and (15). The Board has found that exempting a transaction with very similar facts to the SGR proposal promoted federal rail transportation policy. *Alamo North Texas R.R. Corp.-Construction and Operation Exemption-Wise County, TX*, STB Finance Docket No. 34002, slip op. at 2 (served Nov. 16, 2001) (finding that exempting a proposal to build a 2.25 mile line of

[6] The standard for approving a construction/operating application under 10901 is quite lenient. Applications "shall" be approved "unless the Board finds that such activities are inconsistent with the public convenience and necessity." 49 U.S.C. § 10901(c).

railroad from a limestone quarry to an interchange with the UP furthered the rail transportation policy of Section 10101).

2. Regulation of SGR's Construction and Operation Proposal under Section 10901 is Not Necessary as the Proposed Line is of Limited Scope

Regulation under Section 10901 is unnecessary as the proposed transaction is limited in scope. The line that SGR is proposing to construct and operate is only about seven miles long and is located in a sparsely populated rural area consisting of primarily pastureland and farmland. It is well-established precedent that rail construction projects of similar or even greater length are considered to be limited in scope. *See, e.g., WFEC R.R. Co. -- Construction and Operation Exemption -- Choctaw and McCurtain Counties, OK*, Finance Docket No. 32607, 1995 ICC LEXIS 34, at *4 (served Feb. 27, 1995) (14 miles); *The Elk River R.R., Inc. -- Construction and Operation Exemption -- Clay and Kanawha Counties, WV*, Finance Docket No. 31989, 1992 ICC LEXIS 105, at *5 (served May 28, 1992) (30 miles); *Southern Elec. Generating Co. -- Petition For Exemption -- Construction of a Rail Line in Shelby County, AL*, Finance Docket No. 31498, 1989 ICC LEXIS 259, at *4 (decided Sept. 12, 1989) (7.5 miles); *Louisville & Jefferson County Riverport Auth. and CSX Transp., Inc. -- Construction and Operation Exemption -- in Jefferson City, KY*, Finance Docket No. 31136, 1987 ICC LEXIS 20 (decided Dec. 16, 1987) (6.7 miles).

3. Regulation of SGR's Construction and Operation Proposal under Section 10901 is Not Necessary to Protect Shippers from an Abuse of Market Power

Moreover, even if the Board were to find that the proposal was not limited in scope, the transaction should still be exempted as regulation is not necessary to protect shippers from an abuse of market power. In fact, the proposed construction will enhance competition in the area

by giving shippers, including Vulcan, which would otherwise be served only by trucks, a rail transportation option. The Board and the Interstate Commerce Commission have found no threat of market power abuse in similar transactions in the past. *Alamo North Texas R.R. Corp.-Construction and Operation Exemption-Wise County, TX*, STB Finance Docket No. 34002, slip op. at 2 (served Nov. 16, 2001) (finding no threat of market power abuse in the case of a proposed rail line running from a limestone quarry to the UP); *Southern Gulf Ry. Co. -- Construction Exemption -- In Calcasieu Parish, LA*, Finance Docket No. 32321, 1993 ICC LEXIS 171, at *4 (served Sept. 9, 1993) (no threat of market power abuse where a coal shipper proposed to build a 4 mile rail line from a generating station to the main line of the Southern Pacific Transportation Company).

C. Environmental Requirements Will be Satisfied

The Board's environmental review process has already been triggered by SGR. At SGR's request, SEA has agreed to the appointment, pursuant to the Board's rules at 49 CFR Part 1105, of a third party contractor to work with SEA to undertake all appropriate environmental reviews and assist in SEA's preparation of required documents under the National Environmental Policy Act.

CONCLUSION

For the aforementioned reasons, SGR respectfully requests that the Board issue an order exempting the proposed construction and operation of a rail line from the prior approval requirements of 49 U.S.C. § 10901. Further, should the Board decide to grant this Petition, SGR requests that the Board do so on a conditional basis, subject only to the completion of any environmental review that is ongoing at the time of such Board action. Such conditional

approval will facilitate SGR's ability to move forward with various engineering and other plans relating to the rail line. As it has in other, similar proceedings, the Board could then issue a final decision on this Petition once the environmental process is completed, and make that decision effective as of the date of its issuance.[7]

Respectfully submitted,

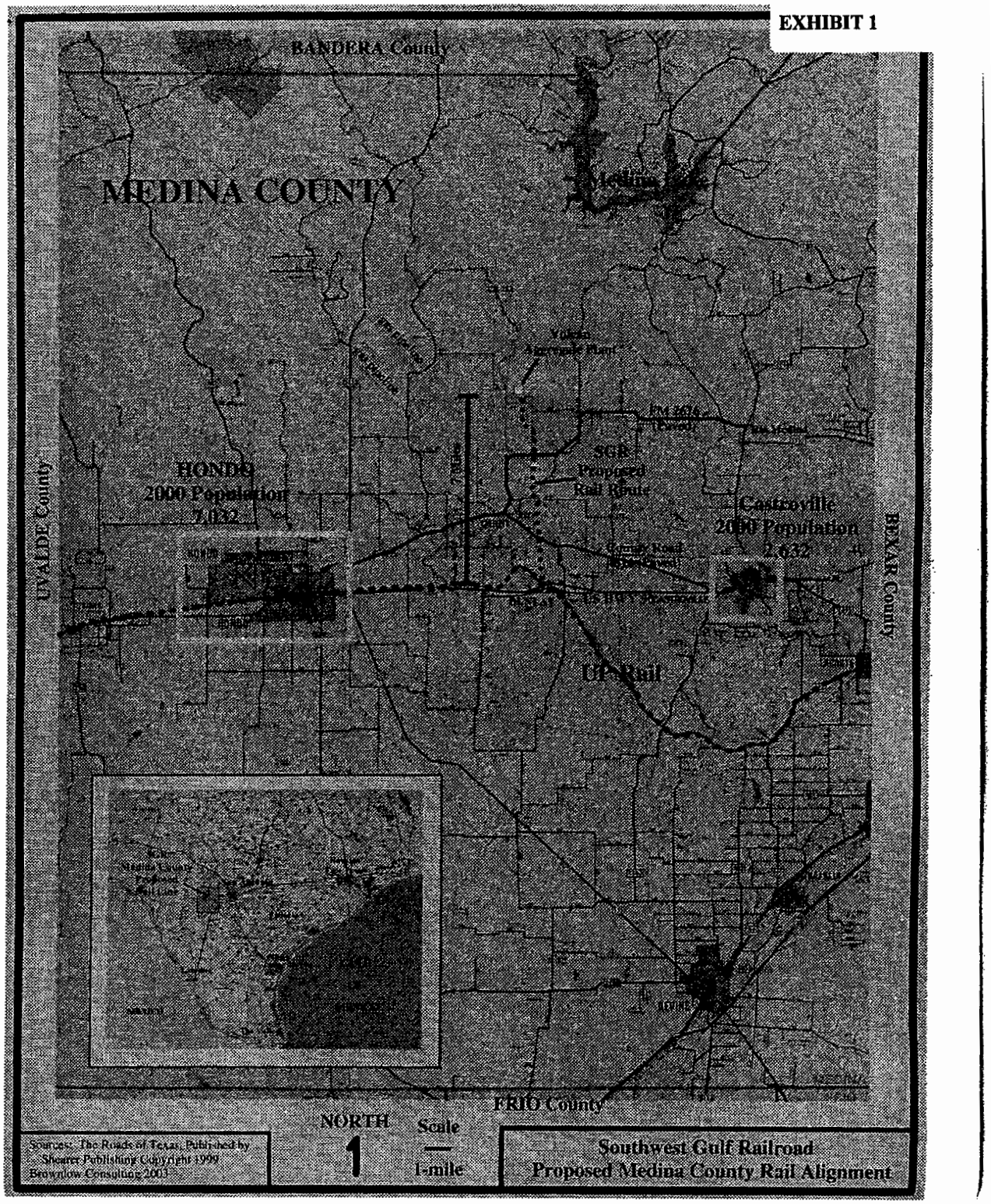
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Attorneys for Southwest Gulf
Railroad Company

February 27, 2003

[7] *See, e.g., Missouri Mining, Inc. v. ICC*, 33 F.3d 980 (8th Cir. 1994); *Illinois Commerce Com'n v. ICC*, 848 F.2d 1246, 1259 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1004 (1989); *Alamo North Texas R.R. Corp.-Construction and Operation Exemption-Wise County, TX*, STB Finance Docket No. 34002, slip op. at 3 (served Nov. 16, 2001).

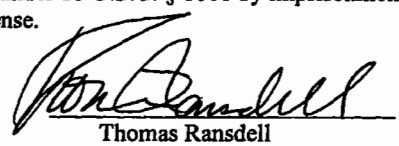
EXHIBIT 1



0012

VERIFICATION

I, Thomas Ransdell, President of Southwest Gulf Railroad Company, hereby verify under penalty of perjury that all of the facts set forth in the attached Petition for Exemption are true and correct to the best of my knowledge. I know that willful misstatements or omissions of material facts constitute Federal criminal violations punishable under 18 U.S.C. § 1001 by imprisonment up to five years and fines up tom $10,000 for each offense.



Thomas Ransdell

February 24, 2003

0013

33424
EB

SERVICE DATE - MAY 19, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34284

SOUTHWEST GULF RAILROAD COMPANY–CONSTRUCTION AND OPERATION EXEMPTION–MEDINA COUNTY, TX

Decided: May 9, 2003

By petition filed on February 27, 2003, Southwest Gulf Railroad Company (SGR) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for authority to construct and operate an approximately 7-mile line of railroad in Medina County, TX. The proposed line will extend from Vulcan Construction Materials, LP's (Vulcan Construction)[1] proposed quarry in the north central part of the county to a connection with the Del Rio Subdivision of Union Pacific Railroad Company (UP) at approximately milepost 250 near Dunlay. The primary purpose of the proposed construction is to provide rail service to the quarry site; however, the line would be available to serve other industries that might locate in the area in the future. SGR requests that we conditionally grant the exemption, subject to our completion of the required environmental review. We will grant a conditional exemption and issue a final decision after completion of the environmental review process.

BACKGROUND

SGR is a new company that does not own or operate any rail lines, but intends to hold itself out as a common carrier and anticipates that its annual revenue will qualify it as a Class III rail carrier.[2] SGR states that it may at some point enter into an agreement to allow an existing rail carrier to operate the line.

Vulcan Materials, through Vulcan Construction (collectively, Vulcan), is working towards the development of a stone quarry in Medina County, which is just west of Bexar

[1] Vulcan Construction is a subsidiary of Vulcan Materials Company (Vulcan Materials), which is affiliated through common ownership with SGR. Vulcan Materials is a producer of aggregate, composed primarily of crushed stone, sand and gravel.

[2] SGR believes that the area around the proposed line will be attractive for future economic development by other businesses because, in addition to a rail line, the property values are relatively low, there is open area available for development, it is close to a major market (San Antonio) and to Mexico, and is near major interstate highways.

County where San Antonio is located. According to SGR, the site for the quarry is in excess of 1,700 acres.

SGR maintains that there is a local market in the San Antonio area for the aggregate that the planned quarry would produce, but the primary market would be the eastern part of Texas, including the Houston area. SGR asserts that to get the aggregate to that market most efficiently, Vulcan intends to rely on rail transportation from the quarry.[3]

To serve the needs of Vulcan and any other shipper that may locate on or near the proposed line, SGR plans to construct and operate a single-track rail line between the planned quarry site and UP's line. The proposed line would cross relatively dry and flat farmland and pastureland and would not traverse any incorporated or densely populated areas or cross any other rail lines. The line is expected to cross one paved state farm-to-market road, one paved county road and three unpaved county roads. However, the precise location of the line will be based on environmental reviews and final engineering work.[4] SGR asserts that it has met with and made UP fully aware of the planned rail line.

DISCUSSION AND CONCLUSIONS

The construction and operation of railroad lines require prior Board approval under 49 U.S.C. 10901. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Based on the information provided, we conclude that detailed scrutiny of the proposed construction and operation under 49 U.S.C. 10901 is not necessary to carry out the rail transportation policy. The requested exemption will promote that policy by providing a rail service option to Vulcan and, thereby, ensuring the development of a sound rail transportation system with effective competition among rail carriers and other modes [49 U.S.C. 10101(4)]; fostering sound economic conditions in transportation [49 U.S.C. 10101(5)]; reducing regulatory barriers to entry [49 U.S.C. 10101(7)]; and providing for the expeditious handling and resolution of this proceeding [49 U.S.C. 10101(15)]. Unless determined otherwise following the environmental analysis, nothing on the record indicates that other aspects of the rail transportation policy will be adversely affected.

---

[3] Vulcan relies on rail transportation at other quarry sites it has developed in Texas and other states.

[4] The proposed line will not traverse federal lands and, with the exception of the road crossings, no state-owned property will be traversed.

Regulation of the transaction is not necessary to protect shippers from the abuse of market power. Rather, the proposed transaction will enhance competition by providing Vulcan with a rail transportation option to go along with existing motor carrier options. Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope.

SGR has requested[5] that, consistent with our usual practice in rail construction cases, we issue a preliminary decision addressing the transportation-related issues prior to completion of our environmental review, which we are doing here.[6] According to SGR, this action will facilitate SGR's ability to move forward with various engineering and other plans relating to the rail line. But we cannot, of course, authorize the construction until we have completed our environmental review. Therefore, this exemption will not be effective, and no construction can begin, until our environmental review process is concluded.

After the environmental review process has been completed, we will issue a further decision addressing the environmental issues, and making the exemption effective at that time if appropriate, subject to mitigation conditions if necessary. See Missouri Mining, Inc. v. ICC, 33 F.3d 980 (8th Cir. 1994). This decision does not in any way prejudge our ultimate decision, and will not diminish our capacity to address environmental matters in rendering a final decision. Illinois Commerce Comm'n v. ICC, 848 F.2d 1246, 1259 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989). Construction may not begin until our final decision in this proceeding has been issued and becomes effective.

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

It is ordered:

1. Under 49 U.S.C. 10502, we conditionally exempt SGR's construction and operation of the above-described line from the prior approval requirements of 49 U.S.C. 10901, subject to our further consideration of the anticipated environmental impacts of the proposal.

2. On completion of the environmental review, we will issue a further decision addressing those matters and making the exemption effective at that time, if appropriate, subject to any necessary conditions, thereby allowing construction to begin.

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[5] SGR Petition at 8-9.

[6] See Great Salt Lake and Southern Railroad, L.L.C. – Construction and Operation – In Tooele County, UT, STB Finance Docket No. 33824 (STB served Dec. 15, 2000).

3. Notice will be published in the Federal Register on May 19, 2003.

4. Petitions to reopen must be filed by June 9, 2003.

5. This decision is effective 30 days from the date of service of this decision.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams
Secretary

207872



May 20, 2003

To the Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street N.W. Room 711
Washington, D.C. 20423-0001

Dear Secretary Williams:

Enclosed is a Petition to Revoke STB Finance Docket No. 34284 and the supporting documents for consideration.

Sincerely,

FILED

MAY 23 2003

Robert T. Fitzgerald

Dr. Robert T. Fitzgerald

Encl.

FILING FEE WAIVED

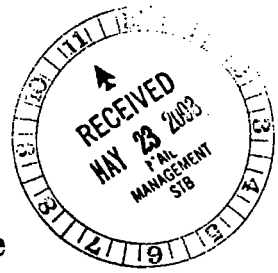
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Part of
Public Record

May 20, 2003

Re: STB Finance Docket No. 34284
Southwest Gulf Railroad Company



Petition to Revoke

This petition is filed by the Medina County Environmental Action Association. We are asking the Surface Transportation Board to revoke the conditional authority granted to Southwest Gulf Railroad Company (SWGR) to construct a rail line on the grounds that (1) proper notice was not given to the public in accordance with 49 CFR 1150.10, and (2) there is no current need for a rail line because there is no quarry.

1. No local public notification concerning the petition for exemption on Finance Docket No.34284 was given. Inquiries made to the three major Medina County newspapers, The Hondo Anvil Herald, the Medina Valley Times, and the Devine News, the only radio station in Medina County which is local radio station KCWM, and the Hondo City Public Library showed that there were no public notices posted. Therefore, the public had no opportunity to request denial of the petition for exemption filed on February 27, 2003, Finance Docket No. 34284.

2. Although SWGR says the purpose of the proposed line is to serve a quarry, there is no quarry. Therefore, the railroad line is not required. By checking county records of deeds recorded for land transfers and ownership of land, neither Vulcan Materials nor any of its subsidiaries has acquired the land for the proposed quarry. Further evidence that there is no quarry is that the required permits for the proposed quarry have not been obtained from other agencies:

   a. No permit has been issued by the U.S. Fish and Wildlife Service. According to their letter of March 20, 2002, outlining the requirements of the bird protocol study, this study would be conducted for a minimum of 3 years. (Copy enclosed) 1/ Therefore no permit by U. S Fish & Wildlife Service can be issued, if they ever do, until these three years studies have been completed, prior to March 2005.

   b. None of the required permits for a rock crusher have been issued by the Texas Commission on Environmental Quality, as per our frequent inquiries by mail and telephone to this agency. As of this date, we have received no notification of application for the required permits.

   Additionally, neither Southwest Gulf Railroad, nor its parent company Vulcan Materials, Inc., nor MedTex Lands, Inc. has acquired the land for any of the proposed routes for the line. One hundred and six landowners in this area have drawn up, signed, and recorded in the county records three restrictive covenants on their deeds covering over 9,500 acres. These restrictive covenants state that no railroad or other type of conveyor system can be placed upon their property. The landowners will not sell voluntarily. Parts of the needed property for all of the proposed lines are in these covenanted acreages.

3. The petition is misleading in that it understates the population of Medina County by approximately 22%. The population of Medina County is 40,000 instead of 33,000 persons, and is projected to grow to 44,000 in the next 12 to 18 months. Most of this growth is occurring in the eastern half of the county, consisting primarily of bedroom communities for the city of San Antonio. These communities would be adversely affected by the railroad line. See No. 5 below.

4. We strongly disagree that this proposed line would ever be used as a common carrier because the line routes as proposed would traverse as many as three floodplains, according to FEMA maps.

Currently, there are not any other prospective shippers on or near these proposed routes, and future shippers locating on or near these routes, which as proposed would be in these floodplains, is highly unlikely. Flooding occurs frequently, and severe flooding requiring FEMA assistance has occurred on all the proposed routes three times during the past seven years. Therefore the likelihood of shippers other than Vulcan Materials, Inc., locating here is extremely remote. Thus, the product from the proposed quarry is the only freight that would be shipped on this line.

5. We also object to the statement that the four county roads crossed by the proposed grade level crossings are 'lightly traveled'. (See copy of Synopsis of the Southwest Gulf Railroad Company Rail Project in Medina County Texas, submitted to the STB titled "Description of SGR's Preferred Route"). 2/ Two of these roads are actually the main arteries that connect the area to San Antonio and Castroville. Without grade level separations, severe traffic problems for commuters and school buses, delays for fire emergency medical services and police protection, would be caused by the one-mile-long trains crossing these roads four times daily, 250 days per year, as described in Southwest Gulf memorandum to SEA dated February 27, 2003, Part III, No.2,4,5,8.(Copy enclosed). 3/ Also see County Judge Jim Barden's letter supporting our concerns to URS Corporation dated April 24, 2003. (Copy enclosed) 4/

6. We believe that the railroad line would present hazards to public health and safety and will endanger over two dozen historic sites by flooding and vibration. These structures are located in the floodplain in close proximity to all the proposed routes.

7. Concerning the necessity for shipping the proposed quarry's product as it pertains to regional necessity, consultation with Martin Murietta reveals that, although the demand for limestone varies from time to time, the Houston and Gulf Coast area is already being serviced efficiently by Vulcan Materials and other companies by shipments by rail. In addition, the above areas are already being supplied by Vulcan Materials by its Yucatan plant by vessel. Additionally, Alamo North Railroad Company is authorized by STB Docket No. 34002 to build a railroad line in Wise County Texas. This authorization was granted in part to service the Houston area. According to a spokesperson at Martin Murietta, this rail line has not been built. Should the need arise, this Wise County line could be constructed and utilized. It costs taxpayers money to have STB authorize railroad lines that are not needed.

CONCLUSION

For these reasons, citizens of Medina County, represented in part by the Medina County Environmental Action Association, respectfully request the Surface Transportation Board to revoke the petition filed on STB Finance Docket No.34284. There is no need for the railroad since there is no quarry.

Respectfully,

Robert T. Fitzgerald

Dr. Robert T. Fitzgerald, President
Medina County Environmental Action Association
202 CR 450
Hondo, TX 78861

I affirm the above statements are true, to the best of my knowledge, information, and beliefs.

Robert T. Fitzgerald
Dr. Robert T. Fitzgerald

May 20, 2003
Date

I swear that on this the 20 day of May, 2003, I mailed a copy to David H. Coburn, Scott Mirelson,
Steptoe & Johnson, LLP
1330 Connecticut Ave.,
Washington, D.C. 20036
Attorneys for Southwest Gulf
Railroad Company

Robert T. Fitzgerald
Dr. Robert T. Fitzgerald

Encl.

United States Department of the Interior

FISH AND WILDLIFE SERVICE
10711 Burnet Road, Suite 200
Austin, Texas 78758
(512) 490-0057

March 20, 2002

Dr. William J. Rogers
West Texas A&M University
Department of Life, Earth, and Environmental Sciences
WTAMU Box 60808
Canyon, Texas 79016-0001

Consultation #2-15-00-I-0658

Dear Dr. Rogers:

This is a response to the January 3, 2002 letter from Tom Ransdell of Vulcan Materials Company (Vulcan) providing the U.S. Fish and Wildlife Service (Service) with a copy of the Biological Assessment, "Phase I, Medina County Project, Medina County, Texas, December 2001." Mr. Ransdell requested that we direct our response correspondence to you at your university address. The Biological Assessment was completed to voluntarily assess potential effects to threatened and endangered species from a proposed limestone quarry located approximately 5 miles north of Quihi, Medina County, Texas.

Vulcan has purchased or leased 3 large tracts totaling approximately 1760 acres for the proposed quarry, plus a fourth smaller tract for the Plant Maintenance Facility and Fuel Storage Area associated with the quarry. An additional easement may be required for the construction of a rail line to transport limestone spoils from the quarry to an existing rail line approximately 6.7 miles to the south of the proposed quarry site. The quarry is expected to have at least a 50-year life span, with quarry operations progressing within the 1760 acres generally from the south to the north over time. Not all of the 1760 acres will be quarried, depending upon the locations of stream corridors, endangered species habitat, and appropriate geology for quarry operations.

The Service's interest in the proposed quarry project began in the spring of 2000 when we were contacted by neighbors of the proposed quarry site who were opposed to the project and were concerned that the project may impact endangered species or other sensitive natural resources. In response to the proposed quarry's neighbors' concerns, we sent a letter dated June 15, 2000 to Tom Ragsdell of Vulcan to inform him of the potential for the proposed quarry to impact Federally listed and proposed threatened and endangered species and designated wetlands. However, according to the December 2001 Biological Assessment provided by Mr. Ragsdell, Vulcan had assembled a team of environmental experts in April 1999, over a year before our June 15, 2000 letter, to assess the geological, biological, and historical resources of the proposed quarry site. The team's responsibilities included determining the potential environmental impacts from proposed quarry operations, developing avoidance and mitigation plans for

sensitive resources, proposing wildlife habitat improvements on non-quarried sections of the site, and assessing the economic feasibility of a quarry at the site, given the environmental and historical resources present.

On April 16, 2001, Mary Orms and Ray Brown of the Austin Service office visited the proposed quarry site with you and project geologist Dr. Darrell T. Brownlow to discuss the potential for the project to impact protected resources, the endangered species surveys you had planned and/or conducted, and the procedural hurdles that needed to be addressed under the Endangered Species Act. We discussed the potential for the endangered golden-cheeked warbler to occur on the property, the protection of some potential warbler habitat in riparian corridors, and the protection of additional habitat areas as on-site mitigation depending upon the eventual quarry plan and the results of bird surveys on the property. On March 21, 2002, Dr. Brownlow met with Dawn Whitehead, Supervisory Fish and Wildlife Biologist for the Austin Service office, to discuss the proposed quarry and to ensure that senior Service staff members were fully informed of the project and concurred with the minimization and mitigation measures that Vulcan has proposed to protect sensitive resources in the area.

You, Dr. Brownlow, and Service staff have discussed your plans for conducting bird surveys on the property that would provide adequate information to ensure protection of the golden-cheeked warblers and black-capped vireos that may currently, or may at some point in the future, occupy portions of the over 1700 acres that have been leased or purchased for the project. Normally, the Service requires a minimum of three years of Service-approved bird surveys to determine the absence of golden-cheeked warblers and black-capped vireos from potential habitat areas before we will concur that a development project will not adversely affect the species. Bird survey results are typically considered to be valid for up to three years, after which new surveys would have to be conducted to show absence of the endangered birds from an area of potential habitat.

The Service must consider the impacts of development projects, such as the proposed quarry, in their entirety, and cannot consider the potential impacts of particular phases or segments of a project without taking into consideration the other project phases or project segments. Typically the Service requires that adequate assessments for endangered species be conducted for all phases or segments for a particular project up front, before any habitat destruction or "take" of endangered species is authorized on any part of the project. However, given the long life span of the project and incremental nature of potential impacts associated with the proposed quarry project, it would not be prudent for the Service to require surveys over the entire quarry property at this time. Some portions of the quarry property may not be impacted by quarry operations for 10, 20, 30, or 40 years into the future. Surveys conducted by Vulcan would expire 3 years after completion, so Vulcan would have to conduct additional surveys at additional expense in the future for those areas not impacted within three years of the initial surveys. If the Service were to require that Vulcan conduct three years of presence/absence bird surveys over its entire property up front, Vulcan may be inclined to immediately bulldoze all areas where no endangered species were recorded, and to maintain those areas in a barren condition to avoid having to conduct additional surveys on those areas in the future. Of course, that would not be in the best interest of the wildlife in the area. This outcome would definitely not be desirable to the Service, as we

would prefer to see the site provide habitat for the area's native flora and fauna for as long as possible. This outcome would not be desirable for Vulcan either, since Vulcan is endeavoring to develop this project in a responsible, environmentally friendly manner. Furthermore, the vegetation on the site in 40 or 50 years may differ drastically from the current condition, and therefore any surveys conducted in the next few years may provide little or no information on the wildlife communities and threatened or endangered species that will occur on the site just prior to vegetation clearing and quarrying activities at later phases of the project.

Therefore, we concur with Vulcan's environmental team's recommendation to conduct the endangered bird surveys on the property in a somewhat unconventional manner. Vulcan intends to (1) periodically conduct broad-scale low-intensity surveys over the entire 1700+ acre site throughout the life of the project to get a general idea of the distribution of endangered species across the site, and (2) conduct Service-approved high-intensity annual presence/absence surveys beginning a minimum of three years prior to vegetation disturbing activities for each phase of the project. Current survey protocols call for three years of surveys for golden-cheeked warblers and black-capped vireos to prove absence of these birds from areas of potential habitat, so Vulcan's environmental team should plan to initiate Service-approved annual bird surveys in areas of potential habitat at least three years prior to clearing of habitat for each phase of the proposed project. Vulcan's environmental team will have to communicate effectively throughout the life of the project with Vulcan's quarry operators and planning teams to ensure that the appropriate surveys are initiated at least three years prior to vegetation clearing for each phase of the project. We have enclosed our latest survey protocols for your use this survey season.

The broad-scale, low intensity surveys that will be conducted across the property throughout the life of the project are an important part of the project for several reasons: (1) these surveys will help Vulcan's environmental team monitor the populations and locations of endangered birds on the property (if any) to help Vulcan avoid any major surprises from arising in the future during the high-intensity Service-approved bird surveys; (2) these low-intensity surveys will help Vulcan plan for any on-site or off-site mitigation of endangered species habitat that may be deemed necessary to compensate for any destruction of endangered species habitat associated with quarry operations; (3) the low-intensity surveys will help to provide the Service with reassurance that Vulcan's environmental team is aware of the natural resources on the entire site and that no areas of potential endangered species habitat will be cleared or disturbed without proper surveys and adequate mitigation.

We appreciate Vulcan's desire to develop the proposed Medina County quarry as a showcase project to demonstrate the compatibility of quarry operations and environmental and endangered species habitat protection. We are pleased with Vulcan's willingness to cooperate with us and maintain open lines of communication for the Medina County project. Your proactive approach to addressing the potential impacts from your project, i.e. early awareness of sensitive resource locations during the project design phases, avoidance of those areas where possible, and planned mitigation for those sensitive resources that may be disturbed or destroyed by the proposed project, is the preferred method of minimizing impacts to threatened and endangered species and other sensitive resources. We appreciate that Vulcan has acquired extra acreage at the quarry site and plans to acquire extra right-of-way for the proposed rail lines so that they may have some

additional leeway for avoiding sensitive resource locations when you and the rest of the environmental team provide them with more precise information on the sensitive resources in the project area. We believe that Vulcan and its environmental team will continue to develop this project in an environmentally sensitive manner, and will continue to work and communicate with the Service, the Texas Natural Resource Conservation Commission (TNRCC), the Edwards Aquifer Authority (EAA), and other interested parties to ensure appropriate consideration and protection of sensitive resources in the area. We look forward to working with and maintaining a positive relationship with you, the rest of the environmental staff, and Vulcan representatives on this project and others in the future.

If we can be of further assistance or if you have questions about these comments, please contact Ray Brown at the Service's Austin Office at (512) 490-0057, ext. 243. Please refer to the Service Consultation number listed above in any future correspondence with this office regarding this project.

Sincerely,

/s/ C. Dawn Whitehead

David C. Frederick
Supervisor

Enclosure

cc: Dr. Darrell Brownlow

1.

-COMM. JOURNAL- DATE MAR-20-2002 TIME 14:14

MODE = MEMORY TRANSMISSION START=MAR-20 14:10 END=MAR-20 14:14

FILE NO.=559

STN NO.	COMM.	ABBR NO.	STATION NAME/TEL NO.	PAGES	DURATION
001	OK	#	18066512928	006/006	00:03:42

-US FISH & WILDLIFE -

-AUSTIN ES FIELD - - 1 512 490 0974-

U.S. Fish and Wildlife Service
Ecological Services Field Office
10711 Burnet Road, Suite 200
Austin, Texas 78758

FAX TRANSMITTAL MEMORANDUM

DATE: 3/20/02 TIME: 2:10 AM/PM NO. OF PAGES (includes cover pg.) 6

TO: Dr. Rogers

VOICE PHONE:

FAX PHONE: (806) 651-2928

FROM: Ray Brown

VOICE PHONE: (512) 490-0057 EXT: ____

FAX PHONE: (512) 490-0974

SUBJECT:

********** -COMM. JOURNAL- ********** DATE MAR-20-2002 ***** TIME 14:17 *********

MODE = MEMORY TRANSMISSION START=MAR-20 14:15 END=MAR-20 14:17

FILE NO.=560

STN NO.	COMM.	ABBR NO.	STATION NAME/TEL NO.	PAGES	DURATION
001	OK	#	18066512928	002/002	00:01:00

-US FISH & WILDLIFE -

********** -AUSTIN ES FIELD - ***** - 1 512 490 0974- **********

U.S. Fish and Wildlife Service
Ecological Services Field Office
10711 Burnet Road, Suite 200
Austin, Texas 78758

FAX TRANSMITTAL MEMORANDUM

DATE: 3/20/02 TIME: 2:10 AM/PM NO. OF PAGES (includes cover pg.) to 2

TO: Dr. Rogers

VOICE PHONE: _____

FAX PHONE: (806) 651-2928

FROM: Ray Brown

VOICE PHONE: (512) 490-0057 EXT: ____

FAX PHONE: (512) 490-0974

SUBJECT: Page 2 of the Bird Survey protocol.

2.

SYNOPSIS OF THE SOUTHWEST GULF RAILROAD COMPANY RAIL PROJECT IN MEDINA COUNTY, TEXAS

Background

Southwest Gulf Railroad Company (SGR), a wholly owned subsidiary of Vulcan Materials Company (VMC), plans to construct and operate a rail line to connect a proposed VMC stone quarry to the Union Pacific Railroad Company (UP) main line railroad in Medina County, Texas, about 30 miles west of San Antonio, Texas. SGR has filed with the Surface Transportation Board (Board) a petition for exemption from the requirements of 49 U.S.C. 10901 to construct and operate approximately 7 miles of single-track railroad. SGR has also proposed to construct and operate either a 2-mile long loading loop or a 1-mile long straight track, which could include one or more parallel tracks, within the quarry property, which would not be subject to Board jurisdiction. Pursuant to the Council on Environmental Quality's regulations for implementing the provisions of the National Environmental Policy Act at 40 CFR 1508.25 both the proposed Board jurisdictional rail line and the loading loop will be considered in the Board's environmental review.

VMC plans to locate the new quarry in the north central part of Medina County. The quarry would produce crushed stone aggregate for highway and other construction purposes. Although the proposed rail line would primarily serve VMC's new stone quarry, it would also be available to serve any other nearby industries, including other quarries, in the future. According to SGR, when the rail line is in operation, it will be shipping about 5 million tons of rock per year (416 trains, with 100 cars each, per year) or about four movements per day (2 leaving loaded and 2 returning empty), assuming a 250-day work year.

Description of SGR's Preferred Route

SGR states that the proposed rail line would consist of a single-track rail line between the planned quarry site and the nearest Class I rail line, which is UP's Del Rio Subdivision, as shown on the attached map. The UP rail line is located approximately seven miles south of the quarry site, and the SGR line would meet the UP rail line at approximately milepost 250 of the UP line, at a point near Dunlay, Texas.

Despite its proximity to San Antonio, Medina County has a population of about 33,000 persons. The area is mostly rural, composed of relatively dry and flat farmland and pastureland. The proposed rail line would not traverse any incorporated or densely populated areas and would not cross any other rail lines. SGR's preferred route would cross some lightly traveled county paved and unpaved roads and one state maintained road (FM 2676), but would not cross any major highways. No Federal lands would be traversed and, apart from the road crossings, no state owned property would be traversed. SGR states that the line would cross only two drainage features with intermittent seasonal flow (Quihi and Elm Creeks).

2.

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II. Construction

1. Electronic Maps of Alignment and Location Maps

These will be forwarded under separate cover.

2. Schedule of Construction and Operation

A. Clearing and Preparation of ROW:	Begin in Month 1
B. Construction of Roadbed:	Begin in Month 3
C. Placement of Tracks:	Begin in Month 5
D. Begin Operation:	Begin in Month 12

3. Construction Phases

A. Clearing and Preparation of Right of Way
B. Fencing and Utility Relocations
C. Earth Work – Cut and Fill:
D. Roadbed Construction
E. Structures/Bridges Construction
F. Track Placement
G. Signaling and Grade Crossings
H. Seeding and Erosion Control

Details of each of these elements are provided in the accompanying TRAX Conceptual Design Report.

Responses to items 4-11 may be found in accompanying TRAX Conceptual Design Report

III. Operation and Maintenance

1. Describe the types of locomotives to be used.
Gross train weights exceeding 14,000 tons can be expected from a 100, 100-ton car, capacity train. A minimum of 9000 horsepower will be required to move these heavy trains to the main Union Pacific track. Once on the UP main track, since their grades and speeds exceed those planned for the line, additional locomotives will be added.

3.

COPY

2. **Describe the number and type of cars to be used, average number of cars per train.**
The typical car will be a gondola or bottom-dump hopper type with a capacity to carry 100 to 120 tons of aggregate. The typical train length will be 100 of these cars.

3. **Describe switching operations and interface with UP.**
Southwest Gulf Railroad or Union Pacific will own, lease, and or operate the engine and cars on the track. SWG anticipates entering into an arrangement with UP regarding the interface with the UP; the details of which will be determined at a later date.

4. **Describe the length of typical train in terms of number of cars and length.**
The average car ranges from 50 to 58 feet in length, therefore, including variable numbers of engines, the average train length will range from 5,200 to 5,800 feet.

5. **Describe the number of Train movements per week (where a movement is either loaded or unloaded).**
An annual volume of 5,000,000 tons would require four train movements per day (2 leaving loaded, 2 returning empty), assuming a 250-Day work year.

6. **How many workers will be employed by and what is the estimated payroll for the operation of the train.**
Operation of the railroad would require approximately 24 people, with a combined compensation and benefits package estimated to be $ 1.15 million dollars.

7. **Describe maintenance procedures including weed control.**
Maintenance procedures would be consistent with Union Pacific standards.

8. **Describe any public or private road crossings, and type of safety or warning devices proposed.**

Crossing	Road Type	Safety/Warning Device
County Road 454	(un-improved)	At grade - Warning Signs
County Road 4516	paved	At grade - Warning Signals
County Road 365	(gravel surface)	At grade - Warning Signs
FM 2676	paved – State Maint.	As Dictated by State DOT
County Road 353	(gravel surface)	At grade – Warning Signs
County Road 353	(gravel surface)	At grade – Warning Signs

9. **What are the average and maximum speeds expected**
Track geometry will allow 40-mph maximum speed operations; however, 25 mph will meet the needs of the quarry for the foreseeable future and operating

Jim Barden

1100 16th Street
Room 101
Hondo, Texas 78861

(830) 741-6021 Fax (830)741-6025



April 24, 2003

COPY

Ms. Jaya Zyman-Ponebshek
URS Corporation
P.O. Box 201088
Austin, Texas 78720-1088

Re: TB Finance Docket No. 34284, Southwest Gulf Railroad Company-Construction and Operation Exemption-Medina County, TX

Thank you for the opportunity to comment on the above matter. As you can imagine it is a subject of some concern and controversy among the citizens who live in or near the affected area.

Before outlining the county's concerns regarding the project, I want to correct a few misimpressions in the Synopsis attached to the STB letter of March 31, 2003. First, Medina County has a population of 40,000 persons rather than 33,000 as stated in the Synopsis. This number is increasing dramatically as developers are opening subdivisions in the eastern half of the county to accommodate San Antonio's growth. By the time any such rail line be put in operation, I expect the population will have grown by another 10% or more with most of it in the eastern part of the county where the quarry and railroad are proposed.

Second, while the roads to be crossed are lightly traveled when compared to urban interstates, they do carry a significant amount of traffic and are major east/west routes for our county citizens.

Third, the synopsis states that the proposed line traverses only two drainage features with intermittent seasonal flow (Quihi and Elm Creek). Substitute the word "flood" for "flow" and a more accurate picture emerges. Placing a rail line across these areas without significant length of open bridges or trestles will exacerbate our almost annual flooding problems.

Having said the above, the county governments concerns regarding the proposed rail line center on two areas. If the rail line is built we want to see the safest possible road crossings and the least intrusive creek, draw and slough crossings. Several years ago when this project was first announced the proposed quarry owners represented to the Precinct

Commissioner that there would be elevated road or RR crossings on FM 2676 and CR 4516. Now we understand they are only proposing grade crossings. With at least 4 trains per day at 100 cars for at least 250 days each year this presents a major safety concern and traffic flow impediment. I urge serious consideration of having elevated roadway crossings at these two major arteries in Medina County.

The other concern (water flow and flooding) is equally great. The history of this area is not one of gently flowing streams that rise with a big rain. Rather it is a history of flash flooding that can inundate large areas of land in a matter of minutes and hours. Any structure placed across these flood areas is a problem. I hope that sufficient construction requirements will be imposed to alleviate this problem as much as possible.

Regarding which of the four proposed routes is preferable, there appears to be little difference as far as our concerns of traffic safety and movement and flooding are concerned... or at least none of that can be discerned without expensive further study.

The individual citizens in the area have substantial and additional concerns which should be heard. The issues outlined above (traffic safety and flooding) are the principal concerns of the county government.

Again, thank you for the chance to have our views heard. I will be glad to visit further with you if you wish.

Sincerely,

James E. Barda

JEB/jaa



BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34284

SOUTHWEST GULF RAILROAD COMPANY -- CONSTRUCTION AND OPERATION EXEMPTION -- MEDINA COUNTY, TX

VERIFIED REPLY OF SOUTHWEST GULF RAILROAD COMPANY TO MEDINA COUNTY ENVIRONMENTAL ACTION ASSOCIATION PETITION TO REVOKE EXEMPTION

David H. Coburn
Scott M. Mirelson
STEPTOE & JOHNSON LLP
1330 Connecticut Ave.
Washington, D.C. 20036
(202) 429-8063

Attorneys for Southwest Gulf Railroad Company

June 9, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34284

SOUTHWEST GULF RAILROAD COMPANY -- CONSTRUCTION AND OPERATION EXEMPTION -- MEDINA COUNTY, TX

VERIFIED REPLY OF SOUTHWEST GULF RAILROAD COMPANY TO MEDINA COUNTY ENVIRONMENTAL ACTION ASSOCIATION PETITION TO REVOKE EXEMPTION

Southwest Gulf Railroad Company ("SGR"), a Texas corporation headquartered in San Antonio, Texas, hereby submits this verified reply in opposition to the Medina County Environmental Action Association Petition to Revoke ("MCEAA Petition") filed on May 23, 2003. SGR respectfully requests that the MCEAA Petition be denied by the Board and that the conditional exemption granted by the Board by decision served May 19, 2003 be allowed to stand.[1]

I. BACKGROUND

On February 27, 2003, SGR filed a Petition with the Board requesting an exemption from the requirements of 49 U.S.C. § 10901 for the construction and operation of an approximately

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[1] This Reply has been verified by Mr. Thomas Ransdell, President of Southwest Gulf Railroad and President, Southwest Division, Vulcan Materials Company.

seven mile long rail line in Medina County, Texas.[2] In its petition, SGR requested that the Board exempt it from the prior approval requirements of Section 10901 for the construction and operation of a rail line and that this exemption be issued on a conditional basis pending completion of the environmental review process. By its decision served May 19, 2003 the Board granted the conditional exemption and stated therein that it would issue a final decision upon completion of its environmental review.[3] Subsequently, on May 23, 2003, MCEAA filed with the Board a petition to revoke the conditional exemption.

II. ARGUMENT

A. Introduction

In its petition, MCEAA provides three basic arguments in support of revocation of the conditional exemption. First, it states that the conditional exemption should be revoked because SGR did not provide proper notice to the public in accordance with 49 C.F.R. § 1150.10. Second, MCEAA argues that the conditional exemption should be revoked because there is no current need for rail service as the quarry that SGR will serve has not yet been developed and there are adequate alternative sources of the aggregate that SGR would transport. Third, MCEAA raises a series of issues that relate to the environmental impacts of the rail line, including the ability of other businesses to locate on the line.

None of MCEAA's arguments is relevant to the question of whether or not a conditional exemption should be revoked or reopened by the Board, and none support the proposition that

[2] Verified Petition of Southwest Gulf Railroad Company For Exemption, Finance Docket No. 34284 Southwest Gulf Railroad Company -- Petition For An Exemption From 49 U.S.C. § 10901 To Construct And Operate A Rail Line In Medina County, Texas (filed Feb. 27, 2003) ("SGR Petition").

[3] *Southwest Gulf R.R. Co.-Construction and Operation Exemption-Medina County, TX*, STB Finance Docket No. 34284 (served May 19, 2003)("May 19 Decision"). The environmental review, being conducted by SEA, is currently underway.

granting that exemption was an error. "The relevant question in a petition to reopen or revoke a conditional exemption is whether the decision to process the proceeding under section 10505 [now 10502] is consistent with applicable law and supported by evidence on the record."[4] As described in detail below, (1) SGR was not required to provide notice in an exemption proceeding under 49 C.F.R. § 1150.10; (2) the fact that the proposed quarry to be served by SGR is not yet in operation or that MCEAA questions the need for the quarry is irrelevant; and (3) MCEAA's other objections are either factually incorrect or will be adequately addressed as part of the Board's environmental review.

B. There was No Violation of Notice Requirements

MCEAA argues that SGR's conditional exemption should be revoked because "proper notice was not given to the public in accordance with 49 CFR 1150.10... ."[5] It goes on to state that notice was not given to the major Medina County newspapers, the county radio station or the Hondo City Public Library. "Therefore, the public had no opportunity to request denial of the petition for exemption filed on February 27, 2003, Finance Docket No. 34284."[6]

MCEAA's argument is completely off base. The regulation it cites, 49 C.F.R. § 1150.10, is not applicable to petitions for *exemption* from the prior approval requirements of 49 U.S.C. § 10901. It is instead applicable to applications under 49 U.S.C. § 10901, the very statute that SGR petitioned to be exempted from. Moreover, the Board posted a notice in the Federal Register on May 19, 2003 informing the public that a conditional exemption had been granted,

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[4] *WFEC R.R. Co. -- Construction and Operation Exemption -- Choctaw and McCurtain Counties, OK*; *WFEC R.R. Co. -- Construction and Operation Exemption -- Choctaw and McCurtain Counties, OK* -- Petition For Issuance of an Order Pursuant to 49 U.S.C. 10901(d), Finance Docket No. 32607, 1996 STB LEXIS 56, at *5 n.7 (served Feb. 23, 1996).

[5] MCEAA Petition, at 1.

[6] *Id.*

and it provided in its decision for the filing of petitions to reopen by June 9, 2003.[7] Ample notice has been provided of the Board's conditional exemption and there is ample opportunity for parties to challenge the Board's decision (as MCEAA has done), and to participate in the environmental review process. Lack of notice is therefore not a proper basis for revoking the conditional exemption.

C. The Fact that the Quarry Is Not Yet Developed is Not Grounds for Revoking the Conditional Exemption

MCEAA makes the extraordinary claim that the conditional exemption granted in the Board's May 19 Decision should be revoked because "there is no current need for a rail line because there is no quarry."[8] There is no legal basis for MCEAA's unusual contention that a facility or plant to be served by a rail line must be completed or developed before rail line construction can be authorized or exempted by the Board, and in fact the law is to the contrary. MCEAA points to no such requirement in either 49 U.S.C. § 10901 (construction authority), 49 U.S.C. § 10502 (exemptions) or 49 U.S.C. § 10101 (rail transportation policy). Further, the Board and its predecessor, the Interstate Commerce Commission (ICC), have repeatedly approved applications and petitions for exemption for the construction of rail lines to facilities that were not yet operational.[9]

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[7] 68 Fed. Reg. 27141 (May 19, 2003).

[8] MCEAA Petition, at 1.

[9] *E.g., Tongue River Railroad Co. -- Rail Construction and Operation -- Ashland to Decker, MT*, STB Finance Docket No. 30186 (Sub No. 2) (served Nov. 6, 1996)(granting authority to railroad to construct a line to serve not-yet-operational coal mines); *East Cooper and Berkeley R.R.--Construction and Operation Exemption--In Berkeley County, SC*, Finance Docket No. 32704, 1995 WL 734007 (ICC served Dec. 13, 1995)(granting final approval for construction of a rail line to a proposed steel mill); *Northern Nevada R.R. Corp.--Construction and Operation Exemption--White Pine County, NV*, Finance Docket No. 32476, 1995 WL 73355 (ICC served Feb. 24, 1995)(conditionally granting a construction exemption for a rail line to

Clearly, SGR is not proposing to build a railroad, and pursuing these efforts before the Board, for no good reason. Vulcan Materials Company ("Vulcan"), the parent of SGR, is planning a quarry for Medina County and has taken initial steps to move forward toward development of the quarry, despite MCEAA's misinformed claims to the contrary. MCEAA asserts that "[b]y checking county records of deeds recorded for land transfers and ownership of land, neither Vulcan nor any of its subsidiaries has acquired the land for the proposed quarry."[10] This is not true. Through subsidiaries, Vulcan has purchased or leased property for its planned quarry. In fact, since 1999 Vulcan has held leases on approximately 1,760 acres of contiguous land at the quarry site and has options to purchase several large tracts associated with the planned quarry and the rail line. MCEAA is hardly in a position to question Vulcan's intentions to develop the quarry, having actively opposed the quarry project for several years.[11]

MCEAA challenges not only the need for the line, but the need for the quarry. Based on its consultations with Martin Marietta Materials Southwest, Ltd. ("Martin Marietta"), a Vulcan

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serve copper and gold mining facilities that needed to be reactivated), *conditional exemption made effective by, Northern Nevada R.R. Corp.--Construction and Operation Exemption--White Pine County, NV*, Finance Docket No. 32476, 1995 ICC LEXIS 114 (ICC served May 16, 1995); *Vaughan R.R. Co.--Construction Exemption--Nicholas and Fayette Counties, WV*, No. 32322, 1993 WL 451259 (ICC served Nov. 4, 1993)(granting conditional exemption for construction of line to a proposed coal loadout facility and preparation plant), *conditional exemption made effective by, Vaughan R.R. Co.--Construction Exemption--Nicholas and Fayette Counties, WV*, No. 32322, 1994 ICC LEXIS 228 (ICC served Oct. 27, 1994) *Jackson County Port Authority--Construction Exemption--Pascagoula, MS*, Finance Docket No. 31536, 1990 WL 287815 (ICC decided Aug. 6, 1990)(granting conditional exemption for the construction of a rail line to a to-be-constructed port facility), *conditional exemption made effective by, Jackson County Port Authority--Construction Exemption--Pascagoula, MS*, Finance Docket No. 31536, 1991 ICC LEXIS 233 (ICC decided Oct. 1, 1991); *Columbia--Astoria Rail Service, Inc.--Construction and Operation Exemption--At Tongue Point, OR*, Finance Docket No. 31304 (ICC decided Oct. 26, 1988)(granting exemption for construction of track at a proposed port terminal facility).

[10] MCEAA Petition, at 1.

[11] MCEAA in fact maintains an anti-quarry website.

competitor in the quarrying of aggregate, the primary markets for the aggregate from the proposed Vulcan quarry (the Houston and Gulf Coast areas) are already being supplied with aggregate from Vulcan and others by rail. MCEAA's consultations with Martin Marietta about Vulcan's business plan is akin to a third party consulting with Pepsi about whether Coke should make more cola. Martin Marietta's views on Vulcan's plans, even if correctly reported by MCEAA, are thus hardly a basis on which to question Vulcan's business decision to develop the Medina County quarry and, through its subsidiary SGR, build a rail line to serve the quarry and other shippers. Like any major company (and Vulcan is one of the largest and most successful producers of aggregate in the world), Vulcan makes its business decisions only after careful study of the market. Based on its proprietary studies of the market, Vulcan is confident that there is an ample opportunity in the huge Southeast Texas market, and elsewhere, for the aggregate that will be derived from the quarry in Medina County.[12] MCEAA's effort to place the Board in a position where it might second guess Vulcan's decision therefore should be rejected out of hand.[13]

MCEAA further claims that "the required permits for the proposed quarry have not been obtained from other agencies... ." In support of this contention, MCEAA states that "[n]o permit

[12] MCEAA points to the fact that Vulcan currently transports aggregate to Houston by vessel from quarries in the Yucatan peninsula of Mexico. That is correct, and it is equally correct that there is large and continuing demand for that aggregate, just as there would be for the Medina County aggregate.

[13] MCEAA notes that Martin Marietta's subsidiary, Alamo North Texas Railroad Company, has not constructed the rail line in Wise County, TX for which it sought and received an exemption in STB Docket No. 34002 in September 2002. *Alamo North Texas R.R. Corp.--Construction and Operation Exemption--Wise County, TX*, STB Finance Docket No. 34002, at 1-2 (served Sept. 3, 2002). SGR offers no comment on MCEAA's contention that the Alamo North line, which is designed to serve a Martin Marietta quarry some 300 miles from the planned Medina County quarry, has not been built, other than to note that SGR's parent does not make it a policy to offer insights into the business plans and timing of a competitor.

has been issued by the U.S. Fish and Wildlife Service."[14] However, the Fish and Wildlife Service (USF&W) is not a permitting agency and thus MCEAA's statement is not meaningful. MCEAA next points to a March 20, 2002 letter from USF&W to one of Vulcan's environmental consultants for the proposition that before development of the proposed quarry, Vulcan would need to begin and complete a minimum 3 year bird protocol study, which MCEAA interprets to mean that the study could not be completed until March 2005. What the USF&W letter unfortunately does not make clear is that this three year study, part of a complete biological assessment of the area, has in fact been completed. Vulcan first consulted with USF&W about the quarry in early 2000, after Vulcan assembled a highly qualified team of environmental experts. As a result of those consultations, Vulcan submitted a Biological Assessment report to USF&W in late 2001, which included the first year's survey for threatened and endangered species, including bird species. The second and third year surveys have also now been completed. These will be submitted to USF&W in an updated Biological Assessment in July of this year, thereby completing Vulcan's obligations to USF&W in terms of biological surveys.[15] The surveys indicate that the development of the quarry will not adversely affect any threatened or endangered species. Further, USF&W advised Vulcan in the March 20 letter that, "The USF&W appreciates Vulcan's desire to develop the proposed Medina Quarry as a 'Showcase' project to demonstrate the compatibility of quarry operations and habitat protection". USF&W further stated that, "We believe that Vulcan and its environmental team will continue to develop

[14] MCEAA Petition at 1 and attached letter from Dawn Whitehead, Fish and Wildlife Service, United States Department of the Interior to Dr. William J. Rogers, Department of Life, Earth, and Environmental Sciences, West Texas A&M University (dated Mar. 20, 2002).

[15] The 2001 Biological Assessment performed for USF&W, which covers not only the quarry area but also the rail corridor, previously has been shared with SEA, which will also receive a copy of the forthcoming updated Assessment.

this project in an environmentally sensitive manner, and will work and communicate with the Service, the [Texas Commission on Environmental Quality], and other interested parties to ensure protection of sensitive resources in the area".

MCEAA further claims that "[n]one of the required permits for a rock crusher have been issued by the Texas Commission on Environmental Quality. . . ."[16] While Vulcan has not to date applied to TCEQ for such a permit, Vulcan fully understands its obligations and it intends to timely comply with TCEQ requirements. Vulcan's compliance with TCEQ requirements and the timing of its actions relative to the operation of a rock crusher, however, have nothing whatever to do with the SGR rail line before the Board in this proceeding.

MCEAA next claims that "[o]ne hundred and six landowners in this area have drawn up, signed, and recorded in the county records three restrictive covenants on their deeds covering over 9,500 acres. These restrictive covenants state that no railroad or other type of conveyor system can be placed upon their property. The landowners will not sell voluntarily. Parts of the needed property for all of the proposed lines are in these covenanted acreages."[17] The allegation that some landowners may not sell land voluntarily to SGR or affiliated entities, and that there are restrictive covenants on the land that the SGR line may cross, is not pertinent to the question of whether SGR should be exempted from regulatory requirements with respect to the construction and operation of its proposed line.[18] Moreover, MCEAA has not asserted facts that would prevent the future construction and operation of the line. Should the Board grant final

[16] MCEAA Petition at 1.

[17] *Id.*

[18] Based on its review of public land records, SGR is aware that about 25% of its preferred rail route traverses property subject to such covenants, and that these covenants are in place only with respect to a small handful (three or four) of properties on that route.

exemption for construction of the rail line, SGR intends to purchase, lease or take such other steps as are authorized by law to acquire such title or easements to property as may be necessary for the line. At that time, the enforceability (or lack thereof) of the restrictive covenants cited by MCEAA can be addressed. That issue, however, is not one that SGR believes is ripe for Board consideration at this time.[19]

D. MCEAA's Claims Concerning Environmental Issues are Not Grounds for Revocation

MCEAA contests SGR's assertion in its petition that the rail line will be operated on a common carriage basis, claiming that no shippers other than Vulcan will locate on the rail line because the proposed route crosses as many as three floodplains and the area is prone to flooding.[20] MCEAA is incorrect in asserting that shippers will not locate along the rail line due to flood problems. The site of the proposed rail line is in an semi-arid area (receiving less than 28 inches of rain per year), where streams are ephemeral, filling with water occasionally. In any event, SGR's proposed line traverses not only the streams and any associated floodplains (within which the line will be designed to accommodate these areas), but also areas that are outside any floodplains of the streambeds that will be crossed.[21] There is, in short, ample property

---

[19] MCEAA alleges that "[t]he petition is misleading in that it understates the population of Medina County by approximately 22%. The population of Medina County is 40,000 instead of 33,000 persons... ." MCEAA also asserts that bedroom communities for San Antonio would be affected by the proposed SGR line. MCEAA is correct that the latest U.S. Census data now available shows a county population of about 40,000. The point is hardly significant, however. The important fact is that the SGR line will not operate through bedroom communities and that not a single residence will be displaced. The proposed line will operate through pastureland and farmland.

[20] MCEAA Petition, at 1-2.

[21] SGR assumes that SEA's environmental document will describe the characteristics of the land that will be traversed.

appropriate for development and use by prospective shippers along the rail line. Further, SGR intends to employ best engineering design and construction techniques at these stream crossings to prevent damage to its rail line and mitigate any impacts from potential flooding.

As further support for its petition to revoke, MCEAA challenges the assertion that the four county roads to be crossed by SGR at-grade are "'lightly traveled.'"[22] Once again, MCEAA's assertions are factually incorrect. The roads to be crossed by any of the proposed routings for the SGR line are lightly traveled by any reasonable measure.[23] There is only one state road, FM (farm to market) 2676 that would be crossed and according to a 2001 Texas Department of Transportation report, only 570 vehicles per day use the portion of FM 2676 at the point it crosses the proposed SGR line. MCEAA also asserts that the lack of grade separations will cause disruptions along the proposed route.[24] The issue of grade separations, which are not necessary due to the light traffic volumes along the proposed route, is irrelevant to the issue of whether SGR's *conditional* exemption was properly granted. Grade crossing issues are instead properly addressed as part of the ongoing SEA review.[25]

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[22] MCEAA Petition, at 2 (quoting Synopsis of The Southwest Gulf Railroad Company Rail Project in Medina County, Texas prepared by SEA and attached to MCEAA Petition as Attachment 2).

[23] SGR understands that traffic and transportation issues will be addressed by SEA in its environmental document.

[24] MCEAA Petition, at 2.

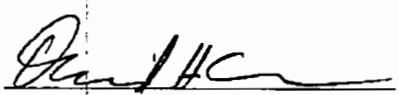
[25] It is expected that for an initial period of several years an average of about 4 trains/day will use the rail route. Crossing delays are expected to be minimal, about 3 minutes each time a train traverses a crossing given expected train speeds and length. In view of the light highway and rail traffic volume at these crossings, meaningful traffic delays or safety issues are not anticipated. In fact, it bears note that the UP line that crosses Medina County is much more heavily utilized and that it traverses directly through the county seat of Hondo, crossing many streets at grade there, apparently without any serious problem.

MCEAA asserts that "the railroad line would present hazards to public health and safety and will endanger over two dozen historic sites by flooding and vibration."[26] Once again, MCEAA's concerns about public health, safety and historic preservation, to the extent these concerns may have any merit, are properly considered as part of the Board's environmental review and are not relevant to the merits of SGR's petition. Further, SGR does not agree that any historic properties will be placed at risk by its proposed rail line, or that the line will pose any safety risk.

CONCLUSION

For the aforementioned reasons, SGR respectfully requests that the Board deny the Petition to Revoke filed by the Medina County Environmental Action Association.

Respectfully submitted,



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1330 Connecticut Ave.
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(202) 429-8063

Attorneys for Southwest Gulf
Railroad Company

June 9, 2003

[26] *Id.*

VERIFICATION

I, Thomas Ransdell, President of Southwest Gulf Railroad Company and President, Southwest Division, Vulcan Materials Company, hereby verify under penalty of perjury that all of the facts regarding Southwest Gulf Railroad Company and Vulcan Materials Company set forth in the attached Verified Reply are true and correct to the best of my knowledge. I know that willful misstatements or omissions of material facts constitute Federal criminal violations punishable under 18 U.S.C. § 1001 by imprisonment up to five years and fines up tom $10,000 for each offense.

Thomas Ransdell

June 6, 2003

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2003, I caused a copy of the foregoing Verified Reply of Southwest Gulf Railroad Company to Petition to Revoke STB Finance Docket No. 34284 of the Medina County Environmental Action Association to be served via first-class mail on:

Dr. Robert T. Fitzgerald
Medina County Environmental Action Association
202 CR 450
Hondo, TX 78861

David H. Coburn

33632
EB

SERVICE DATE - LATE RELEASE AUGUST 21, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34284

SOUTHWEST GULF RAILROAD COMPANY–CONSTRUCTION AND OPERATION EXEMPTION–MEDINA COUNTY, TX

Decided: August 21, 2003

In a decision served on May 19, 2003 (May 19 decision),[1] the Board addressed transportation-related issues and tentatively granted, subject to later consideration of the environmental impacts, an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for the Southwest Gulf Railroad Company (SGR) to construct and operate an approximately 7-mile line of railroad in Medina County, TX. The proposed line would extend from Vulcan Construction Materials, LP's (Vulcan Construction)[2] proposed quarry in the north central part of the county to a connection with the Del Rio Subdivision of Union Pacific Railroad Company at approximately milepost 250 near Dunlay. The May 19 decision stated that, upon completion of the environmental review, a further decision would be issued addressing the environmental impacts of the proposal and whether to authorize the construction.

On May 23, 2003, Medina County Environmental Action Association (MCEAA) filed a petition to revoke the conditional exemption. On June 9, 2003, SGR replied.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), an exemption may be revoked, in whole or in part, when application of the Board's regulation is necessary to carry out the rail transportation policy of 49 U.S.C. 10101. The burden of proof is on the petitioner, who must articulate reasonable, specific concerns under the revocation criteria. See The Elk River Railroad, Inc. — Construction and Operation Exemption — Clay and Kanawha Counties, WV, Finance Docket No. 31989 (STB served Apr. 11, 1997). Because MCEAA has not met its burden of proof, its petition will be denied.

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[1] Notice was published in the Federal Register on May 19, 2003 (68 FR 27141).

[2] Vulcan Construction is a subsidiary of Vulcan Materials Company (Vulcan Materials), which is affiliated through common ownership with SGR. Vulcan Materials is a producer of aggregate, composed primarily of crushed stone, sand, and gravel.

MCEAA makes three arguments in support of its petition for revocation. First, MCEAA contends that proper public notice of the proposal was not given in accordance with 49 CFR 1150.10. Second, MCEAA argues that the conditional exemption should be revoked because there is as of yet no quarry for the proposed rail line to serve and, thus, no current need for rail service. Finally, MCEAA raises various environmental concerns.[3]

Notice. MCEAA argues that proper notice was not given because there was no local publication in a newspaper, citing the Board's rules at 49 CFR 1150.10. The specific rule that MCEAA refers to, at 49 CFR 1150.10(f), pertains to applications for construction, acquisition or operation of railroad lines under 49 U.S.C. 10901. However, in this case, SGR filed a petition for exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901. Rules governing petitions for exemption are set out at 49 CFR 1121, and do not require publication of a notice in a local newspaper in a rail construction case. Instead, the Board's practice in many construction cases is to issue a decision addressing the transportation-related issues, and, where appropriate, find, subject to later consideration of environmental impacts, that the proposal meets the exemption standards of 49 U.S.C. 10502. That conditional exemption is then published in the Federal Register assuring notice to the public. Petitions to reopen may be filed, as was filed here, and a final decision is not issued until the environmental review process is completed. Construction may not begin until a final decision is issued and becomes effective. Thus, even without local newspaper publication, this process gives adequate notice and an opportunity for the public to address all aspects of the proposed construction.

Need for rail service. According to MCEAA, there is no need for the proposed rail line because neither Vulcan Materials nor any of its subsidiaries has acquired the land for the proposed quarry, and none of the required permits for the proposed quarry have been obtained.[4] SGR argues that these contentions are incorrect, but in any event, are not grounds for revoking the conditional exemption. SGR asserts that Vulcan Materials' subsidiaries have acquired much of the land necessary for the quarry, and have been in consultation with the U.S. Fish and Wildlife Service. SGR also states that it will comply with all permitting requirements for the

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[3] These concerns include: locating the rail line in a floodplain; allegations related to public health and safety; and potential adverse effects on historic sites.

[4] Specifically, MCEAA asserts that SGR has not been issued a permit for the quarry by the U.S. Fish and Wildlife Service and has not been issued the required permits for a rock crusher by the Texas Commission on Environmental Quality. MCEAA also questions the need for the proposed quarry. Finally, MCEAA states that several landowners have entered into restrictive covenants to prevent rail activity on their property.

quarry.[5] In the May 19 decision, the Board acknowledged that Vulcan Construction is still in the process of developing the quarry. Applications and petitions for exemption for the construction and operation of rail lines to facilities that are not yet fully developed and operational have been approved in the past. See, e.g., East Cooper and Berkeley Railroad — Construction and Operation Exemption — In Berkeley County, SC, Finance Docket No. 23704 (ICC served Dec. 13, 1995). The fact that the quarry does not yet exist, or that necessary permits for the quarry have not yet been obtained, are not grounds for revoking the exemption.

Environmental issues. The Board's Section of Environmental Analysis (SEA) is currently conducting an environmental review of SGR's proposal. Either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) will be prepared. As part of the environmental review process, SEA will consider all of the environmental issues raised by MCEAA, and there will be ample opportunity for public review and comment on all environmental issues and any mitigation recommended by SEA when the Draft EA or Draft EIS is issued. After the environmental review is completed, the Board will issue a further decision addressing the environmental issues and making the exemption effective at that time, if appropriate, subject to environmental mitigation conditions, if necessary. Moreover, no construction can begin until the Board's final decision is issued and has become effective. In these circumstances, no need has been shown to revoke the conditional exemption because of potential environmental issues.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition to revoke the conditional exemption for construction and operation is denied.

---

[5] As to the need for the proposed quarry, SGR submits that Vulcan Materials is confident that there is a market for the aggregate that will be derived from the quarry. SGR also submits that development of the quarry by Vulcan Materials is a business decision. As far as restrictive covenants are concerned, SGR asserts that these matters can be addressed later, should the Board grant a final exemption for construction of the line.

2. This decision is effective on its service date.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary

2/0115

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February 19, 2004

Office of the Secretary
U.S. Surface Transportation Board
Case Control Unit
Attn: STB Finance Docket No. 34284
1925 K Street, NW
Washington, DC 20423-0001

VIA TELEFAX: (202) 565-9004
& CM-RRR #7002 0510 0003 0883 8366

Re: **STB Finance Docket No. 34284**
Southwest Gulf Railroad Company (Vulcan) – Construction and Operation
Medina County, Texas

Notice of Intent to Become a Party to the Proceeding

Dear Secretary Williams:

The Medina County Environmental Action Association, Inc. (MCEAA) hereby gives notice it is participating as a party in the above-captioned proceeding. It requests to receive notice of all Board decisions, filings, and pleadings related to this action under FD_34284, so that it may participate and comment accordingly. Please include MCEAA on the service list as a party of record representing the Medina County Environmental Action Association at the following address:

MEDINA COUNTY ENVIRONMENTAL ACTION ASSOCIATION
202 CR 450
Hondo, Texas 78861
(830) 741-5040

An original and 10 copies of this notice are enclosed.

Respectfully submitted,

THE GARDNER LAW FIRM
A Professional Corporation

David F. Barton
Attorney for Medina County Environmental Action Association

ENTERED
Office of Proceedings

FEB 20 2004

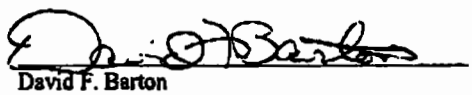
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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2004, I have caused to be served by first-class mail, postage prepaid, a true and correct copy of the foregoing Request to the following parties of record in STB Finance Docket Case No. 34284:

David H. Coburn
Steptoe & Johnson LLP
1330 Connecticut Ave.
Washington, D.C. 20036
(202) 429-8063
Attorneys for Southwest Gulf Railroad Co.



David F. Barton
Attorney for Medina County Environmental Action Association

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RECEIVED

February 19, 2004

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Washington, DC 20423-0001

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Medina County, Texas

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202 CR 450
Hondo, Texas 78861
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An original and 10 copies of this notice are enclosed.

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Office of Proceedings

FEB 24 2004

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Public Record

Respectfully submitted,

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A Professional Corporation

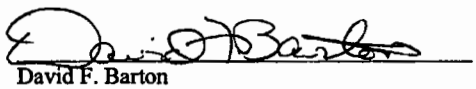
David F. Barton
Attorney for Medina County Environmental Action Association

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Attorney for Medina County Environmental
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BEFORE THE SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34284

SOUTHWEST GULF RAILROAD COMPANY
CONSTRUCTION AND OPERATION—MEDINA COUNTY, TX

MEDINA COUNTY ENVIRONMENTAL ACTION ASSOCIATION

Letter for Placement in the Record

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(210) 733-8191

Attorney for Medina County
Environmental Action Association

February 20, 2004

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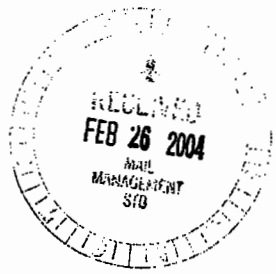
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February 20, 2004

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
Case Control Unit
Attn: STB Finance Docket No. 34284
1925 K Street, NW
Washington, DC 20423-0001

VIA TELEFAX: (202) 565-9004
& CM-RRR #7002 0510 0003 0883 8373

Re:

STB Finance Docket No. 34284
SOUTHWEST GULF RAILROAD COMPANY
CONSTRUCTION AND OPERATION—MEDINA COUNTY, TX

MEDINA COUNTY ENVIRONMENTAL ACTION ASSOCIATION
Letter for Placement in the Record

Dear Mr. Williams:

The Medina County Environmental Action Association (MCEAA) files this letter to provide new information relevant to the final decision in this proceeding, and to focus the STB's attention on a question of law that will impact that decision.[1] As stated in MCEAA's February

[1] The proposal was conditionally exempted on May 19, 2003. STB precedents are clear that a party may raise merits, environmental, or joint merits and environmental issues up until the final decision. *Finance Docket No.*

19, 2004 letter to Victoria J. Rutson of STB's Section of Environmental Analysis, Vulcan Materials Corporation's (Vulcan) planned quarry and proposed rail line of its wholly-owned subsidiary Southwest Gulf Railroad (SGR) are "connected actions" that by law must each be fully analyzed in the same environmental impact statement (EIS).

As Part I of this letter discusses, the STB's decision whether to act in accordance with the law on this issue will impact final merits determinations under the STB's statutory mandate, the Rail Transportation Policy of the United States. 49 U.S.C. § 10101 (2000). First, the § 10101(8) duty "to operate transportation facilities and equipment without detriment to the public health and safety" could possibly be satisfied in isolation, except when other connected or cumulative actions that affect those operations are considered, all proposals/actions must be considered together. Second, SGR's proposed action to seek common carrier status,[2] when the evidence shows that its proposal's viability is solely connected to the plans of their parent Vulcan, implicates its § 10101(5) duty to "foster sound economic conditions in transportation" by making a showing of financial viability. In the STB's analysis of this requirement for the conditional exemption grant, SGR received the benefit of the common carrier assumption. Yet SGR's own

33388, CSX Corp. et al - Control & Operating Leases/Agreements - Consolidated Rail Corp. ("*CSX Corp.*") (May 27, 1998) at 2-3.

[2] MCEAA acknowledges that any eminent domain issues associated with the failure of SGR's proposal to constitute a "public use" will be resolved at the state level, not by the STB.

statements undermine this assumption.[3] If SGR is to receive the benefit of any showing of financial viability, it is solely that associated with the quarry.[4] The precise nature of that financial relationship remains undisclosed. And if SGR is to claim the benefit of the quarry at all, the quarry must be analyzed in the EIS, for the reasons discussed in our letter to Ms. Rutson.

It is the applicant's burden to respond to these bases for exemption denial.[5] Consequently MCEAA has filed and served this letter to place the matter at issue in the record and to allow SGR to reply.

In Part II of this letter, we review several past exemption cases that illustrate a need for STB to more closely evaluate how it considers connected actions in rail construction proceedings. MCEAA is concerned with the manner in which some past STB rail construction cases have considered (or not considered) connected actions. Because the STB commonly grants a conditional exemption in rail construction proceedings pending the outcome of the

[3] Letter from David H. Coburn, Steptoe & Johnson LLP, to Victoria J. Rutson, STB-SEA 1 (Jan. 5, 2004) (Document EI-423) ("Accordingly, any assessment of the level of commercial and industrial development that could develop along the line is speculative"); SGR Reply to MCEAA Petition to Revoke 5 (Jun. 9, 2003) (Document 208015) ("Clearly SGR is not proposing to build a railroad . . . for no good reason. [Vulcan], the parent of SGR, is planning a quarry. . .").

[4] Profitability is an issue of concern as stated by Vulcan's Southwest Division President, "Vulcan wants to have the quarry become profitable before it has to make the investment," when referring to possible road projects. "Vulcan Presents Its Side of Quarry Dispute," Hondo Anvil Herald Online, February 19, 2004.

[5] *Dakota, Minnesota, & Eastern R.R. Corp.—Construction Into the Powder River Basin—Finance Docket No. 33407* (Dec. 9, 1998), 3 S.T.B. 847, 864-65 (1998) (opponents can overcome presumption of a statutory standard by coming forward with credible evidence that requires a response).

environmental review, improperly scoping that review may affect the final decision without STB realizing it.

I. THE SCOPE OF THE ACTION WILL IMPACT THE MERITS

A. Defining Scope

The results of the environmental review under the National Environmental Policy Act (NEPA) in this proceeding are universally recognized as a component of the final decision to grant or deny an exemption based on the statutory criteria of § 10101.[6] While the proposal in this proceeding has been conditionally exempted from further regulation under 49 U.S.C. § 10901, the applicant still bears the burden of satisfying § 10101 pending the environmental review and any new information that may arise.

In this proceeding, the decision to prepare an EIS, rather than an Environmental Assessment (EA), triggers a heightened and broader level of scrutiny during the environmental review. The test for whether and to what extent other actions besides the proposed action must be considered and analyzed in an EIS differs from that of an EA.

In an EA, the STB would proceed through a two step analysis to determine whether to prepare an EIS or whether to prepare a Finding of No Significant Impact (FONSI) and finalize

[6] *See The Indiana & Ohio Railway Co.—Construction and Operation, Butler, Warren and Hamilton Counties, Ohio—Finance Docket No. 31320* (July 23, 1993), 9 I.C.C.2d 783, 786 ("This is the first time we have denied a construction application based on evidence and analysis set out in an Environmental Impact Statement"); *Calvert Cliffs Coordinating Committee, Inc. v. U.S. Atomic Energy Agency*, 449 F.2d 1109, 1112-14 (D.C. Cir. 1971).

the decision. The first step, relatedness, involves a multifactor analysis not explicitly defined by CEQ regulations and measured for reasonableness against the NEPA statute.[7] The second step, significance, analyzes cumulative impacts of related actions as reasonably foreseeable future actions along with past and present actions.[8] If these impacts are cumulatively significant, an EIS will be required, regardless of whether the direct impacts of the proposal are significant. However, in an EA, the direct impacts and alternatives to related actions other than the proposal need not be discussed.

In the EIS for the SGR rail project, STB must apply the tests defined in the CEQ regulations for connected and cumulative actions.[9] As explained in MCEAA's February 19th letter to Ms. Rutson (and summarized here), one of the legal consequences under the Council on Environmental Quality (CEQ) regulations implementing NEPA is that the proposed rail line and planned quarry "are connected actions . . . and therefore should be discussed in the same impact statement."[10] The three factor connected action test,[11] any one of which may trigger a combined EIS, deems actions connected if they:

[7] Certain factors, such as the EIS-scoping factors at 40 C.F.R. § 1508.25(a)(1)-(2), and agency regulations deemed reasonable interpretations of the statute worthy of deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), are essentially *per se* reasonable factors, but no one factor defines the test.
[8] *See* 40 C.F.R. § 1508.7 (defining "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.")
[9] 40 C.F.R. § 1508.25(a)(1) (2003) (connected action) and § 1508.25(a)(2) (2003) (cumulative action).
[10] 40 C.F.R. § 1508.25(a)(1) (2003). Like the same command for "cumulative actions" in 40 C.F.R. § 1508.25(a)(2) (2003), this is not a discretionary determination. *See Kleppe v. Sierra Club*, 427 U.S. 390, 413 (1976) ("Cumulative

(i) Automatically trigger other actions which may require environmental impact statements.
(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.[12]

When actions are deemed connected actions, the EIS must analyze the indirect or cumulative effects of the other action(s), plus the proposed action. That is, the EIS must evaluate alternatives and direct impacts for the other action(s) just as for the proposed action.[13]

B. Operation of transportation facilities and equipment without detriment to the public health and safety

If the location of a proposed action would create a threat to public safety that cannot be adequately mitigated, an exemption can be denied under § 10101(8), regardless of the level of scrutiny (§ 10901 or § 10502(b)) used in reviewing the petition for exemption. For connected and cumulative actions, this standard may be satisfied by the proposal in isolation, but might not be when other actions that affect those operations are considered.

impacts are indeed, what require a comprehensive impact statement"). This interpretation of § 102(c) of NEPA by the Supreme Court in *Kleppe* was translated by CEQ into the test and requirements of 40 C.F.R. § 1508.25 to prepare comprehensive EIS for cumulative and connected actions.
[11] 40 C.F.R. § 1508.25(a)(1) (2003).
[12] This last factor is known as the "independent utility" test.
[13] *See e.g., Sierra Club v. Sigler*, 695 F.2d 957, 978-79 (5th Cir. 1983).

In the case of a cumulative action, one can envision an overburdened rail system in a major city where two exemption actions proceeding in isolation would create an unacceptable cumulative risk of derailment or accident that would justify the denial of one or both under § 10101(8). Alternatively, a single proposal acting as a common carrier may not create a detriment to public health and safety with its own traffic, but when reasonably foreseeable common carrier traffic is considered, the detriment may rise to a level that justifies a mitigation condition or denial under § 10101(8).

For a connected action, the impact on public health and safety from transportation facilities and equipment arises from the full scope of the action that is connected, not just a single phase. The relevant analysis is the full build-out level of rail traffic from the action that will not proceed without, or which is interdependent with, the rail line.

For the SGR proposal, which is a connected action, the full build-out level of rail traffic has not been disclosed. Rather, an estimate from the first phase of the Vulcan quarry is being used, because the other phases of the quarry, even though obviously interdependent with and connected to the rail line, are being treated as speculative.

We are not saying that the § 10101 analysis includes the entire quarry, even though the NEPA analysis must because it is a connected action. We are saying that the full extent of the

quarry must be considered in the final evaluation of the rail proposal on its merits, and that the STB needs to take particular care that the decision is made correctly.

C. Fostering Sound Economic Conditions in Transportation

To date, SGR has received the benefit of assumed common carrier status. Yet SGR's own statements undermine this assumption. If SGR is to receive the benefit of any showing of financial viability, it is solely that associated with the quarry. The precise nature of that financial relationship remains undisclosed.

The STB cannot simply take the applicant's word that an abstract benefit, in the form of Vulcan's quarry, exists to satisfy § 10101(5), without also analyzing that benefit's connection to the rail line in the EIS. The alternative is to pretend that this is a rail line to nowhere,[14] which not only runs afoul of NEPA, but is difficult to justify under § 10101(5).

II. CLOSER STB OVERSIGHT OF CONNECTED ACTIONS TO NEW RAIL CONSTRUCTION IS NEEDED

Several past STB rail construction cases have defined the scope of their respective environmental impact analyses with varying degrees of legality. Some of these cases applied the relatedness test (for EA/FONSI cases) or the connected and/or cumulative action designation (for EIS cases) correctly. But others left STB exposed to potential judicial reversals on those issues.

[14] *Cf.* SGR Reply to MCEAA Petition to Revoke 5 (Jun. 9, 2003) (Document 208015) ("Clearly SGR is not proposing to build a railroad . . . for no good reason. [Vulcan], the parent of SGR, is planning a quarry. . .").

MCEAA urges the STB to study and re-evaluate its positions in these cases, and focus particular oversight to prevent disparate results from occurring in this proceeding.

Alamo North

In a recent case with a connected action somewhat similar to the one in this proceeding, the STB applied the relatedness test legally *in the context of an EA*. In *Alamo North*,[15] the proposed rail line would serve an existing quarry and a new quarry. The owner of the new quarry assured STB that it was not related to a new rail line.[16] As in this case, the owner of both the new and existing quarries, Martin Marietta, was the owner and developer of the rail line. STB found no cumulative impact between the rail line and either the existing or planned quarry sites. Both the relatedness finding and the cumulative impact finding could have been challenged on the facts, but as a matter of law STB likely properly applied the relatedness test in the absence of contrary evidence.

San Jacinto Rail

In *San Jacinto Rail*,[17] however, contrary evidence was submitted to show that a proposed 13.2-mile chemical rail line and an adjacent, unconnected proposed Port Authority container port

[15] *Alamo North Texas R.R. Corp.—Construction and Operation, Wise County, TX—Finance Docket No. 34002* (Sept. 3, 2002).
[16] *Id.*, Environmental Assessment at ES-4 (Apr. 10, 2002).
[17] *San Jacinto Rail Ltd.—Construction Exemption, Build-in to the Bayport Loop—Finance Docket No. 34079* (May 9, 2003).

that would be served by a separate rail, were "cumulative actions." Both actions were at the proposal stage and undergoing an EIS. Parties submitted unrebutted evidence that the two proposals might have numerous cumulatively significant impacts over a wide area, justifying their analysis in a single EIS. The STB and the Corps of Engineers (the lead agency reviewing the container port) ignored this evidence and made only separate, conclusory statements concerning the cumulative impacts of each project on the other, rather than of both projects together on the environment.[18] In the eyes of opponents, the STB improperly applied a relatedness test, rather than 40 C.F.R. § 1508.25(a)(2), to cut off analysis of overlapping rail traffic impacts from the container port and San Jacinto Rail within the city of Houston. Even without this particularly severe additive impact, numerous other potentially cumulatively significant impacts, such as noise and impact on the road transportation system adjacent to the container port, were not jointly analyzed.

Tongue River

[18] *Id.*, Final Environmental Impact Statement (May 2, 2003) at 4-141, 142 (incorporating cumulative impact analysis of Draft Environmental Impact Statement served Dec. 6, 2002); *see also* U.S. Army Corps of Engineers, Galveston District, Draft and Final Environmental Impact Statements for the Port of Houston Authority's Bayport Container Terminal, at http://www.swg.usace.army.mil/pe/reg/pha/

In *Tongue River*,[19] another EIS case, the proposed actions of a consortium formed to serve existing and new area coal mines were properly limited to exclude a new mine along one of the proposed lines. The STB found that the consortium would build the new rail line regardless of whether another mine began operations.

East Cooper

In *East Cooper*,[20] a state run railroad proposed to connect to a proposed steel mill as an incentive for the steel mill project. The EA for the rail line indicated that the Corps of Engineers had granted a permit on August 3, 1995, after the petition for exemption was filed for the rail line on June 29, 1995, but before the EA was completed.[21] Clearly, the Corps exposed itself to reversal here by not including the obviously connected rail line action in its own analysis before granting a permit. Instead, the Corps foreclosed alternatives and STB evidently did not or could not object. The one paragraph cumulative impacts discussion in STB's EA speaks solely of reasonably foreseeable future rail traffic, and does not reference environmental impacts that would be caused by the steel mill connected action. The analyses of the rail line and the steel mill could not have been tiered within the meaning of 40 C.F.R. § 1508.28 precisely because the

[19] *Tongue River Railroad Co.—Construction and Operation, Ashland to Decker, MT—Finance Docket No. 30186* (Sub-No. 2) (Nov. 8, 1996).
[20] *East Cooper and Berkeley R.R.—Construction and Operation, Berkeley County, SC—Finance Docket No. 32704* (Dec. 13, 1995), 1995 WL 734007.
[21] *Id.*, Environmental Assessment (Sept. 12, 1995), 1995 WL 684898 at 5.

Corps analysis of the steel mill contained no general discussion of or reference to any specific categories of impacts from the proposed rail line alternatives.

Northern Nevada Railroad

In *Northern Nevada Railroad*,[22] the STB produced an EA[23] lacking a cumulative impact section entirely for a proposed rail line spur to serve a reactivated mine. The mine and the new rail line were clearly related in that the mine was interdependent on the rail line and required it to operate. Nevertheless, the U.S. Bureau of Land Management (BLM) produced a separate EIS for the mine that analyzed rail operations much more comprehensively:

> The FEIS addressed potential environmental impacts of rail freight operations over the proposed new rail line and the two existing line segments, as they relate to BLM's approval of RMLP's mining operation. In addition, on October 20, 1993, BLM issued an EA on construction and operation of the proposed new rail line in the areas where the line would be located on BLM property (approximately half the proposed rail ROW).[24]

Since the actions were obviously related, and connected for the purposes of BLM's EIS, there was no reason for STB to wait for BLM to analyze them separately and then incorporate BLM's analysis into its own. Analyzed together, the mine and rail line would have generated at least one less environmental document with the same result.

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[22] *Northern Nevada R.R. Corp.—Construction and Operation, White Pine County, NV—Finance Docket No. 32476* (Feb. 24, 1995), 1995 WL 73355.
[23] *Id.*, Environmental Assessment (Sept. 12, 1995), 1995 WL 141753.
[24] *Id.* at 3.

Vaughan

In *Vaughan,* [25] the STB failed to properly apply the relatedness test in an EA to a proposed coal loadout facility and preparation plant to be owned by Fola Coal Company. That plant was interdependent on the construction of Vaughan's line and likely would have been deemed related had an appropriate relatedness test been applied. The loadout facility and preparation plant should have been analyzed in the EA cumulative impacts section to determine whether its cumulative impacts might have been significant enough to trigger an EIS.

Vaughan raises difficult questions for the STB, since the resource shortages at the agency encourage resistance to federalizing large industrial rail-dependent projects during environmental review. STB certainly does not want to have to consider the environmental consequences of every rail-dependent development project in the nation. However, at the EA stage, the multi-factor federalization test for relatedness does offer some flexibility for "small federal handles." As discussed in our letter to Ms. Rutson, however, the CEQ regulations do not afford this same flexibility when the threshold of significance or public controversy is sufficient to require the more detailed EIS.

[25] *Vaughn R.R. Co.—Construction Exemption, Nicholas and Fayette Counties, WV—Finance Docket No. 32322* (Nov. 4, 1993), 1993 WL 451259

To the extent that STB must consider cumulative impacts in an EA, it is asking to be sued on the adequacy of the EA when it fails to explicitly apply a defensible relatedness test. If the lead agency on the other, potentially connected action undertakes an EIS or concludes without an EIS before STB even starts, both agencies are subject to be sued under the CEQ regulations. But in many cases, if STB and the other agencies with jurisdiction over the non-rail potentially connected action would cooperate, STB could avoid unnecessarily duplicated analysis or segmenting the rail proposal and still comply with NEPA.

Pascagoula

In *Pascagoula*,[26] a Port Authority sought to connect its proposed rail line from its proposed intermodal terminal to a mainline common carrier. Though it did not represent as much at the time, the Port Authority later also received operating authority on the line.[27] The port terminal and the rail line were clearly related for the purposes of the EA analysis. Nevertheless, the Corps of Engineers (lead agency on the port terminal) and STB proceeded separately,[28] despite STB's explicit finding, in Section 1.2.3 of the EA, that the port terminal and rail line were related actions. A finding of relatedness necessarily entails a finding of cumulative significance or insignificance as to the impacts of the related actions, yet the STB's EA contained no cumulative

[26] *Jackson County Port Auth.—Construction Exemption, Pascagoula, MS—Finance Docket No. 31536* (Aug. 6, 1990), 1990 WL 287815.
[27] *Jackson County Port Auth.—Operating Authority, Pascagoula, MS—Finance Docket No. 34134* (Dec. 5, 2001), 2001 WL 1544905.
[28] *Id., Finance Docket No. 31536*, Environmental Assessment (Jul. 25, 1991), 1991 WL 163508.

impact discussion whatsoever. This exposed both STB and the Corps to potential judicial reversal.

CONCLUSION

In this case, the proposed SGR rail line and planned Vulcan quarry are interdependent. The rail line depends on the quarry for its justification, and each phase of the quarry connects to the others to fulfill this purpose of the rail line. The economic viability of both is potentially dependent on the other. Because an EIS will be prepared, and because the rail line lacks independent utility without the quarry that will benefit from it, the direct impacts and alternatives to the quarry must also be analyzed. The case law is clear on these points, even where STB's past rail construction proceedings have not been. MCEAA urges the STB to closely examine how it accounts for cumulative impacts in all potential project situations and levels of environmental analysis, to determine where clearer policies or interagency cooperation may aid in compliance with NEPA and with § 10101.

Very truly yours,

THE GARDNER LAW FIRM
A Professional Corporation

David F. Barton

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served on all Parties of Record in *Finance Docket Number 34284*, by first class mail or more expeditious means, on this 20th day of February, 2004, including:

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March 11, 2004

VIA HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 711
Washington, DC 20423-0001

FD 34284

Re: Reply of Southwest Gulf Railroad Company to MCEAA Letter Filing

Dear Secretary Williams:

Enclosed for filing please find an original and 10 copies of the Reply of Southwest Gulf Railroad Company to MCEAA February 20, 2004 letter.

Respectfully,

David H. Coburn
Attorney for Southwest Gulf Railroad Company

Enclosure

cc: All parties of record

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BEFORE THE
SURFACE TRANSPORTATION BOARD



Finance Docket No. 34284

SOUTHWEST GULF RAILROAD COMPANY --
CONSTRUCTION AND OPERATION EXEMPTION --
MEDINA COUNTY, TEXAS

REPLY OF SOUTHWEST GULF RAILROAD COMPANY TO MCEAA FEBRUARY 20, 2004 LETTER

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Attorney for Southwest Gulf
Railroad Company

March 11, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34284

SOUTHWEST GULF RAILROAD COMPANY –
CONSTRUCTION AND OPERATION EXEMPTION –
MEDINA COUNTY, TEXAS

REPLY OF SOUTHWEST GULF RAILROAD COMPANY TO MCEAA FEBRUARY 20, 2004 LETTER

Southwest Gulf Railroad Company ("SGR") hereby replies to the February 20, 2004 "Letter for placement in the record" submitted by the Medina County Environmental Action Association ("MCEAA").[1]

A. MCEAA's Arguments are Addressed to Environmental Issues Within SEA's Purview

The nature and purpose of MCEAA's unusual filing is unclear. MCEAA does not ask for any specific relief, but rather appears to have filed its letter primarily in order to reiterate arguments that MCEAA has previously made in a series of separate filings with the Board's Section of Environmental Analysis ("SEA"). Those arguments primarily concern the scope of the Environmental Impact Statement ("EIS") being prepared by SEA in this case, and specifically the issue of whether that EIS should assess the direct environmental impacts of a

[1] MCEAA is composed of landowners who oppose the proposed 7-mile common carrier SGR line, and the limestone quarry of a sister company that it would serve. They apparently have other plans for the area and thus seek to use the Board's processes to halt or delay construction of the rail line.

quarry that SGR will serve. SEA issued, on January 28, 2004, a Notice of Intent to Prepare an Environmental Impact Statement and solicited comments on the draft scope of that EIS ("Draft Scoping Notice"). MCEAA's arguments in its February 20 are, in large measure, addressed to that Draft Scoping Notice.

SGR responded to MCEAA's environmental scoping issues by a March 10, 2004 letter filed with SEA. SGR demonstrated in that reply that SEA had properly chosen in the Draft Scoping Notice to confine its assessment of the quarry to a cumulative impacts analysis. SGR submits that there is no basis, and MCEAA has asserted no basis, on which the Board, as opposed to SEA, should intervene in the EIS process on this issue. Matters concerning the scope of the EIS that SEA is preparing should be addressed by SEA as part of its continuing environmental review, and presumably will be addressed by SEA when it issues a final scoping notice in this proceeding.

B. MCEAA Has Not Demonstrated Any Basis for Questioning the Conditional Exemption Granted to SGR

Apart from its environmental scoping arguments, MCEAA's rambling letter to the Board also appears to suggest at page 3 that somehow the filing of that letter places a burden on SGR to respond to alleged "bases for exemption denial" suggested by MCEAA. MCEAA, however, has not even set forth a colorable basis for questioning the Board's May 19, 2003 decision conditionally granting SGR's exemption petition. That decision was affirmed on August 21, 2003, when the Board denied a Petition for Revocation filed by MCEAA. In its February 20 letter -- its second bite at the apple -- MCEAA has not even asked for any specific relief, much less articulated "reasonable, specific concerns under the revocation criteria," as is required to

justify a challenge to the exemption.[2] Thus, as in its previously denied Petition for Revocation, MCEAA has once again failed to meet *its* burden of proof that the Board acted erroneously in granting the SGR exemption.

Using tortured arguments, MCEAA suggests SGR's proposed rail line might not meet certain Rail Transportation Policy ("RTP") goals set forth at 49 U.S.C. § 10101, and thus might not warrant an exemption under 49 U.S.C. § 10901. MCEAA appears to argue that the rail and quarry together may give rise to a safety detriment that would warrant denial of the rail line exemption, citing 49 U.S.C. 10101(8).[3] Putting aside the question of the extent to which the quarry should be addressed in the EIS, there is no doubt that safety issues will be assessed in the EIS. Once the Board has analyzed the EIS, it can impose those mitigation measures that it deems appropriate to address any legitimate safety concerns that it finds. Further, SGR has supplied information about the projected level of quarry-generated rail traffic for the reasonably foreseeable future. MCEAA's suggestion that there is more data to supply is not correct.[4]

Moreover, MCEAA's effort to argue that the SGR line poses an unreasonable safety risk that could justify denial of its exemption is based on nothing more than far-fetched speculation. The SGR line traverses a primarily rural area, few trains will operate on the line and grade crossings will be protected consistent with applicable standards. There is no reason to believe that the line poses any kind of special risk above and beyond that associated with any rail line of

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[2] See August 21, 2003 Decision at 1.

[3] That provision of the RTP states that, "In regulating the railroad industry, it is the policy of the United States Government -- . . . (8) to operate transportation facilities and equipment without detriment to the public health and safety."

[4] MCEAA appears to believe that there are "other phases" of the quarry as to which SGR should supply information. However, the number of trains SGR has estimated will operate over the line is based on an estimate of quarry production over a reasonable foreseeable period of at least several years.

this nature. In addition, MCEAA offers no basis to question that the SGR line will further several RTP goals, including ensuring the development of a sound rail transportation system and promoting efficient rail transportation. *See* 49 U.S.C. §§ 10101(3), (4).

MCEAA also argues that SGR must disclose its financial relationship with the quarry in order to show financial viability. MCEAA relies on no regulations or precedents for this odd proposition, and SGR knows of none. The Board does not normally assess financial viability in rail construction exemption cases, and there is no reason to do so here. SGR is a subsidiary of one of the largest corporations in the United States, Vulcan Materials Company. Vulcan had over $2.5 billion in sales in 2003, is included in the S&P 500 and is one of the largest producers of aggregate in the nation. It was recently ranked by Fortune Magazine in fifth place out of the U.S. Fortune 1000 companies in terms of financial soundness, and was joined in the top ten by companies such as United Parcel Service, Microsoft and Exxon-Mobil.[5] Given these facts, there is no reason to believe that SGR will not have the financial backing needed to build and operate its line.[6]

The final portion of MCEAA's letter filing (pages 8-15) is devoted to a rambling critique of how the Board has handled its NEPA responsibilities in prior rail construction cases. Generally, MCEAA seems to believe that in several cases the Board committed reversible error in failing to adequately address environmental issues. SGR has responded to this critique in its March 10 letter addressed to SEA.

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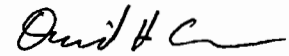
[5] See attached press release. Vulcan was also ranked by Fortune among its top ten companies in terms of social responsibility.

[6] SGR has never claimed that it will rely on quarry-generated revenues for its financial viability. Further, SGR is not in a position at this stage to estimate traffic volumes or revenues that will be generated from its common carrier operations for businesses other than the quarry that might locate on or near its line. Such revenues could further support SGR's line.

CONCLUSION

The NEPA issues raised by MCEAA are properly addressed in the on-going environmental process, in which MCEAA will have ample opportunity to comment. To the extent that MCEAA's February 20 letter warrants any Board action, the Board should find that there is no basis in that letter for questioning the Board's prior decisions granting and affirming SGR's conditional exemption.

Respectfully submitted,



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March 11, 2004



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Thursday, March 04, 2004

VULCAN ON FORTUNE MAGAZINE'S MOST ADMIRED LIST - AMONG TOP TEN IN SOCIAL RESPONSIBILITY AND FINANCIAL SOUNDNESS

Birmingham, Ala. — Vulcan Materials Company (NYSE:VMC) announced that it has been named to Fortune Magazine's "America's Most Admired Companies" list, which appears in the publication's March 8, 2004 issue. Vulcan ranked first in its industry category and ranked among the top ten companies in the U.S. Fortune 1000 for both financial soundness and social responsibility.

To compile its "Most Admired Companies" industry rankings list, Fortune identified the ten largest companies by revenues in 64 industries, including large subsidiaries of foreign-owned companies. They then asked 10,000 executives, directors and securities analysts to rate the companies of their own industries in eight separate categories: innovation, employee talent, use of corporate assets, social responsibility, quality of management, financial soundness, long-term investment, and quality of products and services. Within its industry group, Vulcan was rated number one in all eight categories.

"Our culture and our vision for the future of this Company compel us to be good stewards of our financial resources while also operating in a socially responsible manner," said Donald M. James, Vulcan's chairman and chief executive officer. "The Fortune list is one indication that we are on the right track for continued success for our company, customers and communities. This recognition is a great tribute to the thousands of Vulcan employees all across the country who work every day to achieve superior returns for our shareholders and to be good citizens in the communities where we operate."

Vulcan Materials Company was ranked 9th out of all Fortune 1000 companies in social responsibility. Social responsibility efforts at Vulcan are focused upon four areas: community involvement, environmental stewardship, safety and health, and product usage. Community involvement ensures we help strengthen the communities that support our facilities and provide us with employees. Environmental stewardship preserves the quality of life for future generations while providing products to enhance the quality of life for the present generation. Safety and

health programs are fundamental in ensuring the health and well being of our workers and neighbors. Product usage reflects our determination to manufacture quality products in a responsible manner that adds value to society.

Every year the Company's sites become open-air classrooms, offering thousands of students a hands-on experience in earth science and ecology. Approximately 30,000 students toured Vulcan locations in 2003. Each plant selects relevant activities that fit the interests of tour participants. In addition, many facilities partner with school groups or science classes to erect nest boxes for wildlife, create butterfly gardens, develop habitat to attract native flora and fauna, and build nature trails on our land. Some work with local Scouting organizations, retirement communities or other groups to monitor wildlife at these sites. Employees are active participants in these and other community-enhancing activities.

The other companies among the top ten in Fortune's social responsibility category were United Parcel Service, Alcoa, Washington Mutual, BP, McDonald's, Procter & Gamble, Fortune Brands, Altria, and American Express.

In the financial soundness category, Vulcan was ranked fifth out of all Fortune 1000 companies, and was joined in this category by United Parcel Service, Microsoft, Anheuser-Busch, Exxon-Mobil, Berkshire Hathaway, Procter & Gamble, Johnson & Johnson, Liz Claiborne, and Cisco Systems in the top ten.

Vulcan Materials Company, an S&P 500 company, is a producer of industrial materials with significant positions in two industries. It is the nation's foremost producer of construction aggregates, a major producer of other construction materials, and a leading chemicals manufacturer, supplying chloralkali and other industrial chemicals. For more information about Vulcan, see www.vulcanmaterials.com.

-END-

For further information contact David Donaldson, Media Relations, at (205) 298-3220.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March 2004, I caused a copy of the foregoing Reply of Southwest Gulf Railroad Company to be served via first-class mail on the parties of record to this proceeding or their counsel.

David H. Coburn

Appendix C

Consultation Letter and Agency Comments

Contents

Name of Sender	Date	ECT #	Page
Consultation Letter - Request for Preliminary Comments,,	3/31/2003		C-1
US EPA - Scoping Comments	4/4/2003		C-7
Federal Emergency Management Agency	4/4/2003		C-13
Texas Water Development Board	4/7/2003		C-14
Texas Commission on Environment Quality	4/10/2003		C-15
Edwards Aquifer Authority	4/16/2003		C-16
United States Fish and Wildlife Service	4/22/2003		C-17
Texas Department of Transportation	4/30/2003	EI-63	C-19
Texas Commission on Environmental Quality	4/30/2003	EI-72	C-21
Texas Commission on Environmental Quality	5/5/2003	EI-73,	C-23
Schweers Historical Foundation, Inc.,(URS)	5/14/2003		C-24
Schweers Historical Foundation, Inc., (Congressman Bonilla)	5/14/2003		C-25
Texas Parks and Wildlife	5/28/2003		C-28
Texas Review and Comment System	4/1/2003		C-36
Office of the Governor,,	6/11/2003		C-37
Texas Historical Commission	6/11/2003		C-38
Email Re: Floodplain Standards; cc to County Floodplain Administrator, 10/30/2003	10/30/2003		C-39
Texas Department of Transportation	2/6/2004	EI-597	C-40
Advisory Council on Historic Preservation	2/4/2004	EI-543	C-42
United States Fish and Wildlife Service	2/13/2004	EI-600	C-44
Texas Department of Transportation	2/25/2004	EI-698	C-46
Edwards Aquifer Authority	2/26/2004	EI-656	C-48
Medina County Judge	4/24/2003	EI-57	C-49
U.S. Fish and Wildlife Service	3/1/2004	EI-683	C-51
U.S. Army Corps of Engineers	3/8/2004	EI-738	C-52

Contents (continued)

Name of Sender	Date	ECT #	Page
Medina County Judge	6/1/2004	EI-879	C-103
Texas Commission on Environmental Quality	6/28/2004	EI-902	C-104
Texas Parks and Wildlife	7/6/2004	EI-916	C-105
Texas Historical Commission	7/20/2004	EI-942	C-110

SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Economics, Environmental Analysis and Administration

March 31, 2003

Mr./Ms. _____
Agency Name
Agency Address

Re: STB Finance Docket No. 34284, Southwest Gulf Railroad Company – Construction and Operation Exemption – Medina County, TX;
Request for Preliminary Comments

Dear _____:

On February 27, 2003 Southwest Gulf Railroad Company (SGR) filed a petition for exemption from the requirements of 49 U.S.C. 10901 with the Surface Transportation Board (Board) to construct and operate a rail line from a proposed Vulcan Materials Company (VMC) limestone quarry to a connection with the Union Pacific Railroad Company (UP) in Medina County, Texas. The proposed rail line would consist of approximately seven miles of single-track railroad from the quarry to milepost 250 of UP's Del Rio Subdivision near Dunlay, Texas, as well as either a 2-mile long loading loop or a 1-mile long straight track, which could include one or more parallel loading tracks, within the quarry grounds.

Pursuant to the requirements of the National Environmental Policy Act of 1969, the Board's Section of Environmental Analysis (SEA) is conducting an environmental analysis of the proposed rail line construction and operation. As part of our environmental analysis, SEA is requesting comments from Federal, state and local agencies, such as yours, that may have information regarding the environmental impacts of this project.

Based on preliminary information submitted by SGR, enclosed with this letter is a brief description of the proposed project and alternatives. I would appreciate receiving any comments you may have on the proposed action, as well as the alternatives described. If possible, I would prefer to receive your comments no later than May 1, 2003. SEA will incorporate the findings of its environmental analysis into an appropriate environmental document and will provide you with a copy of the document for review and comment.

URS Corporation, SEA's independent third-party consultant for this project, is working under the supervision, direction and control of SEA to assist in the preparation of the appropriate environmental document. Thus, I request that you send your comments directly to the URS Project Manager at the following address:

Ms. Jaya Zyman-Ponebshek
URS Corporation
P.O. Box 201088
Austin, TX 78720-1088

If you have any questions or require more information regarding this project, please do not hesitate to contact me or Rini Ghosh of my staff at (202) 565-1539.

Sincerely,

Victoria Rutson
Chief
Section of Environmental Analysis

Enclosure

cc: Jaya Zyman-Ponebshek (URS Corporation)

SYNOPSIS OF THE SOUTHWEST GULF RAILROAD COMPANY RAIL PROJECT IN MEDINA COUNTY, TEXAS

Background

Southwest Gulf Railroad Company (SGR), a wholly owned subsidiary of Vulcan Materials Company (VMC), plans to construct and operate a rail line to connect a proposed VMC stone quarry to the Union Pacific Railroad Company (UP) main line railroad in Medina County, Texas, about 30 miles west of San Antonio, Texas. SGR has filed with the Surface Transportation Board (Board) a petition for exemption from the requirements of 49 U.S.C. 10901 to construct and operate approximately 7 miles of single-track railroad. SGR has also proposed to construct and operate either a 2-mile long loading loop or a 1-mile long straight track, which could include one or more parallel tracks, within the quarry property, which would not be subject to Board jurisdiction. Pursuant to the Council on Environmental Quality's regulations for implementing the provisions of the National Environmental Policy Act at 40 CFR 1508.25 both the proposed Board jurisdictional rail line and the loading loop will be considered in the Board's environmental review.

VMC plans to locate the new quarry in the north central part of Medina County. The quarry would produce crushed stone aggregate for highway and other construction purposes. Although the proposed rail line would primarily serve VMC's new stone quarry, it would also be available to serve any other nearby industries, including other quarries, in the future. According to SGR, when the rail line is in operation, it will be shipping about 5 million tons of rock per year (416 trains, with 100 cars each, per year) or about four movements per day (2 leaving loaded and 2 returning empty), assuming a 250-day work year.

Description of SGR's Preferred Route

SGR states that the proposed rail line would consist of a single-track rail line between the planned quarry site and the nearest Class I rail line, which is UP's Del Rio Subdivision, as shown on the attached map. The UP rail line is located approximately seven miles south of the quarry site, and the SGR line would meet the UP rail line at approximately milepost 250 of the UP line, at a point near Dunlay, Texas.

Despite its proximity to San Antonio, Medina County has a population of about 33,000 persons. The area is mostly rural, composed of relatively dry and flat farmland and pastureland. The proposed rail line would not traverse any incorporated or densely populated areas and would not cross any other rail lines. SGR's preferred route would cross some lightly traveled county paved and unpaved roads and one state maintained road (FM 2676), but would not cross any major highways. No Federal lands would be traversed and, apart from the road crossings, no state owned property would be traversed. SGR states that the line would cross only two drainage features with intermittent seasonal flow (Quihi and Elm Creeks).

While there is some local market in the San Antonio area for the aggregate that would be produced at the proposed new quarry, according to SGR, the primary market for the aggregate is in the eastern part of Texas, including the Greater Houston area. Since truck transportation of stone products becomes increasingly inefficient and uneconomical for distances much over 50 miles, VMC intends to rely on rail transportation from the quarry to the market destinations. SGR states that when the quarry is in operation, it will produce approximately 5 million tons of stone per year. According to SGR, transporting that volume of stone from the quarry to a remote rail yard by truck would involve in excess of 215,000 round trips per year (over 850 per day).

Alternatives to SGR's Preferred Route

SGR states that its preferred route of the proposed rail line, although not necessarily the shortest possible route between the existing UP line and the proposed quarry, avoids environmentally sensitive areas, such as wetlands. The route is relatively flat, which minimizes construction costs and limits the number of individual property owners to as few as 10 (not counting the property that is owned by VMC). According to SGR, the route crosses the state-maintained road (FM 2676) in a location that affords high visibility in both directions. The route also takes maximum advantages of existing property lines and fence lines and reduces splitting large tracts of land.

SGR preliminarily examined a total of eight routes (with minor variations within the routes), and evaluated the routes for avoidance of wetlands, favorable topography and the number of properties crossed. SGR determined that four of the eight original alternatives met the criteria for further evaluation. In addition to SGR's preferred route described above, the three alternative routes considered were:

Alternative Route 1 would connect with the UP rail line approximately 3 miles west of SGR's preferred route. This route is approximately 2 miles longer than the preferred route and crosses in excess of 20 individual properties.

Alternative Route 2 would connect with the UP rail line in the same location as the SGR's preferred route. This route swings farther west than SGR's preferred route, increasing the distance by approximately 1,000 feet and crosses in excess of 18 individual properties.

Alternative Route 3 would connect with the UP rail line in the same location as Alternative Route 2 and SGR's preferred route. This route swings father east and then cuts back to the west diagonally across several properties. This route is nearly 2,500 feet longer than the preferred route and crosses in excess of 16 individual properties.

VMC also considered alternative ways to transport quarried materials to the UP rail line, such as a conveyor system. VMC rejected the conveyor system option, because

of the economic cost of building and maintaining more than seven miles of belts, idlers, and idler tables. In addition, SGR states that such a conveyor would require the construction of a remote rail yard and possibly an additional aggregate finishing plant north of the UP rail line.

The no-build alternative would require the use of trucks to carry the aggregate from the quarry to the UP line. This alternative would also require the construction of a remote rail yard and possibly an additional aggregate finishing plant north of the UP rail line. According to SGR, this would significantly reduce the economic benefit of distributing quarry products to markets in southeast Texas, the opportunity of capitalizing on the rail distribution network, and the ability to attract capital investment for the development of Medina County. In addition, according to SGR, based on the recent and projected growth in population of the southeast Texas region along with its accompanying demands for infrastructure development, when combined with the limited and declining resources of existing aggregate operations, the no-build alternative has potentially far-reaching negative economic impacts on the region.

Attached is a map outlining SGR's preferred route and the three alternative routes considered.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

April 4, 2003

Ms. Jaya Zyman-Ponebshek
URS Corporation
P.O.Box 201088
Austin, TX 78720-1088

Dear Ms. Zyman-Ponebshek:

In accordance with Section 309 of the Clean Air Act and the National Environmental Policy Act (NEPA), the U.S. Environmental Protection Agency (EPA), Region 6 office, has reviewed your solicitation for comments for preparing a U.S. Department of Transportation, Surface Transportation Board, Environmental Assessment to construct and operate a rail line from the proposed Vulcan Material Company limestone quarry to a connection with the Union Pacific Railroad Company in Medina County, Texas. The proposed rail line would consist of approximately seven miles of single-track railroad from the quarry to milepost 250 of Union Pacific's Del Rio Subdivision near Dunlay, Texas, as well as either a 2-mile long loading loop or a 1-mile long straight track, which could include one or more parallel loading tracks, within the quarry.

We have completed our review of the brief project description and would like to take this opportunity to submit basic recommendations on the content and scope of the Environmental Assessment you are preparing. Our comments, which are enclosed, are based upon the Council on Environmental Quality regulations 40 CFR (Parts 1500-1508) and our authority under Section 309 of the Clean Air Act.

We appreciate the opportunity to comment. Please send our office two copies of the Environmental Assessment. If you have any questions, please contact me at (214) 665-7451.

Sincerely yours,

Michael P. Jansky, P.E.
Regional Environmental Review
Coordinator

Enclosure

SCOPING COMMENTS
FOR THE
SOUTHWEST GULF RAILROAD COMPANY
CONSTRUCTION AND OPERATION
ENVIRONMENTAL ASSESSMENT

FEDERAL REGULATORY PROGRAMS

EPA Federal programs, authorities and special interests include but are not limited to:

A. Water Quality Management Program - Sections 106, 205, 208, and 303 of the Clean Water Act.

B. National Pollutant Discharge Elimination System (NPDES) Permit Program - Section 402 of the Clean Water Act.

C. Drinking Water Programs - Surface Public Water Supply and Underground Water Source Programs - Safe Drinking Water Act.

D. Section 404 Permit Program Coordination - Section 404 of the Clean Water Act.

E. Environmental Impact Statement (EIS) Coordination - EIS Preparation and Review Programs - National Environmental Policy Act (NEPA) and Section 309 of the Clean Air Act.

F. Executive Orders 11988 (Floodplain Management) and 11990 (Wetland Protection).

G. Section 7 of the Endangered Species Act - Protection of threatened or endangered species of flora or fauna.

H. 36 CFR Part 800 of the Historic Preservation Act - Protection of archeological or historical elements eligible for nomination to the National Register.

Description and requirements of these programs:

A. The Environmental Protection Agency (EPA) established the Water Quality Management (WQM) Program under the authority of Sections 106, 205, 208, and 303 of the Clean Water Act to develop and implement programs to control point and nonpoint sources of water pollution. Specific program activities include identifying water pollution problems; assigning the responsibility for problem solving to state and local agencies; and then coordinating with these agencies in developing and implementing solutions to the problems. The state agencies establish their water quality goals and standards, and develop programs to meet these goals. To establish water quality standards, states designate uses for stream segments, and set numerical and general water quality criteria to attain these uses.

B. Wastewater discharges are considered point sources subject to a National Pollutant

Discharge Elimination System (NPDES) permit under Section 402 of the Clean Water Act.

C. The EPA developed primary drinking water regulations to protect public health, and established requirements for state programs to implement the public water supply supervisor program and underground injection control program under authority of the Safe Drinking Water Act.

D. Under Section 404, the U.S. Army Corps of Engineers is authorized to issue permits for discharge of dredged or fill material into waters of the U.S., subject to an EPA "veto" if the discharge has certain unacceptable impacts. Thus, in general, the Corps is the primary permitting agency for the Federal 404 program. EPA has the authority to review each permit application and to submit comments. Pursuant to the 404(b)(1) Guidelines for evaluating discharge of dredged or fill material, an EPA permit review focuses on evaluating practicable alternatives, minimizing impacts, and mitigating for unavoidable impacts to the aquatic ecosystem, including wetlands.

E. Section 309 of the Clean Air Act and the Council on Environmental Quality (CEQ) regulations require EPA to review and comment on projects that may significantly impact the quality of the human environment.

F. Executive Orders 11988 (Floodplain Management) and 11990 (Wetland Protection) require federal agencies to evaluate the potential effects of their actions in floodplains and to avoid adverse floodplain impacts wherever possible, as well as taking action to avoid adversely impacting wetlands wherever possible and minimizing wetlands destruction and preserving the values of wetlands.

G. Section 7 of the Endangered Species Act requires federal agencies to insure that any agency action does not jeopardize the continued existence of any endangered or threatened species or result in the destruction of adverse modification of such critical habitat.

H. 30 CFR Part 800 of the Historic Preservation Act requires federal agencies to identify and determine the effect of the action on any district site, building, structure, or object listed in or eligible for listing in the National Register of Historic Places.

GENERAL COMMENTS:

Environmental Assessment should objectively evaluate all reasonable alternatives and, for alternatives which were eliminated from detailed study, adequately discuss the reasons for their having been eliminated (40 CFR 1502.14).

ENVIRONMENTAL JUSTICE

All Federal agencies should be aware that on February 11, 1994, Executive Order 12898 (E.O.) on "Federal Actions to Address Environmental Justice in Minority Populations and Low-

Income Populations," and an accompanying Presidential Memorandum was issued. The E.O. directs Federal agencies to analyze "the environmental effects, including human health, economic and social effects, of federal actions...." The Presidential Memorandum directs EPA to ensure that Federal agencies analyze the environmental effects of Federal actions on minority and low-income communities when such analysis is required by the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. Section 4321 et seq.)

Although social and economic impacts have always been a consideration in EPA's Section 309 reviews, the Presidential Memorandum highlights the necessity to better integrate the consideration of human health, social and economic effects into the Section 309 review process. The E.O. calls for collection and analysis of information on race, national origin, income level and other appropriate information for areas surrounding projects that have expected environmental, health and economic effect on those populations.

WATER QUALITY

For each alternative under consideration, we request that the EA adopt a process to ensure that water quality concerns are assessed. The discussion in the EA should be of sufficient detail to determine which sites are environmentally preferable. Site-specific water quality problems need to be assessed in greater detail, if applicable, including the adoption of site-specific mitigation measures to protect water quality and beneficial uses.

In 1987, Congress amended the CWA by adding Section 319. Section 319 requires states to assess nonpoint source water pollution problems, develop nonpoint source pollution management programs, and implement controls to protect and improve water quality and beneficial uses. We ask that the applicant work closely with appropriate state water pollution control agencies to determine what pollution control measures should be adopted to implement the state's nonpoint source management plans.

GROUNDWATER COMMENTS

For the selected alternative under consideration, we ask that the EA adopt a process to ensure that the following groundwater concerns are assessed.

a. Describe current groundwater conditions in the program areas. Assess any likely impact to groundwater quality and quantity from program activities.

b. Identify mitigation measures to prevent or reduce adverse impacts to groundwater quality and discuss their effectiveness. We recommend that the applicant work closely with state and local agencies which regulate the protection of groundwater resources (i.e., state health departments and water pollution control agencies.)

WETLANDS - CLEAN WATER ACT (CWA)

The EA should determine whether the project will require the placement of dredged or

fill material into waters of the United States, including wetlands, an activity regulated under Section 404(b)(1) of the Clean Water Act (CWA). We recommend that the applicant work closely with the U.S. Army Corps of Engineers to determine if Section 404 is applicable. We recommend the preservation and enhancement of existing wetland resources. The EA should consider alternatives which will preserve these resources in perpetuity.

It is essential that the applicant undertake every practicable effort to first avoid and then reduce the amount of fill placed into waters of the United States. It would be useful for the EA to make an initial determination whether the proposed project may require the placement of fill material in waters of the United States. If so, the EA should substantiate that appropriate and practicable steps have been taken to avoid and minimize the adverse impacts on aquatic ecosystems. Finally, the EA should describe appropriate and practicable measures to compensate for the unavoidable loss of wetlands and other waters of the United States.

AIR QUALITY COMMENTS - CLEAN AIR ACT

For the preferred alternative under consideration, we suggest that the EA adopt a process to ensure that the air quality concerns are assessed. The EA should discuss existing air quality conditions in terms of National Ambient Air Quality Standards (NAAQS), Federal Prevention of Significant Deterioration (PSD) increments, and state air quality standards. State air quality laws should also be discussed.

When appropriate, the EA should substantiate coordination with state/local/regional air pollution control agencies on air quality planning, air quality modeling, compliance with federal/state air quality standards, the need for air permits, air quality monitoring, and mitigation for adverse impacts.

PESTICIDES

The EA should state whether or not any pesticides (e.g., herbicides, insecticides, rodenticide, fungicides, etc.) will be used for vegetation clearance or control, maintenance and harvest operations, or the control of rat, mosquito or other vector populations. If so, the types of pesticides, application rates, and application procedures should be addressed. Any pesticides used must be registered with the EPA and the state, and label directors and instructions followed. All applicable state regulations must also be followed. In addition, because the regulatory status of chemicals is constantly changing, EPA recommends that a periodic review of the chemical's current regulatory status be done prior to application.

AGRICULTURAL LAND

The EA should clarify if any agricultural land would be impacted by the program. If so, the EA should use the U.S. Department of Agriculture classification scheme to describe the present use of agricultural land which would be affected. If this acreage is prime agricultural land (Class 2), consideration should be given to the Council on Environmental Quality (CEQ) (August 30, 1976 and August 11, 1980) which urge the protection of prime agricultural land.

ENDANGERED SPECIES

The EA should demonstrate adequate coordination with the Fish and Wildlife Service to identify any adverse effects, determine the effect and take measures to eliminate it and fully comply with the requirements under Section 7 of the Endangered Species Act.

HISTORIC PRESERVATION

36 CFR Part 800 of the Historic Preservation Act requires federal agencies to identify and determine the effect of the action on any district, site, building, structure, or object listed in or eligible for listing in the National Register of Historic Places. The EA should demonstrate proper coordination with the state historical preservation officer. If adverse impacts are identified, the applicant should request formal consultation with the Advisory Council on Historic Preservation (36 CFR, Part 800). Compliance with E.O. 121593 is required.

Federal Emergency Management Agency

Region VI
Federal Regional Center
800 North Loop 288
Denton, Texas 76209–3698

April 4, 2003

Ms. Jaya Zyman-Ponebshek
URS Corporation
P.O. Box 201088
Austin, TX 78720-1088

Re: STB Finance Docket No. 34284, Southwest Gulf Railroad Company – Construction and Operation Exemption – Medina County, Texas, Community Number 480472

Dear Ms Zyman-Ponebshek:

This is in response to Victoria Rutson of Surface Transportation Board of Washington, D.C. letter dated March 31, 2003, requesting comments on the above referenced project. The Median County, Texas does participate in the National Flood Insurance Program (NFIP). We would request that the Floodplain Administrator for the County, Pat Brawner, FPA/Health/Sanitation, 709 Ave. Y, Hondo, Texas 78861, 830-741-6195, be contacted for their review and possible permit requirements for this project.

If you have any questions you may contact me at 940-898-5170.

Sincerely,

Glen H. Beard
Natural Hazards
Program Specialist

TEXAS WATER DEVELOPMENT BOARD

E. G. Rod Pittman, *Chairman*
Wales H. Madden, Jr., *Member*
Thomas Weir Labatt III, *Member*

J. Kevin Ward
Executive Administrator

Jack Hunt, *Vice Chairman*
William W. Meadows, *Member*
Dario Vidal Guerra, Jr., *Member*

April 7, 2003

Ms. Jaya Zyman-Ponebshek
Project Manager, Medina County Railroad Project
URS Corporation
P.O. Box 201088
Austin, Texas 78720-1088

Re: Request for Preliminary Comments on STB Finance Docket No. 34284, Southwest Gulf Railroad Company Construction and Operation Exemption – Medina County, Texas

Dear Ms. Zyman-Ponebshek:

Thank you for sending preliminary information about the proposed railroad project to transport limestone quarry aggregate to Houston and other markets. Our staff has reviewed the information provided, with a focus on any potential impacts to water resources or conflicts with the regional and state water plans.

We concur with Southwest Gulf Railroad Company's observation that the rail line would only cross two drainages with intermittent seasonal flow (Quihi and Elm Creeks). However, those drainages are important for their recharge of the Edwards aquifer, which is an important water source for meeting municipal, industrial, and agricultural water needs. Therefore, we recommend best management practices in crossing those drainages. In addition, water quality is a concern because any spills into these drainages could result in pollution to a major aquifer. Since the aggregate material is not a major pollution concern, the only thing remaining is the fuel and oil from the train operation itself. We do concur that the transport of these bulky aggregates appears to be much more feasible by train than by truck, based on the description in the preliminary synopsis. In conclusion, we find no conflicts with the regional or state water plans.

Sincerely,

William F. Mullican, III
Deputy Executive Administrator
Office of Planning

Our Mission
Provide leadership, technical services and financial assistance to support planning, conservation, and responsible development of water for Texas.

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Telephone (512) 463-7847 • Fax (512) 475-2053
1-800-RELAYTX (for the hearing impaired)
URL Address: http://www.twdb.state.tx.us
E-Mail Address: info@twdb.state.tx.us
TNRIS - The Texas Information Gateway • www.tnris.state.tx.us
A Member of the Texas Geographic Information Council (TGIC)

TNRIS The Texas Information Gateway www.tnris.state.tx.us

Robert J. Huston, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Kathleen Hartnett White, *Commissioner*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 10, 2003

Ms. Victoria Rutson, Chief
Section of Environmental Analysis
Surface Transportation Board
1925 K Street NW
Washington, DC 20423-0001

Re: STB Finance Docket No. 34284, Southwest Gulf Railroad Company - Construction and Operation Exemption - Medina County, TX;
Request for Preliminary Comments

Dear Ms. Rutson:

On April 1, 2003, the Austin Regional Office of the Texas Commission on Environmental Quality (TCEQ) received the referenced request for comment. The project is located in Medina County which is within the area regulated by the San Antonio Regional Officer. Therefore, the request is being forwarded to Mr. Bobby Caldwell, Water Section Manager for that region.

Mr. Bobby Caldwell
Water Section Manager
San Antonio Regional Office
14250 Judson Road
San Antonio, Texas 78233-4480
(210) 490-3096

If you need any addition information, please contact Mr. Caldwell at the San Antonio Regional Office.

Sincerely,

James Bice, P.E.
Field Investigator
Austin Regional Office

cc: Ms. Jaya Zyman-Ponebshek, URS Corporation, Austin, Texas

REPLY TO: REGION 11 • 1921 CEDAR BEND DR., STE. 150 • AUSTIN, TEXAS 78758-5336 • 512/339-2929 • FAX 512/339-3795

P.O. Box 13087 • Austin, Texas 78711-3087 • 512/239-1000 • Internet address: www.tceq.state.tx.us

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AUTHORITY

6.10-1.1-5

April 16, 2003

Ms. Jaya Zyman-Ponebshek
URS Corporation
P.O. Box 201088
Austin, TX 78720-1088

Dear Ms. Zyman-Ponebshek:

The purpose of this letter is to provide comments regarding the petition filed by Southwest Gulf Railroad Company (SGRC) for the proposed construction and operation of a railroad line from a proposed Vulcan Materials Company (VMC) limestone quarry to a connection with the Union Pacific Railroad Company (UPRC) in Medina County, Texas. The Edwards Aquifer Authority (Authority) received your letter requesting preliminary comments on April 1, 2003. The Authority is mandated to manage and protect the Edwards Aquifer within all or parts of an eight county region, including Medina County.

According to the synopsis included with your request for preliminary comments, most of the proposed railroad line construction and operation will be south of the Edwards Aquifer Recharge Zone, and no recharging streams will be crossed by the proposed project. Based on that synopsis, the Authority offers the following preliminary comments regarding the proposed railroad line:

- All wells within the proposed project's site and right of way should be properly abandoned. If the wells are completed in, or through, the Edwards Aquifer, a plugging permit from the Authority will be required.
- Considering the number of trips required if the crushed aggregate should be hauled by trucks, it is the Authority's opinion that the proposed railroad line is the better alternative. However, the Authority would like to express need for caution in the vicinity where the proposed railroad line will be operated within the boundaries of the Edwards Aquifer Recharge Zone (within the quarry), as the area is environmentally sensitive.

If you have any questions regarding these comments, please call Mr. John Hoyt, Aquifer Science Program Manager, at (210) 222-2204, or 1-800-292-1047.

Sincerely,

Gregory M. Ellis
General Manager

GME:RT:JH/ev

E:\Aquifer Science\Environmental\Recharge Zone\Letters\Medina Quarry RR line comments.doc

1615 N. St. Mary's Street San Antonio, Texas 78215-1415 (210) 222-2204 (800) 292-1047

United States Department of the Interior

FISH AND WILDLIFE SERVICE
10711 Burnet Road, Suite 200
Austin, Texas 78758
(512) 490-0057

April 22, 2003

Jaya Zyman-Ponebshek
URS Corporation
PO Box 201088
Austin, Texas 78720-1088

Consultation # 2-15-2003-0276

Dear Ms. Zyman-Ponebshek:

This is a response to your March 31, 2003, letter requesting that the U.S. Fish and Wildlife Service (Service) review potential impacts to federally listed or proposed threatened and endangered species, designated critical habitat, and wetlands that may occur as a result of construction of rail line connecting the proposed Vulcan Materials Company (VMC) quarry to the existing Union Pacific Railroad Company (UP) in Medina County, Texas. We understand the 7-mile rail line will consist of a single track and will be available for use by other industries in the area, including other quarries.

We are providing this information to assist you and the Surface Transportation Board (STB) in assessing and avoiding impacts to federally listed or proposed threatened and endangered species and their habitat pursuant to the National Environmental Policy Act of 1969.

Endangered and Threatened Species

There is currently no designated critical habitat for any species in Medina County. The only two federally listed species that occur in Medina County are the black-capped vireo (*Vireo atricapillus)* and the golden-cheeked warbler (*Dendroica chrysoparia).* We are unable to determine, based on aerial photographs of the area, if these species may be present in this area. It appears that most of the area in the vicinity of the proposed rail line is primarily used for agriculture and has been previously cleared. However, we are particularly concerned about the area noted by STB as the "straight loading track option". It appears the vegetation in this area has not been cleared and may support habitat for one or both of these species.

Please see the enclosed species information and assess the potential for the construction to affect the warbler or vireo. We recommend including a habitat assessment and, if applicable, survey results of the rail line corridor. Any surveys should be done by a biologist familiar with protocols established by the Service to assure the results are accurate as possible. Photos and a detailed description of the vegetation (including percent canopy cover and individual tree species) of the area are helpful in determining if these species may be present. If it is determined that one or both of these species are present, please contact this office for further information on how to avoid or minimize adverse impacts.

The State of Texas provides legal protection for additional species of plants and animals (Texas Parks and Wildlife Code Chapters 67, 68, and 88). We recommend you contact the Diversity Program of the Texas Parks and Wildlife Department, 3000 IH-35 South, Suite 100, Austin, Texas 78704 (512/912-7011) for information concerning animals and plants of State concern.

We thank you for your concern for endangered and threatened species and other natural resources, and we appreciate the opportunity to comment on the proposed rail line. If we can be of further assistance or if you have questions about these comments, please contact Jana Milliken of our staff at 512-490-0057, extension 243. Please refer to the Service Consultation number listed above in any future correspondence regarding this project.

Sincerely,

E. Dawn Whitehead

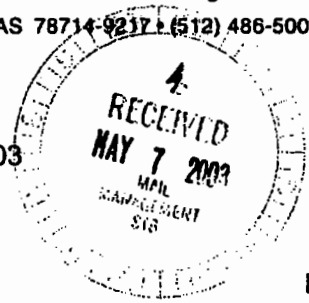
for Robert T. Pine
Supervisor

Enclosures

cc: Victoria Rutson - Surface Transportation Board, Washington, D.C.

Texas Department of Transportation
P O BOX 149217 • AUSTIN, TEXAS 78714-9217 • (512) 486-5000

#E1-63
RZ



April 30, 2003

Ms. Jaya Zyman-Ponebshek
URS Corporation
P.O. Box 201088
Austin, Texas 78720-1088

FILE: TPP (M)
(512) 416-2349

Re: STB Finance Docket No. 34284, Southwest Gulf Railroad Company – Construction and Operation Exemption – Medina County, Texas

Dear Ms. Zyman-Poneshek:

The Texas Department of Transportation (TxDOT) has reviewed the documents supplied by the Surface Transportation Board (STB), in relation to STB Finance Docket No. 34284. Southwest Gulf Railroad Company (SGR) has filed a petition for exemption from certain requirements of 49 U.S.C 10901 in this docket, and seeks authority to construct approximately seven miles of railroad track in Medina County, Texas. TxDOT offers the following comments and information in regards to that application.

SGR states in their petition that the area of their planned quarry and railroad construction is mostly rural and composed of farmland and pastureland. The preferred route would cross a state roadway, FM 2676, as well as several county and local roads. TxDOT is concerned about the impact that an estimated four, one-hundred car trains crossing FM 2676 would have upon the safety of the local community and traveling public. Hondo Independent School District has three bus routes and Medina Valley Independent School District has one bus route that travels along FM 2676 and cross the preferred route twice daily. In addition, there is a large agricultural supply business at the eastern terminus of FM 2676, which provides significant quantities of fertilizer and insecticides to the surrounding area. FM 2676 is abutted by numerous working farms and ranches that utilize these materials on a daily basis. The combination of school children traveling along the route and the transportation of potentially hazardous materials present significant safety concerns at highway-rail grade crossings.

TxDOT's focus on transportation issues throughout the state is multimodal in nature and we appreciate the economic and efficiency benefits provided by the utilization of freight rail transportation. Texas ranks number one in the United States in total number of railroad track miles, second in number of freight railroads operating within the state, fifth in rail traffic transported within the state, and first in number of grade crossing fatalities. As you are aware, the Federal Railroad Administration is encouraging states

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to reduce the number of at-grade crossings by consolidating crossings, closing crossings, and grade-separating crossings wherever possible. We are requesting that STB require SGR to construct a grade-separation at FM 2676 to eliminate all highway-rail grade crossing conflicts. We believe a grade-separation at this location would increase the safety of the traveling public, as well as improve the efficiency of the proposed rail operations and any future increase in operations along the route.

Please contact Mario Medina, Director, Multimodal Section, at (512) 416-2349, if you have any further questions regarding this matter.

Sincerely,

James L. Randall, P.E.
Director, Transportation
Planning and Programming

cc: Victoria Rutson, Surface Transportation Board
Wayne A. Dennis, P. E., Deputy Director, Transportation Planning and Programming Division, TxDOT
Mario G. Medina, P.E., Transportation Planning and Programming Division, TxDOT
Julie Brown, P.E., San Antonio District, TxDOT

EI-12

Robert J. Huston, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Kathleen Hartnett White, *Commissioner*
Margaret Hoffman, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 30, 2003

Ms. Jaya Zyman-Ponebshek
URS Corporation
P.O. Box 201088
Austin, TX 78720-1088

Re: Edwards Aquifer, Medina County
NAME OF PROJECT: STB Finance Docket No. 34284, Southwest Gulf Railroad Company Rail line construction project; From Vulcan Materials Company limestone quarry to Union Pacific Company rail line; near Dunlay, Texas
TYPE OF PLAN: Request for Preliminary Comments

Dear Ms. Zyman-Ponebshek:

The Texas Commission on Environmental Quality (TCEQ) has completed its preliminary review of the proposed rail line construction project for the referenced project submitted to the San Antonio Regional Office by Victori Rutson on behalf of the Surface Transportation Board on April 1, 2003. Based on this preliminary review it appears that a portion of the project may take place within the boundary of the Edwards Aquifer Recharge Zone. We were not able to make a precise determination of the portion of the project affected using the one map provided. If the project does indeed fall within the designated boundaries of the Edwards Aquifer Recharge Zone then any construction related activities, including construction of roads, highways, or railroads, is regulated under Title 30 Texas Administrative Code (TAC) Chapter 213 Edwards Aquifer Rules. These rules are administered by the TCEQ and plans for regulated activities in Median County are reviewed by staff in the San Antonio Regional Office.

Information on the rules, forms required, maps, etc. pertaining to this program can be found at our web site, www.tnrcc.state.tx.us/EAPP/index.html.

REPLY TO: REGION 13 • 14250 JUDSON RD. • SAN ANTONIO, TEXAS 78233-4480 • 210/490-3096 • FAX 210/545-4329

P.O. Box 13087 • Austin, Texas 78711-3087 • 512/239-1000 • Internet address: www.tceq.state.tx.us

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If you have any questions or require additional information, please contact John Mauser of the Edwards Aquifer Protection Program of the San Antonio Regional Office at (210) 490-3096.

Sincerely,

Bobby D. Caldwell

Bobby D. Caldwell
Water Section Manager
San Antonio Regional Office

BDC/

cc: Mr. David Montgomery, Medina County
Mr. Greg Ellis, Edwards Aquifer Authority
Ms. Luana Buckner, Medina County Underground Water Conservation District
TCEQ Central Records, MC-212, Austin

EI-73

Robert J. Huston, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Kathleen Hartnett White, *Commissioner*
Margaret Hoffman, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 5, 2003

Ms. Jaya Zyman-Ponebshek
URS Corporation
P.O. Box 201088
Austin, TX 78720-1088

Re: TRACS #5464-SW Gulf Railroad Company

Dear Ms. Zyman-Ponebshek:

The Texas Commission on Environmental Quality has reviewed the above-referenced project and offers the following comments:

A review of the above-referenced project for General Conformity impact in accordance with 40 CFR Part 93 and Title 30, Texas Administrative Code § 101.30 indicates that the proposed action is located in Medina County, which is currently unclassified or in attainment of the National Ambient Air Quality Standards for all six criteria air pollutants. Therefore, general conformity does not apply.

Although any demolition, construction, rehabilitation or repair project will produce dust and particulate emissions, these actions should pose no significant impact upon air quality standards. Any minimal dust and particulate emissions should be easily controlled by the construction contractors using standard dust mitigation techniques.

We recommend the environmental assessment address actions that will be taken to prevent surface and groundwater contamination.

Thank you for the opportunity to review this project. If you have any questions, please call Mr. Daniel Burke, Policy and Regulations Division, at (512) 239-1543.

Sincerely,

Jim Muse

Jim Muse, Director
Policy and Regulations Division

P.O. Box 13087 • Austin, Texas 78711-3087 • 512/239-1000 • Internet address: www.tceq.state.tx.us

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2405 IH-35 South, Suite 102
New Braunfels, Texas 78130

Schweers Historical Foundation, Inc.

May 14, 2003

Ms. Jaya Zyman-Ponebshek
URS Corporation
P.O. Box 201088
Austin, TX 78720-1088

Re: STB Finance Docket No. 34284, Southwest Gulf Railroad Company-
Construction and Operation Exemption-Medina County, TX;
Request for Preliminary Comments.

Dear Madam:

This letter is our response to a letter from the Surface Transportation Board (STB) dated March 31, 2003 requesting comments from Federal, state and local agencies that may have information regarding the environmental impacts of this project.

Attached hereto is a copy of our letter dated May 13, 2003 to Congressman Henry Bonilla, which states our position regarding this project, and our interest regarding it.

We feel the environmental impact of the 'Proposed Route' would be quite insignificant, and less than Alternates 1, 2, and 3 because it is the shortest route, and because it appears to cross the Quihi Creek at the existing gas line right of way. At this location, the Quihi Creek is not normally flowing at all, or very little.

Below this point are wide, deep water holes with springs flowing throughout the year. Below that are wetlands and marshes. These would not be good areas to cross the creek. We do not know about the point where Alternate 3 crosses the Quihi Creek, but doubt that it would be better than the Proposed Route, and it is 2500 feet longer.

We believe an elevated bridge for the spur track crossing the Quihi Creek at the gas line right of way (see map enclosed) would have negligible adverse effect on the environment and wildlife.

Sincerely,

Donald S. Schoch

Donald S. Schoch
President

2405 IH-35South, Suite 102
New Braunfels, Texas 78130-6817
830-620-6350

Schweers Historical Foundation, Inc.

May 14, 2003

Congressman Henry Bonilla
11120 Wurzbach, Suite 300
San Antonio, Texas 78230

Dear Congressman Bonilla:

Schweers Historical Foundation, Inc. was incorporated on May 14, 2002 with 501 (c) (3) tax exemption status for the purpose of acquiring, restoring, and preserving historic homes and related structures in the Quihi, Texas area, and to develop a museum, library, and recreational facilities for the enjoyment of the general public. Our immediate goal is to acquire homes of the descendants of Schweer and Zeda Balzen. Our vision is to promote the restoration and preservation of historic homes and buildings throughout the Quihi community. Quihi is one of four (4) colonies created by Henry Castro, and is significant to Texas German-American history. We already have over one hundred members, with potential for many more in the near future.

Vulcan Material Company has chartered a short line railroad company called Southwest Gulf Railroad, which is to serve their transportation needs for a new quarry to be located in Medina County. Their planned railroad spur track will cross the Quihi Creek near the historic homes of Heinrich & Johanna Schweers (1858), Wilhelm & Elizabeth Schweers (1884), Heyo & Margarite Schweers (1865), and Mimke & Trientje Saathoff (1846).

The Heinrich Schweers and Wilhelm Schweers homes are located on land recently purchased by Vulcan Material Company for their spur track. Descendants of the Schweers families asked Vulcan if they would consider selling the homes so they could be restored and preserved. The Vulcan folks were not only willing to let us acquire the homes, but are donating them to us! They have elected to do this regardless of approval by the Federal Surface Transportation Board, and other authorities, to build the track. We support Vulcan's objective to develop a quarry and the spur track for the following reasons:

1. Transportation is a large part of the total cost of their delivered products. Medina County will benefit substantially by having a quarry located locally by virtue of lower transportation costs. Transportation by rail is far superior to trucking. It produces less traffic, less road wear and tear, far less dust, less danger with slow moving trains on a spur track, less noise, more environmentally friendly, and is more economical. Transportation is planned to be principally by rail.

2. The proposed project would make the combined Vulcan Operation and Southwest Gulf Railroad the largest private employer in Medina County. On a percentage basis, the impact of Vulcan and Southwest Gulf Railroad's project on the employment opportunities for Medina County residents would be more than twice that of the proposed Toyota Project's impact on neighboring Bexar County. San Antonio fought very hard to get Toyota, and with good reason!

There is nothing permanent except change! Rogers

3. Vulcan would be the largest single private payer of county and local school district taxes in the county. This is significant when considering most land around the area is agriculturally exempt property generating very little taxes for Medina County. This project would provide increased County and School tax benefits.

4. Vulcan has a proud history of responsible community involvement. Proof of this is how they stepped in and helped our Foundation regardless of any monetary benefit to themselves. They will undoubtedly be contributing to Medina County in many positive ways, as they have in other communities.

5. Vulcan plans to develop a modern quarry with 'state of the art' equipment. Air scrubbers will remove virtually all dust in the production phases, loaded cargo will be sprayed with water, and trains on rail create little dust. As we all know, water is a precious commodity in south Texas; however, the water to be utilized by the proposed project is for beneficial use, as there are substantial good paying jobs being created. Vulcan is a leader in water recycling and conservation.

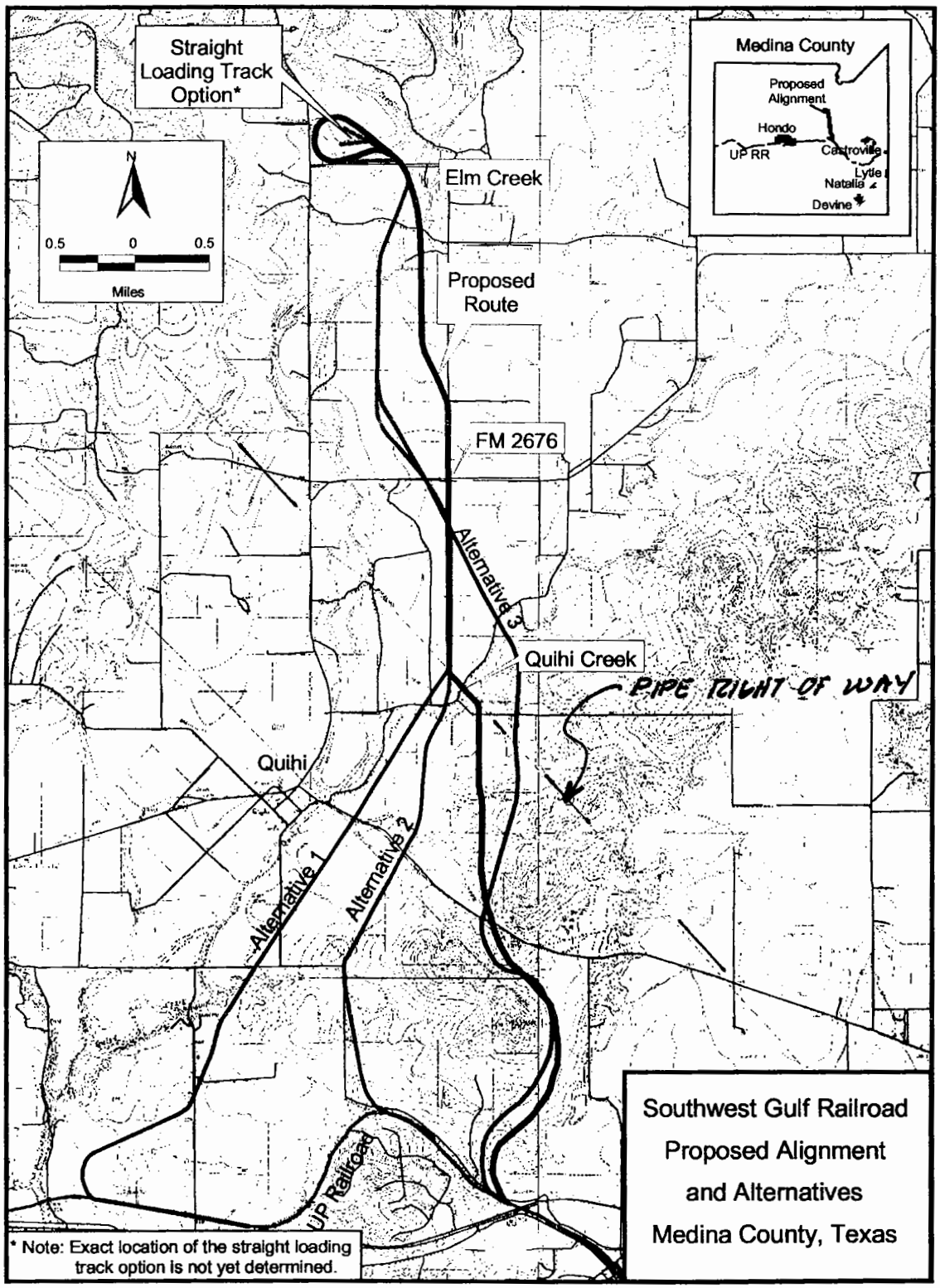
6. The proposed quarry is located within a rural and sparsely populated area without a paved road within nearly three (3) miles of the site. This is in contrast to quarries in neighboring Bexar County that have become surrounded by expensive homes! With the exceptionally remote location, the effects of vibration, noise, and dust would be minimal.

7. New Braunfels is also a very historic area of Texas. It is a fast-growth town and people are attracted to it as visitors and homeowners. They like the rural atmosphere, the natural beauty, and the small town atmosphere. Yet, it has several railroad tracks serving many trains each day and several quarries in full view from busy IH 35. With modern equipment in place at the quarries, dust, noise, blasting, and train traffic are not now issues in the community. Problems are resolved as they occur.

It has been said, "there is nothing permanent except change." You cannot stop change, but you can control it. Growth is heading towards Quihi like a big tidal wave. The inevitable change will best be handled by communities that plan for it, and companies like Vulcan Material Company, who are community oriented and experienced in the care of our environment, our wildlife, and the history and legacy in Quihi and Medina County. At your convenience, we would like to meet with you to answer any questions you might have, and to discuss our position.

Sincerely,

Donald S. Schoch,
President


Straight Loading Track Option*
Medina County
Proposed Alignment
Hondo
UP RR
Castroville
Lytle
Natalia
Devine
N
0.5
0
0.5
Miles
Elm Creek
Proposed Route
FM 2676
Alternative 3
Quihi Creek
PIPE RIGHT OF WAY
Quihi
Alternative 1
Alternative 2
UP Railroad
* Note: Exact location of the straight loading track option is not yet determined.
Southwest Gulf Railroad
Proposed Alignment
and Alternatives
Medina County, Texas

TEXAS
PARKS &
WILDLIFE

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KATHARINE ARMSTRONG
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FORT WORTH

ROBERT L. COOK
EXECUTIVE DIRECTOR

May 28, 2003

Ms. Jaya Zyman-Ponebshek
URS Corporation
P.O. Box 201088
Austin, TX 78720-1088

RE: Proposed rail line from Vulcan Materials Company limestone quarry to Union Pacific Railroad, Medina County.

Dear Ms. Zyman-Ponebshek:

Thank you for providing information about the project referenced above to Texas Parks and Wildlife Department (TPWD) for review of potential impacts to wildlife habitat. Staff reviewed the information and provides following comments.

Southwest Gulf Railroad Company proposes to construct and operate an approximately 7-mile long, single-track rail line from a new Vulcan Materials Company limestone quarry in north central Medina County to milepost 250 of Union Pacific Railroad's Del Rio Subdivision. The project also would include a 2-mile long loading loop or 1-mile long straight track within the quarry.

According to the synopsis, the proposed rail line would traverse farmland, pastureland, and both Quihi and Elm Creeks. In order to evaluate the alternatives, staff request additional information detailing the habitat types that would be affected on each alternative and mitigation and reclamation measures planned. Staff would support a route that follows existing rights-of-way and/or easements wherever possible. Photographs (ground level and/or aerial) of the routes would be helpful in the review process because they aid in the determination of the quality of vegetation communities present. Please find the attachment entitled **TPWD Suggested Guidelines for Environmental Assessments** for your assistance.

ENJOY THE TEXAS OUTDOORS!

Take a kid
hunting or fishing

• ● •

Visit a state park
or historic site

Based upon the information provided, staff has concerns about impacts to the following habitat types: riparian buffers at Quihi and Elm Creeks, mesquite-granjeno parks, mesquite-blackbrush brush, mesquite-liveoak-bluewood parks, pecan-elm forests, and oak-juniper parks and woods. Staff recommends that the route be planned to minimize impacts to wetlands, Waters of the U.S., riparian vegetation, mature trees and old timber, karst and recharge features, unique vegetation communities, and threatened and endangered species habitats.

The synopsis states that the preferred route avoids wetlands. Natural buffers contiguous to floodplains should remain undisturbed to preserve wildlife cover,

food sources, travel corridors and as a soil erosion and abatement mechanism. The route should be planned to minimize drainage crossings. The Clean Water Act (CWA) sets the basic regulatory framework for regulating discharges of pollutants to U.S. waters. Section 404 of the CWA establishes a federal program to regulate the discharge of dredge and fill material into waters of the U.S., including wetlands. The U.S. Army Corps of Engineers (COE) and the Environmental Protection Agency (EPA) are primarily responsible for making jurisdictional determinations and regulating wetlands under Section 404 of the CWA. The COE also makes jurisdictional determinations under Section 10 of the Rivers and Harbors Act of 1899. If the proposed construction would impact aquatic resources then the project sponsor should contact the U.S. Army Corp of Engineers (Corpus Christi Regulatory Field Office) for determination of jurisdictional wetlands and for permitting requirements. Compensation may be required for any encroachment into these areas.

Typically staff recommends that mature trees (DBH of at least 12 inches) be replaced at a 3:1 ratio and the replacement trees should be maintained to ensure a survival rate of 80%. Old timber are trees that are 100 or more years old and have a DBH of 25 inches or greater. If removal of old timber is unavoidable, then staff recommends that these trees be replaced at a ratio of 10 trees for each one lost and maintained to ensure 80% survival rate. Trees should be planted in location that would provide habitat for wildlife, such as within conservation easements, parks or riparian buffer zones.

Please find the annotated list of special species that occur in Medina County. If rare plant or animal species are found within or near the selected route, precautions should be taken to avoid adverse impacts to them. If it is determined adverse impacts could occur with completion of your project, then mitigation in the form of planning to reduce adverse impacts and/or compensation for damages should occur. **More site-specific information from a search of the BCD database and review of potential project impacts to endangered and threatened species can be obtained for a $50 fee. For more information about the BCD or threatened and endangered species in the project area please contact Celeste Brancel at (512) 912-7021.**

In order to protect migratory birds construction activities should occur outside the March – August migratory bird nesting season of each year the project is authorized and lasting for the life of the project. Construction activities include (but are not limited to) removal of nests or nest structures, tree felling as well as vegetation clearing, trampling or maintenance. Additional information regarding

the Migratory Bird Treaty Act may be obtained from the U.S. Fish and Wildlife Service Southwest Regional Office (Region 2) at (505) 248-6879.

Project plans should include measures to prevent erosion and sediment runoff from disturbed areas. The Department recommends a combination of hay bales and silt screens to prevent siltation into wetlands. Any hay that is used in erosion control should be certified weed free hay to reduce the potential for introduction of exotic weedy species. Graded embankments should not exceed a 4:1 slope. Runoff control measures should be maintained until native vegetation has been reestablished on disturbed sites. The reseeding of exposed areas with a mixture of native grasses and limiting mowing practices can assist enhancement of existing native grasses or prairie remnants.

We appreciate the opportunity to review and comment on your project. If you have any questions contact me in San Marcos at (512) 396-9211.

Sincerely,

Renée Fields

Renée Fields
Wildlife Habitat Assessment Program
Wildlife Division

/jrf

Attachments

Texas Parks and Wildlife Department Suggested Guidelines for Preparation of Environmental Assessment Documents

Following is an outline of categories of information needed to evaluate a proposed project or action. Every effort should be made to supply quantified data. If subjective data is all that can be supplied, documentation verifying the credentials of the data collector should be provided.

An asterisk notes categories considered essential for adequate biological review by this agency (*). Depending on the complexity and scope of the proposed project or action, or requirements by other agencies, all the items listed below may be required.

Whenever practical, environmental documents should be supported by aerial photography, topographic maps, schematics, charts, tables, etc. with minimum narrative sufficient to describe, quantify, and qualify the data.

A. Project Description

* • Identify who is proposing the project.

* • Identify who is conducting the assessments and provide credentials of this person(s).

* • Describe the purpose of the project.

* • Define the scope of work.

* • Identify the project area and study area (total acres, miles of ROW)

* • Identify the timetable projected for the entire project

* • Describe any required coordination and review for the project.

* • List or describe any required public input.

• Provide historical information significant to the project.

B. Description of the Affected Environment

1. Natural Resources

• Describe the geology within the study area.

* • Describe the soils present and their characteristics.

* • Describe the landform (topography) and the natural processes impacting the present landform.

• Describe the climatic factors affecting the study area.

* • Describe the supply and quality of surface water resources in the study area.

* • Describe the supply and quality of groundwater resources including aquifer recharge zones occurring within the study area.

* • Describe natural hazards affecting the study area, i.e. tidal influences, flood activity, etc.).

• Describe the quality of the air in the study area.

* • Describe the vegetation communities (cover type) specifically impacted by the project to include: dominant plant species, estimated height of trees, woody shrubs or brush; and estimated canopy coverage of woody vegetation. Total acreage of each cover type disturbed by the project should also be listed.

* • Describe the fauna that would be associated with the dominant vegetation cover types identified above.

* • Identify "sensitive" ecosystems which occur in the study area such as: springs, streams, rivers, floodplains, vegetation corridors, bottomland hardwoods, wetlands, bays, estuaries, native grasslands, etc.

* • Describe the occurrence of threatened/endangered species (or their habitats) and unique or rare natural communities which occur in the study area.

a. On site inspection of the study area for permanent or seasonal occurrence.

b. On site inspection of the study area for occurrence of habitat.

c. Interviews with recognized experts on all species with a potential of occurrence.

d. Literature review of data applicable to a potential occurring species concerning species distribution, habitat needs, and biological requirements.

2. Cultural Resources

* • Identify public use and open space areas in the vicinity of the proposed project such as parks, natural areas, wildlife preserves and management areas.

• Identify previous, present, and proposed land uses within the study area.

• Identify significant archeological features within the study area.

• Identify significant historical features in the study area with special consideration of "National Register of Historic Places" properties.

• Identify rights-of-ways, easements, public utilities, and transportation features within the study area.

• Identify noise pollution sources and current noise levels within the study area.

• Identify existing and proposed public health and hazardous waste facilities that exist in the study area such as land fills, hazardous waste sites, wastewater treatment facilities, septic tanks, etc.

• Identify socioeconomic factors, if applicable.

*C. Project Alternatives

List and describe project alternatives (including "no action") and associated impacts (direct and indirect) to described resources. If the project is potentially large in scope, cumulative effects with other similar projects may be required.

*D. Mitigation

A major responsibility of TPWD is to conserve and protect the state's fish, wildlife, and plant resources. Certain categories of these biotic resources warrant special consideration. These include habitats that are locally and regionally scarce, habitats supporting unique species or communities, stream and river ecosystems, bays, estuaries, wetlands, bottomland hardwoods, and native grasslands. All projects that could adversely affect these resources should be fully evaluated, and where possible, implementation of less damaging alternatives undertaken. If it is determined that a project or action will potentially affect fish, wildlife or plant resources, a process for adverse impact reduction should be initiated. Mitigation measures should be developed and implemented sequentially as follows:

1. AVOIDANCE: Avoiding adverse impacts through changes in project location, design, operation, or maintenance procedures, or through selection of other less damaging alternatives to the project or action.

2. MINIMIZATION: Minimizing impacts and by project modification or rectification to restore or improve impacted habitat to pre-project condition; or through reducing the impacts over time by preservation and maintenance operations during the life of the project or action.

3. COMPENSATION: Compensating for unavoidable impacts by providing replacement or substitute resources (including appropriate management) for losses caused by project construction, operation, or maintenance.

Mitigation should be an integral part of any action or project that adversely affects fish, wildlife, and habitats upon which they depend. Failure to adequately avoid or minimize adverse impacts or to adequately compensate for unavoidable losses of natural resources is a serious deficiency in any project plan and may cause delays in this Department's review and assessment of the adverse impacts upon fish & wildlife resources. In assessing project impacts, reasonable foreseeable secondary and cumulative impacts should be included.

*E. Coordination

Provide copies of pertinent coordination correspondence.

*F. Document Preparers and Their Qualifications

*G. Bibliography

MEDINA COUNTY

	Federal Status	State Status
***** AMPHIBIANS *****		
Edwards Plateau Spring Salamanders (*Eurycea sp. 7*) - endemic; troglobitic; springs, seeps, cave streams, and creek headwaters; often hides under rocks and leaves in water; Edwards Plateau, from near Austin to Val Verde County		
Valdina Farms Sinkhole Salamander (*Eurycea troglodytes*) - isolated, intermittent pools of a subterranean stream; sinkhole located in Medina County		
***** BIRDS *****		
American Peregrine Falcon (*Falco peregrinus anatum*) - potential migrant; nests in west Texas	DL	E
Arctic Peregrine Falcon (*Falco peregrinus tundrius*) - due to similar field characteristics, treat all Peregrine Falcons as federal listed Endangered; potential migrant	DL	T
Black-capped Vireo (*Vireo atricapillus*) - oak-juniper woodlands with distinctive patchy, two-layered aspect; shrub and tree layer with open, grassy spaces; requires foliage reaching to ground level for nesting cover; return to same territory, or one nearby, year after year; deciduous & broad-leaved shrubs & trees provide insects for feeding; species composition less important than presence of adequate broad-leaved shrubs, foliage to ground level, & required structure; nests mid April-late summer	LE	E
Golden-cheeked Warbler (*Dendroica chrysoparia*) - juniper-oak woodlands; dependent on Ashe juniper (also known as cedar) for long fine bark strips, only available from mature trees, used in nest construction; nests placed in various trees other than Ashe juniper; only a few mature junipers or nearby cedar brakes can provide the necessary nest material; forage for insects in broad-leaved trees & shrubs; nests late March-early summer	LE	E
Henslow's Sparrow (*Ammodramus henslowii*) - wintering individuals (not flocks) found in weedy fields or cut-over areas where lots of bunch grasses occur along with vines and brambles; a key component is bare ground for running/walking; likely to occur, but few records within this county		
Zone-tailed Hawk (*Buteo albonotatus*) - arid open country, including open deciduous or pine-oak woodland, mesa or mountain county, often near watercourses, and wooded canyons and tree-lined rivers along middle-slopes of desert mountains; nests in various habitats and sites, ranging from small trees in lower desert, giant cottonwoods in riparian areas, to mature conifers in high mountain regions		T
***** MAMMALS *****		
Frio Pocket Gopher (*Geomys texensis bakeri*) - associated with nearly level Atco soil, which is well-drained and consists of sandy surface layers with loam extending to as deep as two meters		
***** REPTILES *****		
Indigo Snake (*Drymarchon corais*) - Texas south of the Guadalupe River and Balcones Escarpment; thornbush-chaparral woodlands of south Texas, in particular dense riparian corridors; can do well in suburban and irrigated croplands if not molested or indirectly poisoned; requires moist microhabitats, such as rodent burrows, for shelter		T
Keeled Earless Lizard (*Holbrookia propinqua*) - coastal dunes, barrier islands, and other sandy areas; eats insects and likely other small invertebrates; eggs laid underground March-September (most May-August)		

	Federal Status	State Status
Spot-tailed Earless Lizard (*Holbrookia lacerata*) - central & southern Texas and Adjacent Mexico; oak-juniper woodlands & mesquite-prickly pear associations; eggs laid underground; eats small invertebrates		
Texas Garter Snake (*Thamnophis sirtalis annectens*) - wet or moist microhabitats are conducive to the species occurrence, but is not necessarily restricted to them; hibernates underground or in or under surface cover; breeds March-August		
Texas Horned Lizard (*Phrynosoma cornutum*) - open, arid and semi-arid regions with sparse vegetation, including grass, cactus, scattered brush or scrubby trees; soil may vary in texture from sandy to rocky; burrows into soil, enters rodent burrows, or hides under rock when inactive; breeds March-September		T
Texas Tortoise (*Gopherus berlandieri*) - open brush with a grass understory is preferred; open grass and bare ground are avoided; when inactive occupies shallow depressions at base of bush or cactus, sometimes in underground burrows or under objects; longevity greater than 50 years; active March-November; breeds April-November		T

*** VASCULAR PLANTS ***

Bracted twistflower (*Streptanthus bracteatus*) - endemic; shallow clay soils over limestone, mostly on rocky slopes, in openings in juniper-oak woodlands; flowering April-May

Sandhill woolywhite (*Hymenopappus carrizoanus*) - endemic; open areas in deep sands derived from Carrizo and similar Eocene formations, including disturbed areas; flowering late spring-fall

Texas mock-orange (*Philadelphus texensis*) - endemic; limestone cliffs and boulders in mesic stream bottoms and canyons, usually in shade of mostly deciduous sloped forest; flowering April-May

LE,LT - Federally Listed Endangered/Threatened
PE,PT - Federally Proposed Endangered/Threatened
E/SA,T/SA - Federally Endangered/Threatened by Similarity of Appearance
C1 - Federal Candidate, Category 1; information supports proposing to list as endangered/threatened
DL,PDL - Federally Delisted/Proposed Delisted
E,T - State Endangered/Threatened
"blank" - Rare, but with no regulatory listing status

Species appearing on these lists do not all share the same probability of occurrence. Some species are migrants or wintering residents only, or may be historic or considered extirpated.

Texas Review and Comment System
Review Notification

Applicant/Origination Agency: Surface Transportation Board
Contact Name: Ms. Jaya Zyman-Ponebshek
Contact Phone: 512/419-5316
Email:

Project Name: Request for Preliminary Comment - Surface Transportation Board - re: Medina County

Funding Agency: STB
SAI/EIS#: TX-R-20030402-0002-50
Date Received: 4/1/2003
Date Comments Due BPO: 4/29/2003

Review Participants

Agencies

Texas Attorney General's Office
Ms. Patricia Grohman
TRACS Coordinator
209 West 14th Street, 8th Floor
Austin, Texas

Texas Commission On Environmental Quality
Mr. Dan Burke
Office of Policy & Regulatory Dev. MC205
12100 Park 35 Circle
Austin, Texas

Texas Historical Commission
Ms. Kathy Pigman
Project Review Coordinator
1511 Colorado Street
Austin, Texas

Texas Dept. of Transportation - Aviation Division
Ms. Linda Howard
Planning
125 East 11th Street
Austin, Texas

Cogs

Alamo Area Council of Governments
Ms. Tiffany Pickens (210) 362-5204
TRACS Coordinator
8700 Tesoro Drive, Suite 700
San Antonio, TX 78217

Special Notes/Comments:

STB Finance Docket No. 34284. Summary of application is attached in the TRACS system. Reviewers should contact applicant directly for additional information.

☒ **No Comment**

Review Agency — **Signature**

Return Comments to:

~~Denise S.~~ Francis, State Single Point of Contact
Governor's Office of Budget, Planning & Policy
P.O. Box 12428
Austin, TX 78711
(512) 463-8465

OFFICE OF THE GOVERNOR

RICK PERRY
GOVERNOR

Wednesday, June 11, 2003

Ms. Jaya Zyman-Ponebshek
Surface Transportation Board
URS Corporation, P.O. Box 201088
Austin, TX 78720-1088

RE: TX-R-20030402-0002-50

Request for Preliminary Comment - Surface Transportation Board - re: Medina County

Dear Ms. Jaya Zyman-Ponebs

Your application for assistance referenced above has been reviewed. The comments received are summarized below.

This application was submitted for comment to the Texas Historical Commission, the Texas Attorney's General Office, the Texas Commission on Environmental Quality, the Texas Department of Transportation and the Alamo Area Council of Governments. The Texas Historical Commission responded with a "no comment" and the other agencies did not respond. No other substantive comments were received.

We appreciate the opportunity to review your proposal. Please let me know if we can be of further assistance.

Sincerely,

for Denise S. Francis, State Single Point of Contact
DSF/dsi

cc: Surface Transportation Board

POST OFFICE BOX 12428 AUSTIN, TEXAS 78711 (512) 463-2000 (VOICE)/(512) 475-3165 (TDD)

TEXAS HISTORICAL COMMISSION

The State Agency for Historic Preservation

RICK PERRY, GOVERNOR

JOHN L. NAU, III, CHAIRMAN

F. LAWERENCE OAKS, EXECUTIVE DIRECTOR

RECEIVED
JUN 20 2003
MAIL MANAGEMENT
STB

June 11, 2003

Ms. Victoria Rutson
Office of Economics, Environmental Analysis and Administration
Surface Transportation Board
Washington, D.C. 20423

Re: *Project review under Section 106 of the National Historic Preservation Act of 1966*
Proposed Railway, Medina County. (STB)

Dear Ms. Rutson:

Thank you for your correspondence describing the above referenced project. This letter serves as comment on the proposed undertaking from the State Historic Preservation Officer, the Executive Director of the Texas Historical Commission.

The review staff, led by Pam Opiela, has completed its review of the project documentation provided. In April, we received a letter from your office requesting our comments. Neither that letter nor the latest correspondence includes information necessary to complete the Section 106 review process as required under the National Historic Preservation Act of 1966. We have contacted Ms. Rini Ghosh and requested that the Surface Transportation Board identify cultural resources within the area of potential effect. This documentation should include surveys of archaeological sites and historic structures. We are aware that there are important historic resources located adjacent to the routes you propose, including the Schuehle-Saathoff House, which is listed on the National Register of Historic Places and is a Recorded Texas Historic Landmark. Please send the required documentation per 36 CFR 800, Section 800.4 of the National Preservation Act.

We look forward to further consultation with your office and hope to maintain a partnership that will foster effective historic preservation. Thank you for your cooperation in this federal review process, and for your efforts to preserve the irreplaceable heritage of Texas. **If you have any questions concerning our review or if we can be of further assistance, please contact Pam Opiela at 512/463-6218.**

Yours truly,

for: F. Lawerence Oaks, State Historic Preservation Officer

cc. Ed Baker, THC Archaeology Division; Peter Ketter, THC History Programs Division
FLO/PO

P.O. BOX 12276 · AUSTIN, TX 78711-2276 · 512/463-6100 · FAX 512/475-4872 · TDD 1-800/735-2989
www.thc.state.tx.us



Philip Ponebshek

10/30/2003 04:42 PM

To: Jaya Zyman-Ponebshek/Austin/URSCorp@URSCORP
cc: Jeff Irvin/Austin/URSCorp@URSCORP, PBrawner@devtex.net, philip_ponebshek@urscorp.com
Subject: Medina County Floodplain Standards - SGR Railroad

I spoke with Pat Brawner today by phone. Mr. Brawner is the Medina County FEMA coordinator - his contact information is:

Pat Brawner
Medina County Health and Sanitation
1706 Avenue M # 2a
Hondo, TX 78861
(830) 741-6195
PBrawner@devtex.net

First, Mr. Brawner has not received any official correspondence yet with respect to this project, and would appreciate being included in relevant mailings in the future, including the draft EA when it becomes available.

Second, Mr. Brawner confirmed that Medina County has development standards which require a submittal demonstrating that the proposed construction does not cause more than a 12" rise in the 100-year floodplain. Medina County will issue the necessary floodplain development permit upon review and approval of the floodplain study.

Mr. Brawner wanted to stress that while he's apparently heard from local residents that a study might be limited to the 25-year floodplain, or have a different rise threshold, the project will still require a study based on the 100-year floodplain in order to acquire the necessary county approvals.

My recommendation is that for the NEPA process, the significance criteria be set by Surface Transportation Board - Section of Environmental Analysis (SEA) be a requirement that SGR conforms with Medina County floodplain development code by committing to obtain a Medina County Floodplain Permit for each crossing prior to construction. This allows for the study to be performed in the future, and a finding of "no significant impact" based on SGR's necessary compliance with Medina County code is appropriate.

Phil Ponebshek
URS Corp
Austin, TX
Senior Project Manager
512-419-5357
512-454-8807 (fax)
512-751-2553 (cell)

#EI-597
RS

Texas Department of Transportation

P O BOX 149217 • AUSTIN, TEXAS 78714-9217 • (512) 486-5000



February 6, 2004

Ms. Jaya Zyman-Ponebshek
URS Corporation
P.O. Box 201088
Austin, Texas 78720-1088

File: TPP (M)
(512) 416-2349

Re: STB Finance Docket No. 34284, Southwest Gulf Railroad Company
Construction and Operation Exemption – Medina County, Texas

Dear Ms. Zyman-Poneshek:

In coordination with Southwest Gulf Railroad Company (SGR) filing, the Texas Department of Transportation (TxDOT) has had several meetings with representatives of SGR since our last letter, dated April 30, 2003. These discussions have dealt with the rail crossing at FM 2676 in Medina County and the viability of placing a grade separation versus a fully signalized and gated grade crossing.

It is our understanding that an Environmental Impact Statement will now be required for the proposed rail corridor. Upon the record of environmental determination and identification of the proposed FM 2676 rail crossing location, TxDOT will conduct a safety assessment of the proposed crossing to determine the necessary safety improvements required to address the needs of the traveling public.

Safety improvements required for the FM 2676 crossing will be performed in accordance with TxDOT's policy and procedures. This will require an agreement with SGR. TxDOT must obtain approval from the Texas Transportation Commission (TTC) to enter into this agreement. The TTC approval would include the type of safety treatment required by TxDOT at this highway-rail intersection. In accordance with the Texas Transportation Code, funding for initial and future rail crossing safety improvements must be borne by the rail company.

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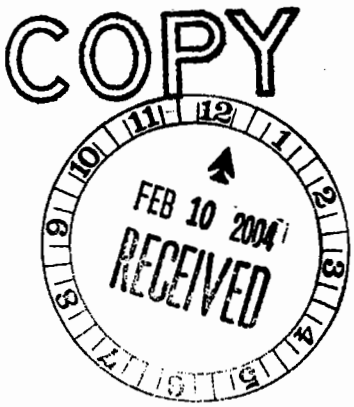
If you have any further questions regarding this matter, please contact Carlos Lopez, Director, Traffic Operations Division at (512) 416-3200.

Sincerely,

James L. Randall, P.E.
Director, Transportation
Planning and Programming

cc: David H. Coburn, Steptoe & Johnson L.L.P.
Dr. Robert Fitzgerald, Medina County Environmental Action Association
Rini Ghosh, Surface Transportation Board
Victoria Rutson, Surface Transportation Board
Carlos Lopez, P.E., Director, Traffic Operations Division, TxDOT
Wayne A. Dennis, P. E., Deputy Director, Transportation Planning and Programming Division, TxDOT
Mario G. Medina, P.E., Transportation Planning and Programming Division, TxDOT
David Casteel, P.E., San Antonio District, TxDOT

#EI-543
RS





Preserving America's Heritage

February 4, 2004

Neecey Schulte
President
Quihi & New Fountain Historical Society
1901 22nd St.
Hondo, TX 78861

FD 34284

Dear Ms. Schulte:

On January 6, 2004, we received you letter regarding the proposed construction of a railroad through the Quihi Creek Flood plain in Medina County, Texas, and its potential impact on historic structures in the Quihi-New Fountain community. As we understand it, the proposed railroad is a 7 mile long rail line intended to serve an aggregate quarry that is yet to be developed. Construction of the railroad will require approval of the Surface Transportation Board (STB), and is thus a federal undertaking requiring review under Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. 470f).

We have discussed the project with Rini Ghosh of the Surface Transportation Board (STB) and she informs us that the project proponent, the Southwest Gulf Railroad Company, is working with the Texas Historical Commission to draft a Programmatic Agreement for this project, and that representatives from the local community have been invited to participate as consulting parties in the development of this document. Programmatic Agreements may be developed for Federal undertakings pursuant to the ACHP's regulations at 36 CFR 800.14(b), to tailor the Section 106 review process to the specifics of a large or complicated project. Because of the high level of local interest and controversy concerning this project, the ACHP has informed STB that we will participate in the consultation on this Programmatic Agreement. We have not yet received a copy of the draft Programmatic Agreement or other information from the STB, but expect that it will be provided soon.

We very much appreciate your concern with the protection of historic values associated with the historic communities of Quihi and New Fountain, and your offer to provide me with a guided tour of the proposed project. Although our agency will at some point want to hear directly from your organization and other local groups, a visit to the project site right now would be premature. Since our responsibility in the Section 106 review process is to provide comments to the Federal agency official (that is, STB), we will need to coordinate any visit to the project area or meeting with local organizations with the STB. Once we have had a chance to review a copy of the proposed Programmatic Agreement and background documentation provided by STB, we will let you know if a site visit is possible. Although we appreciate your offer to cover my travel expenses, I am afraid that our ethics rules prohibit ACHP staff from accepting travel funds from consulting parties other than Federal agencies.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

12136 West Bayaud Avenue, Suite 330 • Lakewood, Colorado 80228
Phone: 303-969-5110 • Fax: 303-969-5115 • achp@achp.gov • www.achp.gov

Thank you for informing us of your interest in this undertaking and your offer to provide us with a project site tour. If you have any questions, or wish to discuss things further, please feel free to contact me at 303-969-5110 or clegard@achp.gov.

Sincerely,

Carol Legard

Carol Legard
Program Analyst
Western Office of Federal Agency Programs

#EI-600
RS

United States Department of the Interior

FISH AND WILDLIFE SERVICE
10711 Burnet Road, Suite 200
Austin, Texas 78758
512 490-0057
FAX 490-0974

FEB 13 2004

FD 34284

Rini Ghosh
Surface Transportation Board
Case Control Unit
1925 K Street, NW
Washington, DC 20423-0001

Consultation # 2-15-03-I-0276

Dear Ms. Ghosh:

This responds to your January 28, 2004, request for comments from the U.S. Fish and Wildlife Service (Service) related to the Southwest Gulf Railroad Company construction of a 7-mile (11-kilometer) rail line near Dunlay, Medina County, Texas. The Surface Transportation Board (STB) Finance Docket No. is 34284. The rail line will connect the proposed Vulcan Materials, Inc. (Vulcan) limestone quarry to the existing Union Pacific Del Rio subdivision.

In our April 22, 2003, letter, we expressed concern that the proposed project may impact two endangered species, the golden-cheeked warbler (*Dendroica chrysoparia*) and the black-capped vireo (*Vireo atricapillus*). We requested a habitat assessment and, if applicable, surveys be to done particularly of the "straight loading track option". This option appears to be on or adjacent to the quarry site. We cannot determine from aerial photos if this area may support one or both of these species. Following this letter, we spoke with Rusty Mase, a consultant representing the project proponent and recommended he speak with Dr. Darrell Brownlow, a geologist representing Vulcan, and obtain biological survey information from the Vulcan quarry to help determine if additional surveys by STB are necessary. As of the date of this letter, we have not received any additional information addressing our concerns.

If assessments indicate that suitable habitat is likely to be affected either directly or indirectly, we recommend that STB consult with us further. If impacts cannot be avoided, we recommend that STB pursue formal consultation through section 7 of the Endangered Species Act of 1973, as amended. Section 7 requires that all federal agencies consult with the Service to ensure that the actions authorized, funded, or carried out by such agencies do not jeopardize the continued existence of any threatened or endangered species or adversely modify or destroy critical habitat of such species. It is the primary responsibility of STB, as the federal action agency, to determine whether any action it authorizes, funds, or carries out may affect a federally listed or proposed species.

TAKE PRIDE® IN AMERICA

Thank you for the opportunity to comment on the proposed project. Contact Jana Milliken at 512-490-0057, extension 243 with any additional questions or comments. Please refer to the consultation number listed above in all future correspondence with this office.

Sincerely,

Robert T. Pine
Supervisor

Cc: Terence N. Martin – Office of Environmental Policy and Compliance
Stephanie Nash – Branch of Federal Activities

#EI-698
RS

Texas Department of Transportation

DEWITT C. GREER STATE HIGHWAY BLDG. • 125 E. 11TH STREET • AUSTIN, TEXAS 78701-2483 • (512) 463-8585

February 25, 2004



The Honorable Frank Madla
Texas State Senate
1313 S.E. Military Drive, Suite 101
San Antonio, Texas 78214-2850

Re: Proposed Southwest Gulf Railroad Company Spur Track Crossing Permit Application - Medina County at FM 2676, near Hondo

Dear Senator Madla:

This is in response to your letter of January 8, 2004, regarding the proposed rail corridor to the proposed quarry operations in Medina County which will require a highway-rail crossing at FM 2676. The proposed spur track permit for an at-grade crossing of FM 2676 was tabled during the December 18, 2003 Texas Transportation Commission meeting for further study by the Texas Department of Transportation (TxDOT). Since the December meeting, we have had further discussions with the Southwest Gulf Railroad Company (SGR) regarding their filing with the Surface Transportation Board (STB). Representatives of TxDOT have also met with Medina County officials and the local group opposing the proposed rail line and rock quarry operations. These discussions have dealt with the proposed rail crossing at FM 2676 in Medina County and the viability of placing a grade separation versus a fully signalized and gated grade crossing.

It is our understanding that the STB has ruled that an Environmental Impact Statement will now be required for the proposed rail corridor. Upon the record of environmental determination and final identification of the proposed FM 2676 rail crossing location, TxDOT will conduct a safety assessment of the proposed crossing to determine the necessary safety improvements required to address the needs of the traveling public.

Safety improvements required for the FM 2676 crossing will be done in accordance with TxDOT's policy and procedures. This will require an agreement with SGR which TxDOT must obtain approval to enter into from the Texas Transportation Commission (TTC). The TTC approval would include the type of safety treatment TxDOT would require at this highway-rail intersection. In accordance with the Texas Transportation Code, funding for initial and future rail crossing safety improvements must be borne by the rail company.

An Equal Opportunity Employer

Thank you for your interest in the safety of the traveling public. Please contact Mr. Carlos Lopez, Director, Traffic Operations Division at (512) 416-3200 or me at (512) 305-9501, if you have any questions regarding this matter.

Sincerely,

Original Signed by M. W. Behrens, P.E.

Michael W. Behrens, P.E.
Executive Director

cc: Texas Transportation Commission
David H. Coburn, Steptoe & Johnson, LLP
Victoria Rutson, Surface Transportation Board
Dr. Robert Fitzgerald, Medina County Environmental Action Association
The Honorable Jim Barden, Medina County Judge
The Honorable Frank Madla, Capitol Office
David Casteel, P.E., San Antonio District Engineer, TxDOT
Amy Medrano, Legislative Affairs Office, TxDOT
Jim Randall, P.E., Director, Transportation Planning and Programming, TxDOT
Carlos A. Lopez, P.E., Director, Traffic Operations Division, TxDOT

#E1-656
RS

received 2/26/2004

EDWARDS AQUIFER
AUTHORITY

6.10-1.1-5

February 26, 2004

Ms. Rini Ghosh
Surface Transportation Board
Case Control Unit
1924 K Street, NW
Washington, D.C. 20423-0001

FD 34284

Dear Ms. Ghosh:

The purpose of this letter is to provide comments on Surface Transportation Board (STB) Finance Docket No. 34284 regarding Southwest Gulf Railroad Company (SGRC) and their proposed construction and operation of seven miles of railroad track in Medina County, Texas. On February 4, 2004, the Edwards Aquifer Authority (Authority) received the STB memorandum with the Notice of Intent to Prepare an Environmental Impact Statement (EIS), the draft EIS scope, and request for comments. The Authority is mandated to manage and protect the Edwards Aquifer within all or parts of an eight-county region, including Medina County.

According to the draft scope for the EIS, the EIS will address various proposed activities associated with the construction and operation of the proposed new rail line by SGRC and the potential environmental impacts. Because the Edwards Aquifer is used as an agricultural and domestic water supply within the SGRC project area, the Authority recommends that specific language be inserted to require an inventory of all water wells. The Authority recommends that Impact Category 3.a. - Water Resources be changed to read as follows:

> "Describe the existing groundwater resources within the project area, such as aquifers, and springs, and the potential impact on these resources resulting from construction and operation of the proposed new rail line. Locate all water wells in the project area and identify the aquifer in which they are completed."

The Authority will comment on the completed EIS. If you have any questions regarding these comments, please call Ms. Robin L. Tremallo, P.G., Environmental Coordinator, at (210) 477-5141, or by e-mail at rtremallo@edwardsaquifer.org.

Sincerely,

Gregory M. Ellis
General Manager

GME:RLT/JH/ev

E:\Aquifer Science\Environmental\Recharge Zone\Letters\STB EIS comment.doc

1615 N. St. Mary's Street San Antonio, Texas 78215-1415 (210) 222-2204 (800) 292-1047
P.O. Box 326 Hondo, Texas 78861 Metro (830) 741-8665

Medina County Judge
Jim Barden

1100 16th Street
Room 101
Hondo, Texas 78861

(830) 741-6021 Fax (830)741-6025



#E1-57
29

April 24, 2003

FD34284

Ms. Jaya Zyman-Ponebshek
URS Corporation
P.O. Box 201088
Austin, Texas 78720-1088

Re: TB Finance Docket No. 34284, Southwest Gulf Railroad Company-Construction and Operation-Exemption-Medina County, TX

Thank you for the opportunity to comment on the above matter. As you can imagine it is a subject of some concern and controversy among the citizens who live in or near the affected area.

Before outlining the county's concerns regarding the project, I want to correct a few misimpressions in the Synopsis attached to the STB letter of March 31, 2003. First, Medina County has a population of 40,000 persons rather than 33,000 as stated in the Synopsis. This number is increasing dramatically as developers are opening subdivisions in the eastern half of the county to accommodate San Antonio's growth. By the time any such rail line be put in operation, I expect the population will have grown by another 10% or more with most of it in the eastern part of the county where the quarry and railroad are proposed.

Second, while the roads to be crossed are lightly traveled when compared to urban interstates, they do carry a significant amount of traffic and are major east/west routes for our county citizens.

Third, the synopsis states that the proposed line traverses only two drainage features with intermittent seasonal flow (Quihi and Elm Creek). Substitute the word "flood" for "flow" and a more accurate picture emerges. Placing a rail line across these areas without significant length of open bridges or trestles will exacerbate our almost annual flooding problems.

Having said the above, the county governments concerns regarding the proposed rail line center on two areas. If the rail line is built we want to see the safest possible road crossings and the least intrusive creek, draw and slough crossings. Several years ago when this project was first announced the proposed quarry owners represented to the Precinct

Commissioner that there would be elevated road or RR crossings on FM 2676 and CR 4516. Now we understand they are only proposing grade crossings. With at least 4 trains per day at 100 cars for at least 250 days each year this presents a major safety concern and traffic flow impediment. I urge serious consideration of having elevated roadway crossings at these two major arteries in Medina County.

The other concern (water flow and flooding) is equally great. The history of this area is not one of gently flowing streams that rise with a big rain. Rather it is a history of flash flooding that can inundate large areas of land in a matter of minutes and hours. Any structure placed across these flood areas is a problem. I hope that sufficient construction requirements will be imposed to alleviate this problem as much as possible.

Regarding which of the four proposed routes is preferable, there appears to be little difference as far as our concerns of traffic safety and movement and flooding are concerned... or at least none of that can be discerned without expensive further study.

The individual citizens in the area have substantial and additional concerns which should be heard. The issues outlined above (traffic safety and flooding) are the principal concerns of the county government.

Again, thank you for the chance to have our views heard. I will be glad to visit further with you if you wish.

Sincerely,

James E. Boyle

JEB/jaa

#EI-683



Jana_Milliken@fws.gov
03/01/2004 03:39 PM

To ghoshr@stb.dot.gov
cc
bcc
Subject Biological assessment recommendations

Rini,

Per our phone conversation today, here's the link for the recommendations on the preparation of a biological assessment for a major construction activity (as defined by NEPA).

http://a257.g.akamaitech.net/7/257/2422/05dec20031700/edocket.access.gpo.gov/cfr_2003/octqtr/50cfr402.12.htm

Key in on section (f) on contents of the BA. If that link doesn't work, the regulations can be found at 50 CFR 402.12.

Also as discussed today, we can concur with this information and your determination made in an EIS. In other words, STB does not need to prepare a separate document (i.e. a BA) for concurrence.

Let me know if you have any other questions, Jana

Jana Milliken
Wildlife Biologist
US Fish & Wildlife Service
10711 Burnet Road, Suite 200
Austin, TX 78758
512-490-0057

#EI-738
RH

DEPARTMENT OF THE ARMY
FORT WORTH DISTRICT, CORPS OF ENGINEERS
P. O. BOX 17300
FORT WORTH, TEXAS 76102-0300

REPLY TO
ATTENTION OF:

March 8, 2004

MAR 16 2004
RECEIVED

Planning, Environmental, and Regulatory Division
Regulatory Branch

SUBJECT: Project Number 200300101, Surface Transportation Board (STB) Docket Number 34284

Ms. Kini Ghosh
Case Control Unit
Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20423-0001

Dear Ms. Ghosh:

This letter is in response to the notice of intent to prepare an environmental impact statement (EIS) and request for comments regarding a proposal by Southwest Gulf Railroad (SGR) to construct and operate a seven-mile rail line from a proposed limestone quarry to an existing Union Pacific rail line near the city of Dunlay in Medina County, Texas. This project has been assigned Project Number 200300101. Please include this number in all future correspondence concerning this project. Failure to reference the project number may result in a delay.

We have reviewed this project in accordance with Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. Under Section 404, the U. S. Army Corps of Engineers (USACE) regulates the discharge of dredged and fill material into waters of the United States, including wetlands. Our responsibility under Section 10 is to regulate any work in, or affecting, navigable waters of the United States. Any such discharge or work requires Department of the Army authorization from the USACE in the form of a permit. For more information on the USACE Regulatory Program, please see our Internet homepage at www.swf.usace.army.mil and select "Permits". The EIS should address the requirements of the USACE Regulatory Program, including the elements that are discussed in the following paragraphs.

It appears that areas subject to Section 404 regulation, such as Polecat Creek, Elm Creek, Quihi Creek, and Cherry Creek, as well as other unnamed tributaries to navigable waters and adjacent wetlands, occur within the proposed project area. The construction, expansion, modification, or improvement of linear transportation crossings such as highways, railways, trails, airport runways, and taxiways are examples of linear transportation projects that may require Department of the Army authorization where they occur in waters of the United States.

If a Department of the Army permit is required, the project may be authorized by one or more general permits including nationwide permit 14 for Linear Transportation Crossings (copy enclosed). For work to be authorized by general permit it must comply with the specifications and conditions of the permit. Projects that would not meet the specifications and conditions of a general permit may require authorization by individual permit.

If a Department of the Army permit is required, you should provide us with a detailed description of the proposed project, a suitable map of the proposed project area showing the location of proposed discharges, the type and amount of material (temporary or permanent), if any, to be discharged, and plan and cross-section views of the proposed project. Please refer to the enclosed guidance for Department of the Army submittals and individual permit application checklist for additional details about what you should submit for this and future projects. Information about the proposed project and project alternatives relating to Department of the Army permitting should be presented in the EIS.

Important cultural resources are known to occur in the vicinity of the proposed project. Several endangered and threatened species, including the black-capped Vireo (*Vireo atricapilla*) and the golden-cheeked warbler (*Dendroica chrysoparia*) are known to occur in Medina County. Please consider the potential effects of your proposed action on cultural resources and endangered species in your planning efforts. For additional information about endangered and threatened species, please contact the U. S. Fish and Wildlife Service.

We encourage you to avoid and minimize adverse impacts to streams, wetlands, and other waters of the United States in planning this project. Please note that it is unlawful to start work without a Department of the Army permit if one is required.

Thank you for your interest in our nation's water resources. If you have any questions concerning our regulatory program, please contact Ms. Jessica Napier at the address above or telephone (817) 886-1745.

Sincerely,

Presley B. Hatcher

for Wayne A. Lea
Chief, Regulatory Branch

Enclosures

Copy furnished:

Mr. Darrell T. Brownlow
Brownlow Consulting Group
12425 FM 775
Floresville, Texas 78114

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NATIONWIDE PERMIT 14

Linear Transportation Projects

Effective Date: March 18, 2002

Activities required for the construction, expansion, modification, or improvement of linear transportation crossings (e.g., highways, railways, trails, airport runways, and taxiways) in waters of the US, including wetlands, if the activity meets the following criteria:

a. This NWP is subject to the following acreage limits:

(1) For linear transportation projects in non-tidal waters, provided the discharge does not cause the loss of greater than 1/2-acre of waters of the US; or

(2) For linear transportation projects in tidal waters, provided the discharge does not cause the loss of greater than 1/3-acre of waters of the US.

b. The permittee must notify the District Engineer in accordance with General Condition 13 if any of the following criteria are met:

(1) The discharge causes the loss of greater than 1/10-acre of waters of the US; or

(2) There is a discharge in a special aquatic site, including wetlands;

c. The notification must include a compensatory mitigation proposal to offset permanent losses of waters of the US to ensure that those losses result only in minimal adverse effects to the aquatic environment and a statement describing how temporary losses will be minimized to the maximum extent practicable;

d. For discharges in special aquatic sites, including wetlands, and stream riffle and pool complexes, the notification must include a delineation of the affected special aquatic sites;

e. The width of the fill is limited to the minimum necessary for the crossing;

f. This permit does not authorize stream channelization, and the authorized activities must not cause more than minimal changes to the hydraulic flow characteristics of the stream, increase flooding, or cause more than minimal degradation of water quality of any stream (see General Conditions 9 and 21);

g. This permit cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars; and

h. The crossing is a single and complete project for crossing waters of the US. Where a road segment (i.e., the shortest segment of a road with independent utility that is part of a larger project) has multiple crossings of streams (several single and complete projects) the Corps will consider whether it should use its discretionary authority to require an Individual Permit. (Sections 10 and 404)

Note: Some discharges for the construction of farm roads, forest roads, or temporary roads for moving mining equipment may be eligible for an exemption from the need for a Section 404 permit (see 33 CFR 323.4).

NATIONWIDE PERMIT GENERAL CONDITIONS

The following General Conditions must be followed in order for any authorization by an NWP to be valid:

1. **Navigation**. No activity may cause more than a minimal adverse effect on navigation.

2. **Proper Maintenance**. Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.

3. **Soil Erosion and Sediment Controls**. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow.

4. **Aquatic Life Movements**. No activity may substantially disrupt the necessary life-cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions.

5. **Equipment**. Heavy equipment working in wetlands must be placed on mats, or other measures must be taken to minimize soil disturbance.

6. **Regional and Case-By-Case Conditions**. The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state or tribe in its Section 401 Water Quality Certification and Coastal Zone Management Act consistency determination. **Note: Statewide Regional Conditions have been added for activities within Texas.**

7. **Wild and Scenic Rivers**. No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a ``study river'' for possible inclusion in the system, while the river is in an official study status; unless the appropriate Federal agency, with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation, or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).

8. **Tribal Rights**. No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

9. **Water Quality**. (a) In certain states and tribal lands an individual 401 Water Quality Certification must be obtained or waived (See 33 CFR 330.4(c)).

(b) For NWPs 12, 14, 17, 18, 32, 39, 40, 42, 43, and 44, where the state or tribal 401 certification (either generically or individually) does not require or approve water quality management measures, the permittee must provide water quality management measures that will ensure that the authorized work does not result in more than minimal degradation of water quality (or the Corps determines that compliance with state or local standards, where applicable, will ensure no more than minimal adverse effect on water quality). An important component of water quality management includes stormwater management that minimizes degradation of the downstream aquatic system, including water quality (refer to General Condition 21 for stormwater management requirements). Another important component of water quality management is the establishment and maintenance of vegetated buffers next to open waters, including streams (refer to General Condition 19 for vegetated buffer requirements for the NWPs).

This condition is only applicable to projects that have the potential to affect water quality. While appropriate measures must be taken, in most cases it is not necessary to conduct detailed studies to identify such measures or to require monitoring.

10. **Coastal Zone Management**. In certain states, an individual state coastal zone management consistency concurrence must be obtained or waived (see 33 CFR 330.4(d)).

11. **Endangered Species**. (a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the District Engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or is located in the designated critical habitat and shall not begin work on the activity until notified by the District Engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that may affect Federally-listed endangered or threatened species or designated critical habitat, the notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. As a result of formal or informal consultation with the FWS or NMFS the District Engineer may add species-specific regional endangered species conditions to the NWPs.

(b) Authorization of an activity by a NWP does not authorize the ``take'' of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with ``incidental take'' provisions, etc.) from the USFWS or the NMFS, both lethal and non-lethal ``takes'' of protected

species are in violation of the ESA. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the USFWS and NMFS or their world wide web pages at http://www.fws.gov/r9endspp/endspp.html and http://www.nmfs.noaa.gov/prot_res/overview/es.html respectively.

12. **Historic Properties**. No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the District Engineer has complied with the provisions of 33 CFR part 325, Appendix C. The prospective permittee must notify the District Engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)). For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the notification must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

13. **Notification.**

(a) Timing; where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a preconstruction notification (PCN) as early as possible. The District Engineer must determine if the notification is complete within 30 days of the date of receipt and can request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the District Engineer will notify the prospective permittee that the notification is still incomplete and the PCN review process will not commence until all of the requested information has been received by the District Engineer. The prospective permittee shall not begin the activity:

(1) Until notified in writing by the District Engineer that the activity may proceed under the NWP with any special conditions imposed by the District or Division Engineer; or

(2) If notified in writing by the District or Division Engineer that an Individual Permit is required; or

(3) Unless 45 days have passed from the District Engineer's receipt of the complete notification and the prospective permittee has not received written notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) Contents of Notification: The notification must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed project;

(3) Brief description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), Regional General Permit(s), or Individual Permit(s) used or intended to be used to authorize any part of the proposed project or any related activity. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP (Sketches usually clarify the project and when provided result in a quicker decision.);

(4) For NWPs 7, 12, 14, 18, 21, 34, 38, 39, 40, 41, 42, and 43, the PCN must also include a delineation of affected special aquatic sites, including wetlands, vegetated shallows (e.g., submerged aquatic vegetation, seagrass beds), and riffle and pool complexes (see paragraph 13(f));

(5) For NWP 7 (Outfall Structures and Maintenance), the PCN must include information regarding the original design capacities and configurations of those areas of the facility where maintenance dredging or excavation is proposed;

(6) For NWP 14 (Linear Transportation Projects), the PCN must include a compensatory mitigation proposal to offset permanent losses of waters of the US and a statement describing how temporary losses of waters of the US will be minimized to the maximum extent practicable;

(7) For NWP 21 (Surface Coal Mining Activities), the PCN must include an Office of Surface Mining (OSM) or state-approved mitigation plan, if applicable. To be authorized by this NWP, the District Engineer must determine that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are minimal both individually and cumulatively and must notify the project sponsor of this determination in writing;

(8) For NWP 27 (Stream and Wetland Restoration Activities), the PCN must include documentation of the prior condition of the site that will be reverted by the permittee;

(9) For NWP 29 (Single-Family Housing), the PCN must also include:

(i) Any past use of this NWP by the Individual Permittee and/or the permittee's spouse;

(ii) A statement that the single-family housing activity is for a personal residence of the permittee;

(iii) A description of the entire parcel, including its size, and a delineation of wetlands. For the purpose of this NWP, parcels of land measuring 1/4-acre or less will not require a formal on-site delineation. However, the applicant shall provide an indication of where the wetlands are and the amount of wetlands that exists on the property. For parcels greater than 1/4-acre in size, formal wetland delineation must be prepared in accordance with the current method required by the Corps. (See paragraph 13(f));

(iv) A written description of all land (including, if available, legal descriptions) owned by the prospective permittee and/or the prospective permittee's spouse, within a one mile radius of the parcel, in any form of ownership (including any land owned as a partner, corporation, joint tenant, co-tenant, or as a tenant-by-the-entirety) and any land on which a purchase and sale agreement or other contract for sale or purchase has been executed;

(10) For NWP 31 (Maintenance of Existing Flood Control Facilities), the prospective permittee must either notify the District Engineer with a PCN prior to each maintenance activity or submit a five year (or less) maintenance plan. In addition, the PCN must include all of the following:

(i) Sufficient baseline information identifying the approved channel depths and configurations and existing facilities. Minor deviations are authorized, provided the approved flood control protection or drainage is not increased;

(ii) A delineation of any affected special aquatic sites, including wetlands; and,

(iii) Location of the dredged material disposal site;

(11) For NWP 33 (Temporary Construction, Access, and Dewatering), the PCN must also include a restoration plan of reasonable measures to avoid and minimize adverse effects to aquatic resources;

(12) For NWPs 39, 43 and 44, the PCN must also include a written statement to the District Engineer explaining how avoidance and minimization for losses of waters of the US were achieved on the project site;

(13) For NWP 39 and NWP 42, the PCN must include a compensatory mitigation proposal to offset losses of waters of the US or justification explaining why compensatory mitigation should not be required. For discharges that cause the loss of greater than 300 linear feet of an intermittent stream bed, to be authorized, the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine adverse environmental effects are minimal both individually and cumulatively, and waive the limitation on stream impacts in writing before the permittee may proceed;

(14) For NWP 40 (Agricultural Activities), the PCN must include a compensatory mitigation proposal to offset losses of waters of the US. This NWP does not authorize the relocation of greater than 300 linear-feet of existing serviceable drainage ditches constructed in non-tidal streams unless, for drainage ditches constructed in intermittent non-tidal streams, the District Engineer waives this criterion in writing, and the District Engineer has determined that the project complies with all terms and conditions of this NWP, and that any adverse impacts of the project on the aquatic environment are minimal, both individually and cumulatively;

(15) For NWP 43 (Stormwater Management Facilities), the PCN must include, for the construction of new stormwater management facilities, a maintenance plan (in accordance with state and local requirements, if applicable) and a compensatory mitigation proposal to offset losses of waters of the US. For discharges that cause the loss of greater than 300 linear feet of an intermittent stream bed, to be authorized, the District Engineer must determine that the activity complies with the other terms and conditions of the NWP, determine adverse environmental effects are minimal both individually and cumulatively, and waive the limitation on stream impacts in writing before the permittee may proceed;

(16) For NWP 44 (Mining Activities), the PCN must include a description of all waters of the US adversely affected by the project, a description of measures taken to minimize adverse effects to waters of the US, a description of measures taken to comply with the criteria of the NWP, and a reclamation plan (for all aggregate mining activities in isolated waters and non-tidal wetlands adjacent to headwaters and any hard rock/mineral mining activities);

(17) For activities that may adversely affect Federally-listed endangered or threatened species, the PCN must include the name(s) of those endangered or threatened species that may be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work; and

(18) For activities that may affect historic properties listed in, or eligible for listing in, the National Register of

Historic Places, the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

(c) Form of Notification: The standard Individual Permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PCN and must include all of the information required in (b) (1)-(18) of General Condition 13. A letter containing the requisite information may also be used.

(d) District Engineer's Decision: In reviewing the PCN for the proposed activity, the District Engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. The prospective permittee may submit a proposed mitigation plan with the PCN to expedite the process. The District Engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, after considering mitigation, the District Engineer will notify the permittee and include any conditions the District Engineer deems necessary. The District Engineer must approve any compensatory mitigation proposal before the permittee commences work. If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the District Engineer will expeditiously review the proposed compensatory mitigation plan. The District Engineer must review the plan within 45 days of receiving a complete PCN and determine whether the conceptual or specific proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant. The response will state that the project can proceed under the terms and conditions of the NWP.

If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then the District Engineer will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an Individual Permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the District Engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period. The authorization will include the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level. When conceptual mitigation is included, or a mitigation plan is required under item (2) above, no work in waters of the US will occur until the District Engineer has approved a specific mitigation plan.

(e) Agency Coordination: The District Engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

For activities requiring notification to the District Engineer that result in the loss of greater than 1/2-acre of waters of the US, the District Engineer will provide immediately (e.g., via facsimile transmission, overnight mail, or other expeditious manner) a copy to the appropriate Federal or state offices (USFWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the District Engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 15 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. As required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act, the District Engineer will provide a response to NMFS within 30 days of receipt of any Essential Fish Habitat conservation recommendations. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification.

(f) Wetland Delineations: Wetland delineations must be prepared in accordance with the current method required by the Corps (For NWP 29 see paragraph (b)(9)(iii) for parcels less than (1/4-acre in size). The permittee may ask the

Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 45-day period will not start until the wetland delineation has been completed and submitted to the Corps, where appropriate.

14. **Compliance Certification**. Every permittee who has received NWP verification from the Corps will submit a signed certification regarding the completed work and any required mitigation. The certification will be forwarded by the Corps with the authorization letter and will include:

(a) A statement that the authorized work was done in accordance with the Corps authorization, including any general or specific conditions;

(b) A statement that any required mitigation was completed in accordance with the permit conditions; and

(c) The signature of the permittee certifying the completion of the work and mitigation.

15. **Use of Multiple Nationwide Permits**. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the US authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit (e.g. if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the US for the total project cannot exceed 1/3-acre).

16. **Water Supply Intakes**. No activity, including structures and work in navigable waters of the US or discharges of dredged or fill material, may occur in the proximity of a public water supply intake except where the activity is for repair of the public water supply intake structures or adjacent bank stabilization.

17. **Shellfish Beds**. No activity, including structures and work in navigable waters of the US or discharges of dredged or fill material, may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4.

18. **Suitable Material**. No activity, including structures and work in navigable waters of the US or discharges of dredged or fill material, may consist of unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.) and material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the CWA).

19. **Mitigation**. The District Engineer will consider the factors discussed below when determining the acceptability of appropriate and practicable mitigation necessary to offset adverse effects on the aquatic environment that are more than minimal.

(a) The project must be designed and constructed to avoid and minimize adverse effects to waters of the US to the maximum extent practicable at the project site (i.e., on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing or compensating) will be required to the extent necessary to ensure that the adverse effects to the aquatic environment are minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland impacts requiring a PCN, unless the District Engineer determines in writing that some other form of mitigation would be more environmentally appropriate and provides a project-specific waiver of this requirement. Consistent with National policy, the District Engineer will establish a preference for restoration of wetlands as compensatory mitigation, with preservation used only in exceptional circumstances.

(d) Compensatory mitigation (i.e., replacement or substitution of aquatic resources for those impacted) will not be used to increase the acreage losses allowed by the acreage limits of some of the NWPs. For example, 1/4-acre of wetlands cannot be created to change a 3/4-acre loss of wetlands to a 1/2-acre loss associated with NWP 39 verification. However, 1/2-acre of created wetlands can be used to reduce the impacts of a 1/2-acre loss of wetlands to the minimum impact level in order to meet the minimal impact requirement associated with NWPs.

(e) To be practicable, the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of the overall project purposes. Examples of mitigation that may be appropriate and practicable include, but are not limited to: reducing the size of the project; establishing and maintaining wetland or upland vegetated buffers to protect open waters such as streams; and replacing losses of aquatic resource functions and values by creating, restoring, enhancing, or preserving similar functions and values, preferably in the same watershed.

(f) Compensatory mitigation plans for projects in or near streams or other open waters will normally include a requirement for the establishment, maintenance, and legal protection (e.g., easements, deed restrictions) of vegetated buffers to open waters. In many cases, vegetated buffers will be the only compensatory mitigation required. Vegetated buffers should consist of native species. The width of the vegetated buffers required will address documented water quality or aquatic habitat loss concerns. Normally, the vegetated buffer will be 25 to 50 feet wide on each side of the stream, but the District Engineers may require slightly wider vegetated buffers to address documented water quality or habitat loss concerns. Where both wetlands and open waters exist on the project site, the Corps will determine the appropriate compensatory mitigation (e.g., stream buffers or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where vegetated buffers are determined to be the most appropriate form of compensatory mitigation, the District Engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland impacts.

(g) Compensatory mitigation proposals submitted with the ``notification'' may be either conceptual or detailed. If conceptual plans are approved under the verification, then the Corps will condition the verification to require detailed plans be submitted and approved by the Corps prior to construction of the authorized activity in waters of the US.

(h) Permittees may propose the use of mitigation banks, in-lieu fee arrangements or separate activity-specific compensatory mitigation. In all cases that require compensatory mitigation, the mitigation provisions will specify the party responsible for accomplishing and/or complying with the mitigation plan.

20. **Spawning Areas**. Activities, including structures and work in navigable waters of the US or discharges of dredged or fill material, in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., excavate, fill, or smother downstream by substantial turbidity) of an important spawning area are not authorized.

21. **Management of Water Flows**. To the maximum extent practicable, the activity must be designed to maintain preconstruction downstream flow conditions (e.g., location, capacity, and flow rates). Furthermore, the activity must not permanently restrict or impede the passage of normal or expected high flows (unless the primary purpose of the fill is to impound waters) and the structure or discharge of dredged or fill material must withstand expected high flows. The activity must, to the maximum extent practicable, provide for retaining excess flows from the site, provide for maintaining surface flow rates from the site similar to preconstruction conditions, and provide for not increasing water flows from the project site, relocating water, or redirecting water flow beyond preconstruction conditions. Stream channelizing will be reduced to the minimal amount necessary, and the activity must, to the maximum extent practicable, reduce adverse effects such as flooding or erosion downstream and upstream of the project site, unless the activity is part of a larger system designed to manage water flows. In most cases, it will not be a requirement to conduct detailed studies and monitoring of water flow.

This condition is only applicable to projects that have the potential to affect waterflows. While appropriate measures must be taken, it is not necessary to conduct detailed studies to identify such measures or require monitoring to ensure their effectiveness. Normally, the Corps will defer to state and local authorities regarding management of water flow.

22. **Adverse Effects From Impoundments**. If the activity creates an impoundment of water, adverse effects to the aquatic system due to the acceleration of the passage of water, and/or the restricting its flow shall be minimized to the maximum extent practicable. This includes structures and work in navigable waters of the US, or discharges of dredged or fill material.

23. **Waterfowl Breeding Areas**. Activities, including structures and work in navigable waters of the US or discharges of dredged or fill material, into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

24. **Removal of Temporary Fills**. Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

25. **Designated Critical Resource Waters**. Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally listed threatened

and endangered species, coral reefs, state natural heritage sites, and outstanding national resource waters or other waters officially designated by a state as having particular environmental or ecological significance and identified by the District Engineer after notice and opportunity for public comment. The District Engineer may also designate additional critical resource waters after notice and opportunity for comment.

(a) Except as noted below, discharges of dredged or fill material into waters of the US are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters. Discharges of dredged or fill materials into waters of the US may be authorized by the above NWPs in National Wild and Scenic Rivers if the activity complies with General Condition 7. Further, such discharges may be authorized in designated critical habitat for Federally listed threatened or endangered species if the activity complies with General Condition 11 and the USFWS or the NMFS has concurred in a determination of compliance with this condition.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with General Condition 13, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The District Engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

26. **Fills Within 100-Year Floodplains**. For purposes of this General Condition, 100-year floodplains will be identified through the existing Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Maps or FEMA-approved local floodplain maps.

(a) Discharges in Floodplain; Below Headwaters. Discharges of dredged or fill material into waters of the US within the mapped 100-year floodplain, below headwaters (i.e. five cfs), resulting in permanent above-grade fills, are not authorized by NWPs 39, 40, 42, 43, and 44.

(b) Discharges in Floodway; Above Headwaters. Discharges of dredged or fill material into waters of the US within the FEMA or locally mapped floodway, resulting in permanent above-grade fills, are not authorized by NWPs 39, 40, 42, and 44.

(c) The permittee must comply with any applicable FEMA-approved state or local floodplain management requirements.

27. **Construction Period**. For activities that have not been verified by the Corps and the project was commenced or under contract to commence by the expiration date of the NWP (or modification or revocation date), the work must be completed within 12-months after such date (including any modification that affects the project).

For activities that have been verified and the project was commenced or under contract to commence within the verification period, the work must be completed by the date determined by the Corps.

For projects that have been verified by the Corps, an extension of a Corps approved completion date maybe requested. This request must be submitted at least one month before the previously approved completion date.

FURTHER INFORMATION

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.
2. NWPs do not obviate the need to obtain other Federal, state, or local permits, approvals, or authorizations required by law.
3. NWPs do not grant any property rights or exclusive privileges.
4. NWPs do not authorize any injury to the property or rights of others.
5. NWPs do not authorize interference with any existing or proposed Federal project.

DEFINITIONS

Best Management Practices (BMPs): BMPs are policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural. A BMP policy may affect the limits on a development.

Compensatory Mitigation: For purposes of Section 10/404, compensatory mitigation is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purpose

of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Creation: The establishment of a wetland or other aquatic resource where one did not formerly exist.

Enhancement: Activities conducted in existing wetlands or other aquatic resources that increase one or more aquatic functions.

Ephemeral Stream: An ephemeral stream has flowing water only during and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Farm Tract: A unit of contiguous land under one ownership that is operated as a farm or part of a farm.

Flood Fringe: That portion of the 100-year floodplain outside of the floodway (often referred to as ``floodway fringe").

Floodway: The area regulated by Federal, state, or local requirements to provide for the discharge of the base flood so the cumulative increase in water surface elevation is no more than a designated amount (not to exceed one foot as set by the National Flood Insurance Program) within the 100-year floodplain.

Independent Utility: A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

Intermittent Stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of Waters of the US: Waters of the US that include the filled area and other waters that are permanently adversely affected by flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent above-grade, at-grade, or below-grade fills that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the US is the threshold measurement of the impact to existing waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and values. The loss of stream bed includes the linear feet of stream bed that is filled or excavated. Impacts to ephemeral streams are not included in the linear foot measurement of loss of stream bed for the purpose of determining compliance with the linear foot limits of NWPs 39, 40, 42, and 43. Waters of the US temporarily filled, flooded, excavated, or drained, but restored to preconstruction contours and elevations after construction, are not included in the measurement of loss of waters of the US.

Non-tidal Wetland: A non-tidal wetland is a wetland (i.e., a water of the US) that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., spring high tide line).

Open Water: An area that, during a year with normal patterns of precipitation, has standing or flowing water for sufficient duration to establish an ordinary high water mark. Aquatic vegetation within the area of standing or flowing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. The term ``open water" includes rivers, streams, lakes, and ponds. For the purposes of the NWPs, this term does not include ephemeral waters.

Perennial Stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Permanent Above-grade Fill: A discharge of dredged or fill material into waters of the US, including wetlands, that results in a substantial increase in ground elevation and permanently converts part or all of the waterbody to dry land. Structural fills authorized by NWPs 3, 25, 36, etc. are not included.

Preservation: The protection of ecologically important wetlands or other aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection and/or enhancement of the overall aquatic ecosystem.

Restoration: Re-establishment of wetland and/or other aquatic resource characteristics and function(s) at a site

where they have ceased to exist, or exist in a substantially degraded state.

Riffle and Pool Complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a course substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

Single and Complete Project: The term ``single and complete project" is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers (see definition of independent utility). For linear projects, the ``single and complete project" (i.e., a single and complete crossing) will apply to each crossing of a separate water of the US (i.e., a single waterbody) at that location. An exception is for linear projects crossing a single waterbody several times at separate and distant locations: each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies.

Stormwater Management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater Management Facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and BMPs, which retain water for a period of time to control runoff and/or improve the quality (i.e., by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream Bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream Channelization: The manipulation of a stream channel to increase the rate of water flow through the stream channel. Manipulation may include deepening, widening, straightening, armoring, or other activities that change the stream cross-section or other aspects of stream channel geometry to increase the rate of water flow through the stream channel. A channelized stream remains a water of the US, despite the modifications to increase the rate of water flow.

Tidal Wetland: A tidal wetland is a wetland (i.e., water of the US) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b) and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line (i.e., spring high tide line) and are inundated by tidal waters two times per lunar month, during spring high tides.

Vegetated Buffer: A vegetated upland or wetland area next to rivers, streams, lakes, or other open waters which separates the open water from developed areas, including agricultural land. Vegetated buffers provide a variety of aquatic habitat functions and values (e.g., aquatic habitat for fish and other aquatic organisms, moderation of water temperature changes, and detritus for aquatic food webs) and help improve or maintain local water quality. A vegetated buffer can be established by maintaining an existing vegetated area or planting native trees, shrubs, and herbaceous plants on land next to open-waters. Mowed lawns are not considered vegetated buffers because they provide little or no aquatic habitat functions and values. The establishment and maintenance of vegetated buffers is a method of compensatory mitigation that can be used in conjunction with the restoration, creation, enhancement, or preservation of aquatic habitats to ensure that activities authorized by NWPs result in minimal adverse effects to the aquatic environment. (See General Condition 19.)

Vegetated Shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: A waterbody is any area that in a normal year has water flowing or standing above ground to the extent that evidence of an ordinary high water mark is established. Wetlands contiguous to the waterbody are considered part of the waterbody.

ADDITIONAL INFORMATION

Information about the U.S. Army Corps of Engineers regulatory program, including nationwide permits, may also be accessed on our Internet page: http://www.usace.army.mil/inet/functions/cw/cecwo/reg

This nationwide permit is effective March 18, 2002, and expires on March 19, 2007, unless sooner modified, suspended, or revoked.

Summary Version: March 18, 2002

Texas Commission on Environmental Quality

401 Water Quality Certification Conditions for Nationwide Permits

Attachment 1

Below are the 401 water quality certification conditions the Texas Commission on Environmental Quality (TCEQ) added to the January 15, 2002 issuance of Nationwide Permits (NWP), as described in the Federal Register (Part II, Vol. 67, No. 10, pages 2020-2095). These conditions were included as part of TCEQ's certification finalized on April 12, 2002 and September 5, 2003.

Additional information regarding these conditions, including descriptions of the best management practices, can be obtained from the TCEQ by contacting the 401 Coordinator, MC-150, P. O. Box 13087, Austin, Texas 78711-3087 or from the appropriate U.S. Army Corps of Engineers district office.

I. Erosion Control

Disturbed areas must be stabilized to prevent the introduction of sediment to adjacent wetlands or water bodies during wet weather conditions (erosion). *At least one* of the following BMPs must be maintained and remain in place until the area has been stabilized for NWPs 3, 7, 12, 13, 14, 15, 17, 18, 19, 21, 22, 25, 27, 29, 30, 31, 32, 33, 36, 37, 38, 39, 40, 41, 42, 43, and 44. If the applicant does not choose one of the BMPs listed, an individual 401 certification is required.

- o Temporary Vegetation
- o Mulch
- o Interceptor Swale
- o Erosion Control Compost
- o Compost Filter Berms and Socks
- o Blankets/Matting
- o Sod
- o Diversion Dike
- o Mulch Filter Berms and Socks

II. Sedimentation Control

Prior to project initiation, the project area must be isolated from adjacent wetlands and water bodies by the use of BMPs to confine sediment. Dredged material shall be placed in such a manner that prevents sediment runoff into water in the state, including wetlands. Water bodies can be isolated by the use of one or more of the required BMPs identified for sedimentation control. These BMP's must be maintained and remain in place until the dredged material is stabilized. *At least one* of the following BMPs must be maintained and remain in place until the area has been stabilized for NWPs 3, 7, 12, 13, 14, 15, 17, 18, 19, 21, 22, 25, 27, 29, 30, 31, 32, 33, 36, 37, 38, 39, 40, 41, 42, 43, and 44. If the applicant does not choose one of the BMPs listed, an individual 401 certification is required.

- o Sand Bag Berm
- o Rock Berm
- o Silt Fence
- o Hay Bale Dike
- o Triangular Filter Dike
- o Brush Berms
- o Stone Outlet Sediment Traps
- o Sediment Basins
- o Erosion Control Compost
- o Mulch Filter Berms and Socks
- o Compost Filter Berms and Socks

III. Post-Construction TSS Control

After construction has been completed and the site is stabilized, total suspended solids (TSS) loadings shall be controlled by *at least one* of the following BMPs for NWPs 12, 14, 17, 18, 21, 29, 31, 36, 39, 40, 41, 42, and 44. If the applicant does not choose one of the BMPs listed, an individual 401 certification is required. Runoff from bridge decks has been exempted from the requirement for post construction TSS controls.

- o Retention/Irrigation
- o Constructed Wetlands
- o Extended Detention Basin
- o Wet Basins
- o Vegetative Filter Strips
- o Vegetation lined drainage ditches
- o Grassy Swales
- o Sand Filter Systems
- o Erosion Control Compost
- o Mulch Filter Berms and Socks
- o Compost Filter Berms and Socks

IV. Return Water from Upland Contained Disposal Areas

Effluent from an upland contained disposal areas shall not exceed a TSS concentration of 300 mg/L unless an individual certification has been issued with site-specific TSS limits.

V. NWP 39, 40, and 42

The Corps will copy the TCEQ on all authorizations for impacts of greater than 300 feet of intermittent streams sent to applicants.

Attachment 2
Reference to Nationwide Permits Best Management Practices Requirements

NWP	Permit Description	Erosion Control	Sediment Control	Post Construction TSS
1	Aid to Navigation			
2	Structures in Artificial Canals			
3	Maintenance (Repair, Replacement, rehabilitation of currently serviceable structure or fill)	X	X	
4	Fish and Wildlife Harvesting, Enhancement and Attraction Devices and Activities (Duck Blinds and Crab Traps)			
5	Scientific Measurement Devices			
6	Survey Activities			
7	Outfall Structures and Maintenance	X	X	
8	Oil and Gas Structures			
9	Structures in Fleeting And Anchorage Areas			
10	Mooring Buoys			
11	Temporary Recreation Structures			
12	Utility Line Activities	X	X	X
13	Bank Stabilization	X	X	
14	Linear Transportation Projects	X	X	X
15	U.S. Coast Guard Approved Bridges	X	X	
16	Return Water From Upland Disposal Areas			
17	Hydropower Projects	X	X	X
18	Minor Discharges (25yds)	X	X	X
19	Minor Dredging	X	X	
20	Oil Spill Cleanup			
21	Surface Coal Mining Activities	X	X	X
22	Removal of Vessels	X	X	

Attachment 2
Reference to Nationwide Permits Best Management Practices Requirements

NWP	Approved Categorical Exclusions	Erosion Control	Sediment Control	Post Construction TSS
23	Approved Categorical Exclusions			
24	State Administered 404 Program			
25	Structural Discharges	X	X	
26	Reserved			
27	Stream and Wetland Restoration	X	X	
28	Modifications of Existing Marinas			
29	Single-Family Housing	X	X	X
30	Moist Soil Management for Wildlife	X	X	
31	Maintenance of Existing Flood Control Facilities	X	X	X
32	Completed Enforcement Actions	X	X	
33	Temporary Construction, Access and Dewatering	X	X	
34	Cranberry Production			
35	Maintenance Dredging of Existing Basins			
36	Boat Ramps	X	X	X
37	Emergency Watershed Protection and Rehabilitation	X	X	
38	Cleanup of Hazardous and Toxic Waste	X	X	
39	Residential, Commercial, and Institutional Developments	X	X	X
40	Agricultural Activities	X	X	X
41	Reshaping Existing Drainage Ditches	X	X	X
42	Recreational Facilities	X	X	X
43	Stormwater Management Facilities	X	X	
44	Mining Activities	X	X	X

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Description of BMPs

EROSION CONTROL BMPs

Temporary Vegetation

Description: Vegetation can be used as a temporary or permanent stabilization technique for areas disturbed by construction. Vegetation effectively reduces erosion in swales, stockpiles, berms, mild to medium slopes, and along roadways. Other techniques such as matting, mulches, and grading may be required to assist in the establishment of vegetation.

Materials:

- The type of temporary vegetation used on a site is a function of the season and the availability of water for irrigation.
- Temporary vegetation should be selected appropriately for the area.
- County agricultural extension agents are a good source for suggestions for temporary vegetation.
- All seed should be high quality, U.S. Dept. of Agriculture certified seed.

Installation:

- Grading must be completed prior to seeding.
- Slopes should be minimized.
- Erosion control structures should be installed.
- Seedbeds should be well pulverized, loose, and uniform.
- Fertilizers should be applied at appropriate rates.
- Seeding rates should be applied as recommended by the county agricultural extension agent.
- The seed should be applied uniformly.
- Steep slopes should covered with appropriate soil stabilization matting.

Blankets and Matting

Description: Blankets and matting material can be used as an aid to control erosion on critical sites during the establishment period of protective vegetation. The most common uses are in channels, interceptor swales, diversion dikes, short, steep slopes, and on tidal or stream banks.

Materials:

New types of blankets and matting materials are continuously being developed. The Texas Department of Transportation (TxDOT) has defined the critical performance factors for these types of products and has established minimum performance standards which must be met for any product seeking to be approved for use within any of TxDOT's construction or maintenance activities. The products that have been approved by TxDOT are also appropriate for general construction site stabilization. TxDOT maintains a web site at http://www.dot.state.tx.us/insdtdot/orgchart/cmd/erosion/contents.httm which is updated as new products are evaluated.

Installation:

- Install in accordance with the manufacturer's recommendations.
- Proper anchoring of the material.
- Prepare a friable seed bed relatively free from clods and rocks and any foreign material.
- Fertilize and seed in accordance with seeding or other type of planting plan.
- Erosion stops should extend beyond the channel liner to full design cross-section of the channel.
- A uniform trench perpendicular to line of flow may be dug with a spade or a mechanical trencher.
- Erosion stops should be deep enough to penetrate solid material or below level of ruling in sandy soils.
- Erosion stop mats should be wide enough to allow turnover at bottom of trench for stapling, while maintaining the top edge flush with channel surface.

Mulch

Description: Mulching is the process of applying a material to the exposed soil surface to protect it from erosive forces and to conserve soil moisture until plants can become established. When seeding critical sites, sites with adverse soil conditions or seeding on other than optimum seeding dates, mulch material should be applied immediately after seeding. Seeding during optimum seeding dates and with favorable soils and site conditions will not need to be mulched.

Materials:

- Mulch may be small grain straw which should be applied uniformly.
- On slopes 15 percent or greater, a binding chemical must be applied to the surface.

- Wood-fiber or paper-fiber mulch may be applied by hydroseeding.
- Mulch nettings may be used.
- Wood chips may be used where appropriate.

Installation:

Mulch anchoring should be accomplished immediately after mulch placement. This may be done by one of the following methods: peg and twine, mulch netting, mulch anchoring tool, or liquid mulch binders.

Sod

Description: Sod is appropriate for disturbed areas which require immediate vegetative covers, or where sodding is preferred to other means of grass establishment. Locations particularly suited to stabilization with sod are waterways carrying intermittent flow, areas around drop inlets or in grassed swales, and residential or commercial lawns where quick use or aesthetics are factors. Sod is composed of living plants and those plants must receive adequate care in order to provide vegetative stabilization on a disturbed area.

Materials:

- Sod should be machine cut at a uniform soil thickness.
- Pieces of sod should be cut to the supplier's standard width and length.
- Torn or uneven pads are not acceptable.
- Sections of sod should be strong enough to support their own weight and retain their size and shape when suspended from a firm grasp.
- Sod should be harvested, delivered, and installed within a period of 36 hours.

Installation:

- Areas to be sodded should be brought to final grade.
- The surface should be cleared of all trash and debris.
- Fertilize according to soil tests.
- Fertilizer should be worked into the soil.
- Sod should not be cut or laid in excessively wet or dry weather.
- Sod should not be laid on soil surfaces that are frozen.
- During periods of high temperature, the soil should be lightly irrigated.

• The first row of sod should be laid in a straight line with subsequent rows placed parallel to and butting tightly against each other.

• Lateral joints should be staggered to promote more uniform growth and strength.

• Wherever erosion may be a problem, sod should be laid with staggered joints and secured.

• Sod should be installed with the length perpendicular to the slope (on the contour).

• Sod should be rolled or tamped.

• Sod should be irrigated to a sufficient depth.

• Watering should be performed as often as necessary to maintain soil moisture.

• The first mowing should not be attempted until the sod is firmly rooted.

• Not more than one third of the grass leaf should be removed at any one cutting.

Interceptor Swale

Interceptor swales are used to shorten the length of exposed slope by intercepting runoff, prevent off-site runoff from entering the disturbed area, and prevent sediment-laden runoff from leaving a disturbed site. They may have a v-shape or be trapezodial with a flat bottom and side slopes of 3:1 or flatter. The outflow from a swale should be directed to a stabilized outlet or sediment trapping device. The swales should remain in place until the disturbed area is permanently stabilized.

Materials:

• Stabilization should consist of a layer of crushed stone three inches thick, riprap or high velocity erosion control mats.

• Stone stabilization should be used when grades exceed 2% or velocities exceed 6 feet per second.

• Stabilization should extend across the bottom of the swale and up both sides of the channel to a minimum height of three inches above the design water surface elevation based on a 2-year, 24-hour storm.

Installation:

• An interceptor swale should be installed across exposed slopes during construction and should intercept no more than 5 acres of runoff.

• All earth removed and not needed in construction should be disposed of in an approved spoils site so that it will not interfere with the functioning of the swale or contribute to siltation in other areas of the site.

• All trees, brush, stumps, obstructions and other material should be removed and disposed of so as not to interfere with the proper functioning of the swale.

• Swales should have a maximum depth of 1.5 feet with side slopes of 3:1 or flatter. Swales should have positive drainage for the entire length to an outlet.

• When the slope exceeds 2 percent, or velocities exceed 6 feet per second (regardless of slope), stabilization is required. Stabilization should be crushed stone placed in a layer of at least 3 inches thick or may be high velocity erosion control matting. Check dams are also recommended to reduce velocities in the swales possibly reducing the amount of stabilization necessary.

• Minimum compaction for the swale should be 90% standard proctor density.

Diversion Dikes

A temporary diversion dike is a barrier created by the placement of an earthen embankment to reroute the flow of runoff to an erosion control device or away from an open, easily erodible area. A diversion dike intercepts runoff from small upland areas and diverts it away from exposed slopes to a stabilized outlet, such as a rock berm, sandbag berm, or stone outlet structure. These controls can be used on the perimeter of the site to prevent runoff from entering the construction area. Dikes are generally used for the duration of construction to intercept and reroute runoff from disturbed areas to prevent excessive erosion until permanent drainage features are installed and/or slopes are stabilized.

Materials:

• Stone stabilization (required for velocities in excess of 6 fps) should consist of riprap placed in a layer at least 3 inches thick and should extend a minimum height of 3 inches above the design water surface up the existing slope and the upstream face of the dike.

• Geotextile fabric should be a non-woven polypropylene fabric designed specifically for use as a soil filtration media with an approximate weight of 6 oz./yd^2, a Mullen burst rating of 140 psi, and having an equivalent opening size (EOS) greater than a #50 sieve.

Installation:

• Diversion dikes should be installed prior to and maintained for the duration of construction and should intercept no more than 10 acres of runoff.

• Dikes should have a minimum top width of 2 feet and a minimum height of compacted fill of 18 inches measured form the top of the existing ground at the upslope toe to top of the dike and have side slopes of 3:1 or flatter.

• The soil for the dike should be placed in lifts of 8 inches or less and be compacted to 95 % standard proctor density.

• The channel, which is formed by the dike, must have positive drainage for its entire length to an outlet.

• When the slope exceeds 2 percent, or velocities exceed 6 feet per second (regardless of slope), stabilization is required. In situations where velocities do not exceed 6 feet per second, vegetation may be used to control erosion.

Erosion Control Compost

Description: Erosion control compost (ECC) can be used as an aid to control erosion on critical sites during the establishment period of protective vegetation. The most common uses are on steep slopes, swales, diversion dikes, and on tidal or stream banks.

Materials:

New types of erosion control compost are continuously being developed. The Texas Department of Transportation (TxDOT) has established minimum performance standards which must be met for any products seeking to be approved for use within any of TxDOT's construction or maintenance activities. Material used within any TxDOT construction or maintenance activities must meet material specifications in accordance with current TxDOT specifications. TxDOT maintains a website at http://www.dot.state.tx.us/des/landscape/compost/specifications.htm that provides information on compost specification data. This website also contains information on areas where the Texas Commission on Environmental Quality (TCEQ) restricts the use of certain compost products.

ECC used for projects not related to TxDOT should also be of quality materials by meeting performance standards and compost specification data. To ensure the quality of compost used as an ECC, products should meet all applicable state and federal regulations, including but not limited to the United States Environmental Protection Agency (USEPA) Code of Federal Regulations (CFR), Title 40, Part 503 Standards for Class A biosolids and Texas Natural Resource Conservation Commission (now named TCEQ) Health and Safety Regulations as defined in the Texas Administration Code (TAC), Chapter 332, and all other relevant requirements for compost products outlined in TAC, Chapter 332. Testing requirements required by the TCEQ are defined in TAC Chapter 332, including Sections §332.71 Sampling and Analysis Requirements for Final Products and §332.72 Final Product Grades. Compost specification data approved by TxDOT are appropriate to use for ensuring the use of quality compost materials or for guidance.

Testing standards are dependent upon the intended use for the compost and ensures product safety, and product performance regarding the product's specific use. The appropriate compost sampling and testing protocols included in the United States Composting Council (USCC) Test Methods for the Examination of Composting and Compost (TMECC) should be conducted on compost products used for ECC to ensure that the products used will not impact public health, safety, and the environment and to promote production and marketing of quality composts that meet analytical standards. TMECC is a laboratory manual that provides protocols for the composting industry and test methods for compost analysis. TMECC provides protocols to sample, monitor, and analyze materials during all stages of the composting process. Numerous parameters that might be of concern in compost can be tested by following protocols or test methods listed in TMECC. TMECC information can be found at http://www.tmecc.org/tmecc/index.html. The USCC Seal of Testing Assurance (STA) program contains information regarding compost STA certification. STA program information can be found at http://tmecc.org/sta/STA_program_description.html.

Installation:

- Install in accordance with current TxDOT specification.
- Use on slopes 3:1 or flatter.
- Apply a 2 inch uniform layer unless otherwise shown on the plans or as directed.

- When rolling is specified, use a light corrugated drum roller.

Mulch Filter Berms and Socks

Description: Mulch filter berms and socks are used to intercept and detain sediment laden run-off from unprotected areas. When properly used, mulch filter berms and socks can be highly effective at controlling sediment from disturbed areas. They cause runoff to pond which allows heavier solids to settle. Mulch filter berms and socks are used during the period of construction near the perimeter of a disturbed area to intercept sediment while allowing water to percolate through. The berm or sock should remain in place until the area is permanently stabilized. Mulch filter berms should not be used when there is a concentration of water in a channel or drainage way. If concentrated flows occurs after installation, corrective action must be taken. Mulch filter socks may be installed in construction areas and temporarily moved during the day to allow construction activity provided it is replaced and properly anchored at the end of the day. Mulch filter berms and socks may be seeded to allow for quick vegetative growth and reduction in run-off velocity.

Materials:

New types of mulch filter berms and socks are continuously being developed. The Texas Department of Transportation (TxDOT) has established minimum performance standards which must be met for any products seeking to be approved for use within any of TxDOT's construction or maintenance activities. Mulch filter berms and socks used within any TxDOT construction or maintenance activities must meet material specifications in accordance with current TxDOT specifications. TxDOT maintains a website at http://www.dot.state.tx.us/des/landscape/compost/specifications.htm that provides information on compost specification data. This website also contains information on areas where the Texas Commission on Environmental Quality (TCEQ) restricts the use of certain compost products.

Mulch filter berms and socks used for projects not related to TxDOT should also be of quality materials by meeting performance standards and compost specification data. To ensure the quality of compost used for mulch filter berms and socks, products should meet all applicable state and federal regulations, including but not limited to the United States Environmental Protection Agency (USEPA) Code of Federal Regulations (CFR), Title 40, Part 503 Standards for Class A biosolids and Texas Natural Resource Conservation Commission Health and Safety Regulations as defined in the Texas Administration Code (TAC), Chapter 332, and all other relevant requirements for compost products outlined in TAC, Chapter 332. Testing requirements required by the TCEQ are defined in TAC Chapter 332, including Sections §332.71 Sampling and Analysis Requirements for Final Products and §332.72 Final Product Grades. Compost specification data approved by TxDOT are appropriate to use for ensuring the use of quality compost materials or for guidance.

Testing standards are dependent upon the intended use for the compost and ensures product safety, and product performance regarding the product's specific use. The appropriate compost sampling and testing protocols included in the United States Composting Council (USCC) Test Methods for the Examination of Composting and Compost (TMECC) should be conducted on compost products used for mulch filter berms and socks to ensure that the products used will not impact public health, safety, and the environment and to promote production and marketing of quality composts that meet analytical standards. TMECC is a laboratory manual that provides protocols for the composting industry and test methods for compost analysis. TMECC provides protocols to sample, monitor, and analyze materials during all stages of the composting process. Numerous parameters that might be of concern in compost can be tested by following protocols or test methods listed in TMECC. TMECC information can be found at

http://www.tmecc.org/tmecc/index.html. The USCC Seal of Testing Assurance (STA) program contains information regarding compost STA certification. STA program information can be found at http://tmecc.org/sta/STA_program_description.html.

Installation:

- Install in accordance with current TxDOT specification.

- Mulch filter berms should be constructed at 1-1/2 feet high and 3 foot wide at locations shown on plans.

- Routinely inspect and maintain filter berm in a functional condition at all times. Correct deficiencies immediately. Install additional filter berm material as directed. Remove sediment after it has reached 1/3 of the height of the berm. Disperse filter berm or leave in place as directed.

- Mulch filter socks should be in 8 inch, 12 inch or 18 inch or as directed. Sock materials should be designed to allow for proper percolation through.

Compost Filter Berms and Socks

Description: Compost filter berms and socks are used to intercept and detain sediment laden run-off from unprotected areas. When properly used, compost filter berms and socks can be highly effective at controlling sediment from disturbed areas. They cause runoff to pond which allows heavier solids to settle. Compost filter berms and socks are used during the period of construction near the perimeter of a disturbed area to intercept sediment while allowing water to percolate through. The berm or sock should remain in place until the area is permanently stabilized. Compost filter berms should not be used when there is a concentration of water in a channel or drainage way. If concentrated flows occur after installation , corrective action must be taken. Compost filter socks may be installed in construction areas and temporality moved during the day to allow construction activity provided it is replaced and properly anchored at the end of the day. Compost filter berms and socks may be seeded to allow for quick vegetative growth and reduction in run-off velocity.

Materials:

New types of compost filter berms and socks are continuously being developed. The Texas Department of Transportation (TxDOT) has established minimum performance standards which must be met for any products seeking to be approved for use within any of TxDOT's construction or maintenance activities. Compost filter berms and socks used within any TxDOT construction or maintenance activities must meet material specifications in accordance with TxDOT specification 1059. TxDOT maintains a website at http://www.dot.state.tx.us/des/landscape/compost/specifications.htm that provides information on compost specification data. This website also contains information on areas where the Texas Commission on Environmental Quality (TCEQ) restricts the use of certain compost products.

Compost filter berms and socks used for projects not related to TxDOT should also be of quality materials by meeting performance standards and compost specification data. To ensure the quality of compost used as compost filter berms and socks, products should meet all applicable state and federal regulations, including but not limited to the United States Environmental Protection Agency (USEPA) Code of Federal Regulations (CFR), Title 40, Part 503 Standards for Class A biosolids and Texas Natural Resource Conservation Commission (now named TCEQ) Health and Safety Regulations as defined in the Texas Administration Code (TAC), Chapter 332, and all other relevant requirements for compost products

outlined in TAC, Chapter 332. Testing requirements required by the TCEQ are defined in TAC Chapter 332, including Sections §332.71 Sampling and Analysis Requirements for Final Products and §332.72 Final Product Grades. Compost specification data approved by TxDOT are appropriate to use for ensuring the use of quality compost materials or for guidance.

Testing standards are dependent upon the intended use for the compost and ensures product safety, and product performance regarding the product's specific use. The appropriate compost sampling and testing protocols included in the United States Composting Council (USCC) Test Methods for the Examination of Composting and Compost (TMECC) should be conducted on compost products used for compost filter berms and socks to ensure that the products used will not impact public health, safety, and the environment and to promote production and marketing of quality composts that meet analytical standards. TMECC is a laboratory manual that provides protocols for the composting industry and test methods for compost analysis. TMECC provides protocols to sample, monitor, and analyze materials during all stages of the composting process. Numerous parameters that might be of concern in compost can be tested by following protocols or test methods listed in TMECC. TMECC information can be found at http://www.tmecc.org/tmecc/index.html. The USCC Seal of Testing Assurance (STA) program contains information regarding compost STA certification. STA program information can be found at http://tmecc.org/sta/STA_program_description.html.

Installation:

- Install in accordance with TxDOT Special Specification 1059.

- Compost filter berms shall be constructed at 1-1/2 feet high and 3 foot wide at locations shown on plans.

- Routinely inspect and maintain filter berm in a functional condition at all times. Correct deficiencies immediately. Install additional filter berm material as directed. Remove sediment after it has reached 1/3 of the height of the berm. Disperse filter berm or leave in place as directed.

- Compost filter socks shall be in 8 inch, 12 inch or 18 inch or as directed. Sock materials shall be designed allowing for proper percolation through.

SEDIMENT CONTROL BMPS

Sand Bag Berm

Description: The purpose of a sandbag berm is to detain sediment carried in runoff from disturbed areas. This objective is accomplished by intercepting runoff and causing it to pool behind the sand bag berm. Sediment carried in the runoff is deposited on the upstream side of the sand bag berm due to the reduced flow velocity. Excess runoff volumes are allowed to flow over the top of the sand bag berm. Sand bag berms are used only during construction activities in streambeds when the contributing drainage area is between 5 and 10 acres and the slope is less than 15%, i.e., utility construction in channels, temporary channel crossing for construction equipment, etc. Plastic facing should be installed on the upstream side and the berm should be anchored to the streambed by drilling into the rock and driving in "T" posts or rebar (#5 or #6) spaced appropriately.

Materials:

- The sand bag material should be polypropylene, polyethylene, polyamide or cotton burlap woven fabric, minimum unit weight 4 oz/yd 2, mullen burst strength exceeding 300 psi and ultraviolet stability exceeding 70 percent.

- The bag length should be 24 to 30 inches, width should be 16 to 18 inches and thickness should be 6 to 8 inches.

- Sandbags should be filled with coarse grade sand and free from deleterious material. All sand should pass through a No. 10 sieve. The filled bag should have an approximate weight of 40 pounds.

- Outlet pipe should be schedule 40 or stronger polyvinyl chloride (PVC) having a nominal internal diameter of 4 inches.

Installation:

- The berm should be a minimum height of 18 inches, measured from the top of the existing ground at the upslope toe to the top of the berm.

- The berm should be sized as shown in the plans but should have a minimum width of 48 inches measured at the bottom of the berm and 16 inches measured at the top of the berm.

- Runoff water should flow over the tops of the sandbags or through 4-inch diameter PVC pipes embedded below the top layer of bags.

- When a sandbag is filled with material, the open end of the sandbag should be stapled or tied with nylon or poly cord.

- Sandbags should be stacked in at least three rows abutting each other, and in staggered arrangement.

- The base of the berm should have at least 3 sandbags. These can be reduced to 2 and 1 bag in the second and third rows respectively.

- For each additional 6 inches of height, an additional sandbag must be added to each row width.

• A bypass pump-around system, or similar alternative, should be used on conjunction with the berm for effective dewatering of the work area.

Silt Fence

Description: A silt fence is a barrier consisting of geotextile fabric supported by metal posts to prevent soil and sediment loss from a site. When properly used, silt fences can be highly effective at controlling sediment from disturbed areas. They cause runoff to pond which allows heavier solids to settle. If not properly installed, silt fences are not likely to be effective. The purpose of a silt fence is to intercept and detain water-borne sediment from unprotected areas of a limited extent. Silt fence is used during the period of construction near the perimeter of a disturbed area to intercept sediment while allowing water to percolate through. This fence should remain in place until the disturbed area is permanently stabilized. Silt fence should not be used where there is a concentration of water in a channel or drainage way. If concentrated flow occurs after installation, corrective action must be taken such as placing a rock berm in the areas of concentrated flow. Silt fencing within the site may be temporarily moved during the day to allow construction activity provided it is replaced and properly anchored to the ground at the end of the day. Silt fences on the perimeter of the site or around drainage ways should not be moved at any time.

Materials:

• Silt fence material should be polypropylene, polyethylene or polyamide woven or nonwoven fabric. The fabric width should be 36 inches, with a minimum unit weight of 4.5 oz/yd, mullen burst strength exceeding 190 lb/in 2 , ultraviolet stability exceeding 70%, and minimum apparent opening size of U.S. Sieve No. 30.

• Fence posts should be made of hot rolled steel, at least 4 feet long with Tee or Y-bar cross section, surface painted or galvanized, minimum nominal weight 1.25 lb/ft 2, and Brindell hardness exceeding 140.

• Woven wire backing to support the fabric should be galvanized 2" x 4" welded wire, 12 gauge minimum.

Installation:

• Steel posts, which support the silt fence, should be installed on a slight angle toward the anticipated runoff source. Post must be embedded a minimum of 1 foot deep and spaced not more than 8 feet on center. Where water concentrates, the maximum spacing should be 6 feet.

• Lay out fencing down-slope of disturbed area, following the contour as closely as possible. The fence should be sited so that the maximum drainage area is ¼ acre/100 feet of fence.

• The toe of the silt fence should be trenched in with a spade or mechanical trencher, so that the down-slope face of the trench is flat and perpendicular to the line of flow. Where fence cannot be trenched in (e.g., pavement or rock outcrop), weight fabric flap with 3 inches of pea gravel on uphill side to prevent flow from seeping under fence.

• The trench must be a minimum of 6 inches deep and 6 inches wide to allow for the silt fence fabric to be laid in the ground and backfilled with compacted material.

• Silt fence should be securely fastened to each steel support post or to woven wire, which is in turn attached to the steel fence post. There should be a 3-foot overlap, securely fastened where ends of fabric meet.

Triangular Filter Dike

Description: The purpose of a triangular sediment filter dike is to intercept and detain water-borne sediment from unprotected areas of limited extent. The triangular sediment filter dike is used where there is no concentration of water in a channel or other drainage way above the barrier and the contributing drainage area is less than one acre. If the uphill slope above the dike exceeds 10%, the length of the slope above the dike should be less than 50 feet. If concentrated flow occurs after installation, corrective action should be taken such as placing rock berm in the areas of concentrated flow. This measure is effective on paved areas where installation of silt fence is not possible or where vehicle access must be maintained. The advantage of these controls is the ease with which they can be moved to allow vehicle traffic and then reinstalled to maintain sediment

Materials:

- Silt fence material should be polypropylene, polyethylene or polyamide woven or nonwoven fabric. The fabric width should be 36 inches, with a minimum unit weight of 4.5 oz/yd, mullen burst strength exceeding 190 lb/in 2 , ultraviolet stability exceeding 70%, and minimum apparent opening size of U.S. Sieve No. 30.

- The dike structure should be 6 gauge 6" x 6" wire mesh folded into triangular form being eighteen (18) inches on each side.

Installation:

- The frame of the triangular sediment filter dike should be constructed of 6" x 6", 6 gauge welded wire mesh, 18 inches per side, and wrapped with geotextile fabric the same composition as that used for silt fences.

- Filter material should lap over ends six (6) inches to cover dike to dike junction; each junction should be secured by shoat rings.

- Position dike parallel to the contours, with the end of each section closely abutting the adjacent sections.

- There are several options for fastening the filter dike to the ground. The fabric skirt may be toed-in with 6 inches of compacted material, or 12 inches of the fabric skirt should extend uphill and be secured with a minimum of 3 inches of open graded rock, or with staples or nails. If these two options are not feasible the dike structure may be trenched in 4 inches.

- Triangular sediment filter dikes should be installed across exposed slopes during construction with ends of the dike tied into existing grades to prevent failure and should intercept no more than one acre of runoff.

- When moved to allow vehicular access, the dikes should be reinstalled as soon as possible, but always at the end of the workday.

Rock Berm

Description: The purpose of a rock berm is to serve as a check dam in areas of concentrated flow, to intercept sediment-laden runoff, detain the sediment and release the water in sheet flow. The rock berm should be used when the contributing drainage area is less than 5 acres. Rock berms are used in areas where the volume of runoff is too great for a silt fence to contain. They are less effective for sediment removal than

silt fences, particularly for fine particles, but are able to withstand higher flows than a silt fence. As such, rock berms are often used in areas of channel flows (ditches, gullies, etc.). Rock berms are most effective at reducing bed load in channels and should not be substituted for other erosion and sediment control measures further up the watershed.

Materials:

- The berm structure should be secured with a woven wire sheathing having maximum opening of 1 inch and a minimum wire diameter of 20 gauge galvanized and should be secured with shoat rings.

- Clean, open graded 3- to 5-inch diameter rock should be used, except in areas where high velocities or large volumes of flow are expected, where 5- to 8-inch diameter rocks may be used.

Installation:

- Lay out the woven wire sheathing perpendicular to the flow line. The sheathing should be 20 gauge woven wire mesh with 1 inch openings.

- Berm should have a top width of 2 feet minimum with side slopes being 2:1 (H:V) or flatter.

- Place the rock along the sheathing to a height not less than 18".

- Wrap the wire sheathing around the rock and secure with tie wire so that the ends of the sheathing overlap at least 2 inches, and the berm retains its shape when walked upon.

- Berm should be built along the contour at zero percent grade or as near as possible.

- The ends of the berm should be tied into existing upslope grade and the berm should be buried in a trench approximately 3 to 4 inches deep to prevent failure of the control.

<u>Hay Bale Dike</u>

Description: The purpose of a hay or straw bale dike is to intercept and detain small amounts of sediment-laden runoff from relatively small unprotected areas. Straw bales are to be used when it is not feasible to install other, more effective measures or when the construction phase is expected to last less than 3 months. Straw bales should not be used on areas where rock or other hard surfaces prevent the full and uniform anchoring of the barrier.

Materials:

Straw: The best quality straw mulch comes from wheat, oats or barley and should be free of weed and grass seed which may not be desired vegetation for the area to be protected. Straw mulch is light and therefore must be properly anchored to the ground.

Hay: This is very similar to straw with the exception that it is made of grasses and weeds and not grain stems. This form of mulch is very inexpensive and is widely available but does introduce weed and grass seed to the area. Like straw, hay is light and must be anchored.

- Straw bales should weigh a minimum of 50 pounds and should be at least 30 inches long.

- Bales should be composed entirely of vegetable matter and be free of seeds.

- Binding should be either wire or nylon string, jute or cotton binding is unacceptable. Bales should be used for not more than two months before being replaced.

Installation:

- Bales should be embedded a minimum of 4 inches and securely anchored using 2" x 2" wood stakes or 3/8" diameter rebar driven through the bales into the ground a minimum of 6 inches.

- Bales are to be placed directly adjacent to one another leaving no gap between them.

- All bales should be placed on the contour.

- The first stake in each bale should be angled toward the previously laid bale to force the bales together.

Brush Berms

Organic litter and spoil material from site clearing operations is usually burned or hauled away to be dumped elsewhere. Much of this material can be used effectively on the construction site itself. The key to constructing an efficient brush berm is in the method used to obtain and place the brush. It will not be acceptable to simply take a bulldozer and push whole trees into a pile. This method does not assure continuous ground contact with the berm and will allow uncontrolled flows under the berm.

Brush berms may be used where there is little or no concentration of water in a channel or other drainage way above the berm. The size of the drainage area should be no greater than one-fourth of an acre per 100 feet of barrier length; the maximum slope length behind the barrier should not exceed 100 feet; and the maximum slope gradient behind the barrier should be less than 50 percent (2:1).

Materials:

- The brush should consist of woody brush and branches, preferably less than 2 inches in diameter.

- The filter fabric should conform to the specifications for filter fence fabric.

- The rope should be ¼ inch polypropylene or nylon rope.

- The anchors should be 3/8-inch diameter rebar stakes that are 18-inches long.

Installation:

- Lay out the brush berm following the contour as closely as possible.

- The juniper limbs should be cut and hand placed with the vegetated part of the limb in close contact with the ground. Each subsequent branch should overlap the previous branch providing a shingle effect.

• The brush berm should be constructed in lifts with each layer extending the entire length of the berm before the next layer is started.

• A trench should be excavated 6-inches wide and 4-inches deep along the length of the barrier and immediately uphill from the barrier.

• The filter fabric should be cut into lengths sufficient to lay across the barrier from its up-slope base to just beyond its peak. The lengths of filter fabric should be draped across the width of the barrier with the uphill edge placed in the trench and the edges of adjacent pieces overlapping each other. Where joints are necessary, the fabric should be spliced together with a minimum 6-inch overlap and securely sealed.

• The trench should be backfilled and the soil compacted over the filter fabric.

• Set stakes into the ground along the downhill edge of the brush barrier, and anchor the fabric by tying rope from the fabric to the stakes. Drive the rope anchors into the ground at approximately a 45-degree angle to the ground on 6-foot centers.

• Fasten the rope to the anchors and tighten berm securely to the ground with a minimum tension of 50 pounds.

• The height of the brush berm should be a minimum of 24 inches after the securing ropes have been tightened.

Stone Outlet Sediment Trap

A stone outlet sediment trap is an impoundment created by the placement of an earthen and stone embankment to prevent soil and sediment loss from a site. The purpose of a sediment trap is to intercept sediment-laden runoff and trap the sediment in order to protect drainage ways, properties and rights of way below the sediment trap from sedimentation. A sediment trap is usually installed at points of discharge from disturbed areas. The drainage area for a sediment trap is recommended to be less than 5 acres.

Larger areas should be treated using a sediment basin. A sediment trap differs from a sediment basin mainly in the type of discharge structure. The trap should be located to obtain the maximum storage benefit from the terrain, for ease of clean out and disposal of the trapped sediment and to minimize interference with construction activities. The volume of the trap should be at least 3600 cubic feet per acre of drainage area.

Materials:

• All aggregate should be at lest 3 inches in diameter and should not exceed a volume of 0.5 cubic foot.

• The geotextile fabric specification should be woven polypropylene, polyethylene or polyamide geotextile, minimum unit weight of 4.5 oz/yd 2, mullen burst strength at least 250 lb/in 2, ultraviolet stability exceeding 70%, and equivalent opening size exceeding 40.

Installation:

• Earth Embankment: Place fill material in layers not more than 8 inches in loose depth. Before compaction, moisten or aerate each layer as necessary to provide the optimum moisture content of the

material. Compact each layer to 95 percent standard proctor density. Do not place material on surfaces that are muddy or frozen. Side slopes for the embankment are to be 3:1. The minimum width of the embankment should be 3 feet.

• A gap is to be left in the embankment in the location where the natural confluence of runoff crosses the embankment line. The gap is to have a width in feet equal to 6 times the drainage area in acres.

• Geotextile Covered Rock Core: A core of filter stone having a minimum height of 1.5 feet and a minimum width at the base of 3 feet should be placed across the opening of the earth embankment and should be covered by geotextile fabric which should extend a minimum distance of 2 feet in either direction from the base of the filter stone core.

• Filter Stone Embankment: Filter stone should be placed over the geotextile and is to have a side slope which matches that of the earth embankment of 3:1 and should cover the geotextile/rock core a minimum of 6 inches when installation is complete. The crest of the outlet should be at least 1 foot below the top of the embankment.

Sediment Basins:

The purpose of a sediment basin is to intercept sediment-laden runoff and trap the sediment in order to protect drainage ways, properties and rights of way below the sediment basin from sedimentation. A sediment basin is usually installed at points of discharge from disturbed areas. The drainage area for a sediment basin is recommended to be less than 100 acres.

Sediment basins are effective for capturing and slowly releasing the runoff from larger disturbed areas thereby allowing sedimentation to take place. A sediment basin can be created where a permanent pond BMP is being constructed. Guidelines for construction of the permanent BMP should be followed, but revegetation, placement of underdrain piping, and installation of sand or other filter media should not be carried out until the site construction phase is complete.

Materials:

• Riser should be corrugated metal or reinforced concrete pipe or box and should have watertight fittings or end to end connections of sections.

• An outlet pipe of corrugated metal or reinforced concrete should be attached to the riser and should have positive flow to a stabilized outlet on the downstream side of the embankment.
• An anti-vortex device and rubbish screen should be attached to the top of the riser and should be made of polyvinyl chloride or corrugated metal.

Basin Design and Construction:

• For common drainage locations that serve an area with ten or more acres disturbed at one time, a sediment basin should provide storage for a volume of runoff from a two-year, 24-hour storm from each disturbed acre drained.

• The basin length to width ratio should be at least 2:1 to improve trapping efficiency. The shape may be attained by excavation or the use of baffles. The lengths should be measured at the elevation of the riser de-

watering hole.

• Place fill material in layers not more than 8 inches in loose depth. Before compaction, moisten or aerate each layer as necessary to provide the optimum moisture content of the material. Compact each layer to 95 percent standard proctor density. Do not place material on surfaces that are muddy or frozen. Side slopes for the embankment should be 3:1 (H:V).

• An emergency spillway should be installed adjacent to the embankment on undisturbed soil and should be sized to carry the full amount of flow generated by a 10-year, 3-hour storm with 1 foot of freeboard less the amount which can be carried by the principal outlet control device.

• The emergency spillway should be lined with riprap as should the swale leading from the spillway to the normal watercourse at the base of the embankment.

• The principal outlet control device should consist of a rigid vertically oriented pipe or box of corrugated metal or reinforced concrete. Attached to this structure should be a horizontal pipe, which should extend through the embankment to the toe of fill to provide a de-watering outlet for the basin.

• An anti-vortex device should be attached to the inlet portion of the principal outlet control device to serve as a rubbish screen.

• A concrete base should be used to anchor the principal outlet control device and should be sized to provide a safety factor of 1.5 (downward forces = 1.5 buoyant forces).

• The basin should include a permanent stake to indicate the sediment level in the pool and marked to indicate when the sediment occupies 50% of the basin volume (not the top of the stake).

• The top of the riser pipe should remain open and be guarded with a trash rack and anti-vortex device. The top of the riser should be 12 inches below the elevation of the emergency spillway. The riser should be sized to convey the runoff from the 2-year, 3-hour storm when the water surface is at the emergency spillway elevation. For basins with no spillway the riser must be sized to convey the runoff from the 10-yr, 3-hour storm.

• Anti-seep collars should be included when soil conditions or length of service make piping through the backfill a possibility.

• The 48-hour drawdown time will be achieved by using a riser pipe perforated at the point measured from the bottom of the riser pipe equal to ½ the volume of the basin. This is the maximum sediment storage elevation. The size of the perforation may be calculated as follows:

$$A_o = \frac{A_s \times \sqrt{2h}}{C_d \times 980{,}000}$$

Where:
Ao = Area of the de-watering hole, ft 2
As = Surface area of the basin, ft 2

Cd = Coefficient of contraction, approximately 0.6
h = head of water above the hole, ft
Perforating the riser with multiple holes with a combined surface area equal to Ao is acceptable.

Erosion Control Compost

Description: Erosion control compost (ECC) can be used as an aid to control erosion on critical sites during the establishment period of protective vegetation. The most common uses are on steep slopes, swales, diversion dikes, and on tidal or stream banks.

Materials:

New types of erosion control compost are continuously being developed. The Texas Department of Transportation (TxDOT) has established minimum performance standards which must be met for any products seeking to be approved for use within any of TxDOT's construction or maintenance activities. Material used within any TxDOT construction or maintenance activities must meet material specifications in accordance with current TxDOT specifications. TxDOT maintains a website at http://www.dot.state.tx.us/des/landscape/compost/specifications.htm that provides information on compost specification data. This website also contains information on areas where the Texas Commission on Environmental Quality (TCEQ) restricts the use of certain compost products.

ECC used for projects not related to TxDOT should also be of quality materials by meeting performance standards and compost specification data. To ensure the quality of compost used as an ECC, products should meet all applicable state and federal regulations, including but not limited to the United States Environmental Protection Agency (USEPA) Code of Federal Regulations (CFR), Title 40, Part 503 Standards for Class A biosolids and Texas Natural Resource Conservation Commission (now named TCEQ) Health and Safety Regulations as defined in the Texas Administration Code (TAC), Chapter 332, and all other relevant requirements for compost products outlined in TAC, Chapter 332. Testing requirements required by the TCEQ are defined in TAC Chapter 332, including Sections §332.71 Sampling and Analysis Requirements for Final Products and §332.72 Final Product Grades. Compost specification data approved by TxDOT are appropriate to use for ensuring the use of quality compost materials or for guidance.

Testing standards are dependent upon the intended use for the compost and ensures product safety, and product performance regarding the product's specific use. The appropriate compost sampling and testing protocols included in the United States Composting Council (USCC) Test Methods for the Examination of Composting and Compost (TMECC) should be conducted on compost products used for ECC to ensure that the products used will not impact public health, safety, and the environment and to promote production and marketing of quality composts that meet analytical standards. TMECC is a laboratory manual that provides protocols for the composting industry and test methods for compost analysis. TMECC provides protocols to sample, monitor, and analyze materials during all stages of the composting process. Numerous parameters that might be of concern in compost can be tested by following protocols or test methods listed in TMECC. TMECC information can be found at http://www.tmecc.org/tmecc/index.html. The USCC Seal of Testing Assurance (STA) program contains information regarding compost STA certification. STA program information can be found at http://tmecc.org/sta/STA_program_description.html.

Installation:

- Install in accordance with current TxDOT specification.
- Use on slopes 3:1 or flatter.
- Apply a 2 inch uniform layer unless otherwise shown on the plans or as directed.
- When rolling is specified, use a light corrugated drum roller.

Mulch Filter Berms and Socks

Description: Mulch filter berms and socks are used to intercept and detain sediment laden run-off from unprotected areas. When properly used, mulch filter berms and socks can be highly effective at controlling sediment from disturbed areas. They cause runoff to pond which allows heavier solids to settle. Mulch filter berms and socks are used during the period of construction near the perimeter of a disturbed area to intercept sediment while allowing water to percolate through. The berm or sock should remain in place until the area is permanently stabilized. Mulch filter berms should not be used when there is a concentration of water in a channel or drainage way. If concentrated flows occurs after installation, corrective action must be taken. Mulch filter socks may be installed in construction areas and temporarily moved during the day to allow construction activity provided it is replaced and properly anchored at the end of the day. Mulch filter berms and socks may be seeded to allow for quick vegetative growth and reduction in run-off velocity.

Materials:

New types of mulch filter berms and socks are continuously being developed. The Texas Department of Transportation (TxDOT) has established minimum performance standards which must be met for any products seeking to be approved for use within any of TxDOT's construction or maintenance activities. Mulch filter berms and socks used within any TxDOT construction or maintenance activities must meet material specifications in accordance with current TxDOT specifications. TxDOT maintains a website at http://www.dot.state.tx.us/des/landscape/compost/specifications.htm that provides information on compost specification data. This website also contains information on areas where the Texas Commission on Environmental Quality (TCEQ) restricts the use of certain compost products.

Mulch filter berms and socks used for projects not related to TxDOT should also be of quality materials by meeting performance standards and compost specification data. To ensure the quality of compost used for mulch filter berms and socks, products should meet all applicable state and federal regulations, including but not limited to the United States Environmental Protection Agency (USEPA) Code of Federal Regulations (CFR), Title 40, Part 503 Standards for Class A biosolids and Texas Natural Resource Conservation Commission Health and Safety Regulations as defined in the Texas Administration Code (TAC), Chapter 332, and all other relevant requirements for compost products outlined in TAC, Chapter 332. Testing requirements required by the TCEQ are defined in TAC Chapter 332, including Sections §332.71 Sampling and Analysis Requirements for Final Products and §332.72 Final Product Grades. Compost specification data approved by TxDOT are appropriate to use for ensuring the use of quality compost materials or for guidance.

Testing standards are dependent upon the intended use for the compost and ensures product safety, and product performance regarding the product's specific use. The appropriate compost sampling and testing protocols included in the United States Composting Council (USCC) Test Methods for the Examination

of Composting and Compost (TMECC) should be conducted on compost products used for mulch filter berms and socks to ensure that the products used will not impact public health, safety, and the environment and to promote production and marketing of quality composts that meet analytical standards. TMECC is a laboratory manual that provides protocols for the composting industry and test methods for compost analysis. TMECC provides protocols to sample, monitor, and analyze materials during all stages of the composting process. Numerous parameters that might be of concern in compost can be tested by following protocols or test methods listed in TMECC. TMECC information can be found at http://www.tmecc.org/tmecc/index.html. The USCC Seal of Testing Assurance (STA) program contains information regarding compost STA certification. STA program information can be found at http://tmecc.org/sta/STA_program_description.html.

Installation:

- Install in accordance with current TxDOT specification.

- Mulch filter berms should be constructed at 1-1/2 feet high and 3 foot wide at locations shown on plans.

- Routinely inspect and maintain filter berm in a functional condition at all times. Correct deficiencies immediately. Install additional filter berm material as directed. Remove sediment after it has reached 1/3 of the height of the berm. Disperse filter berm or leave in place as directed.

- Mulch filter socks should be in 8 inch, 12 inch or 18 inch or as directed. Sock materials should be designed to allow for proper percolation through.

Compost Filter Berms and Socks

Description: Compost filter berms and socks are used to intercept and detain sediment laden run-off from unprotected areas. When properly used, compost filter berms and socks can be highly effective at controlling sediment from disturbed areas. They cause runoff to pond which allows heavier solids to settle. Compost filter berms and socks are used during the period of construction near the perimeter of a disturbed area to intercept sediment while allowing water to percolate through. The berm or sock should remain in place until the area is permanently stabilized. Compost filter berms should not be used when there is a concentration of water in a channel or drainage way. If concentrated flows occur after installation , corrective action must be taken. Compost filter socks may be installed in construction areas and temporality moved during the day to allow construction activity provided it is replaced and properly anchored at the end of the day. Compost filter berms and socks may be seeded to allow for quick vegetative growth and reduction in run-off velocity.

Materials:

New types of compost filter berms and socks are continuously being developed. The Texas Department of Transportation (TxDOT) has established minimum performance standards which must be met for any products seeking to be approved for use within any of TxDOT's construction or maintenance activities. Compost filter berms and socks used within any TxDOT construction or maintenance activities must meet material specifications in accordance with TxDOT specification 1059. TxDOT maintains a website at http://www.dot.state.tx.us/des/landscape/compost/specifications.htm that provides information on compost specification data. This website also contains information on areas where the Texas Commission on Environmental Quality (TCEQ) restricts the use of certain compost products.

Compost filter berms and socks used for projects not related to TxDOT should also be of quality materials by meeting performance standards and compost specification data. To ensure the quality of compost used as compost filter berms and socks, products should meet all applicable state and federal regulations, including but not limited to the United States Environmental Protection Agency (USEPA) Code of Federal Regulations (CFR), Title 40, Part 503 Standards for Class A biosolids and Texas Natural Resource Conservation Commission (now named TCEQ) Health and Safety Regulations as defined in the Texas Administration Code (TAC), Chapter 332, and all other relevant requirements for compost products outlined in TAC, Chapter 332. Testing requirements required by the TCEQ are defined in TAC Chapter 332, including Sections §332.71 Sampling and Analysis Requirements for Final Products and §332.72 Final Product Grades. Compost specification data approved by TxDOT are appropriate to use for ensuring the use of quality compost materials or for guidance.

Testing standards are dependent upon the intended use for the compost and ensures product safety, and product performance regarding the product's specific use. The appropriate compost sampling and testing protocols included in the United States Composting Council (USCC) Test Methods for the Examination of Composting and Compost (TMECC) should be conducted on compost products used for compost filter berms and socks to ensure that the products used will not impact public health, safety, and the environment and to promote production and marketing of quality composts that meet analytical standards. TMECC is a laboratory manual that provides protocols for the composting industry and test methods for compost analysis. TMECC provides protocols to sample, monitor, and analyze materials during all stages of the composting process. Numerous parameters that might be of concern in compost can be tested by following protocols or test methods listed in TMECC. TMECC information can be found at http://www.tmecc.org/tmecc/index.html. The USCC Seal of Testing Assurance (STA) program contains information regarding compost STA certification. STA program information can be found at http://tmecc.org/sta/STA_program_description.html.

Installation:

- Install in accordance with TxDOT Special Specification 1059.

- Compost filter berms shall be constructed at 1-1/2 feet high and 3 foot wide at locations shown on plans.

- Routinely inspect and maintain filter berm in a functional condition at all times. Correct deficiencies immediately. Install additional filter berm material as directed. Remove sediment after it has reached 1/3 of the height of the berm. Disperse filter berm or leave in place as directed.

- Compost filter socks shall be in 8 inch, 12 inch or 18 inch or as directed. Sock materials shall be designed allowing for proper percolation through.

POST-CONSTRUCTION TSS CONTROLS

Retention/Irrigation Systems

Description: Retention/irrigation systems refer to the capture of runoff in a holding pond, then use of the captured water for irrigation of appropriate landscape areas. Retention/irrigation systems are characterized by the capture and disposal of runoff without direct release of captured flow to receiving streams. Retention systems exhibit excellent pollutant removal but can require regular, proper maintenance. Collection of roof runoff for subsequent use (rainwater harvesting) also qualifies as a retention/irrigation practice, but should be operated and sized to provide adequate volume. This technology, which emphasizes beneficial use of stormwater runoff, is particularly appropriate for arid regions because of increasing demands on water supplies for agricultural irrigation and urban water supply.

Design Considerations: Retention/irrigation practices achieve 100% removal efficiency of total suspended solids contained within the volume of water captured. Design elements of retention/irrigation systems include runoff storage facility configuration and sizing, pump and wet well system components, basin lining, basin detention time, and physical and operational components of the irrigation system. Retention/irrigation systems are appropriate for large drainage areas with low to moderate slopes. The retention capacity should be sufficient considering the average rainfall event for the area.

Maintenance Requirements: Maintenance requirements for retention/irrigation systems include routine inspections, sediment removal, mowing, debris and litter removal, erosion control, and nuisance control.

Extended Detention Basin

Description: Extended detention facilities are basins that temporarily store a portion of stormwater runoff following a storm event. Extended detention basins are normally used to remove particulate pollutants and to reduce maximum runoff rates associated with development to their pre-development levels. The water quality benefits are the removal of sediment and buoyant materials. Furthermore, nutrients, heavy metals, toxic materials, and oxygen-demanding materials associated with the particles also are removed. The control of the maximum runoff rates serves to protect drainage channels below the device from erosion and to reduce downstream flooding. Although detention facilities designed for flood control have different design requirements than those used for water quality enhancement, it is possible to achieve these two objectives in a single facility.

Design Considerations: Extended detention basins can remove approximately 75% of the total suspended solids contained within the volume of runoff captured in the basin. Design elements of extended detention basins include basin sizing, basin configuration, basin side slopes, basin lining, inlet/outlet structures, and erosion controls. Extended detention basins are appropriate for large drainage areas with low to moderate slopes. The retention capacity should be sufficient considering the average rainfall event for the area.

Maintenance Requirements: Maintenance requirements for extended detention basins include routine inspections, mowing, debris and litter removal, erosion control, structural repairs, nuisance control, and sediment removal.

Vegetative Filter Strips

Description: Filter strips, also known as vegetated buffer strips, are vegetated sections of land similar to grassy swales, except they are essentially flat with low slopes, and are designed only to accept runoff as

overland sheet flow. They may appear in any vegetated form from grassland to forest, and are designed to intercept upstream flow, lower flow velocity, and spread water out as sheet flow. The dense vegetative cover facilitates conventional pollutant removal through detention, filtration by vegetation, and infiltration.

Filter strips cannot treat high velocity flows, and do not provide enough storage or infiltration to effectively reduce peak discharges to predevelopment levels for design storms. This lack of quantity control favors use in rural or low-density development; however, they can provide water quality benefits even where the impervious cover is as high as 50%. The primary highway application for vegetative filter strips is along rural roadways where runoff that would otherwise discharge directly to a receiving water, passes through the filter strip before entering a conveyance system. Properly designed roadway medians and shoulders make effective buffer strips. These devices also can be used on other types of development where land is available and hydraulic conditions are appropriate. Flat slopes and low to fair permeability of natural subsoil are required for effective performance of filter strips. Although an inexpensive control measure, they are most useful in contributing watershed areas where peak runoff velocities are low, as they are unable to treat the high flow velocities typically associated with high impervious cover. The most important criteria for selection and use of this BMP are soils, space, and slope.

Design Considerations: Vegetative filter strips can remove approximately 85% of the total suspended solids contained within the volume of runoff captured. Design elements of vegetative filter strips include uniform, shallow overland flow across the entire filter strip area, hydraulic loading rate, inlet structures, slope, and vegetative cover. The area should be free of gullies or rills which can concentrate flow. Vegetative filter strips are appropriate for small drainage areas with moderate slopes.

Maintenance Requirements: Maintenance requirements for vegetative filter strips include pest management, seasonal mowing and lawn care, routine inspections, debris and litter removal, sediment removal, and grass reseeding and mulching.

Constructed Wetlands

Description: Constructed wetlands provide physical, chemical, and biological water quality treatment of stormwater runoff. Physical treatment occurs as a result of decreasing flow velocities in the wetland, and is present in the form of evaporation, sedimentation, adsorption, and/or filtration. Chemical processes include chelation, precipitation, and chemical adsorption. Biological processes include decomposition, plant uptake and removal of nutrients, plus biological transformation and degradation. Hydrology is one of the most influential factors in pollutant removal due to its effects on sedimentation, aeration, biological transformation, and adsorption onto bottom sediments.

The wetland should be designed such that a minimum amount of maintenance is required. The natural surroundings, including such things as the potential energy of a stream or flooding river, should be utilized as much as possible. The wetland should approximate a natural situation and unnatural attributes, such as rectangular shape or rigid channel, should be avoided.

Site considerations should include the water table depth, soil/substrate, and space requirements. Because the wetland must have a source of flow, it is desirable that the water table is at or near the surface. If runoff is the only source of inflow for the wetland, the water level often fluctuates and establishment of vegetation may be difficult. The soil or substrate of an artificial wetland should be loose loam to clay. A perennial baseflow must be present to sustain the artificial wetland. The presence of organic material is often helpful in increasing pollutant removal and retention. A greater amount of space is required for a wetland system than is required for a detention facility treating the same amount of area.

Design Considerations: Constructed wetlands can remove over 90% of the total suspended solids contained within the volume of runoff captured in the wetland. Design elements of constructed wetlands include wetland sizing, wetland configuration, sediment forebay, vegetation, outflow structure, depth of inundation during storm events, depth of micropools, and aeration. Constructed wetlands are appropriate for large drainage areas with low to moderate slopes.

Maintenance Requirements: Maintenance requirements for constructed wetlands include mowing, routine inspections, debris and litter removal, erosion control, nuisance control, structural repairs, sediment removal, harvesting, and maintenance of water levels.

Wet Basins

Description: Wet basins are runoff control facilities that maintain a permanent wet pool and a standing crop of emergent littoral vegetation. These facilities may vary in appearance from natural ponds to enlarged, bermed (manmade) sections of drainage systems and may function as online or offline facilities, although offline configuration is preferable. Offline designs can prevent scour and other damage to the wet pond and minimize costly outflow structure elements needed to accommodate extreme runoff events.

During storm events, runoff inflows displace part or all of the existing basin volume and are retained and treated in the facility until the next storm event. The pollutant removal mechanisms are settling of solids, wetland plant uptake, and microbial degradation. When the wet basin is adequately sized, pollutant removal performance can be excellent, especially for the dissolved fraction. Wet basins also help provide erosion protection for the receiving channel by limiting peak flows during larger storm events. Wet basins are often perceived as a positive aesthetic element in a community and offer significant opportunity for creative pond configuration and landscape design. Participation of an experienced wetland designer is suggested. A significant potential drawback for wet ponds in arid climates is that the contributing watershed for these facilities is often incapable of providing an adequate water supply to maintain the permanent pool, especially during the summer months. Makeup water (i.e., well water or municipal drinking water) is sometimes used to supplement the rainfall/runoff process, especially for wet basin facilities treating watersheds that generate insufficient runoff.

Design Considerations: Wet basins can remove over 90% of the total suspended solids contained within the volume of runoff captured in the basin. Design elements of wet basins include basin sizing, basin configuration, basin side slopes, sediment forebay, inflow and outflow structures, vegetation, depth of permanent pool, aeration, and erosion control. Wet basins are appropriate for large drainage areas with low to moderate slopes.

Maintenance Requirements: Maintenance requirements for wet basins include mowing, routine inspections, debris and litter removal, erosion control, nuisance control, structural repairs, sediment removal, and harvesting.

Grassy Swales

Grassy swales are vegetated channels that convey stormwater and remove pollutants by filtration through grass and infiltration through soil. They require shallow slopes and soils that drain well. Pollutant removal capability is related to channel dimensions, longitudinal slope, and type of vegetation. Optimum design of these components will increase contact time of runoff through the swale and improve pollutant removal rates.

Grassy swales are primarily stormwater conveyance systems. They can provide sufficient control under light to moderate runoff conditions, but their ability to control large storms is limited. Therefore, they are most applicable in low to moderate sloped areas or along highway medians as an alternative to ditches and curb and gutter drainage. Their performance diminishes sharply in highly urbanized settings, and they are generally not effective enough to receive construction stage runoff where high sediment loads can overwhelm the system. Grassy swales can be used as a pretreatment measure for other downstream BMPs, such as extended detention basins. Enhanced grassy swales utilize check dams and wide depressions to increase runoff storage and promote greater settling of pollutants.

Grassy swales can be more aesthetically pleasing than concrete or rock-lined drainage systems and are generally less expensive to construct and maintain. Swales can slightly reduce impervious area and reduce the pollutant accumulation and delivery associated with curbs and gutters. The disadvantages of this technique include the possibility of erosion and channelization over time, and the need for more right-of-way as compared to a storm drain system. When properly constructed, inspected, and maintained, the life expectancy of a swale is estimated to be 20 years.

Design Considerations:

- Comparable performance to wet basins
- Limited to treating a few acres
- Availability of water during dry periods to maintain vegetation
- Sufficient available land area

The suitability of a swale at a site will depend on land use, size of the area serviced, soil type, slope, imperviousness of the contributing watershed, and dimensions and slope of the swale system. In general, swales can be used to serve areas of less than 10 acres, with slopes no greater than 5 %. The seasonal high water table should be at least 4 feet below the surface. Use of natural topographic lows is encouraged, and natural drainage courses should be regarded as significant local resources to be kept in use.

Maintenance Requirements:

Research in the Austin area indicates that vegetated controls are effective at removing pollutants even when dormant. Therefore, irrigation is not required to maintain growth during dry periods, but may be necessary only to prevent the vegetation from dying.

Vegetative Filter Strips

Filter strips, also known as vegetated buffer strips, are vegetated sections of land similar to grassy swales except they are essentially flat with low slopes, and are designed only to accept runoff as overland sheet flow. A schematic of a vegetated buffer strip is shown in Figure 3.3. They may appear in any vegetated form from grassland to forest, and are designed to intercept upstream flow, lower flow velocity, and spread water out as sheet flow. The dense vegetative cover facilitates conventional pollutant removal through detention, filtration by vegetation, and infiltration.

Filter strips cannot treat high velocity flows, and do not provide enough storage or infiltration to effectively reduce peak discharges to predevelopment levels for design storms. This lack of quantity control favors use

in rural or low-density development; however, they can provide water quality benefits even where the impervious cover is as high as 50%. The primary highway application for vegetative filter strips is along rural roadways where runoff that would otherwise discharge directly to a receiving water passes through the filter strip before entering a conveyance system. Properly designed roadway medians and shoulders make effective buffer strips. These devices also can be used on other types of development where land is available and hydraulic conditions are appropriate.

Flat slopes and low to fair permeability of natural subsoil are required for effective performance of filter strips. Although an inexpensive control measure, they are most useful in contributing watershed areas where peak runoff velocities are low as they are unable to treat the high flow velocities typically associated with high impervious cover.

Successful performance of filter strips relies heavily on maintaining shallow unconcentrated flow. To avoid flow channelization and maintain performance, a filter strip should:

- Be equipped with a level spreading device for even distribution of runoff
- Contain dense vegetation with a mix of erosion resistant, soil binding species
- Be graded to a uniform, even and relatively low slope
- Laterally traverse the contributing runoff area

Filter strips can be used upgradient from watercourses, wetlands, or other water bodies along toes and tops of slopes and at outlets of other stormwater management structures. They should be incorporated into street drainage and master drainage planning. The most important criteria for selection and use of this BMP are soils, space, and slope.

Design Considerations:

- Soils and moisture are adequate to grow relatively dense vegetative stands
- Sufficient space is available
- Slope is less than 12%
- Comparable performance to more expensive structural controls

<u>Sand Filter Systems</u>

The objective of sand filters is to remove sediment and the pollutants from the first flush of pavement and impervious area runoff. The filtration of nutrients, organics, and coliform bacteria is enhanced by a mat of bacterial slime that develops during normal operations. One of the main advantages of sand filters is their adaptability; they can be used on areas with thin soils, high evaporation rates, low-soil infiltration rates, in limited-space areas, and where groundwater is to be protected.

Since their original inception in Austin, Texas, hundreds of intermittent sand filters have been implemented to treat stormwater runoff. There have been numerous alterations or variations in the original design as engineers in other jurisdictions have improved and adapted the technology to meet their specific

requirements. Major types include the Austin Sand Filter, the District of Columbia Underground Sand Filter, the Alexandria Dry Vault Sand Filter, the Delaware Sand Filter, and peat-sand filters which are adapted to provide a sorption layer and vegetative cover to various sand filter designs .

Design Considerations:

- Appropriate for space-limited areas
- Applicable in arid climates where wet basins and constructed wetlands are not appropriate
- High TSS removal efficiency

Cost Considerations:

Filtration Systems may require less land than some other BMPs, reducing the land acquisition cost; howevr the structure itself is one of the more expensive BMPs. In addition, maintenance cost can be substantial.

Erosion Control Compost

Description: Erosion control compost (ECC) can be used as an aid to control erosion on critical sites during the establishment period of protective vegetation. The most common uses are on steep slopes, swales, diversion dikes, and on tidal or stream banks.

Materials:

New types of erosion control compost are continuously being developed. The Texas Department of Transportation (TxDOT) has established minimum performance standards which must be met for any products seeking to be approved for use within any of TxDOT's construction or maintenance activities. Material used within any TxDOT construction or maintenance activities must meet material specifications in accordance with current TxDOT specifications. TxDOT maintains a website at http://www.dot.state.tx.us/des/landscape/compost/specifications.htm that provides information on compost specification data. This website also contains information on areas where the Texas Commission on Environmental Quality (TCEQ) restricts the use of certain compost products.

ECC used for projects not related to TxDOT should also be of quality materials by meeting performance standards and compost specification data. To ensure the quality of compost used as an ECC, products should meet all applicable state and federal regulations, including but not limited to the United States Environmental Protection Agency (USEPA) Code of Federal Regulations (CFR), Title 40, Part 503 Standards for Class A biosolids and Texas Natural Resource Conservation Commission (now named TCEQ) Health and Safety Regulations as defined in the Texas Administration Code (TAC), Chapter 332, and all other relevant requirements for compost products outlined in TAC, Chapter 332. Testing requirements required by the TCEQ are defined in TAC Chapter 332, including Sections §332.71 Sampling and Analysis Requirements for Final Products and §332.72 Final Product Grades. Compost specification data approved by TxDOT are appropriate to use for ensuring the use of quality compost materials or for guidance.

Testing standards are dependent upon the intended use for the compost and ensures product safety, and product performance regarding the product's specific use. The appropriate compost sampling and testing

protocols included in the United States Composting Council (USCC) Test Methods for the Examination of Composting and Compost (TMECC) should be conducted on compost products used for ECC to ensure that the products used will not impact public health, safety, and the environment and to promote production and marketing of quality composts that meet analytical standards. TMECC is a laboratory manual that provides protocols for the composting industry and test methods for compost analysis. TMECC provides protocols to sample, monitor, and analyze materials during all stages of the composting process. Numerous parameters that might be of concern in compost can be tested by following protocols or test methods listed in TMECC. TMECC information can be found at http://www.tmecc.org/tmecc/index.html. The USCC Seal of Testing Assurance (STA) program contains information regarding compost STA certification. STA program information can be found at http://tmecc.org/sta/STA_program_description.html.

Installation:

- Install in accordance with current TxDOT specification.
- Use on slopes 3:1 or flatter.
- Apply a 2 inch uniform layer unless otherwise shown on the plans or as directed.
- When rolling is specified, use a light corrugated drum roller.

Mulch Filter Berms and Socks

Description: Mulch filter berms and socks are used to intercept and detain sediment laden run-off from unprotected areas. When properly used, mulch filter berms and socks can be highly effective at controlling sediment from disturbed areas. They cause runoff to pond which allows heavier solids to settle. Mulch filter berms and socks are used during the period of construction near the perimeter of a disturbed area to intercept sediment while allowing water to percolate through. The berm or sock should remain in place until the area is permanently stabilized. Mulch filter berms should not be used when there is a concentration of water in a channel or drainage way. If concentrated flows occurs after installation, corrective action must be taken. Mulch filter socks may be installed in construction areas and temporarily moved during the day to allow construction activity provided it is replaced and properly anchored at the end of the day. Mulch filter berms and socks may be seeded to allow for quick vegetative growth and reduction in run-off velocity.

Materials:

New types of mulch filter berms and socks are continuously being developed. The Texas Department of Transportation (TxDOT) has established minimum performance standards which must be met for any products seeking to be approved for use within any of TxDOT's construction or maintenance activities. Mulch filter berms and socks used within any TxDOT construction or maintenance activities must meet material specifications in accordance with current TxDOT specifications. TxDOT maintains a website at http://www.dot.state.tx.us/des/landscape/compost/specifications.htm that provides information on compost specification data. This website also contains information on areas where the Texas Commission on Environmental Quality (TCEQ) restricts the use of certain compost products.

Mulch filter berms and socks used for projects not related to TxDOT should also be of quality materials by meeting performance standards and compost specification data. To ensure the quality of compost

used for mulch filter berms and socks, products should meet all applicable state and federal regulations, including but not limited to the United States Environmental Protection Agency (USEPA) Code of Federal Regulations (CFR), Title 40, Part 503 Standards for Class A biosolids and Texas Natural Resource Conservation Commission (now named TCEQ)Health and Safety Regulations as defined in the Texas Administration Code (TAC), Chapter 332, and all other relevant requirements for compost products outlined in TAC, Chapter 332. Testing requirements required by the TCEQ are defined in TAC Chapter 332, including Sections §332.71 Sampling and Analysis Requirements for Final Products and §332.72 Final Product Grades. Compost specification data approved by TxDOT are appropriate to use for ensuring the use of quality compost materials or for guidance.

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Installation:

- Install in accordance with current TxDOT specification.

- Mulch filter berms should be constructed at 1-1/2 feet high and 3 foot wide at locations shown on plans.

- Routinely inspect and maintain filter berm in a functional condition at all times. Correct deficiencies immediately. Install additional filter berm material as directed. Remove sediment after it has reached 1/3 of the height of the berm. Disperse filter berm or leave in place as directed.

- Mulch filter socks should be in 8 inch, 12 inch or 18 inch or as directed. Sock materials should be designed to allow for proper percolation through.

<u>Compost Filter Berms and Socks</u>

Description: Compost filter berms and socks are used to intercept and detain sediment laden run-off from unprotected areas. When properly used, compost filter berms and socks can be highly effective at controlling sediment from disturbed areas. They cause runoff to pond which allows heavier solids to settle. Compost filter berms and socks are used during the period of construction near the perimeter of a disturbed area to intercept sediment while allowing water to percolate through. The berm or sock should remain in place until the area is permanently stabilized. Compost filter berms should not be used when there is a concentration of water in a channel or drainage way. If concentrated flows occur after installation , corrective action must be taken. Compost filter socks may be installed in construction areas and temporality moved during the day to allow construction activity provided it is replaced and properly

anchored at the end of the day. Compost filter berms and socks may be seeded to allow for quick vegetative growth and reduction in run-off velocity.

Materials:

New types of compost filter berms and socks are continuously being developed. The Texas Department of Transportation (TxDOT) has established minimum performance standards which must be met for any products seeking to be approved for use within any of TxDOT's construction or maintenance activities. Compost filter berms and socks used within any TxDOT construction or maintenance activities must meet material specifications in accordance with TxDOT specification 1059. TxDOT maintains a website at http://www.dot.state.tx.us/des/landscape/compost/specifications.htm that provides information on compost specification data. This website also contains information on areas where the Texas Commission on Environmental Quality (TCEQ) restricts the use of certain compost products.

Compost filter berms and socks used for projects not related to TxDOT should also be of quality materials by meeting performance standards and compost specification data. To ensure the quality of compost used as compost filter berms and socks, products should meet all applicable state and federal regulations, including but not limited to the United States Environmental Protection Agency (USEPA) Code of Federal Regulations (CFR), Title 40, Part 503 Standards for Class A biosolids and Texas Natural Resource Conservation Commission (now named TCEQ) Health and Safety Regulations as defined in the Texas Administration Code (TAC), Chapter 332, and all other relevant requirements for compost products outlined in TAC, Chapter 332. Testing requirements required by the TCEQ are defined in TAC Chapter 332, including Sections §332.71 Sampling and Analysis Requirements for Final Products and §332.72 Final Product Grades. Compost specification data approved by TxDOT are appropriate to use for ensuring the use of quality compost materials or for guidance.

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Installation:

- Install in accordance with TxDOT Special Specification 1059.

- Compost filter berms shall be constructed at 1-1/2 feet high and 3 foot wide at locations shown on plans.

- Routinely inspect and maintain filter berm in a functional condition at all times. Correct deficiencies immediately. Install additional filter berm material as directed. Remove sediment after it has reached 1/3

of the height of the berm. Disperse filter berm or leave in place as directed.

- Compost filter socks shall be in 8 inch, 12 inch or 18 inch or as directed. Sock materials shall be designed allowing for proper percolation through.

PERMIT COMPLIANCE CERTIFICATION

Permit Number:

Name of Permittee:

Date of Issuance:

Upon completion of the activity authorized by this permit and any mitigation required by the permit, sign this certification and return it to the following address:

Regulatory Branch
CESWF-PER-R
U.S. Army Corps of Engineers
P.O. Box 17300
Fort Worth, Texas 76102-0300

Please note that your permitted activity is subject to a compliance inspection by a U.S. Army Corps of Engineers representative. If you fail to comply with this permit you are subject to permit suspension, modification, or revocation.

I hereby certify that the work authorized by the above referenced permit was completed in accordance with the terms and conditions of the said permit, and required mitigation was completed in accordance with the permit conditions.

_____ _____

Signature of Permittee Date

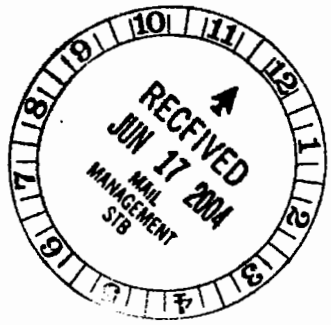
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Medina County Judge
James E. Barden

1100 16th Street
Room 101
Hondo, Texas 78861

(830) 741-6021 Fax (830)741-6025





June 1, 2004

Ms. Victoria Rutson, Chief
Section of Environmental Analysis
Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20402-0001

Re: STB Finance Docket 34284

Dear Ms. Rutson:

At the request of some of the interested parties I am writing to reiterate the county's concerns regarding the construction of a railroad from the Union Pacific line to a planned quarry operation.

From the beginning we have stated two areas of concern. The first has to do with crossings by the proposed rail line of county and state roads. We want to see that careful attention is given by all authorities to having the safest road/highway crossing available under the circumstances.

Our second concern has to do with the construction of any rail line crossing the low lying flood pron areas. We have consistently asked that any rail construction be as open as possible so as not to add to flooding problems inherent in the area.

Thank you for receiving these brief comments and for the consideration you are giving these and other areas of concern.

Sincerely,

James E. Barden

JEB/jaa

#EI-902
RY

Kathleen Hartnett White, *Chairman*
R. B. "Ralph" Marquez, *Commissioner*
Larry R. Soward, *Commissioner*
Margaret Hoffman, *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 28, 2004

Received
7/7/04

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

FD 34284

Re: TCEQ GEARS #6063–Southwest Gulf Railroad Company, Railway Construction, Medina County

Dear Ms. Ghosh:

The Texas Commission on Environmental Quality (TCEQ) has reviewed the above-referenced project and offers the following comments:

A review of the project for General Conformity impact in accordance with 40 CFR Part 93 and Title 30, Texas Administrative Code §101.30 indicates that the proposed action is located in Medina County, which is currently unclassified or in attainment of the National Ambient Air Quality Standards for all six criteria air pollutants. Therefore, general conformity does not apply.

Although any demolition, construction, rehabilitation or repair project will produce dust and particulate emissions, these actions should pose no significant impact upon air quality standards. Any minimal dust and particulate emissions should be easily controlled by the construction contractors using standard dust mitigation techniques.

The environmental assessment addresses issues related to surface and groundwater quality.

Thank you for the opportunity to review this project. If you have any questions, please call Mr. Daniel Burke, Policy and Regulations Division, at (512) 239-1543.

Sincerely,

Jim Muse

Jim Muse, Director
Policy and Regulations Division

P.O. Box 13087 • Austin, Texas 78711-3087 • 512/239-1000 • Internet address: www.tceq.state.tx.us

#EI-916
RA

TEXAS PARKS & WILDLIFE

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LAREDO

MARK E. WATSON, JR.
SAN ANTONIO

LEE M. BASS
CHAIRMAN-EMERITUS
FORT WORTH

ROBERT L. COOK
EXECUTIVE DIRECTOR

July 6, 2004

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

FD 34284

received
7/12/04

RE: Notice of availability of Final Scope of Study for the Environmental Impact Statement, Southwest Gulf Railroad Company, Medina County, Texas

Dear Ms. Ghosh:

Thank you for coordinating with Texas Parks and Wildlife Department (TPWD) in the preparation of a Draft Environmental Impact Statement (DEIS) regarding a proposed single-track rail line in Medina County, Texas. The information provided by the Surface Transportation Board's Section of Environmental Analysis (SEA) was a notification of the availability of the final scope of study for the Environmental Impact Statement for the project. Preliminary information and recommendations regarding fish and wildlife resources of Texas that should be considered in the preparation of the DEIS are provided.

The proposed project is a single-track rail line in Medina County, Texas to connect a proposed Vulcan Construction Materials, LP (VCM) quarry and the Union Pacific Railroad Company (UP) Del Rio Subdivision at milepost 250 near Dunlay, Texas. The proposed line would primarily transport limestone from the proposed VCM quarry, but may provide transport services to other industries in the future.

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Visit a state park or historic site

In general, an inventory of existing natural resources should be made of the project area. Additionally, specific evaluations should be designed to predict project impacts upon these natural resources. Sufficient documentation should be supplied to accurately interpret the value of the natural resources involved and the extent to which the project will impact these resources. This can often be accomplished best with good quality aerial and ground photography, terrain maps, charts and tables, and narrative descriptions of these data. More detailed information outlining requirements and expectations of this Department concerning environmental assessments and impact statements are attached in a document entitled, "Texas Parks and Wildlife Department Suggested Guidelines for Preparation of Environmental Assessment Documents."

The SEA's coordination with the appropriate state and federal regulatory agencies, particularly the US Army Corps of Engineers for wetland issues, the

4200 SMITH SCHOOL ROAD
AUSTIN, TEXAS 78744-3291
512-389-4800

www.tpwd.state.tx.us

To manage and conserve the natural and cultural resources of Texas and to provide hunting, fishing and outdoor recreation opportunities for the use and enjoyment of present and future generations.

Edwards Aquifer Authority for groundwater impacts, and the US Fish and Wildlife Service for impacts to biological resources, is in accordance with the Departments recommendations.

Your interest in Texas' fish and wildlife resources and this agency's efforts to protect them is appreciated. Please contact me at (361) 825-3240 if we may be of further assistance.

Sincerely,

Russell Hooten

Russell Hooten
Wildlife Habitat Assessment Program
Wildlife Division

/rh

Attachment

Texas Parks and Wildlife Department Suggested Guidelines for Preparation of Environmental Assessment Documents

Following is an outline of categories of information needed to evaluate a proposed project or action. Every effort should be made to supply quantified data. If subjective data is all that can be supplied, documentation verifying the credentials of the data collector should be provided.

Categories considered essential for adequate biological review by this agency are noted by an asterisk (*). Depending on the complexity and scope of the proposed project or action, or requirements by other agencies, all the items listed below may be required.

Whenever practical, environmental documents should be supported by aerial photography, topographic maps, schematics, charts, tables, etc. with minimum narrative sufficient to describe, quantify, and qualify the data.

A. Project Description

* • Identify who is proposing the project.
* • Identify who is conducting the assessments and provide credentials of this person(s).
* • Describe the purpose of the project.
* • Define the scope of work.
* • Identify the project area and study area (total acres, miles of r-o-w, etc.)
* • Identify the time table projected for the entire project.
* • Describe any required coordination and review for the project.
* • List or describe any required public input.
• Provide historical information significant to the project.

B. Description of the Affected Environment

1. Natural Resources

• Describe the geology within the study area.
* • Describe the soils present and their characteristics.
* • Describe the landform (topography) and the natural processes impacting the present landform.
• Describe the climatic factors affecting the study area.
* • Describe the supply and quality of surface water resources in the study area.
* • Describe the supply and quality of groundwater resources including aquifer recharge zones occurring within the study area.
* • Describe natural hazards affecting the study area, i.e. tidal influences, flood activity, etc.).
• Describe the quality of the air in the study area.
* • Describe the vegetation communities (cover type) specifically impacted by the project to include: dominant plant species, estimated height of trees, woody

shrubs or brush; and estimated canopy coverage of woody vegetation. Total acreage of each cover type disturbed by the project should also be listed.

* • Describe the fauna that would be associated with the dominant vegetation cover types identified above.
* • Identify "sensitive" ecosystems which occur in the study area such as: springs, streams, rivers, floodplains, vegetation corridors, bottomland hardwoods, wetlands, bays, estuaries, native grasslands, etc.
* • Describe the occurrence of threatened/endangered species (or their habitats) and unique or rare natural communities which occur in the study area.
    a. On site inspection of the study area for permanent or seasonal occurrence.
    b. On site inspection of the study area for occurrence of habitat.
    c. Interviews with recognized experts on all species with a potential of occurrence.
    d. Literature review of data applicable to a potential occurring species concerning species distribution, habitat needs, and biological requirements.

2. Cultural Resources

* • Identify public use and open space areas in the vicinity of the proposed project such as parks, natural areas, wildlife preserves and management areas.
  • Identify previous, present, and proposed land uses within the study area.
  • Identify significant archeological features within the study area.
  • Identify significant historical features in the study area with special consideration of "National Register of Historic Places" properties.
  • Identify rights-of-ways, easements, public utilities, and transportation features within the study area.
  • Identify noise pollution sources and current noise levels within the study area.
  • Identify existing and proposed public health and hazardous waste facilities which exist in the study area such as land fills, hazardous waste sites, wastewater treatment facilities, septic tanks, etc.
  • Identify socioeconomic factors, if applicable.

***C. Project Alternatives**

List and describe project alternatives (including "no action") and associated impacts (direct and indirect) to described resources. If the project is potentially large in scope, cumulative effects with other similar projects may be required.

***D. Mitigation**

A major responsibility of TPWD is to conserve and protect the state's fish, wildlife, and plant resources. Certain categories of these biotic resources warrant special consideration. These include habitats that are locally and regionally scarce, habitats supporting unique species or communities, stream and river ecosystems, bays, estuaries, wetlands, bottomland hardwoods, and native grasslands. All projects which could adversely affect these resources should be fully evaluated, and where possible, implementation of less damaging alternatives undertaken. If it is determined that a project or action will potentially affect fish, wildlife or plant resources, a process for adverse impact reduction should be initiated. Mitigation measures should be developed and implemented sequentially as follows:

1. **AVOIDANCE:** Avoiding adverse impacts through changes in project location, design, operation, or maintenance procedures, or through selection of other less damaging alternatives to the project or action.

2. **MINIMIZATION:** Minimizing impacts and by project modification or rectification to restore or improve impacted habitat to pre-project condition; or through reducing the impacts over time by preservation and maintenance operations during the life of the project or action.

3. **COMPENSATION:** Compensating for unavoidable impacts by providing replacement or substitute resources (including appropriate management) for losses caused by project construction, operation, or maintenance.

Mitigation should be an integral part of any action or project which adversely affects fish, wildlife, and habitats upon which they depend. Failure to adequately avoid or minimize adverse impacts or to adequately compensate for unavoidable losses of natural resources is a serious deficiency in any project plan and may cause delays in this Department's review and assessment of the adverse impacts upon fish & wildlife resources. In assessing project impacts, reasonable foreseeable secondary and cumulative impacts should be included.

***E. Coordination**

Provide copies of pertinent coordination correspondence.

***F. Document Preparers and Their Qualifications**

***G. Bibliography**

(references: 40 CFR Parts 1500-1508 and various EPA handouts concerning Environmental Assessment documentation.)

#EI-942
RA

TEXAS HISTORICAL COMMISSION

The State Agency for Historic Preservation

RICK PERRY, GOVERNOR

JOHN L. NAU, III, CHAIRMAN

F. LAWERENCE OAKS, EXECUTIVE DIRECTOR

July 20, 2004

Ms. Victoria Ruston
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20402-0001

received 8/9/04

Re: ***Project review under Section 106 of the National Historic Preservation Act of 1966***
Southwest Gulf Railroad Company, Medina County (STB/106)

Dear Ms Ruston:

Our agency has received and been copied on correspondence addressed to your agency for the above referenced project. We have also received a letter from the attorney for the Southwest Gulf Railroad (SGR), David H. Coburn of Steptoe & Johnson, LLP, concerning the rejection of the Medina Dam Route.

Our agency's concern in this matter regards a statement in Mr. Coburn's correspondence to you, dated May 4, 2004, which includes the following statement on Page 13:

> *"It is also likely that the traffic of other shippers that might locate on the line will be headed eastbound since there are more potential markets to the east of the area."*

As noted in the regulations implementing Section 106 of the National Historic Preservation Act, when assessing determination of effect, adverse effects "may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative." (36 CRF Part 800 – Protection of Historic Properties, Section 800.5 (a)(1))

Our agency considers the cited comment from Mr. Coburn's letter to indicate foreseeable effects to historic property and associated cultural landscapes, which may result in an adverse effect determination from our office. Without some legal assurances that new facilities will not be granted access to the proposed spur, we can only anticipate a possible adverse effect.

We would like to discuss the direct and indirect impact of this undertaking on the cultural landscape of these historic properties. Please contact me at 512/936-4323 to schedule a meeting and/or conference call to discuss this matter. Thank you for your cooperation in this federal review process.

Yours truly,

F. Lawerence Oaks, State Historic Preservation Officer

cc: John Nau, III. Chair, Texas Historical Commission
Albert Hausser, Texas Historical Commission
Rini Ghosh, Surface Transportation Board
David H. Coburn, Steptoe & Johnson, LLP, 1330 Conneticut Avenue, NW, Washington, DC 20036-1795

Appendix D

Correspondence with Elected Officials, Local Organizations, and Citizen Groups

Some additional correspondence and all public comments received may be found on the Board's website at www.stb.dot.gov, by clicking on "Environmental Issues," clicking on Environmental Correspondence," and then searching the materials under "FD 34284."

Contents

Name of Sender	Date	ECT #*	Page
Texas Department of Agriculture	12/9/2003	E1-371	D-1
The Medina County Environmental Action Association	4/30/2003	EI-60	D-2
Median County Jude, Jim Barden	4/24/2003	EI-57	D-10
Schweers Historical Foundation, Inc.	5/14/2003	EI-71	D-12
Thomas E. Pichot letter to Surface Transportation Board	6/2/2003	E-148	D-13
The Medina County Environmental Action Association	6/6/2003	EI-147	D-16
Adams Environmental, Inc.	6/12/2003	EI-146	D-17
The Medina County Environmental Action Association	6/20/2003	EI-221	D-23
The Medina County Environmental Action Association	8/7/2003	EI-261	D-26
The Gardner Law Firm	11/25/2003	EI-366	D-29
Surface Transportation Board	12/23/2003	EO-51	D-38
Frank Madla, Texas State Senate District 19	1/8/2004	EI-469	D-40
Adams Environmental, Inc.	1/12/2004	EI-592	D-46
The Gardner Law Firm	1/15/2004	EI-471	D-50
Surface Transportation Board	1/15/2004	EO-54	D-60
Henry Bonilla, Member of Congress	1/27/2004	EI-470	D-62
Surface Transportation Board	2/3/2004	EI-57	D-68
Surface Transportation Board	2/17/2004	EO-60	D-69
Surface Transportation Board	2/17/2004	EO-61	D-71
Surface Transportation Board	2/17/2004	EO-59	D-73
Henry Bonilla, Member of Congress	2/17/2004	EI-610	D-75
The Gardner Law Firm	2/19/2004	EI-602	D-79
The Gardner Law Firm	2/19/2004	EI-601	D-90
Cindi Regnier, Member of the MCEAA	2/23/2004	EI-627	D-110
Brad Regnier, Board of Directors, MCEAA	2/24/2004	EI-626	D-113

Name of Sender	Date	ECT #*	Page
Dr. Robert T. Fitzgerald, President, MCEAA	2/24/2004	EI-641	D-117
Adams Environmental, Inc.	2/24/2004	EI-640	D-149
Dr. Robert T. Fitzgerald, President, MCEAA	2/25/2004	EI-645	D-152
Quihi & New Fountain Historical Society	2/26/2004	EI-652	D-157
Dr. Robert T. Fitzgerald, President, MCEAA	4/18/2004	EI-781	D-159
Surface Transportation Board	5/7/2004	EO-123	D-164
Surface Transportation Board	5/7/2004	EO-121	D-166
Surface Transportation Board	5/7/2004	EO-126	D-168
Surface Transportation Board	5/7/2004	EO-125	D-170
Surface Transportation Board	5/7/2004	EO-120	D-172
The Gardner Law Firm	4/19/2004	EI-780	D-182
The Gardner Law Firm	4/22/2004	EI-787	D-227
The Medina County Environmental Action Association	4/27/2004	EI-789	D-230
Quihi & New Fountain Historical Society	2/23/2004	EI-649	D-232
Schweers Historical Foundation	2/20/2004	EI-695	D-234
Medina County Environmental Action Association	5/20/2004	EI-828	D-239

* ECT - Environmental Correspondence Tracking Number

#EI-371
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SUSAN COMBS, COMMISSIONER

TEXAS DEPARTMENT
OF AGRICULTURE

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December 9, 2003

Ms. Victoria Rutson
Chief
Section of Environmental Analysis
Surface Transportation Board
1925 K Street NW, Room 500
Washington, D.C. 20423

Dear Ms. Rutson:

I was recently made aware of Vulcan Materials Inc.'s intention to construct a limestone quarry and rail line in Medina County, Texas. In response to your preliminary study, there are several issues of concern that I would like to bring to your attention.

First, I am worried about the implications of the proposed rail line being built through floodplain areas. I hope your agency has fully contemplated the result that railway culverts and trestles would have on adjacent lands with respect to the possible flooding of homes and agricultural land.

Secondly, I am concerned that the proposed route for the rail line dissects the Gerdes T4 Ranch, honored in 1986 as a Texas Family Land Heritage property. The Family Land Heritage Program honors farms and ranches that have been in continuous agricultural operation by the same family for 100 years or more. The program is designed to recognize and chronicle the unique history of Texas agriculture and the men and women who settled this great state and continue the tradition today.

Thank you for your attention to these concerns. Please feel free to contact me if you have any questions. I look forward to hearing back from you.

Sincerely,

Susan Combs
Commissioner

SC/klk

cc: Rep. Timoteo "Timo" Garza
Sen. Frank Madla

Making Texas the nation's leader in agriculture while providing efficient and extraordinary service.

#EI-60
R2

THE MEDINA COUNTY ENVIRONMENTAL ACTION ASSOCIATION
202 CR 450, HONDO, TX 78861 *ph (830) 741-5040 fax (830) 426-2060*

Home
Health
Heritage
www.dontmesswithquihi.com
Communications: **Mary Walpole**
Website: **Dwight Biediger**

President, **Robert T. Fitzgerald**
Vice-President, **Richard Culpepper**
Secretary, **Christine McCoy**
Treasurer, **Alyne Fitzgerald**
Directors: **Brad Regnier**
Judy Dittmar
Lester Landrum

April 30, 2003

FD 34284

Ms. Jaya Zyman-Ponebshek
URS Corporation
P.O. Box 201088
Austin, Texas 78720-1088

Dear Ms. Zyman-Ponebshek,

Ms. Rini Ghosh of the Surface Transportation Board has advised me that the URS Corporation has been selected to do the required environmental studies for a proposed railroad spur for the Southwest Gulf Railroad Company, a wholly owned subsidiary of Vulcan Materials Company. It is my understanding through telephone contacts with your office that public input in the form of written concerns is appreciated by URS, and that these comments and concerns can be addressed in the environmental study being currently performed.

I am writing in behalf of a group of concerned citizens of about 120 families living in Medina County, Texas in the Quihi area. In February of 2000 we formed the Medina County Environmental Action Association in an effort to protect our homes, health, and heritage, which we believe will be threatened by the opening of yet another quarry and railroad in our area.

According to a map that we received from the Surface Transportation Board, parts of the proposed, as well as the alternative railroad routes cross portions of the flood plains of the Quihi, Elm, and Cherry Creeks. Having lived in Medina County for over thirty years and in my present location for almost twenty years, we have experienced extensive flooding on three separate occasions in the above-mentioned flood plains. The building of a railroad spur crossing the Quihi Creek as depicted by the proposed route and by alternative routes 1 and 2 would traverse a flood plain approximately 2000 feet in width at the point the railroad crosses County Road 365, according to FEMA Flood Plain maps. Alternative route 3 carries the same risks, but crosses the Quihi and Elm Creeks at a different location. In addition, the proposed route and alternative route 3 cross the Cherry Creek, which is not marked on the map. Any type of supporting berm or ~~trussel~~ trestle for a rail line would impound floodwaters during times of heavy rain of four to six inches. Ten-inch rains have even occurred several times in the past fifteen years. Tremendous amounts of debris are caused by these floodwaters. Any blockage of the creek can lead to serious flooding above the blockage. Of even more concern is what would happen should a berm or ~~trussel~~ trestle give way. Prior to my knowledge of your involvement with this project, I sent a letter with fifty-four (54) cosigners to the Corps of Engineers in Forth Worth expressing our concerns in this regard and stating our opposition to building a railroad crossing supported by a berm or ~~trussel~~ trestle. We believe that the only safe railroad crossing would be accomplished by a railroad supported by bridges that would withstand the flooding and allow the unobstructed passage of water.

In addition to the families and individuals living in the affected flood plains, there are twenty-four (24) historic houses built in the late 1840s and early 1850s around the Quihi Creek and Quihi Lake. There are also two historic churches, two cemeteries, one historic school, one historic trail (General Wool or Woll's Road), a gas pipeline pumping station, two pipelines, and the Quihi Gun Club, all of which are either in the flood plains of the Quihi and Elm Creeks or would be crossed by the proposed railroad spur. At least four of the historic Alsatian houses are located within a short distance of fifty yards or less of the proposed railroad line. These structures would be threatened not only by flooding, but also by the vibration of the heavy locomotive engines and cars that would pass nearby. These structures are frail and would be adversely affected by vibration.

Other environmental concerns associated with a one-mile long railroad train of cars are the dust and noise they produce. The proposed gondola cars are not covered and there is no preventative for the dispersion of dust particles along the seven-mile spur, nor the two hundred and fifty (250) mile route along the existing Union Pacific rail line to Houston, which is the proposed destination for ninety percent of the material. Medina County already has eight gravel quarries and there are many quarries in nearby Bexar County. As you are probably aware, Bexar and surrounding counties in Texas already have air quality problems. It is our feeling that the additional particulate matter from the open railroad cars will only make matters worse by contributing to the air pollution and will also increase the health risks to those living near the railroads between the quarry site and Houston.

We would also like you to consider Vulcan Material Company's statements of need and justification for this railroad. It should be noted that permission for a railroad spur in West County has been recently granted to the Martin Marietta Company. This permit was granted so that the company could better serve the Dallas-Ft. Worth area. In addition, Martin Marietta stated that permitting the building of the two and a half-mile spur would allow them to serve the Houston area by connecting with existing rail lines. So I presume this market is being filled.

Still other concerns deal with unavoidable delays caused by grade level crossings proposed for the crossing of at least five county roads. Should people in the area going to work, needing police, EMS, or the Fire Department suffer because a slow mile-long train is blocking the road four times every day? The people in this area don't believe so. We have discussed this matter with our County Commissioner and County Judge and they are with us. Again the solution is to build grade separation for the traffic where the rail line will exist. This has been the solution called for by the Texas Department of Transportation for FM 2676 and it should be the same for the county roads as well. Please see the enclosed letter from our local Texas Department of Transportation engineers to their Austin office.

In conclusion, our organization appreciates the opportunity to make known our concerns about this project. We hope that you will give due consideration to our suggestions concerning the safe management of flood plain dangers, noise and air pollution, and the problems with traffic management this project will surely cause. Thank you for your time devoted to this lengthy letter. We will await your reply and look forward to having further public input when your preliminary report is done.

Sincerely,

Robert Fitzgerald

Robert Fitzgerald
President, Medina County Environmental Association

Enclosures –Letter and Pictures
xc: Rini Ghosh
County Judge Jim Barden
U.S. Representative Henry Bonilla

From: Carl Friesenhahn
To: Clay SMITH; Judith FRIESENHAHN; Julia BROWN
Date: 2/10/00 4:13PM
Subject: New Vulcan Quarry in Medina County

I wanted to make everyone aware of a situation that is developing in Medina County that involves the establishment of a new quarry by Vulcan Materials. The proposed 2,000 acre quarry would be located northeast of Quihi approximately 8 miles north of US 90 (Dunlay) and approximately 3 miles north of FM 2676.

Tom Ransdell, President of Vulcan Materials Company (Southwest Division) visited with me earlier today to brief me on the company's plans. Vulcan is proposing to construct a 6 mile long railroad spur that would transport the material from the pit to the Union Pacific Railroad track that runs adjacent to US 90 on the north side. They agreed that a grade separation needs to be constructed where the spur crosses FM 2676 and they understand that the cost of this would be theirs.

They are also interested in constructing a new roadway or improving existing county roads to provide a direct connection from the quarry to US 90. They seemed to be asking for our assistance (funding) to do this. I explained that although such a roadway would connect two of our roadways (US 90 and FM 2676), I didn't anticipate that we would contribute to this due to the minimal amount of benefit that it would provide to the traveling public as a whole (500 ADT on FM 2676 based on the 98 Traffic Map).

I also explained to Tom that any funding agreement for TxDOT to build a grade separation bridge or to build a roadway back to US 90, would have to be handled through Medina County. Tom said that they would get with the County and discuss this matter and probably try to set up a meeting between all three of us to discuss the options and come up with a strategy for moving forward on this.

One last tidbit, there is a group of local citizens that have formed to fight the project calling themselves the Medina County Environmental Action League. Approximately 200 area residents met last Thursday in Quihi with Vulcan representatives to discuss their concerns. Among many items, they are concerned with noise, dust, contamination of water supply and reduction of property values. I will forward everyone a copy of the front page article from today's Hondo Anvil Herald concerning this subject.

If anyone has questions about this matter or feels that I have provided incorrect information to Vulcan, please let me know. I will keep everyone apprised of any new developments.

Carl

CC: Antonio Arredondo III; Dale Holzhaus; Gregory Biediger; John KELLY

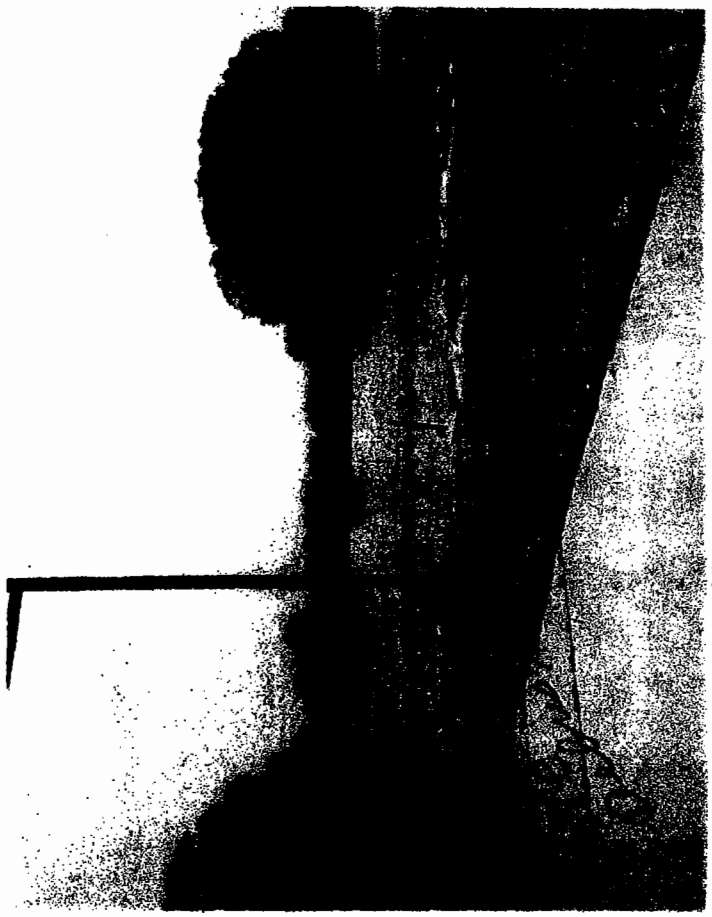
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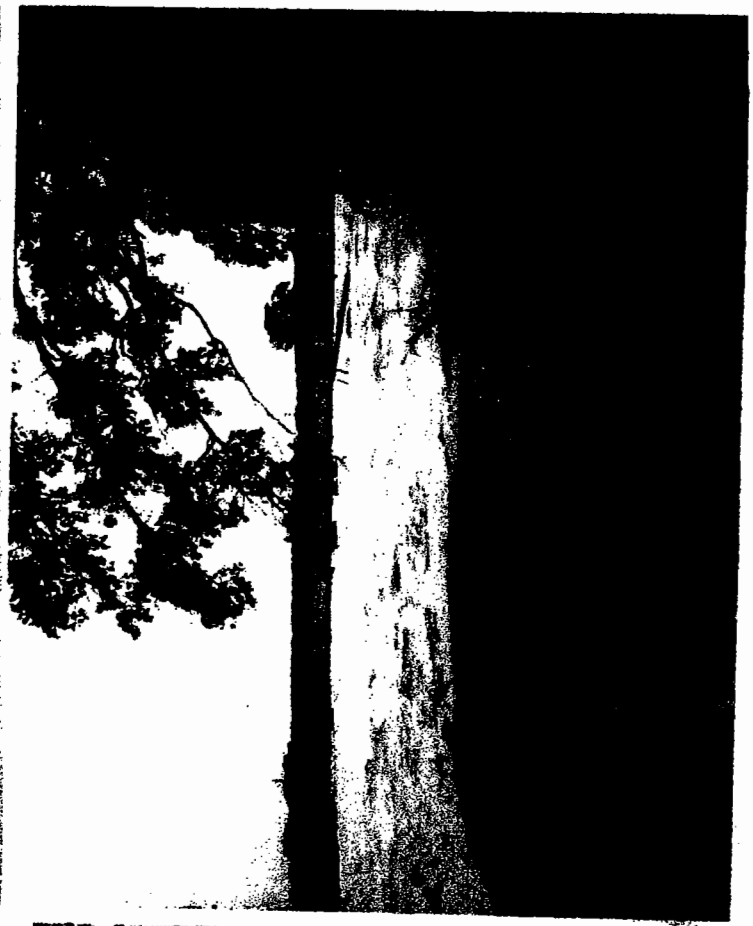
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To Judge Montgomery	From Carl Friesenhahn
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Fax # 741-6025	Fax #

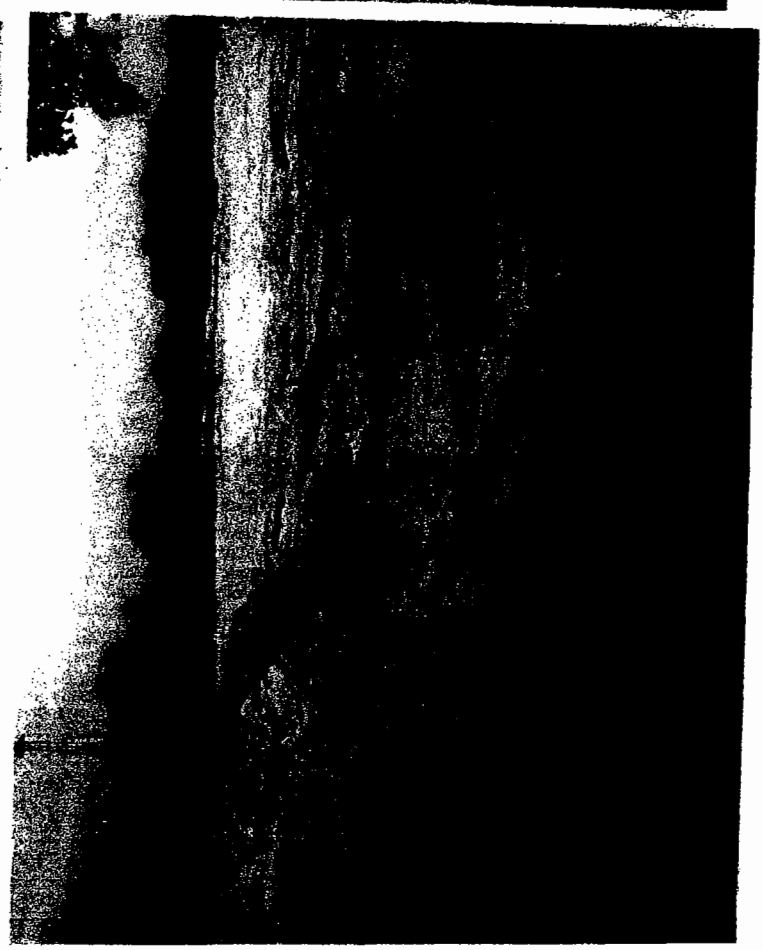
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Several photos from near proposed A.P. line
South to N.T.S. 1975-21

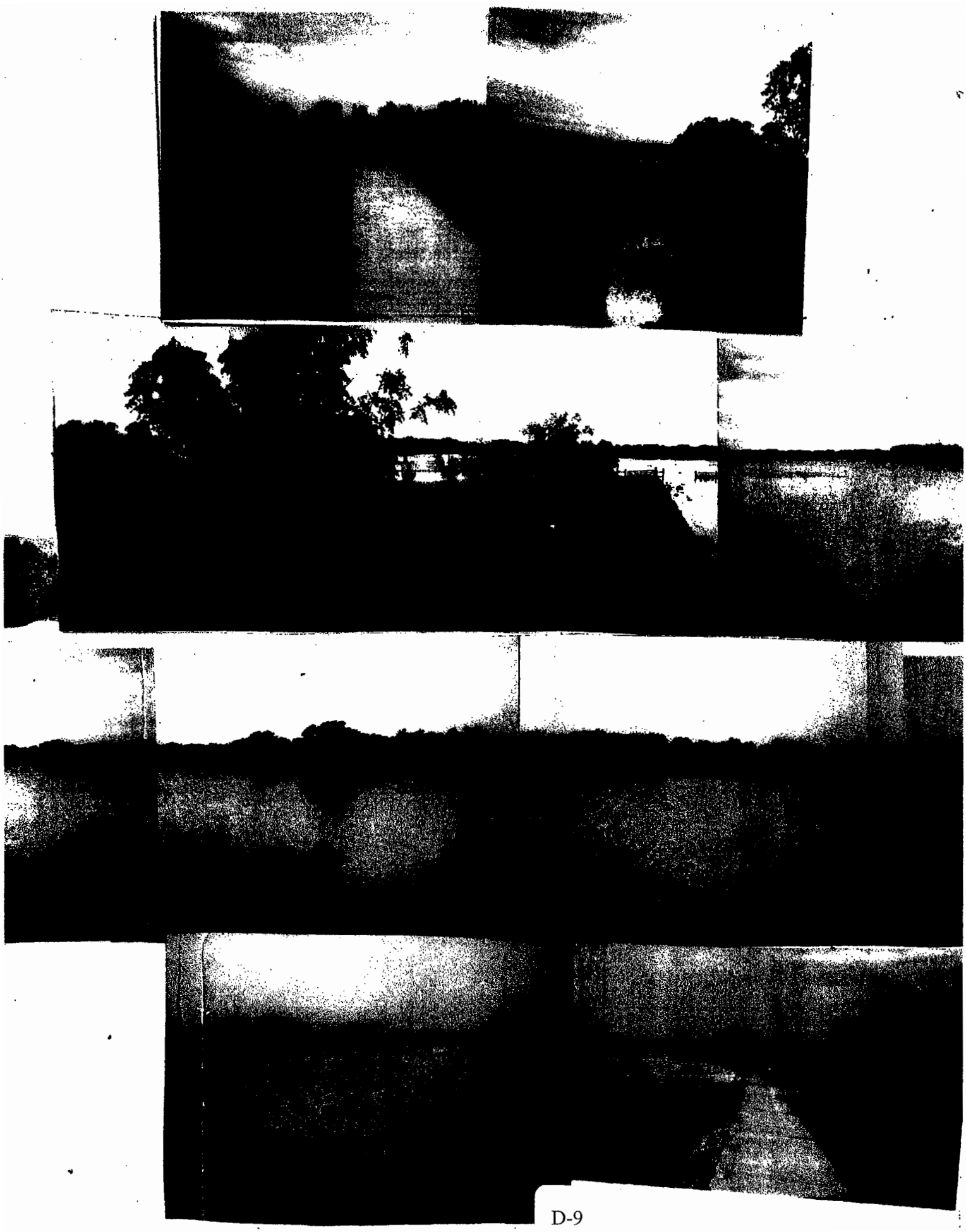








"Quigley" Creek



Medina County Judge
Jim Barden

1100 16th Street
Room 101
Hondo, Texas 78861

(830) 741-6021 Fax (830)741-6025



#E1-57
RA

April 24, 2003

FD34284

Ms. Jaya Zyman-Ponebshek
URS Corporation
P.O. Box 201088
Austin, Texas 78720-1088

Re: TB Finance Docket No. 34284, Southwest Gulf Railroad Company-Construction and Operation-Exemption-Medina County, TX

Thank you for the opportunity to comment on the above matter. As you can imagine it is a subject of some concern and controversy among the citizens who live in or near the affected area.

Before outlining the county's concerns regarding the project, I want to correct a few misimpressions in the Synopsis attached to the STB letter of March 31, 2003. First, Medina County has a population of 40,000 persons rather than 33,000 as stated in the Synopsis. This number is increasing dramatically as developers are opening subdivisions in the eastern half of the county to accommodate San Antonio's growth. By the time any such rail line be put in operation, I expect the population will have grown by another 10% or more with most of it in the eastern part of the county where the quarry and railroad are proposed.

Second, while the roads to be crossed are lightly traveled when compared to urban interstates, they do carry a significant amount of traffic and are major east/west routes for our county citizens.

Third, the synopsis states that the proposed line traverses only two drainage features with intermittent seasonal flow (Quihi and Elm Creek). Substitute the word "flood" for "flow" and a more accurate picture emerges. Placing a rail line across these areas without significant length of open bridges or trestles will exacerbate our almost annual flooding problems.

Having said the above, the county governments concerns regarding the proposed rail line center on two areas. If the rail line is built we want to see the safest possible road crossings and the least intrusive creek, draw and slough crossings. Several years ago when this project was first announced the proposed quarry owners represented to the Precinct

Commissioner that there would be elevated road or RR crossings on FM 2676 and CR 4516. Now we understand they are only proposing grade crossings. With at least 4 trains per day at 100 cars for at least 250 days each year this presents a major safety concern and traffic flow impediment. I urge serious consideration of having elevated roadway crossings at these two major arteries in Medina County.

The other concern (water flow and flooding) is equally great. The history of this area is not one of gently flowing streams that rise with a big rain. Rather it is a history of flash flooding that can inundate large areas of land in a matter of minutes and hours. Any structure placed across these flood areas is a problem. I hope that sufficient construction requirements will be imposed to alleviate this problem as much as possible.

Regarding which of the four proposed routes is preferable, there appears to be little difference as far as our concerns of traffic safety and movement and flooding are concerned... or at least none of that can be discerned without expensive further study.

The individual citizens in the area have substantial and additional concerns which should be heard. The issues outlined above (traffic safety and flooding) are the principal concerns of the county government.

Again, thank you for the chance to have our views heard. I will be glad to visit further with you if you wish.

Sincerely,

James E. Barda

JEB/jaa

2405 IH-35 South, Suite 102
New Braunfels, Texas 78130

Schweers Historical Foundation, Inc.

May 14, 2003

Ms. Jaya Zyman-Ponebshek
URS Corporation
P.O. Box 201088
Austin, TX 78720-1088

Re: STB Finance Docket No. 34284, Southwest Gulf Railroad Company-
Construction and Operation Exemption-Medina County, TX;
Request for Preliminary Comments.

Dear Madam:

This letter is our response to a letter from the Surface Transportation Board (STB) dated March 31, 2003 requesting comments from Federal, state and local agencies that may have information regarding the environmental impacts of this project.

Attached hereto is a copy of our letter dated May 13, 2003 to Congressman Henry Bonilla, which states our position regarding this project, and our interest regarding it.

We feel the environmental impact of the 'Proposed Route' would be quite insignificant, and less than Alternates 1, 2, and 3 because it is the shortest route, and because it appears to cross the Quihi Creek at the existing gas line right of way At this location, the Quihi Creek is not normally flowing at all, or very little.

Below this point are wide, deep water holes with springs flowing throughout the year. Below that are wetlands and marshes. These would not be good areas to cross the creek. We do not know about the point where Alternate 3 crosses the Quihi Creek, but doubt that it would be better than the Proposed Route, and it is 2500 feet longer

We believe an elevated bridge for the spur track crossing the Quihi Creek at the gas line right of way (see map enclosed) would have negligible adverse effect on the environment and wildlife.

Sincerely,

Donald S. Schoch

Donald S. Schoch
President

[Click here and type slogan]

#FEI-148
R2

JUNE 2, 2003



SURFACE TRANSPORTATION BOARD
OFFICE OF ECONOMICS, ENVIRONMENTAL ANALYSIS AND ADMINISTRATION
WASHINGTON, D. C. 20423
ATTENTION VICTORIA RUTSON
CHIEF
SECTION OF ENVIRONMENTAL ANALYSIS

RE: STB Finance Docket No. 34284 - Southwest Gulf Railroad Company - Construction and Operation Exemption Median County, TX.

Dear Chief Review Analysis:

Thanks for the notice of hearing Thursday, June 12, 2003, to inform and receive comments from the public about the proposed project and the environmental review process. Due to the long distance of travel for me and my family to attend this meeting we have chosen to write a letter to you with our comments and concerns. All of us are involved in business or legal work as self employed individuals. Thursday nights are not available for us to travel the long distances to testify before you. Please forgive this informal way of expressing ourselves.

The proposal of SGR's to build and operate rail lines for the delivery of products from the quarry of Vulcan and any other future commercial endeavors that might develop because of the building of this rail road meets "With our FULL Approval!" For just a second I will digress to tell you of our small resumes.

T. Pichot- fifth generation 65 years old Texan born and raised on this land where the possible railroad will pass. Always looking for potential jobs and opportunity for our citizens. Trusting our officials like you to do the right thing in the application of the law in the areas that you outline in your thirteen points of interest in your outline of this hearing. Long in experience in the history of this country. The railroad of 1911 to Media Lake and the building and operation of it made jobs, new families to enter the community, development of new industries, and countless other assets that can be long winded in expression. The negatives and residue of this railroad are few if any. My 86 year old father was asked this question of what negative effects could he say was caused by the railroad to the Lake. He said " NONE!" The memory was that there was a fight for the ties for fencing when the railroad was removed. The spikes were picked up as souvenirs for the next ninety five years. PLEASE PUT IN THE RAILROAD AND LET THE PEOPLE AND COUNTY GROW.

Cindee Pichot, Attorney At Law, daughter of above and future owner of the land. Very interested and environmentally knowledgeable as she is currently the attorney in fact for three municipalities. Has trust in our Government officials to enforce the statutes on the books to keep us free from pollution and protect our waters for future generations.

PERRY PICHOT, Brother of Tom and co-owner of the land with dreams of opportunities for future generations. Five generations ago our Great Great Grandfather homesteaded these lands yes MIMKEN Saathoff left his beloved

home and came to Quihi, Texas in search of freedom, opportunity for his family, freedom of expression and freedom from tyranny. Our family's blood has been shed in many wars to preserve his dream.

The Railroad has met many vocal opponents, but few of these folks lived through the hardships of holding the land or experienced the many changes of both wet and dry times. The viewing of flood waters for days on the Quihi Creek or the seven year drought that caused all the water wells to be redug. As owners of some of the property involved we vote with a loud Yes, Let the Railroad come to Quihi, bringing job opportunities, and increasing the values of our land. to have lived off the wild game and wild fruit was an early and historical wonder but now with modern techniques control of the railroad is much safer than the fast moving many drivers with many of their personal problems lumbering down the roads of the county.

As to the noise of the train, it becomes music to your ears in a short time as does all sounds. The human body quickly adjusts to its surrounding environment. In my lifetime on two occasions, I've learned to live by a railroad track. Soon, the noise was not noticed at all.

As to the effecting on the environment, the damming up of the Quihi Creek will cause much more damage than any railroad will ever will, in my opinion. This act should have never been allowed, if in fact it was allowed and not just done with proper permits.Maybe some checking needs to be done by the environmentalists as well on this earthen dam that was placed at the mouth of the Elm, the Quihi and the great slough that comes out of the old George Heyen pasture. As a child when we were water bound I was pushed into the running rivers that join on the road that passes by the now Mr. Fitzgerald house CR365. The water was flowing deep all along this entire area. My father and my horse swam the distance from the corner of the road intersection (from CR450 to CR365 to the now paved road leading to Rio Medina from Quihi). In retrospect this certainly was a foolish thing for a father and his young son to do. It just happened that during rainy weather and the creeks rising the fences needed to be looked at, in so doing riding over to the Shop at Quihi to get a soda was also part of the activity. From there we would ride north to the other property and see about the fences up there since high water usually washed them out also and the cattle would be scattered to the neighbors places. This is and has always been a flood plain and whoever builds in the center of it, has simply built in the place where water can cause great damage during flood times. To blame other for high water is not correct.

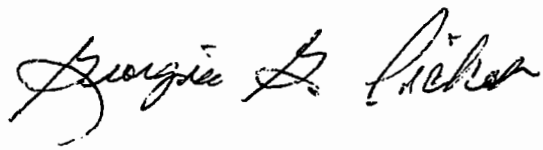
For the Pichot family who now numbering in the twenties we say <u>yes to the train</u> and <u>no to the trucks.</u> Since we are Medina County people from the 1842 era and have been intermarrying for long periods we number in the thousands and have roots in more than thirty three ancestral names of the County. We care about the future of this wonderful paradise that our ancestors came to, fought for and continue to improve.

Sincerely Your,

Thomas E. Pichot Business Owner

2205 Locust
Laredo, Texas 78043 956 722 7656 office or 956 723 3279

Georgia G. Pichot Reflexologist



2901 1/2 Bartlett
Laredo, Tex 78043 956 723 3933

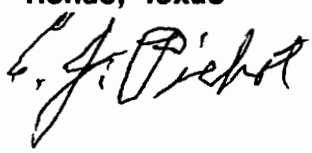
Cindee Pichot Attorney At Law
P O Box 88
110 S. Main
Noble, Okla.73068 405 872 9216

Glynn Rae Pichot Brandt Accountant
1112 Homestead
Fower Mound, Texas 75028 469 293 8040

Perry L. Pichot Business Owner - Home builder
10101 Millspaugh
Yukon, Oklahoma 405 946 5544

Suzanne Pichot Market Operator
Farmers Market El Reno St.
Okla. City, Okla 405 235 2815

Charles J. Pichot 86 years of Age- previous owner of property
909 27th Street having raised his family there
Hondo, Texas 830 426 2718



#EI-147
RD

THE MEDINA COUNTY ENVIRONMENTAL ACTION ASSOCIATION

202 CR 450, HONDO, TX 78861 *ph (830) 741-5040 fax (830) 426-2060*

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www.dontmesswithquihi.com
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Website: **Dwight Biediger**

President, **Robert T. Fitzgerald**
Vice-President, **Richard Culpepper**
Secretary, **Christine McCoy**
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Directors: **Brad Regnier**
Judy Dittmar
Lester Landrum

June 6, 2003

Rini Ghosh
Surface Transportation Board
Office of Economics,
Environmental Analysis, and Administration
1925 K Street, N.W. Suite 500
Washington, D.C. 20423

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Dear Ms. Ghosh:

This letter is to introduce Dr. Lynn Kitchen of Adams Environmental, Inc.(AEI). Dr. Kitchen has been asked to perform various environmental studies and render advice and opinions for the Medina County Environmental Association concerning Vulcan Material's (and Southwest Gulf Railroad's) proposed plans to open a limestone quarry and rail line in the Quihi area of Medina County.

Dr. Kitchen's address is: Adam's Environmental, Inc.,
12018 Las Nubes St.,
San Antonio, TX 78233
Phone 210-691-2221, 210-317-7267 mobile

Should Dr. Kitchen contact you concerning the referenced proposed projects, we would greatly appreciate any assistance you can give him in our behalf. With Dr. Kitchen's knowledge and assistance we can better understand and deal with the complex environmental requirements surrounding these proposed projects.

Sincerely,

Robert Fitzgerald

Dr. Robert Fitzgerald

61-146

ADAMS ENVIRONMENTAL, INC.
12018 Las Nubes Street
San Antonio, Texas 78233

www.adamsenvironmental.com

June 12, 2003

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

Re: List of Potential Environmental Issues for Southwest Gulf Railroad Company, Medina County, Texas

Dear Ms. Rutson:

The Medina Environmental Action Association (MEAA) asked me to compile a list of potential issues involved with the construction and operation of the Southwest Gulf Railroad Company. Please find attached a list of the issues that the MEAA and I prepared for your review. The list is not meant to be "all inclusive", but should serve as a starting point for preparation of the EA or EIS. We hope that you will be open to further additions if they are discovered during the NEPA process. We would sincerely appreciate the transportation board carefully considering the impacts imposed by all four alternative routes of the railroad on each of the listed issues.

Thank you so much for your time and consideration. Feel free to call me if you have any questions or need further information.

Sincerely,

Lynn Kitchen

Lynn M. Kitchen, Ph.D.
Vice President

210-691-2221 (Office)
210-317-7267 (Mobile)
210-691-2041 (Fax)
lkitchen@adamsenvironmental.com

POTENTIAL ENVIRONMENTAL ISSUES IMPOSED BY VULCAN MATERIALS' PLAN TO CONSTRUCT A RAILROAD IN MEDINA COUNTY

Physical Factors

1. Geologic Factors
    a. Sensitive recharge features
        i. May be filled, destroyed or impacted by construction of the rail
        ii. Compromise the structural integrity of the rail
        iii. Susceptible to spills or leaks of fuels and fugitive dust
        iv. Impacted by vibrations, etc. from rail use.
    b. Karst features and faults: May be altered by blasting and earth moving operations causing loss of artesian springs in and around the project area. These springs currently provide the majority of the flow of Quihi Creek.
    c. Impacts to artesian springs associated with the Edwards Aquifer. These springs have created wetlands and other surface waters that are unique in plant community development and composition.
2. Soils:
    a. Loss of farmland soils currently used for crop production
    b. High potential for soil erosion caused by changes in drainage as a result of rail construction. Proper erosion control devices must be put in place to mitigate for impacts along the railroad.
3. Agriculture:
    a. Splitting of pastures by the rail: Ranchers will not have current, easy access to rotate livestock to pastures due to the rail, unless underpasses or safe crossings are constructed. Underpasses will allow livestock to move freely throughout pastures with the rail in place. Some ranchers are concerned that the railroad will cut their livestock off from water sources, making some pastures unusable.
    b. Splitting of croplands making access by farm equipment extremely difficult. Again, underpasses or safe crossings need to be constructed to allow free access by farmers at various locations on their property.
    c. Noise from trains may be disruptive to livestock.
4. Mineral Resources:
    a. Oil and gas pipelines are known to be in the area of the new rail. There is potential for damage to pipelines running through the area stemming from vibrations caused by rail use. Proper measures must be used to prevent damage and subsequent releases fro these pipelines. This is especially important because the northern portion area is located on the recharge zone and in the upper watershed of Quihi Creek.
5. Visual Resources
    a. The rail and associated development will cause significant impacts to the rural and natural landscape of the area.

   b. Lighting and associated features will decrease the visibility of the sky at night. The area is currently being used for astronomy studies and star mapping because of its unusually low level of light at night.
   c. Very significant impact to the historic vernacular of the area.
6. Cultural Resources
   a. Rail runs directly through or nearby many historic structures that are currently registered or will be registered as national historic landmarks. These structures are considered important examples of the architecture of the area's past history.
   b. Potential impacts to family graveyards
   c. Potential impacts to archeological features that may require archiving and further study. The site is known to be rich in archeological features dating back to 10,000 BC.
7. Surface Water Resources
   a. Dust associated with cargo and train movement can impact wetlands and other surface waters in the area.
   b. Potential for the release of fuels and lubricants, which could eventually impact surface waters by runoff, etc.
   c. Culverts and bridges should be required to prevent changes in drainage and flow patterns for all ephemeral, intermittent, and perennial streams in the area.
   d. Wetlands may be filled by construction of the rail. These wetlands are especially unique because of their association with artesian springs in the area and their connectivity with Quihi Creek.
8. Groundwater Resources
   a. Rail could impact groundwater recharge features by filling or destroying the structural integrity of the features. Sinkholes and caves are known to exist in the northern area near the proposed quarry and could be impacted by vibrations of the train or earth moving during construction of the railroad.
   b. Potential for release of fuel and lubricants from the train into recharge structures causing contamination of the water
   c. Potential for release of fuel and lubricants from construction equipment into recharge structures causing contamination of the water.
   d. Past history has shown that the groundwater is very sensitive to vibrations, causing the water to become cloudy with sediments (caused by earthquakes as far away as Mexico). Potential for this to occur from train operation should be addressed. Mitigation for decreased water quality should be included as part of the recommendations.
   e. If gravel is washed prior to transport, potential for sediments from wash water to impact ground water by draining into recharge features in and around the quarry
9. Floodplains
   a. Site is already susceptible to extensive flooding. Rail would create berms across floodplains that would significantly change flood flow and cause flooding of homes and historic structures. Bridges should be required where the rail crosses any stream or floodplain. The bridges should be in place for the full extent of the floodplain.

b. Many areas may be developed in the future, changing the flood flow significantly. Bridges will ensure that even heavier flood levels can be accommodated. Flood studies should include a comparison of flows with and without bridges and should be projected for industrial and residential development associated with the rail. An increase in flood flows would be expected because of increases in impermeable surfaces and construction of rechanneled, concrete lined ditches and streams in developed areas.

10. Air Quality
    a. Fugitive dust emissions from train movement
    b. Fugitive dust emissions from cargo
    c. Release of carbon from train engine (visual impacts)
    d. Dust and emissions caused by construction equipment
    e. Proximity to sensitive receptors and residents in the area that have health problems exacerbated by dust and other particulates
11. Noise
    a. Significant impacts would be expected to any receptors within 1000 ft. of the rail caused by vibrations, engine noise, and track noises.
    b. Significant impacts to receptors by train whistle at crossings
    c. Significant disruption to livestock and other farm animals causing abnormal behavior and impeding breeding.
    d. Impact to quiet, rural environment now enjoyed by residents.
12. Land Use
    a. Splitting of pastures, farmland, and rangelands, making movement of equipment and livestock extremely difficult. Need network of underpasses to allow for safe movement of livestock and equipment across the railroad.
    b. Access to areas will be changed and will be more difficult and dangerous. Driveways across railroad may be blocked for long time periods, especially near the quarry and other loading and unloading areas.
    c. Rail will essentially change the area to industrial/commercial use if Vulcan predictions are true. Much of the farmland in the area will be lost.
13. Roads
    a. Railroad crossings will stop traffic movement for long periods of time, especially if the train is 1 mile long and travels at 10 – 20 mph. Also, the train will be stopped at loading and unloading areas where traffic will be stopped for even longer periods of time.
    b. Railroad crossings will be especially dangerous for school buses and use should be scheduled around school bus transport times.
    c. County feels that above grade crossing should be constructed for all county and state road crossings.
    d. Rail company should be responsible for maintaining minor crossings in safe condition that will not damage vehicles or equipment (not owner's responsibility). Underpasses are preferred where possible. For farm equipment, these underpasses or crossings must be a minimum of 50 ft. wide to accommodate farm equipment.
    e. How long will minor crossings be blocked by the train?
14. Utility lines: Must be accommodated when they cross under or over the rail.
15. Vegetation

a. Potential impacts to sensitive species
b. Potential spread of noxious weeds by rail cars

16. Wildlife
    a. Wildlife mortality along the railroad
    b. Major impact to hunting along and near the railroad
        i. Decrease in interest of hunters paying for leases
        ii. Increase in poaching along railroad ROW
    c. Disruption of wildlife movement (dissection of current trails and movements)
    d. Disruption of wildlife nesting and breeding caused by train noise
    e. Loss of aquatic and terrestrial wildlife habitat
17. Endangered Species
    a. Golden-cheek warbler habitat and black-capped vireo habitat should be evaluated on the northern end of the rail for 1000 ft. on each side of the track (noise impacts). Live bird studies for 3 years should be required to ensure that the birds are not in the area.
    b. Karst invertebrate habitat should be evaluated on the northern end of the rail. Caves and sinkholes have been reported in that area.
    c. Site should be reviewed for potential impacts to state listed species of concern.
18. Socioeconomics
    a. A detailed comparison of benefits and losses associated with each alternative, including the No Action Alternative. Costs to the county need to be assessed, such as increased road use, development of infrastructure for the rail, quarry, and new development associated with the new industry.
    b. Significant decrease in land value due to railroad (no longer valuable as residential property or ranchette developments).
    c. Potential dislocation of some residences
    d. Future change in the overall community from rural to industrial/commercial—loss of farming jobs and careers
    e. Increase in potential for major accidents at crossings
19. Indirect Impacts
    a. Industrial or commercial development of area and all impacts to the rural/natural environment associated with that change
    b. Construction and use of the quarry (reason for the rail) and impacts associated with it
20. Hazardous Materials
    a. If the area becomes developed as Vulcan predicts, potential for release of hazardous materials used by industry increases. Special concern in the recharge area.
21. Potential permits required for rail:
    a. Water Pollution Abatement Plan (recharge zone)
    b. TPDES permit for construction and use of the rail
    c. Section 404 Permit (probably Nationwide Permit 14)
    d. FEMA coordination and possible permitting
    e. Consultation with U.S. Fish and Wildlife Service on northern end of rail

f. Coordination with State Historic Preservation Officer and Texas Historical Commission
g. Surface Transportation Board Permit
h. Texas Department of Transportation approval for state highway crossings
i. Air and Noise Permit (at least coordination with the TCEQ)
j. Local permits and approvals

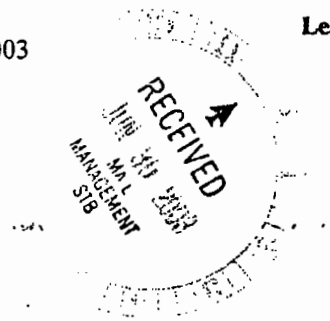
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THE MEDINA COUNTY ENVIRONMENTAL ACTION ASSOCIATION
202 CR 450, HONDO, TX 78861 *ph (830) 741-5040 fax (830) 426-2060*

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Website: **Dwight Biediger**

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Vice-President, **Richard Culpepper**
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Directors: **Brad Regnier**
Judy Dittmar
Lester Landrum

June 20, 2003



Ms. Jaya Zyman-Ponebshek
U.R.S. Corporation
P.O. Box 201088
Austin, TX 78720-1088

Dear Ms. Zyman-Ponebshek,

As per our conversation on 12 June 2003, I am submitting comments on the environmental impacts the proposed Southwest Gulf Railroad (SGR) would have on the Quihi area of Medina County. These comments are submitted on behalf of the Medina County Environmental Association. Concerned citizens that attended the open house meeting in Hondo, Texas have already submitted similar or the same comments.

I believe you already have my correspondence of 30 April 2003 outlining some environmental problems. However, this letter will supplement that correspondence.

To properly address the environmental impact of this project for the present and the future, one should consider these factors.

1. Traffic and Flooding Problems on County and State Roads Due to Proposed **Grade Level** Crossings: This proposed railroad, if constructed, will impact on a rapidly developing area of Medina County. Because of the proximity to San Antonio, Texas and its increasing population, this county of over 40,000 people is expected to grow at a 10% increase annually according to the County Commissioners' Court. This growth rate will likely continue for the next decade. The proposed railroad will cross five county roads and one state road in its 7.3- mile length. The county and state roads will also have to service an ever-increasing amount of traffic from gravel trucks as the development of the proposed quarry progresses. These county roads, not designed for heavy traffic, are narrow unpaved and paved roads that cross flood plains and flood at irregular intervals when 3 to 6 inches of rain occur. This happens frequently (3 times since 1997). A **grade level** crossing on County Road 4516 in the Cherry Creek flood plain is an especially serious problem because this is the primary road from Quihi to Castroville. This road is used for school buses, community EMS, police, and local fire department. A grade level crossing traversed by 4 miles of train cars each day, even if the crossing time was the estimated 3 minutes (which is doubtful), subjects people to unacceptable and unnecessary dangers and delays, which they currently do not experience. In addition, any berm or trestle built in the area near the railroad crossing on County Road 4516 would impound storm water that would disrupt traffic on this vital road for an indeterminate period of time and would damage the road surface and base, which would result in costly repairs to the county. Is Southwest Gulf Railroad going to

pay the repair bills?

II. Damage to Antiquities: Quihi was founded in 1845 by Henry Castro who laid out the land and brought 10 families 9 miles northeast of Castroville to the natural "Quihi Lake" area. These settlers, according to history, were given extra land because the Quihi area was dangerous territory inhabited by hostile Indians who fought the settlers. Of necessity, these settlers built homes and subsequently schools, churches, and cemeteries along the flood plain of the Quihi Creek to be near water that comes from springs of the Artesian Zone of the Edwards Aquifer. A part of this region is the location of the railroad line at the junction of County Road 365. How is the railroad line going to cross the wetland region? Berms or trestles would impound water in the region of the flood plain above the crossing and imperil those in that area as well as those below the crossing if the berms or trestles gave way after heavy storm rains. Fifty historic homes, schools, churches, and cemeteries located in the area would be destroyed. Also, what impact will the vibration from multiple trains passing nearby every day, year after year, for 50 years have on fragile historic homes and buildings? The proposed life of the railroad servicing the quarry is 50 years.

III. Noise, Health, and Safety Issues: Unlike residents of populated city areas that developed in close proximity to existing railroads, how can local residents that have enjoyed a quiet life breathing clean air exist with noise, vibration, and dust from 400 train cars per day passing their homes and blowing whistles as they approach grade level crossings every day and night?

IV. Loss of Income from Recreational Resources: How will the owners of ranches be compensated for the loss of revenue from hunting leases for deer, turkey, dove, and quail which will no longer inhabit the area due to the noise and traffic from the trains? One rancher, among many, will lose at least $4,000.00 every year.

V. Air Quality Issues: Air quality should be ascertained for an adequate period prior to any railroad operation including the building and operation phase. What will be the cumulative effect on air quality along the line of the railroad?

VI. Social and Economic Issues: In considering these factors, Southwest Gulf Railroad sought and obtained an endorsement from the Castroville Chamber of Commerce. The Castroville City Mayor is a friend of one of the quarry site owners and hunted on his ranch for 10 years. It should be noted that Castroville is 15 miles from the proposed quarry site and is 10 miles from the Union Pacific Rail Line that would connect to the proposed SGR Rail Line. Hence, Castroville would not be concerned with the above issues. On the other hand, SGR did not seek or obtain any endorsements from the residents who will be affected by the rail line and/or the quarry. The local residents of the Quihi area have united in their opposition and are represented by the Medina County Environmental Association. Since we first learned of the proposed project in January of 2000, we have diligently opposed this rail line for the above-mentioned factors and have sought the support of our local, state, and federal representatives. We have also submitted our concerns to U.S. Fish and Wildlife, U.S. Corps of Engineers, FEMA, Edwards Aquifer Authority, and Texas Commission on Environmental Quality. For three and a half years, we have held numerous town meetings and placed covenants on 9,650 acres of land stating that no railroad or conveyor belt system could be placed on our land. We have hired Adams

Environmental, Inc. to consult and advise us to oppose this proposed rail line. We have submitted a petition to the Surface Transportation Board to revoke their exemption. This is now being considered.

VII. We believe that Vulcan Materials Co. created the Southwest Gulf Railroad under the guise of hauling its product to the Gulf Coast, an area already serviced adequately by railroad with limestone quarried by Vulcan. However, we believe its main purpose is its hope to be granted a common carrier status so that it will have condemnation right granted under the power of eminent domain. In this regard, because the proposed route chosen by Vulcan is largely located in low lying areas and the flood plain, it is not likely that other shippers will chose to use the rail line. In addition, except for crossings, the great majority of the rail line will be isolated from existing roads and therefore will never be used for any additional industry. In our opinion, these factors should also be addressed in your environmental study so that the Surface Transportation Board can be aware of all concerns when approving or denying the permitting of this rail line.

VIII. Should a private company be allowed to change the economy of a region that is known for its farming and ranching and one that has great potential for creating tranquil rural homes for San Antonio and the surrounding area, to an area with an industrial economy whose questionable potential benefits are associated with great environmental disruptions, hazards, and irreversible changes? According to Vulcan Materials Co., they don't need this rail line and quarry to survive and make a profit. They already have reserves to continue operating for 100 years. Additionally, Vulcan has repeatedly stated that it won't open the quarry unless it has a rail line to ship its product, hence no additional gravel trucks on the roads.

We appreciate your consideration of this and other environmental aspects associated with this proposed rail line. We eagerly await the results of your environmental study, which we trust will appropriately address these issues brought before you and will allow the STB to have the appropriate insight in this drastic proposal. Please notify us of the next public hearing so that we may hear and comment on the results of your study.

Sincerely,

Robert Fitzgerald

Robert Fitzgerald
President, Medina County Environmental Association

cc: Rini Ghosh, Surface Transportation Board
U.S. Senator John Cornyn
U.S. Representative Henry Bonilla
Texas Senator Frank Madla
Texas Representative Timeteo Garza
Jim Barden, County Judge, Medina County
Royce Hartman, Commissioner Pct. 1, Medina County
Medina County Economic Development Committee
Ed Fischer, Mayor City of Hondo
Hondo Chamber of Commerce

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Judy Dittmar
Lester Landrum

FAX MESSAGE

August 7, 2003

To: Rini Ghosh 202-565-9000
Surface Transportation Board
1925 K Street NW, Washington, D.C. 24023-0001

From: Dr. Robert T. Fitzgerald

Ms. Ghosh:

As we discussed on the telephone yesterday, here are the locations of the two sites located near the southern boundary of the Wurzbach property. We were made aware of these sites by a member of our organization. He obtained the information from hunters that formerly had leases to hunt on the Wurzbach property. Perhaps these mounds are of little or no significance, but we thought it necessary to check them out in a timely manner by someone who is appropriately educated in this area. It may be of interest to the Surface Transportation Board that the Quihi/New Fountain Historic Society is progressing with the plans to have the entire 54 historic sites incorporated in a Historic District. This would preserve what remains of this unique community, which was founded in 1844 as one of the earliest land grants in the colonization of the new Republic of Texas. The Quihi/New Fountain historic buildings are possibly one of the few in Texas in which the descendents of the original owners are still here, and are able to relate some of the information as passed on to them by their ancestors. If you are interested in this project, you could contact Mrs. Cynthia Lindsey at 830-741-4041 or Ms. Judy Dittmar at 830-741-3674.

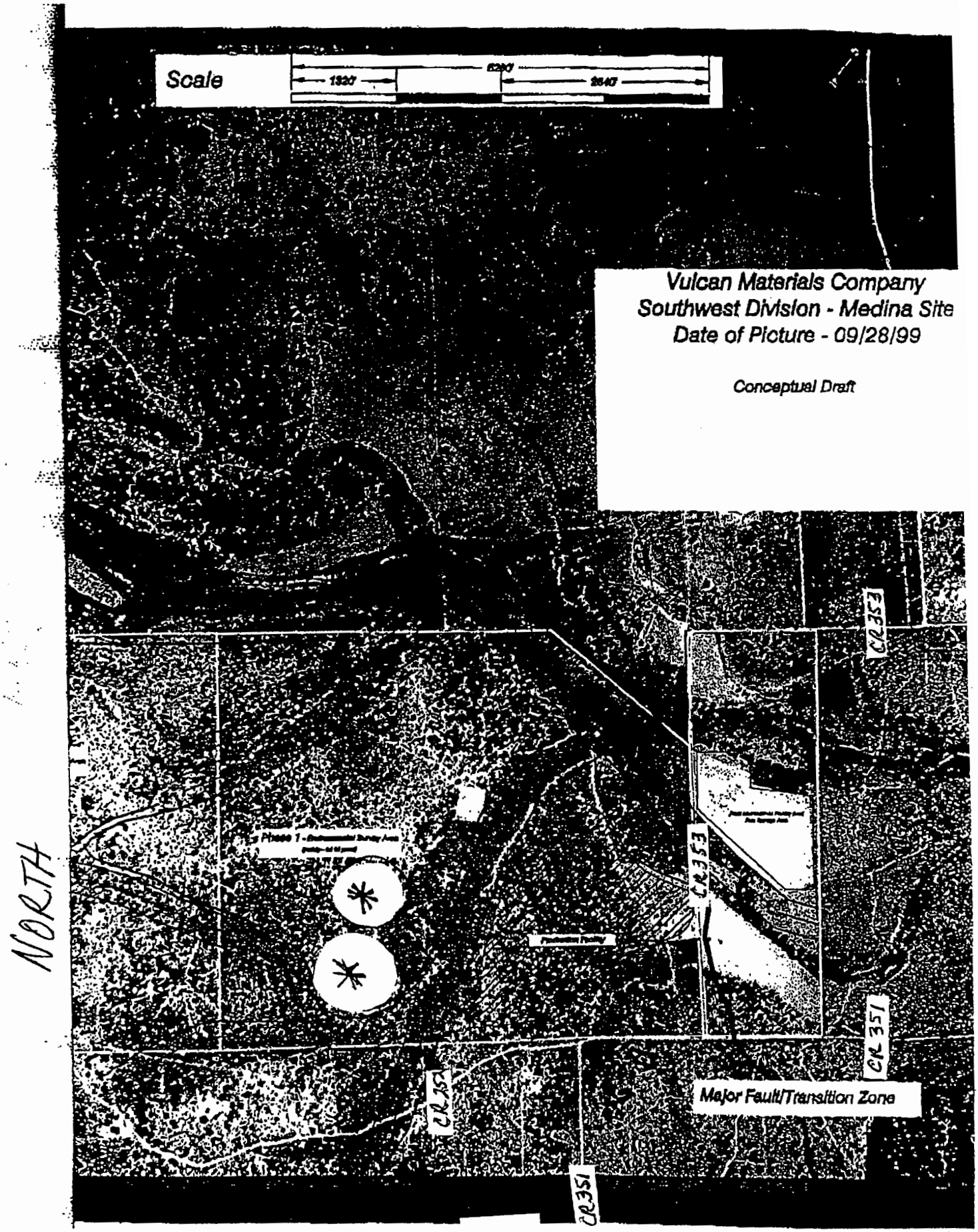
I hope the fax message is clear enough to show the two sites mentioned above. Their approximate locations are indicated by asterisks. If not, please contact me and we will try to get them to go in another way.

Sincerely,

Robert T Fitzgerald

Dr. Robert T. Fitzgerald

THIS IS PAGE 1 OF 3 PAGES


Scale
1320'
2640'
Vulcan Materials Company
Southwest Division - Medina Site
Date of Picture - 09/28/99
Conceptual Draft
NORTH
CR353
CR353
CR351
CR351
CR351
Major Fault/Transition Zone

Account of siting as seen by David

He was hunting on the Wurzbach place on a four-wheeler. As he & the others hunting with him came upon the site, they stopped and noted to each other there was some sort of Indian mounds. They noticed many large oak trees. Between the oak trees were little mounds or burms. They were very distinct mounds and covered a large area.

#E1-366
RJ

THE GARDNER LAW FIRM

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November 25, 2003

Rini Ghosh
Surface Transportation Board – SEA
1925 K Street NW
Washington, D.C. 24023-0001

FD 34284

SUBJECT: Docket #34284 -- Southwest Gulf Railroad Company

Dear Mr. Ghosh:

I represent the Medina County Environmental Action Association ("MCEAA"). During that representation I have had the opportunity to discuss issues surrounding the application of Vulcan Materials Corporation for common carrier status of its proposed Southwest Gulf Railroad Company (Vulcan).

My client informed me of the apparently abortive attempt at a public meeting by the Surface Transportation Board regarding Vulcan's application. I am informed the outcome of that meeting was that the STB directed that all inquiries be submitted in writing following the meeting. It would appear the meeting was one in which STB sought initial contact with the local community in an attempt to reach out in its effort to objectively weigh the application of Vulcan. Unfortunately, the STB chose to raise the distrust of the community's members who are genuinely concerned about the destruction of a sensitive historical and habitat area by changing the expected format of the meeting and essentially closing off any discourse between all the interested parties. Further, the preliminary report issued by STB has disclosed an obvious lack of concern for a full airing of the circumstances surrounding issuance of common carrier status to Vulcan. That issue will be dealt with under separate cover from the MCEAA. I have attached an objective observation of the sensitivity of the area surrounding the rail location, which will be made a part of the record of your evaluation of Vulcan's application at some point.

I request all documents that have been generated pursuant to that public meeting. That request is to include, but not be exclusive to: 1) all documents leading up to the hearing, to

include scheduling and agenda; 2) all questions and answers, with supporting documentation regarding submissions pursuant to the hearing, whether in the form of questions or comments; and, 3) all summaries prepared by STB subsequent to the meeting regarding the conduct and results and expectations of the meeting.

I want to stress how troubled my clients were when they were cut off from verbal discourse during your June "town meeting." I would appreciate your written assurance that there will be open questions and answers conducted at the hearing following the environmental impact study. If the meeting has been scheduled my clients and I want to know the meeting time and location well enough in advance to be prepared for an intellectual discussion regarding the study. This will be of greater value to you and the affected parties.

If there is no mechanism whereby this information can be released, except pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), then consider this a FOIA request.

Very truly yours,

THE GARDNER LAW FIRM
A Professional Corporation

David F. Barton

DFB:ncf
Enc.
dfb/8675.001/l-stb112503

November 6, 2003

Victoria Rutson, Chief
Office of Economics, Environmental Analysis and Administration
Surface Transportation Board
1925 K Street NW, Room 500
Washington, DC 20423

Subject: STB Finance Docket 34284, Southwest Gulf Railroad Company...

Dear Ms. Rutson:

As a consulting party in the process involving STB Finance Docket 34284, "A Preliminary Cultural Resources Assessment...." (a report which I personally never received), I am writing to provide your office with my comments and observations on the contents of this report, as it reflects potential cultural resource impacts to the Quihi area and its environs in Medina County, Texas.

My comments are based on almost 40 years of direct involvement in the archaeology of central, south central and southern Texas, and the publication of over 300 papers, monographs and books on the prehistory of this region. I have directed or supervised well over 100 projects in this region since 1967 [see attached summary vita]. Furthermore, before I ever heard of the construction plans outlined in STB Finance Docket 34284, I was already conducting personal, unfunded archaeological research in the project area near Quihi, Texas.

I give this background as a prelude to saying that this "preliminary cultural resources assessment" is perhaps the *worst* such document I have ever seen in my decades of work as a professional archaeologist. Indeed, in my 30 years as a professor with The University of Texas, I would have given an "F" grade to it had it been turned in as a paper by a first-semester freshman in an introductory archaeology course! All of this means that a vast amount of historical, archaeological, and geoarchaeological studies must be done in the project zone prior to any permitting of such activity. These views are shared by the Texas Historical Commission and in consultations I have already had with the Advisory Council on Historic Preservation.

However, my main purpose in writing this letter is to provide specific comments on the cultural resources, known and expected, in the project zone. Some of these could have

been predicted had any *minimal,* scholarly endeavor been attempted in the preparation of STB 34284.

1. The issue of prehistoric archaeology

This matter receives the poorest coverage in the subject document. Indeed, there are statements made in the document, e.g., page 10, paragraph 2, which are wholly in error, and unfortunately, laughable. The following pages on **Prehistory** (11, 12) show no indication of important archaeological studies that have gone on within a 20-mile radius of Quihi, some of which are in the same environmental contexts. My comments will be two-fold: (a) background the archaeology of the area and (b) my personal knowledge of the area's archaeology.

(a) Background to the archaeology of the area. The most basic scholarly research on the archaeology of this area would have revealed:

1. **41ME34:** A site that I excavated in 1987, lying about 12 mi to the W/SW in the exact type of stream drainage found in the Quihi area. This site had one area, adjacent to a small creek, that was deeply buried and stratified culturally, going back to 5500 years ago. Nearby was an isolated component of the Late Prehistoric Toyah Phase, identical to what will likely be found in the various small creeks that drain into, as well as along, Quihi Creek (MA thesis by Russell Brownlow, University of Houston, Department of Anthropology, 1998). Sites like ME34 should be anticipated in all the drainage systems involving Quihi Creek. This is an issue to which I will return later in this letter.

2. **41ME29.** This is a major archaeological site west of Highway 16 on the Bexar-Medina county border – roughly 20 miles E/NE of your project area. This site, known as "Jonas Terrace" is in the edge of the Balcones escarpment and would be relevant only to the quarry area/northernmost part of the proposed railroad. What is important about this report, by LeRoy Johnson (1995; Office of the State Archeol., #40, Austin) is its comprehensive treatment of the region, its wealth of data on ancient material culture, and its overall importance in planning strategies for future archaeological survey and analysis in the Quihi area.

3. **41UV2.** Located about 30 miles due west of the project area, and at about the distance north of Hwy 90 as Quihi, is one of the most significant archaeological sites in Texas. It contains cultural materials spanning the time frame from Clovis (11,200 years ago) up to the Late Prehistoric. Most important are the Clovis and Folsom (10,800 years) ago finds at Kincaid Rockshelter, excavated in the late 1940s and early 1950s (numerous publications by M. B. Collins, UT-Austin). While there are likely no limestone outcrops in the Quihi area, of the type in which 41UV2 is located, the site in within the same general environmental

context, and this clearly indicates that Clovis and Folsom materials can be expected in the Quihi area. Indeed, they already have been, as I will point out below..

4. **Scorpion Cave (41ME8).** This is a small rockshelter on the Medina River roughly 8-10 miles E of the project area. While the kinds of geologic outcrops in which Scorpion Cave occurs are unlikely in the project area, the site contains archaeological materials which will be important to the analysis and understanding of Quihi area cultural resources. A definitive publication by Highley, et al. is found in the 1978 *Bulletin of the Texas Archeological Society.*

5. **41ME30.** This is a "sinkhole" burial cave found 20 miles due west of the proposed quarry related to the railroad. Indeed, it is within the same geological/ topographic/environmental context as the quarry area. Several Native American burials were found, dating roughly to the Late Archaic, in the late centuries B.C. Sinkhole burial caves are common in Medina, Uvalde, and other southcentral Texas locales, both on the Plateau and just south of the escarpment. During my personal research in the Quihi area, an individual told me of a large sinkhole either at or very near the proposed Vulcan Materials quarry. I hasten to add that I have no first-hand knowledge of this. However, if it or other sinkholes are in that area, and in the northern reaches of the railroad they must be fully investigated. (see Bement book published by UT Press).

6. **41ME53 and the Quinta Medina Project.** In the early 1990s, the Institute of Texan Cultures and the Southern Texas Archaeological Association carried out two field schools at the Quinta Medina site and environs, just a couple of miles southeast of Quihi on the Quihi-Castroville Road. Excavations at site 41ME53 provided evidence of occupation for more than 5000-6000 years. Archaeological surveys in the area revealed other sites. This area is in an environmental context identical to the Quihi/railroad project area and has to be considered in terms of further research and analysis. Publications are to be found in *La Tierra* Vol. 19, #2, 1992, pp. 14-28, and Vol. 20, #1, 1993, pp. 12-26, both papers authored by Thomas Guderjan et al.

An overview of the archaeology of the zone within which this STB subject report is based can be found in Hester, T. R., "Early Human Populations Along the Balcones Escarpment," in *The Balcones Escarpment*, P. Abbott and C. M. Woodruff, Jr., eds., Geological Society of America, 1986, pp. 55-62. Some of the sites noted above are mentioned in that synthesis, although the paper is now dated and some of the other sites have been studied or published since it was prepared.

(b) Personal scientific research in the prehistory of the area

Over the past year or so, I have been a personal study of archaeological collections and sites on the Mangold Ranch near Quihi. My interest in these lies in the fact – which further subject project studies must area—that this area is largely unknown in terms of Texas prehistory.

One of the sites, **41ME132** [official State of Texas site number], the Gap Site, is directly beneath or at least closely adjacent to Alternative 3 of the proposed railroad route southeast of Quihi. This site has just been barely studied. However, a test pit dug by the late Buddy Mangold, found a zone of Frio points just below the surface. Further exploration could (1) expand our knowledge of the Late (Transistional) Archaic by better defining this Frio-age campsite or (2) could find earlier, stratified deposit below Frio. This site is on a terrace of Quihi creek, and while no geoarchaeological studies have yet been done at the site, it appears that Quihi creek has shifted its channel repeatedly in this zone (cf. 4lME34). This site alone points out the errors of the statements re: site occurrence found in the subject report.

However, it is site **41ME133** (the Buddy Mangold site) that points out the incredible deficiencies in the treatment of prehistory in the subject report. This site was partially excavated by the late Buddy Mangold in the 1990s. Much of the site remains intact. The artifacts from the site are incredibly extensive, as I am sure will be the case at many sites yet to be found in the Quihi area.

Although my analysis of the collection is far from complete, I have already identified a Folsom end-scraper (10,800 years ago), and even more importantly, a substantial number of Wilson points. The stemmed Wilson type is a poorly known, but well-dated, Paleoindian time marker in the 10,500 year old time frame. The key site for this type is Wilson-Leonard near Austin, published by Michael B. Collins in a 5-volume report in 1998. Collins tells me that aside from the Wilson-Leonard site, the Buddy Mangold site contains more of these points than any other site in Texas. There are also Plainview, Golondrina, and Angostura points at the site (10,200-8,800 years ago).

Moreover, the Archaic and Late Prehistoric artifacts are in great abundance, representing the broad time frame from 8,000 years ago up to about the time of Spanish contact. Indeed, there are some points that appear to be of the Guerrero type, associated with Indians of the Spanish Mission period in the 18th century. There is also a piece of obsidian—volcanic glass that does not occur in Texas. I have led the study of Texas obsidians since 1970, working with nuclear chemists at the Lawrence Berkeley National Laboratory in Berkeley, CA. Obsidian is very rare in this part of the state, yet our precise geochemical sourcing places some of it as coming from geologic outcrops as far away as southern Idaho (the Malad source) and from sources in northern New Mexico (several sources in the Jemez mountains). We have not yet had this obsidian fragment sourced, but it is reflective of the widespread trade networks that ran along the margin of the Edwards Plateau, and is part of a pattern that extends westward into Uvalde County.

As best as I can tell with limited data, 41ME133 lies outside (perhaps 1.5 mi E) of any of the proposed railroad routes. However, its importance goes farther than immediate impact. It is reflective of the long time depth of Native American prehistory to be expected along Quihi creek and any of its (now) small drainages. It is reflective of intensive prehistoric populations, of trade contacts, and of continuity into the Spanish Colonial period. These sorts of patterns should be expected at other Quihi/project area sites, as
ancient "hunters and gatherers" were highly mobile and didn't just occupy single sites like 41ME133!

2. Implications for Surveys and Excavations Related to the Subject Project

While archaeologists know very little about the archaeology of the project area (that in itself is cause for intensive investigation), what we do know provides hard evidence that it lies in an area of extreme archaeological significance. It is surrounded by important sites, many of which I have listed and some of which are in similar if not identical environmental contexts. We know from 41ME132 and 41ME133, in the midst of the project area, that extensive prehistoric remains are predictable, and will likely extend back almost 11,000 years at some sites. However, the whole chronological range of human
prehistory in the area is likely to be found in various forms at any number of sites (e.g., 41ME34, and even closer, 41ME53). Because of the nature of the formation processes in the local geology, any archaeological survey that is worth its salt will have to employ an experienced geoarchaeologist or geomorphologist to identify likely site areas, changes that are more recent in time, etc., and there will be a pressing need for an extensive program of backhoe trenching to reconstruct the Holocene geology and to develop a model of site location. It can be predicted that any number of sites will lie in the path of the subject railroad or its alternatives. In order for NEPA, Sec. 106, or any number of other permitting processes to go forward, hundreds of thousands of dollars will have to be spent on archaeological survey and geomorphology. The mitigation of only two or three sites would likely cost into the millions of dollars based on modern archaeological standards at the Federal and State level.

3. **Implications for Historic Archaeology**

While STB Finance Docket 34248 report on cultural resources does a more useful job of treating the numerous historic sites in the project area, it falls far short of what is to be expected, the significance of these sites, and the great amount of work (and money) that will go into their investigation. The stone (and other structures) of 1850s Quihi represent one of the most remarkable, surviving constellations of early architecture in southcentral Texas. In my own experience, it is unique. To date, the Quihi and New Fountain Historical Society has already filed with the Texas Historical Commission more than 30 **Endangered Historic Property Identification Forms** as part of the THC's new HELP program. These forms contain details on the structures, their ages, and are accompanied by photographs. However, there are at least 60 known structures of this vintage. Many of

these are in the path or will be impacted by any of the 3 alternative subject railroad routes. This means that formal site assessments will have to be done – the use of professional preservation architects, measured drawings, high quality photographic documentation, oral histories, and archaeological investigations all being part of such studies

This is a highly time consuming and very expensive endeavor, but these sites are part of the history of the development of Texas and cannot be given short shrift. Neither can they, or their archaeological deposits, be "preserved" by having them "moved" to a "protected" location! There are stories, not yet confirmed by me, of a special cemetery set aside for Native American remnant populations in the area. This will require extensive
Native American consultation, probably with the Mescalero Apache (who represent the Lipan Apache on a Federal level), the Kickapoo, and the Lipan Apache Tribe of Texas, a very active (or activist) group in San Antonio.

It is also apparent that the preliminary cultural resource assessment did not identify a property registered in the Texas Family Land Heritage Program, slated to have the main route or an alternate rail route go right through the middle of it. This program has been around since the 1970s, and is a favorite of the State government, particularly the Secretary of Agriculture. This will be a highly sensitive issue, to say the very least, and should the routes continue to be slated for the property, a great deal of very expensive historical archaeology will have to be carried out.

4. **Closing Observations**

It is likely that no worse area in southcentral Texas could have been chosen for a quarry and railroad facilities that the Quihi region. This is one of the richest areas for the historical development of Texas, and is incredibly important in terms of the preservation in place of many of the buildings and related aspects of this historical record. In addition, this is an area where no substantial archaeological work had ever been done before, but which even the most minimal research has demonstrated the high probability for the discovery of numerous, and important, archaeological sites. These will have to be fully assessed and perhaps in some cases, fully excavated (mitigated). This issue has already been brought to the attention of the Texas Historical Commission and the Advisory Council on Historic Preservation. The subject applicant should have funded historical and archaeological research well prior to land purchases and planning if the applicant hoped to avoid the destruction of important pieces of Texas history and prehistory – which can now be done only at a very high cost in time and money. This is an issue that we as professional archaeologists, the Texas Historical Commission, and other agencies have been trying to make clear to developers at all levels for decades.

Now, we are left facing a potential disaster in terms of the historical and archaeological record. It is therefore incumbent on the STB to require extensive and well planned historical and archaeological studies in the area prior to permitting any rail construction.

If the STB does not follow its mandate, there are other Federal and State regulatory agencies waiting in the wings to make sure that this process is done properly.

Thank you for the opportunity to provide these data and these comments.

Sincerely yours,

Thomas R. Hester, Ph.D.
Professor of Anthropology, Emeritus
The University of Texas at Austin

mailing address:
PO Box 625
Utopia, TX 78884

email: secocreek@ricc.net
phone: 830-966-3626

Enclosure: summary vita

#EO-51
RD

SURFACE TRANSPORTATION BOARD

Washington, DC 20423

Office of Economics, Environmental Analysis, and Administration

December 23, 2003

The Honorable Henry Bonilla
U.S. House of Representatives
1120 Wurzbach, Suite 300
San Antonio, TX 78230

Re: STB Finance Docket No. 34284 – Southwest Gulf Railroad Company – Construction and Operation Exemption – Medina County, TX

Dear Congressman Bonilla:

Thank you for your December 5, 2003 letter to Surface Transportation Board Secretary Vernon Williams regarding Southwest Gulf Railroad Company's (SGR) proposed rail line construction and operation in Medina County, Texas. In your letter you list a number of questions and concerns regarding potential environmental impacts that have been submitted to you by the Medina County Environmental Action Association (MCEAA).

The Board's Section of Environmental Analysis (SEA) is the office within the Board responsible for conducting the environmental review process pursuant to the National Environmental Policy Act (NEPA) and related environmental regulations, including the National Historic Preservation Act (NHPA). SEA is currently conducting an environmental review of SGR's proposed rail construction and operation, and will issue the results of the environmental studies and analyses in a draft environmental document for public review and comment.

The draft environmental document will contain information responsive to MCEAA's concerns, including discussion of potential impacts to cultural resources, floodplains, aquifers, sources of groundwater, grade crossings, air quality, land use and socioeconomics. We understand that your constituents are eager to learn the results of our studies and to receive detailed information about potential environmental impacts. This information will be provided in the draft environmental document for public review and comment. Such a document is required by NEPA and the Board's environmental regulations, and is the format that encourages and facilitates widespread public participation.

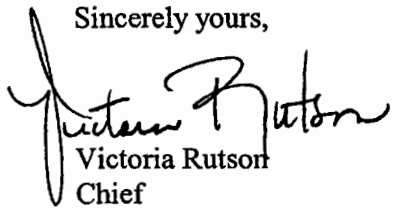
In your letter you also specify MCEAA's concerns regarding the Preliminary Cultural Resources Assessment report. After consulting with the Texas Historical Commission and identifying appropriate consulting parties to the section 106 process of NHPA, SEA issued this

report to the identified section 106 consulting parties. Some of these parties had indicated that they had information about cultural or historic properties in the area of the proposed project, and we believed that preparing and providing the consulting parties with the report would ensure their participation and input from the outset of the section 106 process, as well as provide us with the opportunity to gather additional information from knowledgeable sources. Pursuant to the letter sent to Mr. Gabriel Lozano of your office on November 14, 2003, we have included your office as an official section 106 consulting party for this proceeding. The draft environmental document will contain discussion of the comments received on this report.

As mentioned above, SEA will issue the draft environmental document for public review and comment. After SEA reviews all comments received on the draft environmental document, SEA will conduct additional studies and analyses, if necessary, and then issue final environmental recommendations to the Board. The Board cannot issue a final decision regarding SGR's proposed rail construction and operation until completion of the environmental review process.

We appreciate your interest and participation in the environmental review process for this proceeding. If we can be of further assistance, please do not hesitate to contact me or Rini Ghosh of my staff at (202) 565-1539.

Sincerely yours,



Victoria Rutson
Chief
Section of Environmental Analysis

Frank Madla

Texas State Senate
District 19

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#E1-469
RQS

January 8, 2004

Mr. John W. Johnson, Commission
Mr. Robert Nichols, Member
Mr. Ric Williamson, Member
Texas Transportation Commission
Dewitt C. Greer State Highway Building
125 East 11th Street
Austin, Texas 78701-2483

FD 34284

Dear Commissioner and Members:

It is my understanding that at your public meeting on December 18, 2003 you moved to take no action on agenda item 10f(1) regarding the construction of an at-grade railroad crossing on FM 2676 in Medina County. As expressed to you at the meeting, there is local concern regarding the proposed crossing, and while those concerned appreciate you not taking any action at this time, they remain concerned about the effects such a crossing could have on the safety of the local residents and those traveling on FM 2676.

I have included for your reference two letters from Medina County Judge Jim Barden recommending grade separation crossings, in addition to a letter from James Randall, Director, Texas Department of Transportation, Planning and Programming, also recommending a grade separation crossing to eliminate all highway-rail grade crossing conflicts. I believe these letters will assist you as you further consider the above mentioned proposal.

I respectfully request that before any decisions are made, you take all necessary steps, including on-site studies, to ensure that constructing such a crossing would be in the best interest of the citizens of Medina County and the traveling public. I also request that those who appeared before you on December 18th, as well as Judge Barden and myself, be made aware of any advancements regarding this proposal.

I appreciate your consideration of my request. Should you have any questions please do not hesitate to contact myself or Jason Anderson on my staff.

Yours truly,

Frank Madla

Frank Madla

FM/ja

cc: The Honorable Jim Barden, Medina County Judge
Mr. Michael W. Behrens, P.E., Executive Director, Texas Department of Transportation
Ms. Victoria Rutson, Chief Secretary of Environmental Analysis, Surface Transportation Board
Dr. Robert T. Fitzgerald, President, The Medina County Environmental Action Association

Jim Barden

1100 16th Street
Room 101
Hondo, Texas 78861

(830) 741-6021 Fax (830)741-6025



April 24, 2003

COPY

Ms. Jaya Zyman-Ponebshek
URS Corporation
P.O. Box 201088
Austin, Texas 78720-1088

Re: TB Finance Docket No. 34284, Southwest Gulf Railroad Company-Construction and Operation Exemption-Medina County, TX

Thank you for the opportunity to comment on the above matter. As you can imagine it is a subject of some concern and controversy among the citizens who live in or near the affected area.

Before outlining the county's concerns regarding the project, I want to correct a few misimpressions in the Synopsis attached to the STB letter of March 31, 2003. First, Medina County has a population of 40,000 persons rather than 33,000 as stated in the Synopsis. This number is increasing dramatically as developers are opening subdivisions in the eastern half of the county to accommodate San Antonio's growth. By the time any such rail line be put in operation, I expect the population will have grown by another 10% or more with most of it in the eastern part of the county where the quarry and railroad are proposed.

Second, while the roads to be crossed are lightly traveled when compared to urban interstates, they do carry a significant amount of traffic and are major east/west routes for our county citizens.

Third, the synopsis states that the proposed line traverses only two drainage features with intermittent seasonal flow (Quihi and Elm Creek). Substitute the word "flood" for "flow" and a more accurate picture emerges. Placing a rail line across these areas without significant length of open bridges or trestles will exacerbate our almost annual flooding problems.

Having said the above, the county governments concerns regarding the proposed rail line center on two areas. If the rail line is built we want to see the safest possible road crossings and the least intrusive creek, draw and slough crossings. Several years ago when this project was first announced the proposed quarry owners represented to the Precinct

Commissioner that there would be elevated road or RR crossings on FM 2676 and CR 4516. Now we understand they are only proposing grade crossings. With at least 4 trains per day at 100 cars for at least 250 days each year this presents a major safety concern and traffic flow impediment. I urge serious consideration of having elevated roadway crossings at these two major arteries in Medina County.

The other concern (water flow and flooding) is equally great. The history of this area is not one of gently flowing streams that rise with a big rain. Rather it is a history of flash flooding that can inundate large areas of land in a matter of minutes and hours. Any structure placed across these flood areas is a problem. I hope that sufficient construction requirements will be imposed to alleviate this problem as much as possible.

Regarding which of the four proposed routes is preferable, there appears to be little difference as far as our concerns of traffic safety and movement and flooding are concerned... or at least none of that can be discerned without expensive further study.

The individual citizens in the area have substantial and additional concerns which should be heard. The issues outlined above (traffic safety and flooding) are the principal concerns of the county government.

Again, thank you for the chance to have our views heard. I will be glad to visit further with you if you wish.

Sincerely,

James E. Braden

JEB/jaa

Medina County Judge
Jim Barden

1100 16th Street
Room 101
Hondo, Texas 78861

(830) 741-6021 Fax (830)741-6025



December 17, 2003

Texas Department of Transportation
Austin, Texas

Sirs:

This relates to the proposed grade level crossing of FM 2676 in Medina County by Southwest Gulf Railroad.

FM 2676 has too often been described as an out-of-the-way country road with little in the way of traffic. In fact FM 2676 is one of the best FM roads in the State. It is a major artery in what is becoming one of the fast growing areas of our State. While FM 2676 has not reached a level of congestion that requires a grade separation to ease the threat of traffic jams, its need for a grade separation is primarily a safety concern.

Traffic in the area of the proposed crossing is moving at a relatively high speed because there is no reason to stop or slow down for a few miles in either direction. To suddenly come upon a grade crossing in an east/west stretch of fast moving highway is highly dangerous situation regardless of the warnings and cross-arms.

The owners of the proposed railroad acknowledged the need for a grade-separations crossing at this location in early discussions with the local TXDOT Engineer and some community leaders and Elected Officials. If they are now proposing otherwise, it is essential to understand what has changed. It certainly is not the amount of traffic which has continued to increase or the projected use of the railroad crossing which has not changed.

I urge your serious consideration and on-site study of the location by your engineers familiar with the area. I believe a grade-separation crossing at this location is a must for the best interests of the citizens of Medina County and the traveling public.

Thank your for the opportunity to express my views.

Sincerely,

Jim Barden

JEB/jaa

#E1-592
R91

AEI
A WBE-HUB Firm

ADAMS ENVIRONMENTAL, INC.
12403 Nacogdoches Road, Suite 106
San Antonio, Texas 78217

www.adamsenvironmental.com

January 12, 2004

Ms. Victoria Rutson, Chief
Section of Environmental Analysis
Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20402-001

RE: Finance Docket #34284—Southwest Gulf Railroad Company—Petition for Exemption from 49 U.S.C. Section 10901 to Construct and Operate a Rail Line in Medina County, Texas

Dear Ms. Rutson:

As you know, I am an environmental consultant currently representing the Medina County Environmental Action Association, Inc. (MCEAA) in their efforts to ensure that the applicant, the Southwest Gulf Railroad (SGR), complies with the National Environmental Policy Act (NEPA) and all other environmental permits required for construction and operation of the railroad. In addition, I have been asked to assist MCEAA in their efforts to assure that the property rights of landowners are duly respected by SGR.

MCEAA selected me to assist in their cause because I have over 20 years of environmental and edcological experience, and I have worked with numerous federal and state agencies to acquire necessary environmental permits for my clients. In addition to working experience, I have taught undergraduate and graduate-level classes at the University of Texas at San Antonio on environmental impact analysis and other similar courses. I emphasize my credentials only to point out that, in all of my years of working with environmental issues, I have never witnessed a case such as this where a federal agency is so openly biased toward the applicant and is subsequently demonstrating little or no regard for public opinion. I understand that the STB was created to encourage construction of railroads, but as a federal agency, STB is also mandated to follow and comply with NEPA guidelines.

MCEAA recently provided to me a set of correspondence between the Surface Transportation Board (STB) and SGR over a period ranging from August 2003 to December 2003. A majority of this correspondence contained arguments by SGR designed to convince STB that an environmental impact statement (EIS) would not be necessary for this proposed action.

In my professional history, I have traditionally served as an advocate for the permit applicant. In every case, without exception, the lead agency required the applicant to prove beyond any doubt

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that no significant impacts would be impinged on the environment. Facts and data, not opinions, were required from the applicant to prove this point. Further, in my experience the applicant is required to provide substantive information when addressing concerns from the public. Each comment should be addressed individually or in groups, with well-prepared arguments and facts to back up those arguments. Most important, regardless of how "uneducated" the commenters may seem, they were provided with a response that addresses each issue of concern with facts and logical arguments. NEPA requires that all comments be addressed in a response document. In fact, many of the issues or comments posed to SGR by various commenters were completely disregarded and were not addressed in the response document.

In this regard, I would like to point out a few comments that I have in regard to the correspondence that I have reviewed so far.

On August 4, 2003 David Coburn provided responses to public comments offered to STB at the public meeting. In response to comments concerning flooding, SGR presented no facts to justify any of the opinions they expressed. MCEAA is justifiably concerned about flooding, as many of the homes in the area are close to the 100-year floodplain, and any changes in floodplain characteristics could result in flooding of those homes. MCEAA strongly requests that SGR be asked to provide detailed and factual engineering information concerning expected impacts to floodplains caused by the construction of the railroad. MCEAA also requests that detailed floodplain analyses be conducted for all alternatives so that the alternative with the least impact to flooding could be selected, or so that construction of the preferred alternative could be modified to cause no impact to the 100-year floodplain.

SGR states in its correspondence to STB (July 18, 2003) that the project will cause minimal impacts to wildlife and agriculture. This assumption is based on a biological assessment conducted by its own consultant and staff and "coordinated" with the U.S. Fish and Wildlife Service (USFWS). In their correspondence, SGR implies that the USFWS is not concerned about potential negative impacts to threatened or endangered species by stating that the work was coordinated with the USFWS. In reality, the USFWS has yet to officially comment on the biological assessment, or on any of the surveys conducted to date. The only official USFWS correspondence with SGR was sent to URS on April 22, 2003. In this letter, the USFWS states that while there is no designated critical habitat for any species in Medina County, the agency is concerned about the area noted by STB as the "straight loading track option" because it appears that vegetation in this area supports habitat for the golden-cheeked warbler or black-capped vireo.

Correspondence from SGR also fails to mention the Texas Parks and Wildlife Department's (TPWD's) concern about impacts to various vegetation communities and sensitive species, specifically to habitat types and wetlands. Several recommendations were made by TPWD that were disregarded. It is also disturbing that SGR did not request a site-specific search of the TPWD database, a practice that is universally accepted as standard operating procedure for any biological assessment.

Regarding the issue of cultural resources, SGR addresses only historic structures, ignoring the fact that archeological features constitute a major issue in the area. The necessity of investigating archeological features is not even mentioned. Throughout the correspondence I reviewed, SGR seems to "downplay" the opinions of the public and the Texas Historic Commission (THC). No references are made in SGR correspondence to documents provided by the THC concerning opinions on cultural resource impacts; however, in a letter dated October 29, 2003 to Ms. Victoria Rutson, the THC clearly states that more surveys are needed to identify cultural resources in the area of potential effect. In addition, the THC stated that it was very concerned about the lack of thoroughness and good scholarship in the preliminary document. This is the only document that has been provided thus far as a study for this project. Other archeologists have reviewed the document and have had the same concern as to its inadequacy, and I have to question the wisdom of producing such an document without performing thorough onsite surveys. Finally, the THC pointed out a number of errors and inconsistencies in the document, including simple facts such as the date Mexico was granted independence from Spain. The report also misstated the Native American tribes present in Texas and failed to mention notable tribes that may have an interest in the project. These tribes are being contacted by MCEAA.

At the very least, we expect SGR to provide logical, fact-based answers to comments directed to them from the public. If federal agencies such as the USFWS have provided comments, they should be included, or at least referenced, in the arguments.

According to NEPA, the lead agency may require an EIS prior to the preparation of an EA. This important decision about whether or not to require an EIS should not be based on information provided by a highly-biased applicant; however, it appears that STB has made a decision based solely on opinions offered by the applicant, completely disregarding comments and concerns from the general public and even state agencies. The decision to waive an EIS would be understandable if the applicant's responses to public comments were well-researched and factually based; however, this is not the case in this situation.

As you know, the NEPA process requires that an environmental assessment be conducted to determine whether or not an EIS is needed. The environmental assessment will result in only one of two decisions: (1) a finding of no significant impact, or (2) a record of decision that will result in either requiring an EIS to be prepared, or determining that the project cannot be conducted without significant impacts to the environment. I write this letter in the sincere hope that the STB will comply with NEPA procedure and ensure that environmental assessment conclusions are based on a thorough analysis of factual information, presented in a professional and scholarly manner. STB should address all issues of concern by the public or at least provide well-founded arguments as to why these issues are not addressed. I also would request that STB address all public comments in a respectful and professional manner. This project will impact individuals, the properties of individuals, and the environment. Overall, these impacts may or may not be significant. However, on an individual basis, impacts will be significant, and the feelings of those people being impacted should be acknowledged and respected.

Thank you again for the opportunity to provide you with these comments. I may seem somewhat passionate in my response in this letter, but I have been asked to represent this group from a technical point of view to ensure that SGR complies with NEPA and to ensure that STB addresses all aspects of the environment in the EA. At this point I do not have a high level of confidence that this is happening. I am not trying to stop the project, however, I am mandated to ensure that if the project is approved by STB, the approval was based on sound, scientific data and not opinions and all impacts to the environment were addressed and properly mitigated.

Thank you for your time and consideration. I very much look forward to reviewing the draft EA when it is available.

Very truly yours,

Lynn Kitchen

Lynn M. Kitchen, Ph.D.
Principal Scientist

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FD 34284

January 15, 2004

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CM-RRR #7001 2510 0002 4211 6471
& REGULAR U.S. MAIL

Re: Finance Docket No. 34284-Southwest Gulf Railroad Company
Petition for Exemption from U.S.C. 10901 to Construct and
Operate a Rail Line in Medina County, Texas

Dear Ms. Rutson:

I represent Medina County Environmental Action Association, Inc. (MCEAA). This letter responds to issues in the September 23, 2003, November 10, 2003 and January 5, 2004 letters from David Coburn, as counsel for Vulcan Materials and Southwest Gulf Railway (SGR) to STB/SEA. This letter incorporates herein by reference Dr. Kitchen's letters to STB/SEA. It is stressed that that MCEAA represents over 300 landowners and residents of Medina County, Texas who are concerned about their quality of living and property values.

This letter will respond to numerous issues addressed in the referenced letters which incorrectly state facts and consequences associated with the proposed rail project and, consequently, the quarry project. If correctly portrayed, the facts surrounding those issues would require the Surface Transportation Board to direct an Environmental Impact Statement (EIS) for SGR's proposed rail project. After thorough study, the proposed rail line plan will be shown to have such severe adverse environmental impact, especially on historical and archeological features in the area, that it should be abandoned.

Before going into the points of concern, I want to address the tenor of the latest letter from the Vulcan/SGR counsel. Counsel intimates that MCEAA and anyone else that is "opposed" to the proposed rail and quarry operation somehow are not entitled to the same consideration as Vulcan/SGR in this process. I find that a troubling position for someone who is

representing a company that has entered a quiet rural community of long time ranchers and city dwellers seeking refuge in quiet surroundings with the stated purpose, depending of course upon the time and audience, of foisting a heavy industrial complex and rail line upon that community. At any given time Vulcan/SGR, as you are well aware, has stated the rail is necessary for the quarry operation and also to provide rail service for what it expects to become, as a result of its quarry operations and rail line, a complex of businesses that will come to the area due to the existence of rail service and in need of the rail. At other times, such as in Mr. Coburn's November 10, 2003 and January 5, 2003 letters, there is an over-arching tenor which indicates the quarry will be the only rail user and that it will pose no nuisance or adversity to the community. This is all in the context of the attempt by Vulcan/SGR to get this project pushed through the STB oversight process by getting a waiver of the six month pre-filing notice by erroneously asserting that its rail project was of limited scope and in environmental impact. It is obvious an EIS which addresses both the quarry and rail operations is necessary to properly evaluate the intent of Vulcan/SGR.

At any given time, Vulcan/SGR has informed MCEAA that the quarry will eventually be a 1,700 acre, 80 year project that will quarry in excess of 200 million tons of crushed stone. At the same time Mr. Coburn hedges his commitment to rail use in terms of "four trains per day . . . for the reasonably foreseeable future." Coburn Jan. 5, 2004 letter, page 3. These assertions are at the root of the "opposition" to the proposed project. The local community cannot respond appropriately, because it is unable to determine what the project truly encompasses. MCEAA is convinced the only way to determine what "the reasonably foreseeable future" may be is to prepare an EIS to evaluate the full environmental impact of the rail line.

By further example, Vulcan/SGR continues to be elusive as to the actual proposed rail route and the alternatives. As is made clear by all agency input on the subject, no determination can be made as to impacts of the rail line until accurate routes are made public. It is rather surprising that Vulcan/SGR is this far along in the process without specifically identifying its proposed and alternate routes. It is not difficult in this day of GPS and other mapping technology to identify within inches where any particular landmark is or will be. Mr. Coburn intimates in his January 5, 2004, letter, in reference to the comments of Dr. Thomas Hester, that Dr. Hester made his comments "without benefit of detailed maps." Dr. Hester made his comments on the best available evidence, which, as far as MCEAA knows, does not include any detailed maps. This must be the case for Vulcan/SGR also, based on Mr. Coburn's January 5,

2004 letter in which he refers to their maps of "the approximate location of the preferred alignment."

Contrary to Mr. Coburn's assertion, the intent of the Preliminary Assessment is understood by MCEAA. MCEAA is only exercising its right to address issues raised by the Preliminary Assessment, which indicate it was more preliminary than it should have been and appears purposefully misleading. Its "starting point" fails to show an adequate investigation of even the most preliminary matters. This is an opinion shared by other professionals who have weighed in to date. It is obvious Vulcan/SGR is not "prepared to assist SEA" in moving forward in an open forum. It had its opportunity and failed. Even though their first effort was "preliminary" it was not as enlightening as it should have been, as is obvious by the comments.

The following are the points of concern:

1. Various aspects of Mr. Coburn's assertions relating to the alleged endangered species studies are either incorrect or misleading. We are unaware of and do not believe there has been an endangered species habitat study of the areas associated with the proposed and any of the alternatives for the 7.3 mile rail line from the proposed quarry to the Union Pacific connection at Dunlay, TX. The only study of which we are aware was for a limited area of the quarry site potentially impacted by the railroad for 2001, 2002 and 2003. Additionally, Mr. Coburn incorrectly states that the rail line maintenance facility, which will store diesel fuel and nitrates, will not be located over the Edwards Aquifer. Based upon all available information that facility will be over or immediately adjacent to the Edwards Aquifer Recharge Zone in an area in which the aquifer is extremely close to the surface. This is an extremely dangerous position for the sole source drinking supply for San Antonio and the surrounding area. Considering the possible adverse environmental impacts relating to either of the foregoing, the STB must exercise its responsibility to direct implementation of an Environment Impact Study (EIS) for this project.

2. The final biological assessment report prepared by Vulcan for U.S.F.&W. dated September 23, 2003, incorrectly stated that the proposed rail line is "not expected to traverse jurisdictional wetlands" and "steps would be taken to avoid any wetlands that may have to be crossed." The proposed and alternate routes 1 and 2

rail lines cross wetlands near the Quihi Creek and its flood plain. It will be interesting to learn what "steps would be taken to avoid any wetlands that may **have** to be crossed," when they allege no wetlands exist. The language they use, although it is misleading, provides them a cover for explaining the inadequacy of their current investigation when it is shown they are wrong. All of the foregoing is in the context that Vulcan/SGR informed the Corps of Engineers they did not need to be involved with the project following the Corp's inquiry of the project to Vulcan/SGR. (This fact is contradicted by Mr. Coburn in his January 5, 2004, in which he states Vulcan/SGR has consulted and will be consulting "further" with the Corps. Which is it? Does the Corps not need to be involved or will it be consulted "further?" Vulcan/SGR credibility suffers under this factual scenario.) The Corps does need to be involved in the project, considering the jurisdictional wetland issues.

3. Mr. Coburn states that MCEAA concerns about traffic and flooding problems are without merit, but offers no proof of this. Significant evidence has been presented to you and others in the form of letters from County Commissioners Court, Texas Department of Transportation, U. S. Representative Henry Bonilla, State Senator Frank Madla and private citizens stating that grade separation crossings of county and state roads are required to avoid traffic and flooding problems. The grade level crossings planned on FM 2676 and CR 4516 will result in traffic congestion and tragic, preventable, deaths. An EIS would bear out the facts presented in these letters. It is obvious to the MCEAA that SGR realizes this fact and is trying to avoid an EIS by its misleading allegations.

4. Mr. Coburn states Vulcan/SGR does not possess any information that would suggest that the rail line would have any adverse impact on archeological or historical resources. This statement is not true. See the enclosed letter of November 9, 2003, by Dr. Tom Hester and make reference to the opposition that has been brought to the attention of the STB. Dr. Hester states that a more extensive study of the entire rail area, and the alternate routes, is necessary. It is clear from this expert, who is a known expert on this area's history, that the "Cultural Assessment" is not an excellent starting point for the Section 106 process, as Mr. Coburn claims. It is apparent an EIS will be the best course of action to address the vast and detailed issues addressed by Dr. Hester and others.

Mr. Coburn's statement that the Schweers Historical Foundation, Inc. supports the project rings hollow and raises yet another question of his credibility. The primary benefactors and supporters of the Schweers Historical Foundation, Inc. are the owners and/or former owners of property who stand to benefit and have benefited from the Vulcan/SGR quarry and rail project and Vulcan/SGR who, based upon knowledge and belief, either owns or has an interest in a significant amount of, if not all, the property of the Schweers Historical Foundation, Inc. Vulcan/SGR's purchase of some of this property will possibly alleviate its need to exercise eminent domain, should it be granted common carrier status.

5. MCEAA is unable to understand how vibration impact is an indirect effect on the historic and cultural artifacts and structures. The vibration studies state that pile driving would have adverse effects, but that ***no*** pile driving will be done. It is our understanding that trestle-type bridges are being planned for crossing the Quihi Creek and it's flood plain where it joins with County Road (CR) 365. A vibration study should be done to determine the effect of pile driving required during construction of the proposed trestle bridges. There are four historic structures in close proximity to this crossing which could be adversely affected by pile driving. An EIS should include a study of this.

6. Mr. Coburn states that SGR is moving forward with an understanding with TxDOT with respect to its rail line crossing at FM 2676. In February, 2003, Vulcan/SGR was told by TxDOT officials that a grade separation of the rail line at the T intersection of FM 2676 and CR 353 was needed. Again on April 30, 2003, this requirement for grade separation was made clear by James Randell, Director, Transportation Planning and Programming of Tex DOT in his letter to STB/SEA.

   SGR tried unsuccessfully on December 18, 2003 to get TxDot to okay a grade level crossing at this critical intersection. A decision was postponed by TxDot after letters from Medina County Judge Jim Barden and MCEAA, Inc. requested grade separation at this intersection. This is an example of Vulcan/SGR reluctance to do the construction necessary for a safe crossing. This is disturbing to MCEAA acting on behalf of its members, after Vulcan/SGR had stated years

earlier to the Medina County Government that it would place grade separations on CR 4516 and FM 2676, according to Precinct 1 County Commissioner Royce Hartman. Ironically, Vulcan has stated repeatedly in public meetings that it wanted this project to be environmentally and community friendly and to be a model project which would not endanger people, property, or historic structures. Also, at various organization and public meetings in Castroville and Hondo, they have stated that the public would not be inconvenienced by delays at rail line crossings. Now they are trying to back away from their promises to do the right thing of building grade separation crossings on state and county roads.

7. SGR's November 10th letter failed to note that the Coahuiltecos Tribe that inhabited this region and is mentioned in the preliminary report, has not been contacted for their input. There are known Indian Burial Grounds in the path of rail line alternate #1. As noted by Dr. Hester, the possibility of other Indian cultural and/or burial sites exists on the proposed quarry site and in the vicinity of the railroad loop and straight line loading track. These have been reported to the STB and must be reviewed.

8. Contrary to SGR statements, sinkholes exist on the quarry site which have not been reported or investigated for or by USF&W or other agencies. These sinkholes may contain Indian tribal burial remains or other artifacts. A thorough EIS would address these issues.

9. SGR states that the proposed rail line is the best route of all those submitted. They also state routes other than the proposed and three alternate routes were considered and rejected. No reasons were given for these other routes being rejected. As an example, it is a fact that a previously constructed railroad route existed from the Dunlay area to Medina Dam (constructed in 1911). This abandoned rail route was in close proximity to the proposed quarry. This route did not disturb the historic area of Quihi/New Fountain. It would cross only three county roads and one state road.

   The proposed route crosses county roads six times and FM 2676 once. The Quihi/New Fountain area contains at least 61 historic residences, schools, churches and cemeteries that are registered in State or National Registries, or are

eligible for registry. Mr. Coburn states that there are only 16 such properties. The abandoned rail line route would provide the advantage that it would cross the Quihi Creek floodplain much farther to the north, thereby reducing t he flood problems posed by the proposed and alternate routes. History verifies that this route is feasible, practical and more suited to the needs of the community. Considering the current reluctance of Vulcan/SGR to fully study this issue, an EIS appears necessary.

10. There are possible routes other than those currently under consideration. Vulcan has stated there were a total of eight routes originally considered, but no reason was given for the four that were rejected. It is my understanding that, according to STB regulations, all routes considered require reasons for being rejected. Routes that would not endanger people, historic or archeological areas, and other property, should not be rejected just because they are longer, or more expensive.

11. MCEAA strongly disagrees with the statement in the cultural assessment that the railroad would not have any direct effect on the cultural resources in any of the routes proposed. Flooding problems created by the railroad with the types of crossings proposed for the Quihi flood plain will destroy or severely damage many historic structures and artifacts and wreak havoc with current residents. It is also obvious that noise, dust, vibration and aesthetic degradation will occur with 400 gondola railroad cars and 12 diesel engines encroaching on the area for the next 50 years. All of this will be for the purpose of providing natural resources from this area to benefit those in distant places.

Mr. Coburn states that there will be four trains for the foreseeable future. It is obvious that when a company as large as Vulcan proposes to establish a 1,700 acre quarry operation which will be maintained for a planned 50 years that they are in possession of a detailed business plan for this operation. That plan should be a part of this process to enable all affected to know what will happen after the "foreseeable" future.

Mr. Coburn states that it is not anticipated that dust - from 400 uncovered railroad cars each day - would cause problems. MCEAA finds that to be a foolhardy position. Air and aesthetic issues related to the railroad must be studied for their

impact. No air quality studies have been done to support the assertion that air quality as well as aesthetic value would be adversely affected. An EIS would evaluate this problem. Medina County is part of a San Antonio metropolitan area that is facing close scrutiny relating to federal air non-attainment designation. The air issues associated with this project are critical and could become more-so in the near future. The air issues associated with particulate matter and train exhaust need to be evaluated for the Medina County area and all areas to which the quarry products will be delivered; especially the Houston, Texas area which is already designated as a federal air non-attainment area.

Considering the actions of Vulcan/SGR thus far, MCEAA is not willing to accept their "goal" that cultural and historical sites of concern be "avoided if possible." Preservation is an absolute. That they will "avoid those resources to the extent practicable" and that "the line is unlikely to adversely impact historical or archeological sites" cannot be left to Vulcan/SGR's determination. It is clear it must be addressed through the EIS process. MCEAA is not enamored of the Vulcan/SGR attitude that archeological excavations should be classified as "extraordinary and unnecessary" in order to not block their corporate purposes. That attitude pretty well sums up the lack of concern Vulcan/SGR has for the good people of Medina, County.

12. Mr. Coburn states that the rail line will not detract from the aesthetic value of the historic buildings because it will not be significantly elevated and the railroad would be concealed by grasses, trees and scrub brush growing along the rail line. However, considering all the businesses Vulcan postulates will move into the area as a result of the draw of the railroad would compound this problem. All of these factors would greatly increase the flooding damage potential, considering all the debris and dead vegetation that regularly comes down from the hills during the frequent floods. These points would be shown by a more thorough study accomplished with an EIS.

13. Noise factors have not been adequately evaluated by SGR. Word mincing by Vulcan/SGR is again employed when it refers to noise issues "with respect to cultural resources impacts." County Road 365 runs through the Quihi Creek flood plain. Crossing this road with a grade level crossing would mandate

blowing the diesel whistle at least four times a day. Again, because of their proximity, the aesthetic value of the historic homes in the area would be adversely affected. No mention of this is made in the Vulcan/SGR letters to STB.

Noise factors will also adversely affect the serene surroundings that are the draw of this area to those who live here. It must be remembered that Vulcan/SGR seeks to impose its noise and other adverse impacts on the people, the people did not move to surround a pre-existing nuisance. There is no mention that there currently is no noise, no dust, no rail line, etc. These adverse impacts are being forced on those who did not settle here to endure such adversity and do not want or appreciate their proposed existence.

MCEAA agrees with SGR that there is local opposition to this project, especially as it is currently being approached. MCEAA, Inc. has presented to the STB the concerns of its members, which make up a large percentage of area inhabitants, and other citizens supportive of the concerns of MCEAA. MCEAA is troubled that its concerns, as well as those of the Texas Historical Commission, TxDOT, Quihi/New Fountain Historical Society, and the Medina County Commissioners Court, have apparently not been fully understood and appraised by the STB. The MCEAA was formed, in part, to provide a unified voice which could be recognized by the STB as a tool for communication that would enhance the STB's evaluation of the Vulcan/SGR proposal.

MCEAA perceives, much to its dismay, that STB has not been responsive to the MCEAA and its intended mission to ensure that if the Vulcan/SGR project is allowed to move forward it will be after a full understanding of the project impacts on the Medina County community that will be most adversely affected. The current facts indicate the only way that can be accomplished is for an EIS to be conducted. It is clear there are too many unknowns for which anyone is showing an adequate interest to address outside the EIS process. MCEAA will continue to pursue its chartered purpose until STB steps up to render a full review of the project or an EIS is conducted. MCEAA is of the firm belief that a decision of the STB to forego an EIS will be a violation of its regulatory guidelines.

It is difficult to imagine any objective evaluation of the current situation could lead to a conclusion that Vulcan/SGR is prepared to fully disclose its plans, unless forced to do so, or to make an honest evaluation of the adverse impacts of its proposal. The only way to get a full

investigation of the impacts of this project is to require an EIS. MCEAA is convinced an EIS will show the project, as currently proposed, must be rejected.

Very truly yours,

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David F. Barton

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SURFACE TRANSPORTATION BOARD

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Office of Economics, Environmental Analysis, and Administration

January 15, 2004

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Re: STB Finance Docket 34284, Southwest Gulf Railroad Company – Construction and Operation Exemption – Medina County, TX

Dear Mr. Barton:

Thank you for your letter dated November 25, 2003 to Ms. Rini Ghosh of my staff regarding Southwest Gulf Railroad Company's (SGR) proposed rail line construction and operation in Medina County, Texas.

In your letter you request information regarding the Open House held by the Surface Transportation Board's (Board) Section of Environmental Analysis (SEA) in Hondo, Texas on June 12, 2003. At the Open House, SEA provided the public with informational handouts regarding the environmental review process and the opportunity to ask questions on an informal basis, to view informational poster displays and to submit written comments. Approximately 200 people attended the Open House and SEA received over 100 comment letters. Summaries of the comment letters as well as discussion of the substantive issues raised will be included in the environmental document that SEA will issue for public review and comment.

All of the comments SEA has received pursuant to the Open House are available through the internet on the Board's Environmental Correspondence website. The comments can be accessed by going to www.stb.dot.gov, clicking on "Environmental Issues," clicking on "Environmental Correspondence," and then searching the correspondence under "FD 34284."

Enclosed please find the additional information that is responsive to your request. This information includes:

1. A copy of the text sent to the *Hondo Anvil Herald* to advertise the Open House on June 5, 2003 and June 12, 2003.

2. A copy of the letter from SEA sent to Federal, state, and local agencies, local organizations and possible interested members of the public to announce and describe the Open House.

3. A copy of the handouts provided by SEA to attendees at the Open House.

4. A copy of the text of the posters displayed by SEA at the Open House.

5. A copy of the notes taken by SEA staff at the Open House.

6. A phone log of the calls received on SEA's information hotline set up for the Open House.

7. SEA's and SEA's third-party contractor's (URS Corporation, Inc.) schedule of tasks to complete prior to the Open House.

8. E-mail correspondence between SEA and SGR coordinating the logistical details of the Open House.

9. The sign-in list of people who attended the Open House.

We assume that your request does not extend to internal, predecisional e-mails and working drafts of documents, which are exempt from disclosure under the Freedom of Information Act (FOIA).

If you require additional information, please submit a written request to the Board's FOIA Officer at the following address: **Mr. John Atkisson, FOIA Officer, Surface Transportation Board, 1925 K Street, NW, Washington, DC 20423-0001**.

We appreciate your interest in the environmental review process for this proceeding. If we can be of further assistance, please do not hesitate to contact me or Rini Ghosh at (202) 565-1539.

Sincerely,



Victoria Rutson
Chief
Section of Environmental Analysis

Enclosures

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January 27, 2004

The Honorable Vernon A. Williams
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Surface Transportation Board
1925 K Street NW
Washington, D.C. 20423

FD 34284

Case#: 2028573

Dear Secretary Williams:

Please find attached correspondence from Mr. Lynn M. Kitchen Ph.D., Principal Scientist representing the Medina County Environmental Action Association (MCEAA), Quihi, Texas. Mr. Kitchen is requesting that I forward his correspondence on behalf of the MCEAA addressed to Ms. Victoria Rutson, Section of Environmental Analysis, Surface Transportation Board.

Please review this matter and respond to me at my San Antonio district office. My Constituent Liaison, Gabriel Lozano, will work with me on this case and can be contacted at the number listed below if you require assistance.

Thank you for your prompt attention to this matter.

Sincerely,

Henry Bonilla
Member of Congress

HB:gl
Enclosure

PLEASE REPLY TO:

☑ 11120 WURZBACH, SUITE 300
SAN ANTONIO, TX 78230
(210) 697-9055

☐ 1300 MATAMOROS STREET, SUITE 113B
LAREDO, TX 78040
(956) 726-4682

☐ 111 EAST BROADWAY, SUITE 101
DEL RIO, TX 78840
(830) 774-6547

☐ 107 WEST AVENUE E, #14
ALPINE, TX 79830
(915) 837-1313

http://www.house.gov/bonilla

AEI
A WBE-HUB Firm

ADAMS ENVIRONMENTAL, INC.
12403 Nacogdoches Road, Suite 106
San Antonio, Texas 78217

www.adamsenvironmental.com

January 12, 2004

The Honorable Henry Bonilla
U.S. House of Representatives
11120 Wursbach, Suite 300
San Antonio, Texas 78230

Dear Henry:

Please find attached a letter that the Medina County Environmental Action Association, Inc. (MCEAA) would like to have you forward to Victoria Rutson concerning a review of correspondence between the Surface Transportation Board (STB) and Southwest Gulf Railroad. I reviewed these letters and was very concerned as to STB's compliance with the rules and spirit of the National Environmental Policy Act and also their apparent disregard to the comments and opinions of the public.

I would sincerely appreciate you forwarding this letter to the appropriate STB office through your office as you requested on our January 7 meeting at your office. I sincerely appreciate your assistance and support in this matter.

Very truly yours,

Lynn Kitchen

Lynn M. Kitchen, Ph.D.
Principal Scientist

210-691-2221 (Office)
210-317-7267 (Mobile)
210-691-2041 (Fax)
lkitchen@adamsenvironmental.com

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A WBE-HUB Firm

ADAMS ENVIRONMENTAL, INC.
12403 Nacogdoches Road, Suite 106
San Antonio, Texas 78217

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January 12, 2004

Ms. Victoria Rutson, Chief
Section of Environmental Analysis
Surface Transportation Board
1925 K Street, NW
Washington, D.C. 20402-001

RE: Finance Docket #34284—Southwest Gulf Railroad Company—Petition for Exemption from 49 U.S.C. Section 10901 to Construct and Operate a Rail Line in Medina County, Texas

Dear Ms. Rutson:

As you know, I am an environmental consultant currently representing the Medina County Environmental Action Association, Inc. (MCEAA) in their efforts to ensure that the applicant, the Southwest Gulf Railroad (SGR), complies with the National Environmental Policy Act (NEPA) and all other environmental permits required for construction and operation of the railroad. In addition, I have been asked to assist MCEAA in their efforts to assure that the property rights of landowners are duly respected by SGR.

MCEAA selected me to assist in their cause because I have over 20 years of environmental and edcological experience, and I have worked with numerous federal and state agencies to acquire necessary environmental permits for my clients. In addition to working experience, I have taught undergraduate and graduate-level classes at the University of Texas at San Antonio on environmental impact analysis and other similar courses. I emphasize my credentials only to point out that, in all of my years of working with environmental issues, I have never witnessed a case such as this where a federal agency is so openly biased toward the applicant and is subsequently demonstrating little or no regard for public opinion. I understand that the STB was created to encourage construction of railroads, but as a federal agency, STB is also mandated to follow and comply with NEPA guidelines.

MCEAA recently provided to me a set of correspondence between the Surface Transportation Board (STB) and SGR over a period ranging from August 2003 to December 2003. A majority of this correspondence contained arguments by SGR designed to convince STB that an environmental impact statement (EIS) would not be necessary for this proposed action.

In my professional history, I have traditionally served as an advocate for the permit applicant. In every case, without exception, the lead agency required the applicant to prove beyond any doubt

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210-317-7267 (Mobile)
210-691-2041 (Fax)
lkitchen@adamsenvironmental.com

that no significant impacts would be impinged on the environment. Facts and data, not opinions, were required from the applicant to prove this point. Further, in my experience the applicant is required to provide substantive information when addressing concerns from the public. Each comment should be addressed individually or in groups, with well-prepared arguments and facts to back up those arguments. Most important, regardless of how "uneducated" the commenters may seem, they were provided with a response that addresses each issue of concern with facts and logical arguments. NEPA requires that all comments be addressed in a response document. In fact, many of the issues or comments posed to SGR by various commenters were completely disregarded and were not addressed in the response document.

In this regard, I would like to point out a few comments that I have in regard to the correspondence that I have reviewed so far.

On August 4, 2003 David Coburn provided responses to public comments offered to STB at the public meeting. In response to comments concerning flooding, SGR presented no facts to justify any of the opinions they expressed. MCEAA is justifiably concerned about flooding, as many of the homes in the area are close to the 100-year floodplain, and any changes in floodplain characteristics could result in flooding of those homes. MCEAA strongly requests that SGR be asked to provide detailed and factual engineering information concerning expected impacts to floodplains caused by the construction of the railroad. MCEAA also requests that detailed floodplain analyses be conducted for all alternatives so that the alternative with the least impact to flooding could be selected, or so that construction of the preferred alternative could be modified to cause no impact to the 100-year floodplain.

SGR states in its correspondence to STB (July 18, 2003) that the project will cause minimal impacts to wildlife and agriculture. This assumption is based on a biological assessment conducted by its own consultant and staff and "coordinated" with the U.S. Fish and Wildlife Service (USFWS). In their correspondence, SGR implies that the USFWS is not concerned about potential negative impacts to threatened or endangered species by stating that the work was coordinated with the USFWS. In reality, the USFWS has yet to officially comment on the biological assessment, or on any of the surveys conducted to date. The only official USFWS correspondence with SGR was sent to URS on April 22, 2003. In this letter, the USFWS states that while there is no designated critical habitat for any species in Medina County, the agency is concerned about the area noted by STB as the "straight loading track option" because it appears that vegetation in this area supports habitat for the golden-cheeked warbler or black-capped vireo.

Correspondence from SGR also fails to mention the Texas Parks and Wildlife Department's (TPWD's) concern about impacts to various vegetation communities and sensitive species, specifically to habitat types and wetlands. Several recommendations were made by TPWD that were disregarded. It is also disturbing that SGR did not request a site-specific search of the TPWD database, a practice that is universally accepted as standard operating procedure for any biological assessment.

Regarding the issue of cultural resources, SGR addresses only historic structures, ignoring the fact that archeological features constitute a major issue in the area. The necessity of investigating archeological features is not even mentioned. Throughout the correspondence I reviewed, SGR seems to "downplay" the opinions of the public and the Texas Historic Commission (THC). No references are made in SGR correspondence to documents provided by the THC concerning opinions on cultural resource impacts; however, in a letter dated October 29, 2003 to Ms. Victoria Rutson, the THC clearly states that more surveys are needed to identify cultural resources in the area of potential effect. In addition, the THC stated that it was very concerned about the lack of thoroughness and good scholarship in the preliminary document. This is the only document that has been provided thus far as a study for this project. Other archeologists have reviewed the document and have had the same concern as to its inadequacy, and I have to question the wisdom of producing such an document without performing thorough onsite surveys. Finally, the THC pointed out a number of errors and inconsistencies in the document, including simple facts such as the date Mexico was granted independence from Spain. The report also misstated the Native American tribes present in Texas and failed to mention notable tribes that may have an interest in the project. These tribes are being contacted by MCEAA.

At the very least, we expect SGR to provide logical, fact-based answers to comments directed to them from the public. If federal agencies such as the USFWS have provided comments, they should be included, or at least referenced, in the arguments.

According to NEPA, the lead agency may require an EIS prior to the preparation of an EA. This important decision about whether or not to require an EIS should not be based on information provided by a highly-biased applicant; however, it appears that STB has made a decision based solely on opinions offered by the applicant, completely disregarding comments and concerns from the general public and even state agencies. The decision to waive an EIS would be understandable if the applicant's responses to public comments were well-researched and factually based; however, this is not the case in this situation.

As you know, the NEPA process requires that an environmental assessment be conducted to determine whether or not an EIS is needed. The environmental assessment will result in only one of two decisions: (1) a finding of no significant impact, or (2) a record of decision that will result in either requiring an EIS to be prepared, or determining that the project cannot be conducted without significant impacts to the environment. I write this letter in the sincere hope that the STB will comply with NEPA procedure and ensure that environmental assessment conclusions are based on a thorough analysis of factual information, presented in a professional and scholarly manner. STB should address all issues of concern by the public or at least provide well-founded arguments as to why these issues are not addressed. I also would request that STB address all public comments in a respectful and professional manner. This project will impact individuals, the properties of individuals, and the environment. Overall, these impacts may or may not be significant. However, on an individual basis, impacts will be significant, and the feelings of those people being impacted should be acknowledged and respected.

Thank you again for the opportunity to provide you with these comments. I may seem somewhat passionate in my response in this letter, but I have been asked to represent this group from a technical point of view to ensure that SGR complies with NEPA and to ensure that STB addresses all aspects of the environment in the EA. At this point I do not have a high level of confidence that this is happening. I am not trying to stop the project, however, I am mandated to ensure that if the project is approved by STB, the approval was based on sound, scientific data and not opinions and all impacts to the environment were addressed and properly mitigated.

Thank you for your time and consideration. I very much look forward to reviewing the draft EA when it is available.

Very truly yours,

Lynn Kitchen

Lynn M. Kitchen, Ph.D.
Principal Scientist

Copy: U.S. Senator John Cornyn
U.S. Rep. 23 District Henry Bonilla
Texas Senator Frank Madla
Texas Rep. Timeteo Garza
Robert Fitzgerald, President MCEAA
David Barton, Gardner Law Firm

#EO-57
RS

SURFACE TRANSPORTATION BOARD

Washington, DC 20423

Office of Economics, Environmental Analysis, and Administration

February 3, 2004

Mr. David Barton, Esq.
The Gardner Law Firm
745 East Mulberry Avenue, Suite 100
San Antonio, TX 78212-3167

Re: STB Finance Docket 34284, Southwest Gulf Railroad Company – Construction and Operation Exemption – Medina County, TX

Dear Mr. Barton:

Thank you for your letter dated January 15, 2004 regarding the Surface Transportation Board's (Board) environmental review of Southwest Gulf Railroad Company's proposed rail line construction and operation in Medina County, Texas. We have placed your letter in the environmental correspondence docket for this proceeding.

In your letter you request that the Board's Section of Environmental Analysis (SEA) prepare an Environmental Impact Statement (EIS) for the proposed rail line construction and operation.

Enclosed please find a copy of SEA's Notice of Intent to Prepare an EIS and attached draft scope of study, served by the Board and published in the *Federal Register* on January 28, 2004. We are requesting written comments on the draft scope of study by February 26, 2004.

We appreciate your interest in the environmental review process for this proceeding. If I can be of further assistance, please do not hesitate to contact me at (202) 565-1539.

Sincerely,

Rini Ghosh

Rini Ghosh
Section of Environmental Analysis

Enclosure

#EO-60
RD

SURFACE TRANSPORTATION BOARD

Washington, DC 20423

Office of Economics, Environmental Analysis, and Administration

February 17, 2004

Dr. Lynn Kitchen
Principal Scientist
Adams Environmental, Inc.
12403 Nacogdoches Road, Suite 106
San Antonio, TX 78217

Re: STB Finance Docket 34284, Southwest Gulf Railroad Company – Construction and Operation Exemption – Medina County, TX

Dear Dr. Kitchen:

Thank you for your letter dated January 31, 2004 to Ms. Rini Ghosh of my staff regarding Southwest Gulf Railroad Company's (SGR) proposed rail line construction and operation in Medina County, Texas. In your letter you request that the Section of Environmental Analysis (SEA) conduct public scoping workshops in the area to facilitate the submission of public scoping comments.

SEA has received numerous comment letters from the public that raise specific issues of concern. Based on the nature and extent of the comment letters, SEA has determined that the effects of the proposed project on the quality of the human environment are likely to be highly controversial, and that thus, preparation of an Environmental Impact Statement (EIS) is appropriate. SEA issued a Notice of Intent to Prepare an EIS and draft scope of study on January 28, 2004.

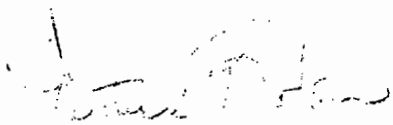
SEA mailed the Notice of Intent and draft scope of study to over 200 parties, including Federal, state, and local agencies, tribes, elected officials, local organizations, and interested members of the public. The Notice of Intent describes the EIS process and opportunities for public involvement. The draft scope of study incorporates the issues and concerns raised in the comment letters SEA has received thus far, and SEA is requesting comments on the draft scope of study by February 26, 2004. The document contains specific information about submitting comments. Although we appreciate your request, I believe that our current process is ensuring full participation and is working well.

After the close of the comment period on the draft scope of study, SEA will review all comments received and then issue a final scope of study for the EIS. Following the issuance of the final scope of study, SEA will prepare a Draft EIS (DEIS) for the project. The DEIS will address those environmental issues and concerns identified during the scoping process. It will

also contain SEA's preliminary recommendations for environmental mitigation measures. Upon its completion, the DEIS will be made available for public and agency review and comment for at least 45 days. A public meeting will also be held during the comment period for the DEIS. The details of the public meeting, including the specific format, location, and date, will be available in the DEIS. SEA will then prepare a Final EIS (FEIS) that addresses the comments on the DEIS from the public and agencies. Then, in reaching its decision in this case, the Surface Transportation Board will take into account the DEIS, the FEIS, and all environmental comments that are received

We appreciate your interest in the environmental review process for this proceeding. If we can be of further assistance, please do not hesitate to contact me or Rini Ghosh at (202) 565-1539.

Sincerely,



Victoria Rutson
Chief
Section of Environmental Analysis

#EO-61
RA

SURFACE TRANSPORTATION BOARD

Washington, DC 20423

Office of Economics, Environmental Analysis, and Administration

February 17, 2004

Dr. Robert Fitzgerald
President
Medina County Environmental Action Association
202 CR 450
Hondo, TX 78861

Re: STB Finance Docket 34284, Southwest Gulf Railroad Company – Construction and Operation Exemption – Medina County, TX

Dear Dr. Fitzgerald:

Thank you for your letter dated February 10, 2004 regarding Southwest Gulf Railroad Company's (SGR) proposed rail line construction and operation in Medina County, Texas. In your letter you request that the Section of Environmental Analysis (SEA) conduct public scoping workshops in the area to facilitate the submission of public scoping comments.

SEA has received numerous comment letters from the public that raise specific issues of concern. Based on the nature and extent of the comment letters, SEA has determined that the effects of the proposed project on the quality of the human environment are likely to be highly controversial, and that thus, preparation of an Environmental Impact Statement (EIS) is appropriate. SEA issued a Notice of Intent to Prepare an EIS and draft scope of study on January 28, 2004.

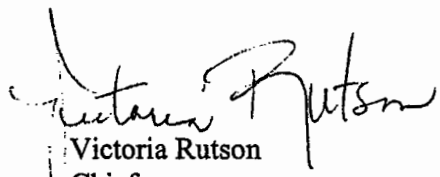
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After the close of the comment period on the draft scope of study, SEA will review all comments received and then issue a final scope of study for the EIS. Following the issuance of the final scope of study, SEA will prepare a DEIS for the project. The DEIS will address those environmental issues and concerns identified during the scoping process. It will also contain SEA's preliminary recommendations for environmental mitigation measures. Upon its

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We appreciate your interest in the environmental review process for this proceeding. If we can be of further assistance, please do not hesitate to contact me or Rini Ghosh at (202) 565-1539.

Sincerely,



Victoria Rutson
Chief
Section of Environmental Analysis

#EO-59

SURFACE TRANSPORTATION BOARD
Washington, DC 20423-0001

Office of Economics, Environmental Analysis, and Administration

February 17, 2004

The Honorable Henry Bonilla
U.S. House of Representatives
1120 Wurzbach, Suite 300
San Antonio, TX 78230

Re: STB Finance Docket No. 34284, Southwest Gulf Railroad Company – Construction and Operation Exemption – Medina County, TX

Dear Congressman Bonilla:

Thank you for your January 27, 2004 letter forwarding correspondence from Dr. Lynn Kitchen, Principal Scientist representing the Medina County Environmental Action Association (MCEAA) to Vernon Williams, Secretary of the Surface Transportation Board, regarding the Board's environmental review of Southwest Gulf Railroad Company's (SGR) proposed rail line construction and operation in Medina County, Texas. In his letter, Dr. Kitchen states that he believes the Board has not adequately considered the concerns of the public when it decided to prepare an Environmental Assessment (EA) rather than an Environmental Impact Statement (EIS). Secretary Williams has forwarded your correspondence and Dr. Kitchen's letter to me and asked that I respond.

The Board's Section of Environmental Analysis (SEA), which is the office within the Board responsible for conducting the environmental review process pursuant to the National Environmental Policy Act and related environmental regulations, is currently conducting an environmental review of SGR's proposed rail construction and operation. Based on concerns raised in the numerous public and agency comments received to date, SEA has recently determined that the effects of the proposed project on the quality of the human environment are likely to be highly controversial, and that preparation of an EIS rather than an EA is appropriate. I have enclosed copies of the Notice of Intent to prepare an EIS and the draft scope of study for the EIS, which serve as SEA's official notification that the Board will be preparing an EIS for this proceeding.

In addition to publishing these documents in the Federal Register (on January 28, 2004) and serving these documents on all parties of record, SEA also distributed these documents to appropriate elected officials, agencies, tribes, and local organizations, such as MCEAA, as well as members of the public who have expressed interest in the environmental review process, and is soliciting written comments on this draft scope of study. Comments are requested by February

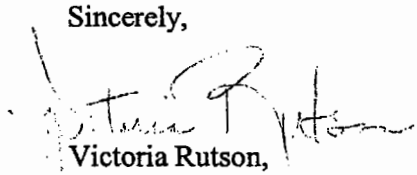
26, 2004. After the close of the comment period on the draft scope of study, SEA will review all comments received and then issue a final scope of study for the EIS.

Following the issuance of the final scope of study, SEA will prepare a Draft EIS (DEIS) for the project. The DEIS will address those environmental issues and concerns identified during the scoping process. It will also contain SEA's preliminary recommendations for environmental mitigation measures. Upon its completion, the DEIS will be made available for public and agency review and comment for at least 45 days. A public meeting will also be held during the comment period for the DEIS. The details of the public meeting, including the specific format, location, and date, will be available in the DEIS. SEA will then prepare a Final EIS (FEIS) that addresses the comments on the DEIS from the public and agencies. Then, in reaching its decision in this case, the Board will take into account the DEIS, the FEIS, and all environmental comments that are received.

In sum, in determining to prepare an EIS for this proceeding, SEA has taken careful note of the comments submitted by members of the public. Moreover, SEA is taking every step to ensure that there will be ample opportunity for public participation during the EIS process.

I appreciate the opportunity to be of assistance. If I may be of further assistance, please do not hesitate to contact me or Ms. Rini Ghosh of my staff.

Sincerely,



Victoria Rutson,
Chief
Section of Environmental Analysis

Enclosure

HENRY BONILLA
23D DISTRICT, TEXAS

2458 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-4511

COMMITTEE ON APPROPRIATIONS

CHAIRMAN—SUBCOMMITTEE ON AGRICULTURE

SUBCOMMITTEE ON DEFENSE

SUBCOMMITTEE ON FOREIGN OPERATIONS

Congress of the United States
House of Representatives
Washington, DC 20515–4323

#EI-610
Q94

February 17, 2004

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street NW
Washington, D.C. 20423
Case#: 2028573

Dear Secretary Williams:

Please find enclosed correspondence from my constituent, Dr. Robert T. Fitzgerald, President of the Medina County Enviromental Action Association (MCEAA) of Quihi, Texas. Dr. Fitzgerald is requesting my assistance forwarding the MCEAA's letter addressed to Ms. Victoria Rutson, requesting an extension of the February 26, 2004, deadline for a public meeting.

Please review this matter and respond to me at my San Antonio district office. My Constituent Liaison, Gabriel Lozano, will work with me on this case and can be contacted at the number listed below if you require assistance.

Thank you for your prompt attention to this matter.

Sincerely,

Henry Bonilla
Member of Congress

HB:gl
Enclosure

PLEASE REPLY TO:

☑ 1120 WURZBACH, SUITE 300
SAN ANTONIO, TX 78230
(210) 697-9055

☐ 1300 MATAMOROS STREET, SUITE 1138
LAREDO, TX 78040
(956) 726-4682

☐ 111 EAST BROADWAY, SUITE 101
DEL RIO, TX 78840
(830) 774-8547

☐ 107 WEST AVENUE E, #14
ALPINE, TX 79830
(915) 837-1313

http://www.house.gov/bonilla

The Medina County Environmental Action Association, Inc.
202 CR 450, Hondo, TX 78861
Phone 830-741-5040
Fax 830-426-2060

FAX MESSAGE

Date: February 10, 2004

To: U.S.Congressman Henry Bonilla
Ph 210-697-9055
Fax 210-697-9185

From: Dr. Robert T. Fitzgerald, President
The Medina County Environmental Action Association, Inc.

Message: To follow—letter dated February 10, 2004, to Ms. Victoria Rutson requesting public meetings, and extension of February 26 deadline if necessary to schedule these meetings. .

Original mailed.

We would greatly appreciate it if you could please forward this letter to Ms. Rutson on behalf of The Medina County Environmental Action Association, Inc. Thank you.

Robert T Fitzgerald

This is page 1 of 3 pages.

MCEAA, Inc., for your Home, Health, and Heritage

The Medina County Environmental Action Association, Inc.
202 CR 460, Hondo, TX 78861 *Phone 830-741-5040*
Fax 830-426-2060

FAX MESSAGE

Date: February 10, 2004

To: Ms. Victoria Rutson, Chief
Section of Environmental Analysis
Surface Transportation Board
Ph 202-565-1539
Fax 202-565-9000

From: Dr. Robert T. Fitzgerald, President
The Medina County Environmental Action Association, Inc.

Message: To follow – letter dated February 10, 2004, to Ms. Victoria Rutson requesting public meetings, and extension of February 26 deadline if necessary to schedule these meetings.

Original mailed.

Robert T Fitzgerald

This is page 1 of 2 pages.

MCEAA, Inc., for your Home, Health, and Heritage

The Medina County Environmental Action Association, Inc.
202 CR 460, Hondo, TX 78861 *Phone 830-741-5040*
Fax 830-426-2060

February 10, 2004

Ms. Victoria Rutson, Chief
Section of Environmental Analysis
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20402-0001

Re: FD 34284
Proposed Southwest Gulf Railroad
Medina County Project

Dear Ms. Rutson:

As per my telephone conversation with Rini Ghosh this date I am making the following request. Based on the number of inquiries from members of the MCEAA, Inc., we request the STB to conduct at least two public workshops in this area concerning the EIS on the above matter.

As previously noted in Dr. Kitchen's letter of January 31, many of the people in this area of Medina County who would be impacted by this project are unfamiliar with the proper procedures to address their concerns about this project to the STB. We believe this request for public workshops is justified.

We are also requesting that you consider extending the deadline for submitting these comments if the workshops can not be held within the proper time frame.

Your prompt attention to this matter is appreciated.

Sincerely,

Robert T Fitzgerald

Dr. Robert T. Fitzgerald, President
MCEAA, Inc.

cc: U.S. Senator John Comyn
U. S. Representative Henry Bonilla
Texas Senator Frank Madla
David Barton, Attorney
Dr. Lynn Kitchen, Principal Scientist

MCEAA, Inc., for your Home, Health, and Heritage

#EI-602
RL

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION
745 EAST MULBERRY AVENUE, SUITE 100
SAN ANTONIO, TEXAS 78212-3149

DAVID F. BARTON
WM. RICHARD DAVIS
JAY K. FARWELL
GREGORY M. HUBER
R. WES JOHNSON[†]
BRAD L. SKLENCAR[Ω]
WILLIAM W. SOMMERS
THOMAS J. WALTHALL, JR.
KEVIN M. WARBURTON

TELEPHONE
(210) 733-8191

TELECOPIER
(210 733-5538

E-MAIL ADDRESS
gardner@tgtf.com

[†]*Board Certified-Consumer & Commercial Law*
[Ω]*Board Certified-Labor & Employment Law*
Texas Board of Legal Specialization

February 19, 2004

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
ATTN: STB Finance Docket No. 34284
1925 K Street, NW
Washington, DC 20423-0001

VIA TELEFAX: (202) 565-9000
& CM-RRR #7001 2510 0002 0226 5676

Re: Analysis under the Endangered Species Act of:

(1) Vulcan Materials Company's planned Medina County stone quarry; and

(2) Vulcan Materials Company subsidiary Southwest Gulf Railroad Company proposed rail line to serve Medina County stone quarry.

Dear Ms. Rutson:

Medina County Environmental Action Association (MCEAA) incorporates herein by reference its letter dated February 15, 2004, requesting that the planned Vulcan Materials Company (Vulcan) quarry and the rail line proposed by Vulcan's wholly owned subsidiary Southwest Gulf Railroad Company (SGR) to serve it be analyzed together as connected and/or cumulative actions in the same environmental impact statement (EIS).

In this letter, MCEAA requests that the STB initiate a mandatory inquiry under § 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. § 1531-1544 (2000), to determine "whether any threatened or endangered species may be present" in the area of the proposed action. MCEAA requests that the scope of inquiry encompass all phases of the quarry, not simply the proposed rail line in phase 2 to which they are connected.

This requires, according to U.S. Fish and Wildlife Service (FWS) protocols-and-precedent at Phase 1 of the quarry site—three years of focused counting for threatened and endangered species. MCEAA further requests that a new Biological Assessment be prepared, as the existing version prepared by the applicant solely for Phase 1 of the quarry fails to address the connected action. The scope of the inquiry must match the scope of the connected action that these actions represent under the Council on Environmental Quality (CEQ) regulations, 40 C.F.R. §§ 1500–

1508 (2003) implementing the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370f (2000).

FACTS

Southwest Gulf Railroad Company (SGR), a wholly owned subsidiary of Vulcan, plans to construct and operate a rail line to connect a planned Vulcan stone quarry to the Union Pacific Railroad Company (UP) main line in Medina County, Texas, about 30 miles west of San Antonio.

Vulcan plans to locate its new quarry in the north central part of Medina County. The quarry would produce crushed stone aggregate for highway and other construction purposes at great distance from the proposed project. Vulcan plans to proceed with the quarry in phases. Phase 1 consists of excavation, in accordance with a site plan, on a portion of the 1,760 acres that Vulcan currently leases, as well as construction and operation of a crushing unit. Trucks and trains would haul materials from the site in Phase 1. Later Phases would expand excavation from Phase 1 to other portions of the 1,760 acres.

During Phase 1, Vulcan will construct a rail service facility to allow material generated from the mining operation to be delivered to remote markets by rail directly connected to the plant area. As stated in an August 2003 Biological Assessment for Phase 1 of the quarry prepared for Vulcan, the rail facility would require approximately seven miles of new rail track directly connecting the quarry operation to the main line rail intercept near Dunlay, Texas.

On February 27, 2003, Vulcan's wholly owned subsidiary, SGR, filed a petition with the U.S. Surface Transportation Board (STB) seeking an exemption under 49 U.S.C. § 10502(b) for authority to construct and operate approximately 7 miles of single track railroad directly connecting the quarry operation to the main line rail intercept near Dunlay, Texas. Although the primary purpose of the proposed construction is to provide rail service to the quarry site, SGR desires to hold itself out as a common carrier and provide service to other industries that might locate in the area in the future. Private citizens own a majority of the land in and adjacent to the easement that SGR will require, as well as lands potentially impacted by the quarry. Many of these private citizens and their neighbors oppose the quarry and its rail line and are members of MCEAA.

On January 22, 2004, the STB determined that the effects of the proposed rail line on the quality of the human environment are likely to be highly controversial, and therefore ordered the

preparation of an environmental impact statement (EIS). The current draft EIS scope of study includes direct effects only from the rail line, not from the quarry.

On April 22, 2003, the U.S. Fish and Wildlife Service (FWS) responded to an inquiry from Vulcan's representative. Letter from Robert T. Pine, FWS Supervisor, to Jana Zyman-Ponebshek, URS (Document EI-56). That letter discussed several FWS concerns with the quarry site.

The applicant has prepared and submitted a Biological Assessment (BA), Phase 1 Medina Project (Aug. 2003), to FWS. SGR's counsel provided it to STB on September 2, 2003 (Document EI-285). This BA covers only the first phase of the Vulcan quarry and is an update of an October 2001 submission that lacked sufficient monitoring data for that phase. Neither BA includes the SGR rail line and its alternative routes or any other phase of the quarry. Biological Assessment, Phase 1 Medina Project 24 (Aug. 2003) ("This report represents the 'Biological Assessment' for Phase 1 of the long-term project").

Two listed endangered species that occur in Medina County are songbirds: the black-capped vireo (*Vireo atricapillus*) and the golden-cheeked warbler (*Dendroica chrysoparia*). The vireo nests in Texas mainly during April through July and migrates to Mexico in the winter. To nest, it relies on low woody brush typically cleared or overgrazed by deer and livestock. Vireos return year after year to the same area, approximately 2 to 4 acres in size.

The warbler nests and raises its young in exclusively in the Edwards Plateau region of Texas and migrates annually between there and Central America. It comes to Texas in March and leaves in July. It prefers mixed Ashe juniper or oak woodland that is disappearing due to clearing for development and grazing. Like the vireo, it is an exceptional songbird well known to the landowners in Medina County.

Other listed species appear on pages 11-12 of the August 2003 Biological Assessment.

THE BIOLOGICAL ASSESSMENT MUST INQUIRE WHETHER PROTECTED SPECIES ARE PRESENT FOR ALL PHASES AND ALTERNATIVES OF THE QUARRY AND RAIL LINE

A. Statutory Framework

Section 7 of the ESA imposes on Federal agencies the duty to "insure that actions authorized, funded, or carried out" by them do not jeopardize the continued existence of any threatened or endangered species or result in the destruction or modification of habitat of such species which the Secretary of Interior determines to be critical. ESA § 7(a)(2) (2000).

An agency proposing to take an action must inquire of the FWS, as the Secretary's delegate, "whether any threatened or endangered species may be present" in the area of the proposed action. *Id.* If the answer is affirmative, the agency must prepare a "biological assessment" (BA) to determine whether such species "is likely to be affected" by the action. ESA § 7(c)(1) (2000). The ESA specifically provides that the BA requirement can be fulfilled in an EIS as part of the procedural requirements established by NEPA. *Id.*

If, after completing the BA, STB determines that an action may affect proposed or listed threatened or endangered species or their proposed or designated critical habitat, it must formally consult with FWS as the Secretary's delegate. ESA § 7(b)(3)(A) (2000). FWS will then provide STB with a written statement—the Biological Opinion (BiOp)—explaining how the proposed action will affect the species or its habitat. *Id.* If the FWS concludes that such action will result in jeopardy or adverse habitat modification, the BiOp must outline any "reasonable and prudent alternatives" (RPAs) that the FWS believes will avoid that consequence, § 7(a)(2), (b)(3)(A). When the Service offers RPAs, it also issues a written statement (known as the Incidental Take Statement) specifying the terms and conditions under which an agency (and through the agency, the applicant) may "take" the species, § 7(b)(4)(C).

B. Activities Between FWS, Vulcan, and/or STB to Date Are Not Adequate

The applicant may also consult with FWS individually, while agency action is still prospective. ESA § 7(a)(3) (2000). Such consultation has the same effect as later consultation with the agency, if FWS makes conclusions consistent with § 7(b)(4). Likewise, if the BA does not "identify[] any endangered or threatened species which is likely to be affected" by the action, the inquiry ceases. ESA § 7(c)(1) (2000).

FWS first became involved with Vulcan's quarry project on June 15, 2000, nearly three years prior to SGR's filing of its petition for exemption with STB, when it sent a letter to Tom Ragsdell of Vulcan to inform him of the potential for the proposed quarry to impact federally listed and proposed threatened and endangered species. This letter takes the place of any "inquiry" to determine "whether any species which is listed or proposed may be present" under § 7(c)(1). FWS also visited the site on April 16, 2001.

As early as March of 2002, before a BA with a valid set of monitoring data had even been completed, Vulcan and FWS appeared to reach an understanding concerning the phasing of the quarry and the studies that FWS will require. FWS began by stating that three consecutive years of focused surveys are required to verify the absence of the golden-cheeked warbler and black-capped vireo from the site. Letter from Dawn Whitehead, FWS, to Dr. William J. Rogers, West Texas A&M University ¶ 5 (March 20, 2002), in MCEAA Petition to Revoke Exemption (May 20, 2003).

> The letter goes on to pay lip service to the FWS' duty to investigate the entire project.
>
> The [FWS] must consider the impacts of development projects, such as the proposed quarry, in their entirety, and cannot consider the potential impacts of particular phases or segments of a project without taking into consideration the other project phases or project segments. Typically the [FWS] requires that adequate assessments for endangered species be conducted for all phases or segments for a particular project up front, before any habitat destruction or "take" of endangered species is authorized on any part of the project.

Id. at ¶ 6. The FWS then allows the applicant to draw an arbitrary time-line, based on the specter of market conditions, beyond which the analysis cannot pass.

> However, given the long life span of the project and incremental nature of potential impacts associated with the proposed quarry project, it would not be prudent for the Service to require surveys over the entire quarry property at this time. Some portions of the quarry property may not be impacted by quarry operations for 10, 20, 30, or 40 years into the future.

Id; *See also* Biological Assessment, Phase 1 Medina Project 2 (Aug. 2003) ("similar detailed assessments for the future phases will be performed . . . closer time-wise and consequently more relevant to the actual implementation of that particular phase"). Where the time-line is as speculative as it for this quarry project it is unlikely this analysis would suffice even for a FONSI case where the connection between all the phases of the quarry and the rail project are so clearly interconnected. As MCEAA's February 19, 2004 connected action letter makes clear, this analysis does not apply once an EIS has been triggered. The scope of the action is a connected action, and STB inquiry of FWS, and if necessary, consultation, should proceed accordingly.

Sierra Club v. Sigler, 695 F.2d 957, 978-79 (5th Cir. 1983), makes it clear that the proposed rail line does not exist independently of any phase of the quarry. The phases of development will overlap. These phases will not locate elsewhere, away from the rail line or rest of the quarry. While not the rule for all phased connected actions, once this quarry is deemed a connected action, every phase of it will be connected to the proposed rail line, because none of the quarry phases have independent utility with respect to one another. They will all rely on common equipment, a shared crushing unit, and shared personnel and resources. They cannot exist apart from one another or the rail line that will transport at least some of their joint output.

Therefore, an inquiry as to "whether any species which is listed or proposed may be present" on all phases must occur, despite FWS' red herring:

> Surveys conducted by Vulcan would expire 3 years after completion, so Vulcan would have to conduct additional surveys at additional expense in the future for those areas not impacted within three years of the initial surveys. If the Service were to require that Vulcan conduct three years of presence/absence bird surveys over its entire property up front, Vulcan may be inclined to immediately bulldoze all areas where no endangered species were recorded, and to maintain those areas in a barren condition to avoid having to conduct additional surveys on those areas in the future.

Id. This completely overblown scenario illustrates FWS' seemingly bottomless and ever-increasing contempt for the Act they are charged with implementing, and raises three issues.

1. Three years of focused counting for threatened and endangered species is required before any activity on the site.

First, according to FWS, three years of monitoring data are required to, at minimum, support a BA that concludes that the golden-cheeked warbler and black-capped vireo are not present at a site. We express no opinion as to whether Vulcan's data and methods constitute "best available scientific and commercial data" under § 7(c)(1). Currently, Vulcan only has data for Phase 1. So, if Vulcan is in such a hurry to bulldoze the entire site, they can just go ahead and sit down and wait the three years it will take for them to gather the monitoring data necessary to support the BA finding of no endangered species on the entire site. Or, if endangered species are found, to support the incidental take permit under ESA § 10 they will need to clear the site. Of course, this is exactly the data required by the scope of the action now being analyzed in an EIS, which includes all phases of the quarry. The screening surveys

performed in the purported later phases of the quarry/rail project do not represent the three year focused surveys required to satisfy FWS's requirements. *See* Biological Assessment, Phase 1 Medina Project 3, 25 (Aug. 2003) (describing progress on quarry phases to date and future plans to follow up on Phase 1 results in other phases).

2. Without three years of focused counting, agency decisions to proceed will be arbitrary and capricious, despite the phasing.

Second, the FWS postulates that Vulcan will have to resurvey the later phases of the project anyhow, so that somehow justifies delaying the BAs for those phases entirely. This is flatly inconsistent with the ESA's prohibition against "take". ESA § 9(a)(1)(B) (2000). While the ESA's consultation requirement extends only to "jeopardiz[ing] the continued existence" of a species, § 7(a)(2), it would certainly be arbitrary and capricious for the agencies to proceed given the nature of FWS' assumptions.

Under the ESA, "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct." ESA § 3(19). In particular, regulations define "harass" as an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. 50 C.F.R. § 17.3 (2003). "Harm" in the definition of "take" in the Act means an act which actually kills or injures wildlife. *Id.* Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. *Id.*

Vulcan has already received an affirmative answer from FWS regarding whether any species which is listed or proposed may be present in the area of the quarry. But Vulcan has only performed a BA for phase 1 of the quarry. Without focused counts "based on the best available scientific and commercial data," it will not be possible to identify "any endangered species or threatened species which is likely to be affected" by the quarry and rail line. The focused count is the method required by FWS and was the method used in Phase 1. It is unacceptable not to maintain it as a minimum requirement for the other phases. While the screening level results may suggest the absence of appropriate habitat, the BA gave those results in Phase 1 no effect before focused counts confirmed them. In the absence of focused counts, FWS cannot guarantee that the applicant will not take a species during quarry excavation and operations, or during rail construction and operation.

Underlying the segmentation of the focused count is FWS' baseless assumption that a take will not occur during the phases of quarry excavation and operations, including the rail line. The BA's conclusions on this issue border on the absurd, consisting of only a bald assertion for blasting on page 23.

For instance, two listed endangered species of salamander—the San Marcos salamander and the Texas Blind salamander—may have their potential sinkhole habitat on the property filled, and at minimum impacted by noise, dust, and blasting vibrations. Additionally, there are endangered species of arachnids known to inhabit karst and cave formations in the surrounding area of the projects. Vulcan and FWS have not even conducted more than a cursory screening of the entire quarry site for these species. The BA also acknowledges that, while Vulcan will attempt to avoid jurisdictional wetlands, it may not be able to, nor has it inventoried, studied, or committed to avoid non-jurisdictional, isolated wetlands, such as sinkholes and vernal pools, where these species may be present. Biological Assessment, Phase 1 Medina Project 3, 10 (Aug. 2003). The BA concludes only that "no jurisdictional wetlands were identified" in the study areas. *Id.* at 9.

In addition, the golden-cheeked warbler and black capped-vireo may be present in dense woodland habitat found in purported later phases of the quarry, as well as along the proposed rail line alternatives. *Id.* at 6. It is even clear from the BA that the golden-cheeked warbler exists within auditory proximity to the property line. *Id.* at 15. But while the BA makes much ado about not finding either bird on site during its screening surveys, any conclusion that these species are not present is premature.

3. The ESA requires that consultation inquiry account for indirect effects from the proposed action.

In *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), the Fifth Circuit held that "the relevant consideration," in whether an agency has "adequately considered" the effects of an action under § 7(a)(2), "is the total impact." *Id.* at 373. In *Coleman*, the FWS had found that a segment of Interstate 10 in coastal Mississippi would not "jeopardize the continued existence" of the endangered sandhill crane. However, the FWS had neglected to consider the "residential and commercial development that [could] be expected to result" adjacent to the highway" *Id.* The court found that regardless of the non-federal nature of the development, the agency still had a duty under § 7 and "control[led] the development . . . to the extent that they control[led] the placement." *Id.* at 374.

"Irrespective of the past actions of others," the court wrote, the agencies "have a duty to ensure that the highway and the development generated by it do not further threaten the crane." *Id.* Absent that analysis, it would be "questionable whether the crane could survive . . . the indirect effects of the highway." *Id.* at 373.

By implicating "indirect effects," the Fifth Circuit calls for the same level of consultation inquiry used for direct effects to apply to what may fairly be called "cumulative effects" as the term is understood in the CEQ regulations implementing NEPA. See 40 C.F.R. § 1508.7 (2003) (defining "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."). The level, or depth, of inquiry must be the same in order to produce the result compelled by the ESA. As applied in *Coleman*, that was "whether the crane could survive." *Coleman*, 529 F.2d at 373.

As MCEAA discusses in its incorporated February 15, 2004 letter on the scope of the quarry and rail line as connected and cumulative actions under NEPA, a cumulative impact analysis will be required in the EIS regardless of whether the rail line and quarry are otherwise analyzed together as connected or cumulative actions. *See* MCEAA Connected Action Letter, Part III (Feb. 19, 2004). *Coleman* holds without ambiguity that any BA placed in the EIS must consider all phases of the quarry and rail line. In addition, such a BA must consider the effects now, before operation begins. Coleman did not allow the U.S. Department of Transportation to wait around and see what the effects of Interstate 10 and the foreseeable private development around it would have on the crane. In the same way, STB and FWS cannot wait and see what indirect effects blasting and other quarry operations would have on the golden-cheeked warbler or the black-capped vireo. Vulcan concedes that it will have to monitor over the life of the project anyhow—but it is the agencies' duty to analyze today that is at issue.

To date, however, only one portion of the quarry project has been studied consistent with FWS protocols. Significantly, the rail loading yard, where the rail line will enter and connect with the quarry, has not been fully surveyed for the golden-cheeked warbler or the black-capped vireo. In an April 22, 2003 letter, from the FWS to Vulcan's environmental analysis contractor, the FWS noted:

> We are particularly concerned about the area noted by STB as the 'straight track loading option'. It appears that the vegetation in this area has not been cleared and may support habitat for one or both of these species.

Letter from Robert T. Pine, FWS Supervisor, to Jana Zyman-Ponebshek, URS ¶ 3 (Document EI-56). Further, several landowners in the area report seeing the birds on their property, which will be crossed by the rail line alternatives.

A procedural requirement of the ESA is a substantive violation for which an injunction may issue. *Thomas v. Peterson*, 753 F.2d 754, 764-65 (9th Cir. 1985). The STB cannot simply ignore *Coleman* and adopt the existing BA for Phase I of the quarry. It must require Vulcan to conduct the additional three years of focused study on all phases of the quarry and the rail line alternatives necessary to produce an adequate BA under FWS protocols. Any such BA must be included for comment with the DEIS if it is not used in lieu of a section discussing impacts on threatened and endangered species.

CONCLUSION

In closing, we wish to restate our rationale, and the law's rationale, for requiring a combined analysis of the full scope of these two connected actions in a single EIS and a single BA. The members of MCEAA are willing to be reasonable in the discussion and mitigation of impacts from the quarry and the rail line. What we cannot support is the unlawful taking of land for alternatives whose impacts are never fully studied.

It is obvious from the decision to conduct focused counting for endangered species only on Phase 1 of the quarry—when Vulcan had both the time and the resources since 1999 to conduct counts for the entire quarry and all rail line alternatives—that Vulcan was trying to play it cute, hoping that the future phases of the quarry would lack sufficient "relatedness" under the multi-factor federalization test to fall within the scope of the environmental assessment. Once the blasting started, the later phases would take care of themselves. But the EIS changes that plan. The years of wasted time and the expense that Vulcan will have to incur to conduct focused counting over the next three years are not our fault, nor are they the fault of the Endangered Species Act. Vulcan knew what it had to do and chose to take a risk to do less than what was logically required under the law, regulations and case precedent. Now that Vulcan has dug this hole, the agencies should stop and fill it in rather than help dig it deeper, if they want Vulcan to have any chance of digging a hole at all.

The EIS will not have a valid BA for endangered species until the focused counting occurs over the entire quarry site and rail line alternatives. Three years should give Vulcan and

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its contractor plenty of time to look for any quarry site alternatives, besides no action, that they may choose to analyze in the combined EIS.

Please place a copy of this letter in the administrative record for FD34284.

Very truly yours,

THE GARDNER LAW FIRM
A Professional Corporation

David F. Barton

DFB:ncf
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February 19, 2004

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
ATTN: STB Finance Docket No. 34284
1925 K Street, NW
Washington, DC 20423-0001

VIA TELEFAX: (202) 565-9000
& CM-RRR #7001 2510 0002 0226 5676

Re: Analysis under the National Environmental Policy Act of:

(1) Vulcan Materials Company's planned Medina County stone quarry; and

(2) Vulcan Materials Company subsidiary Southwest Gulf Railroad Company proposed rail line to serve Medina County stone quarry.

Dear Ms. Rutson:

Medina County Environmental Action Association, Inc. (MCEAA) requests that two actions described in this letter—the planned stone quarry of Vulcan Materials Company (Vulcan) in Medina County, Texas, and the proposed rail line of Vulcan's wholly owned subsidiary that will serve it—be deemed "connected actions" requiring "discuss[ion] in the same impact statement." 40 C.F.R. § 1508.25(a)(1) (2003).

In the event that Vulcan's planned stone quarry has ripened or ripens into a proposal for major federal action, MCEAA requests that it and the rail line be deemed "cumulative actions" which may "have cumulatively significant impacts" requiring "discuss[ion] in the same impact statement." 40 C.F.R. § 1508.25(a)(2) (2003).

FACTS

Southwest Gulf Railroad Company (SGR), a wholly owned subsidiary of Vulcan, plans to construct and operate a rail line to connect a planned Vulcan stone quarry to the Union Pacific Railroad Company (UP) main line in Medina County, Texas, about 30 miles west of San Antonio.

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Vulcan plans to locate its new quarry in the north central part of Medina County. The quarry would produce crushed stone aggregate for highway and other construction purposes. Vulcan plans to proceed with the quarry in phases. Phase 1 consists of excavation, in accordance with a site plan, on a portion of the 1,760 acres that Vulcan currently leases, as well as construction and operation of a crushing unit. Trucks and trains would haul materials from the site in Phase 1. Later Phases 2 to 5 would expand excavation from Phase 1 to other portions of the 1,760 acres. It is clear Vulcan's purpose in proposing its quarry be addressed in phases is to avoid various regulatory requirements which, if addressed to the entire 1,760 acres and the railroad at one time, would jeopardize the entire project.

During Phase 1, Vulcan will construct a rail service facility to allow material generated from the mining operation to be delivered to remote markets by rail directly connected to the plant area. As stated in an August 2003 Biological Assessment for the quarry prepared for Vulcan, the rail facility would require approximately seven miles of new rail track directly connecting the quarry operation to the main line rail intercept near Dunlay, Texas.

On February 27, 2003, Vulcan's wholly owned subsidiary, SGR, filed a petition with the U.S. Surface Transportation Board (STB) seeking an exemption under 49 U.S.C. 10502(b) for authority to construct and operate approximately 7 miles of single track railroad directly connecting the quarry operation to the main line rail intercept near Dunlay, Texas. Although the primary purpose of the proposed construction is to provide rail service to the quarry site, SGR desires to hold itself out as a common carrier and provide service to other industries that might locate in the area in the future. Private citizens own a majority of the land in and adjacent to the easement that SGR will require, as well as lands potentially impacted by the quarry. Many of these private citizens and their neighbors oppose the quarry and its rail line and are members of MCEAA.

It is clear Vulcan's purpose in seeking common carrier status for SGR is to thwart the will of the landowner's in Medina County, who, after preliminary inquiry by Vulcan, made it clear they do not approve of the quarry or rail projects, and would not give up their land for the rail line. Additionally, it is clear that Vulcan is attempting to dupe STB by cloaking its private rail project in common carrier garb. It is not the intent of Congress to promote such private endeavors through common carrier legislation. Even more importantly, it is totally anathema to legislative intent that such private endeavors be allowed to take advantage of common carrier legislation. STB should not be a part of a greater scheme of SGR, which is to be granted condemnation authority through common carrier status. That is the only true goal of SGR in this process.

On January 22, 2004, the STB determined that the effects of the proposed rail line on the quality of the human environment are likely to be highly controversial, and therefore ordered the preparation of an environmental impact statement (EIS). The current draft scope of study includes direct effects only from the rail line, not from the quarry.

I. THE QUARRY AND THE RAIL LINE ARE CONNECTED ACTIONS

The applicant's apparent belief that the STB's EIS analysis of the rail line need not account for the direct, as well as the cumulative environmental impacts of the proposed quarry rests on a fundamental misunderstanding of the National Environmental Policy Act (NEPA) and its case law. The analyses for *whether to prepare* an EIS and the *scope* of an EIS differ completely in their treatment of potentially related actions. Failure to appreciate this distinction has led the applicant to advocate an extension of the EIS-threshold analysis to the EIS-scoping analysis. This effort is mistaken on the facts at hand and contrary to law. As Part I.B. shows, the proposed rail line and planned quarry must be considered together, in their entirety, in a single EIS. First, however, a review of certain elements of the EIS-threshold case law is in order.

A. The EIS-threshold ("Whether to Prepare") Analysis

1. The Difference Between Cumulative Impacts and Cumulative Actions

Following the preparation of an environmental assessment (EA), an agency will reach one of two possible outcomes. If an agency finds a significant impact, it must prepare an EIS. If it does not, and if the action does not significantly affect the quality of the human environment independently, the agency must prepare a Finding of No Significant Impact (FONSI) and finalize the decision. *Id.* §§ 1501.4(c),(e) (2003).

Assuming that the agency is reviewing a proposal for legislation or other major federal action that affects the quality of the human environment, the agency's decision to prepare an EIS will turn on whether the action and any related segment does so "significantly." 40 C.F.R. § 1502.3 (2003). Significance may arise directly from the proposed action, or cumulatively. If "the action is related to other actions with individually insignificant but cumulatively significant impacts . . . [then] [s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." *Id.* § 1508.27(b)(7) (2003).

In the context of reviewing an agency's significance determination

> [i]t is also clear that a decision to forgo preparation of an EIS may be unreasonable for at least two reasons: (1) the evidence before the court

> demonstrates that, contrary to the FONSI, the project may have a significant impact on the environment, or (2) the agency's review was flawed in such a manner that it cannot yet be said whether the project may have a significant impact.

Fritiofson v. Alexander, 772 F.2d 1225, 1238 (5th Cir. 1985). In the former, "the test is whether there is a possibility, not a certainty, of significant impacts." *Id.* at 1239 n.7. Contrary to the conclusion of the district court in *Hoosier Environmental Council, Inc. v. U.S. Army Corps of Engineers*, 105 F. Supp. 2d 953, 981 n.13 (S.D. Ind. 2000), whether the old "reasonableness" standard of review is applied or whether the "arbitrary and capricious" standard that has prevailed since *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375 (1989), is applied has no bearing on this conclusion of *Fritiofson*. If *Hoosier* were correct about *Fritiofson*, a court could never "make a reasoned decision based on its evaluation of the significance—or lack of significance—of the . . . information." *Marsh*, 490 U.S. at 378.

When making the EIS-threshold decision, an agency considers potentially related actions along with the proposed action. These potentially related actions may be proposed, planned, or speculative.

> The regulation does not limit the inquiry to the cumulative impacts that can be expected from proposed projects; rather, the inquiry extends to the effects that can be anticipated from '[past, present, and] reasonably foreseeable future actions.' . . . The regulations clearly mandate consideration of the impacts from actions that are not yet proposals and from actions—past, present, or future—that are not themselves subject to the requirements of NEPA.

Fritiofson, 772 F.2d at 1241 n.10. This distinction arises from the difference between the definitions of "cumulative impact" and "cumulative action." *Cf.* 40 C.F.R. § 1508.7 (defining "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.") and *Id.* §§ 1508.25, 1508.25(a)(2) (defining "scope" as "the range of actions, alternatives, and impacts to be considered in an [EIS]," and defining "cumulative action" as "actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same [EIS]").

While an agency must consider the cumulative impacts from "related" actions in its EIS-threshold significance determination, *Id.* § 1508.27(b)(7), and prepare an EIS if the impacts may

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be cumulatively significant, *Fritiofson*, 772 F.2d at 1238-39 n.7, it need not consider unrelated actions at all.

2. The Multi-factor Federalization Test for Relatedness

A multi-factor test has evolved to determine relatedness for the purpose of the EIS-threshold significance determination. These factors, which "federalize" otherwise non-jurisdictional segments of a project by subjecting them to NEPA, include, but are not limited to:

(a) whether the regulated activity comprises "merely' a link" in a corridor type project (e.g., a transportation or utility transmission project);

(b) whether there are aspects of the nonjurisdictional activity in the immediate vicinity of the regulated activity which uniquely determine the location and configuration of the regulated activity;

(c) the extent to which the entire project will be within the agency's jurisdiction; and

(d) the extent of cumulative federal control and responsibility.

See Sylvester v. Army Corps of Engineers, 884 F.2d 394, 398-99 (9th Cir. 1989) (quoting similar Corps of Engineers regulations at 33 C.F.R. Part 325 Appx. B, §7(b)(2)).

Sylvester involved the alleged segmentation of a proposed golf course from other portions of a proposed resort at Squaw Valley, California, including a village and additional ski runs. The state completed an environmental impact report on all segments of the proposal, pursuant to state law. *Id.* at 396. The Corps of Engineers, however, issued a FONSI for the federal wetland fill permit after completing an EA describing only the golf course, which was the only segment of the proposal that it had jurisdiction over. The Corps applied the federalization test in its regulations, 33 C.F.R. Part 325 Appx. B, §7(b)(2), and concluded that the other segments of the resort were not related to the golf course for the purposes of NEPA. The court held that NEPA was unclear as to the proper scope of analysis of NEPA review for nonjurisdictional actions, and that the Corps' interpretation was not an impermissible reading of the statute. *Sylvester*, 884 F.2d at 397. In the wake of *Sylvester*, numerous other federal agencies promulgated EIS-threshold regulations similar to the Corps. *See e.g.*, 23 C.F.R. § 771.111(f) (2003) (Federal Highway Administration), 18 C.F.R. § 380.12(c)(2)(ii) (2003) (Federal Energy Regulatory Commission).

Still, courts confronted with challenges to agency FONSIs have often misapplied or collapsed the analysis of relatedness and the analysis of potential significance that comprise the two step EIS-threshold analysis. This typically occurs when the court substitutes the EIS-scoping test, in the Council on Environmental Quality (CEQ) regulations implementing NEPA, for the multi-factor relatedness test. *Cf.* 40 C.F.R. § 1508.25 (2003) (defining EIS scope for connected and cumulative actions). The former cannot apply exclusively until an EIS is required. The terms of the EIS-scoping test may be used as factors in the relatedness test, but they cannot be the only test of whether an EIS is required. To surpass the EIS-threshold, the court must deem the agency's "decision to forgo preparation of an EIS . . . unreasonable for at least [one of the] two reasons" outlined in *Fritiofson*, 772 F.2d at 1238. That requires applying both a federalization test for relatedness and a significance test.

By far the best example of an improperly collapsed analysis is *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985). In *Thomas*, the district court upheld the Forest Service's decision to analyze a proposed Forest Service road and several proposed timber sales along the proposed road in separate EAs. Without even consulting the record for a significance determination, the Ninth Circuit reversed the district court and, applying the EIS-scoping test for connected actions at 40 C.F.R. § 1508.25(a)(1)(i)-(iii), deemed the proposals connected and ordered them consolidated in a single EIS. Later courts have noted that *Thomas* relied most heavily on 40 C.F.R. § 1508.25(a)(1)(iii), the so-called "independent utility" factor in the EIS-scoping test. *See Thomas*, 753 F.2d at 759-60 (discussing Ninth Circuit independent utility precedent); *Blue Ocean Preservation Society v. Watkins*, 754 F. Supp. 1450, 1459 n.8 (D. Haw. 1991) (politely suggesting that the Second Circuit, in *Hudson River Sloop Clearwater v. Department of the Navy*, 836 F.2d 760 (2d Cir.1988), was incorrect to categorize *Thomas* as an application of 40 C.F.R. § 1508.25(a)(1)(ii), the "but for" factor in the EIS-scoping test).

The second factor cited in *Sylvester* is an independent utility-type factor, and some agencies have explicitly codified it as such in their regulations. *See, e.g.*, 23 C.F.R. § 771.111(f) (2003) (Federal Highway Administration). But it should be clear that the federalization test for relatedness in an EA case differs from the relatedness tests for connected and cumulative actions once an EIS has been triggered. *Thomas*' reliance on the EIS-scoping factors at 40 C.F.R. § 1508.25 as inputs to a federalization test for relatedness at the EA stage is perfectly reasonable, but *Sylvester* shows that they are not the only reasonable inputs. *Thomas*' bypass of the significance test is completely impermissible.

An agency may reasonably limit relatedness at the EA stage precisely because the statute is silent and because 40 C.F.R. § 1508.25 applies only to the EIS. Nevertheless, it is important to

understand the FONSI cases that correctly and incorrectly apply these principles, in order to limit them to their proper context.

Early FONSI cases set out slightly different sets of relatedness factors but reached results consistent with *Sylvester*. *See Friends of the Earth v. Coleman*, 518 F.2d 323 (9th Cir.1975) (agency did not have to prepare an EIS for state funded projects in a partially federally funded airport development); *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980) (because federal jurisdiction extended only to river crossing of interstate power line, Corps of Engineers was not required to consider impacts beyond that area); *Friends of the Earth v. Hintz*, 800 F.2d 822, 832 (9th Cir. 1986) (agency not required to consider the impacts of shoreside facilities, such as berthing areas, terminals, roadways, and utility improvements).

In *Save the Bay, Inc. v. U.S. Army Corps of Engineers*, 610 F.2d 322 (5th Cir. 1980), the Corps of Engineers was required to analyze only the environmental consequences of a discharge pipeline's construction and maintenance instead of considering an entire chemical plant in its decision on whether or not to prepare an EIS. *Id.* at 327. The record before the court in that case did not contain facts or circumstances to compel an alternate conclusion. However, the Fifth Circuit explicitly stated "We express no opinion as to the proper scope and extent of coverage of an EIS should one have been necessary." *Id.* at 327 n.3.

More recent FONSI cases have applied *Sylvester*-type multifactor tests. *See* Tennessee Gas Pipeline Co., Order Granting, in Part, and Denying, in Part, Rehearing and Request for Reconsideration, 95 FERC ¶ 61,169, 2001 WL 469985 (applying *Sylvester*-type multifactor test in FERC regulations to find that EA was not required to analyze a proposed nonjurisdictional lateral off of proposed pipeline, or the proposed nonjurisdictional power plant that the lateral would serve, due to insufficient federal control and responsibility over them); *Hoosier Environmental Council, Inc. v. U.S. Army Corps of Engineers*, 105 F. Supp. 2d 953, n.13 (S.D. Ind. 2000) (plaintiffs did not present factual evidence of significance contrary to Corps' conclusion under its regulations that EA did not require cumulative effects analysis of riverboat casinos greater than 100 miles away from the proposed action).

There are limits to an agency's ability to reasonably invoke its jurisdiction under the multifactor federalization test for relatedness. In *Stewart v. Potts*, 996 F. Supp. 668 (S.D. Tex. 1998), an environmental group alleged that the Corps violated NEPA and the Clean Water Act by issuance of a permit to a city to build a golf course. To build the golf course, 200 acres of forest land containing approximately two acres of wetlands had to be cleared. The Corps prepared an EA for the wetlands but declined to perform an assessment of the environmental impact of the rest of the area on which the golf course would be built.

Stewart held that the tasks necessary to construct the proposed golf course—filling of the wetlands and clearing of the forest located on the wetlands—were so interrelated and functionally interdependent as to bring the entire project within the jurisdiction of the Corps and NEPA. The court arrived at this conclusion because the two acres of wetlands were not in a "neat square of land" but were scattered throughout the 200 acre site. The court stated that "[t]o suggest that the Corps has no jurisdiction to consider the environmental impacts of the fragmentation of the forest, even though it has jurisdiction to consider the impacts of the wetlands which coexist underneath those very trees is. . . an impermissible abdication of a federal agency's duties under NEPA." *Id.* at 683-84.

Sometimes, if the agencies lack clear EIS-threshold regulations, the courts simply ignore the multifactor case law and apply their own test. *See Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426 (10th Cir. 1995) (test for whether particular parts of airport master plan could be considered cumulative impacts of the proposed action was whether they were "so interdependent that it would be unwise or irrational to complete one without the others").

This has happened frequently for the "independent utility" factor in the federalization test for relatedness, which many circuits have carried over to the third connection action factor in the EIS-scoping analysis, 40 C.F.R. § 1508.25(a)(1)(iii). *See Utahns for Better Transportation v. U.S. Department of Transportation*, 305 F.3d 1152, 1173 (10th Cir. 2002) (expressing the novel theory that the Tenth Circuit test for whether an action can be considered a cumulative impact—a term with its own definition at 40 C.F.R. § 1508.7—and define the scope of an EIS is the *Airport Neighbors* test); *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1118 (9th Cir. 2000) (ignoring *Sylvester* to say that "We use an 'independent utility' test to determine whether an agency is required to consider multiple actions in a single NEPA review pursuant to the CEQ regulations," as the federalization test for relatedness, before an EIS has even been triggered). Again, analogous to the use of the EIS-scoping test factors in *Thomas*, there is nothing wrong with defining independent utility as a factor in the federalization test for relatedness, or even using it as the primary factor, *Association Concerned About Tomorrow, Inc. v. Dole*, 610 F. Supp. 1101, 1108 (N.D. Tex. 1985) ("Nevertheless, the illogic of a terminus is at best a secondary inquiry . . . shadowed by the independent utility inquiry").

However, when applying the EIS-scoping test, it is important to understand first that while carryover of the independent utility concept from the FONSI cases is permissible, those cases often use independent utility as a proxy for a multifactor relatedness test. Second, EIS-scoping cases that have carried over the concept, instead of applying 40 C.F.R. § 1508.25(a)(1)(iii) directly, may do so thinking that they may apply other factors in the FONSI cases as well, when in fact the EIS-scoping test is restricted to the terms of the CEQ regulations. While one factor in the EIS-threshold analysis—the "independent utility" factor—may happen to

match one of the terms in the EIS-scoping analysis, other reasonable factors in a test for relatedness do not carry over, unless they happen to match the prongs of § 1508.25(a)(1).

A. The EIS-Scoping Analysis

Unlike the situation in Part I.A, an EIS will be prepared in this case. Even if the STB had not determined that a public controversy exists, an EIS for both the rail line and the quarry would likely have been required under the analysis in Part I.A.

Because an EIS will be prepared, the federalization test for relatedness is no longer the starting point of the analysis. Rather, the three factor test of 40 C.F.R. § 1508.25(a)(1) determines whether actions are "closely related" and therefore "connected actions", and the definition at 40 C.F.R. § 1508.25(a)(2) determines whether "cumulative actions" are present. Actions deemed connected or cumulative should therefore be discussed in the same EIS. *Id.* § 1508.25(a)(1)-(2). The connected action definition, unlike the cumulative action definition, is not limited to actual "proposals." *See Fritiofson*, 772 F.2d at 1243 n.13. Contemplated actions which have not reach the proposal stage may certainly play a critical role in assessing the impacts of current proposals, and CEQ regulations require that they be considered. *Id.*

1. The Proposed Rail Line and Planned Quarry Are Connected Actions Because the Rail Line Depends On the Quarry For Its Justification

(a) Discussion in the same impact statement is required.

One of the primary reasons for requiring an agency to evaluate "connected actions" in a single EIS is to prevent agencies from minimizing the potential environmental consequences of a proposed action (and thus short-circuiting NEPA review) by segmenting or isolating an individual action that, by itself, may not have a significant environmental impact. *Citizens Committee to Save Our Canyons v. U.S. Forest Service*, 297 F.3d 1012, 1028 n.13 (10th Cir. 2002).

In analyzing the quarry and the rail line under the connected action definition, we note that satisfying any one of the three factors will trigger an agency duty to consider the actions together in the same EIS. *Shoshone-Paiute Tribe v. U.S.*, 889 F. Supp. 1297, 1308 (D. Idaho 1994) ("the three subsections of the regulation [40 C.F.R. § 1508.25(a)(1)] are to be read in the disjunctive, not the conjunctive"); *Town of Huntington v. Marsh*, 859 F.2d 1134, 1142 (2d Cir. 1988) (finding actions to be connected based solely on the satisfaction of subdivision (iii)).

We analyze each connected action factor in turn. *Texas Committee on Natural Resources v. Van Winkle*, 197 F. Supp. 2d 586, 613-14 (N.D. Tex. 2002).

1508.25(a)(1)(i)—Automatically trigger other actions which may require EIS.

As the rail line is the only currently proposed action, the test under this prong is whether the rail line will automatically trigger the quarry, which may require an EIS if it requires any federal permits. Though these projects are related, mere construction of a rail line does not trigger the quarry. This factor typically encompasses actions necessary for the proposal to exist in any circumstance, not just when the proposal happens to depend on the segmented action. *See City of Williams v. Dombeck*, 151 F. Supp. 2d 9, 19-20 (D.D.C. 2001) (water delivery system must be analyzed at the same time as the development where the land exchange "automatically triggers" the need to develop a system which will deliver water).

1508.25(a)(1)(ii)—Cannot or will not proceed unless other actions are taken previously or simultaneously.

A typical example of the "but for" test would be a road that was the sole means of accessing a mine. *See Sierra Club v. U.S. Department of Energy*, 255 F. Supp. 2d 1117 (D. Colo. 2002) (applying this factor in a relatedness test in a FONSI case to the above facts). There, the easement and the mine were connected actions because they were inextricably linked. *Id.* at 1184-85. But for the road, the mining company could not access the mine site; absent the mine, the road had no independent utility. Therefore, DOE was required to consider and evaluate the mine's impacts on the environment.

In "but for" test for this case, one test is whether the quarry cannot or will not proceed unless the proposed rail line is approved and constructed. Evidence may exist to support the conclusion that Vulcan will not proceed with all or part of the project unless the rail line is built. To date, however, Vulcan has represented that the quarry will be built regardless of whether the rail line is, and states that it operates numerous quarries not served by rail.

The other test under this factor is whether the rail line cannot or will not proceed unless the quarry is in operation. This inquiry is better reserved for the independent utility factor.

1508.25(a)(1)(iii)—Are interdependent parts of a larger action and depend on the larger action for their justification.

The proposed rail line and all phases of the planned quarry (including the construction and operation of the rail line into the site) fall within this factor as connected actions. The

proposed rail line is an interdependent part of the larger quarry action, and depends on it for its justification. Therefore, the quarry is a connected action whose direct and cumulative impacts, as well as alternatives, must be analyzed alongside those of the rail line in the same EIS.

Connected actions are defined in a manner consistent with the criteria recognized in the independent-utility cases. *Fritiofson*, 772 F.2d at 1242; *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 439 (5th Cir.1981). The Second Circuit has affirmatively acknowledged that "The proper test to determine relatedness under 40 CFR § 1508.25(a)(1)(iii) is whether the project has independent utility." *Town of Huntington v. Marsh*, 859 F.2d 1134, 1141-42 (2d Cir.1988); *Hudson River Sloop Clearwater v. Department of the Navy*, 836 F.2d 760, 764 (2d Cir.1988).

The independent utility test requires that "[i]f proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the projects should be evaluated together." *Fritiofson*, 772 at 1241 n. 10; *Stewart v. Potts*, 996 F. Supp. 668, 683 (S.D. Tex. 1998).

On the facts in this case, the rail line does not possess any real independent utility. Most significantly, the rail line originates at the quarry site. There is no "independent utility" to building an aggregate loading yard at the start of the line, in phase 2 of the quarry site, without the construction of the quarry that Vulcan intends to supply it at that exact site. Construction of the rail line "forecloses options" as to the quarry's location. If the quarry were not a possibility, it would clearly be "irrational, or at least unwise," *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974), to proceed with the rail line. That action is "irrational" absent imminent construction of the quarry through phase 2, and "functional[ly] dependent" on the quarry. Vulcan could not "reasonably consider" going ahead with the rail line construction if there were no other development to utilize it. *Blue Ocean Preservation Society v. Watkins*, 754 F. Supp. 1450, 1459 (D. Haw. 1991).

At every turn in this proceeding, Vulcan and SGR have stated that the rail line's sole purpose is to serve the quarry. SGR's counsel has represented that "The SGR line would be used to transport aggregate between the quarry and a point near Dunlay, Texas, where the SGR line would connect with a Union Pacific Railroad line." Letter from David H. Coburn, Steptoe & Johnson LLP, to Victoria J. Rutson, STB-SEA 1 (January 5, 2004) (Document EI-423). Even so, Vulcan and its wholly-owned subsidiary continue to insist that their fictional division justifies the evasion of the legally required analysis of their two projects under NEPA. SGR's counsel insists that "the appropriate no action alternative is the alternative of a truck served quarry." *Id.* at 2.

SGR and Vulcan also claim that other shippers "may locate in the area in the future" and plans to hold itself out as a common carrier. *Finance Docket 34284*, Petition of Southwest Gulf Railroad Company for Exemption 3, 5 (February 27, 2003). Rather than allow the NEPA process to account for the changes in land use such development might bring, SGR and Vulcan want it both ways. Fortunately, SGR counsel's own words show that the rail line has no independent utility of its own.

In response to a criticism that the rail line would cause a significant increase in industrial and commercial development along its length, Mr. Coburn responded:

> SGR at this point is not aware of any specific shippers that may locate on the line, other than Vulcan. While the line will be operated as a common carrier line and thus open to use by other shippers, SGR has no information at this time about other shippers that may locate in the area. *Accordingly, any assessment of the level of commercial and industrial development that could develop along the line is speculative.*

Letter from David H. Coburn, Steptoe & Johnson LLP, to Victoria J. Rutson, STB-SEA 1 (January 5, 2004) (Document EI-423) (emphasis added). Clearly, it would be "irrational" to assume that the rail line can proceed independently on the basis of speculation.

The analysis from this point is simple. Either the two projects are connected actions under the EIS-scoping analysis, or the STB's grant of an exemption does not comport with its statutory mandate, the Rail Transportation Policy of the United States, 49 U.S.C. § 10101. In particular, if the STB concludes that the proposed rail line has "independent utility" from the quarry, even though it has only "speculative," and in the eyes of many, "imaginary" future customers besides the quarry, then regulation will be necessary "to carry out the transportation policy of section 10101." *See id.* § 10502(a) (outlining grounds for exemption from prior approval procedures of 49 U.S.C. § 10901). Vulcan's duty to show that SGR will "foster sound economic conditions in transportation" will go unfulfilled in the absence of such regulation, *Id.* § 10101(5). Vulcan has made no such showing to date, and indeed has expressly indicated that no such showing can be made. Approval of Vulcan's petition will be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), under those circumstances. MCEAA will discuss this topic further in a subsequent filing with the STB.

It is also noteworthy that courts have regularly found that other types of natural monopoly goods besides rail, such as pipelines and power lines, lack independent utility under NEPA when they exist only to serve a single proposal. *City of Williams v. Dombeck*, 151 F. Supp. 2d 9, 19-20 (D.D.C. 2001) (review of final EIS) (the "potential for a pipe line, whether

connected to a railroad siding or not, is most certainly an "interdependent part [ ] of [the] larger action" that is Alternative H and "depend[s] on [that] larger action for [its] justification"); *Sierra Club v. Dombeck*, 161 F. Supp. 2d 1052, 1067 (D. Ariz. 2001) (review of final EIS) ("without a water delivery system the development cannot be constructed and without the contemplated construction, a water delivery system would not be needed. It is illogical to maintain that the development and the water delivery system are not connected actions"); *Border Power Plant Working Group v. U.S. Department of Energy*, 260 F. Supp. 2d 997, 1017 (S.D. Cal. 2003) (review of FONSI) (finding, after some confusion as to how to apply the multifactor federalization test for relatedness, that proposed transmission line and planned power plant turbine were "links in the same chain" and therefore "effects" of turbine required analysis in the EA).

Other independent utility cases in the Fifth Circuit are not on point for this issue, and several review a FONSI, rather than an EIS. *Vieux Carre Property Owners, Residents, and Associates, Inc. v. Pierce*, 719 F.2d 1272, 1278 (5th Cir. 1983) (review of FONSI) (office tower phase of planned urban development project that was uncertain and speculative, and might not involve federal funding, had independent utility from other phases, including proposed federally funded common infrastructure and proposed privately funded hotel, retail, and parking complex); *Sierra Club v. Sigler*, 532 F. Supp. 1222, 1234-35 (S.D. Tex. 1982), *aff'd in part, rev'd in part on other grounds*, 695 F.2d 957 (5th Cir. 1983) (review of final EIS) (crude oil terminal, underwater pipeline system, and channel deepening in Galveston had independent utility and did not commit the federal government to other planned and studied navigation projects in the area that had not received Congressional authorization and had not been proposed); *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 586 F. Supp. 1094, 1102 (N.D. Tex. 1984), *rev'd on other grounds*, 770 F.2d 423 (5th Cir. 1985) (review of one EIS and one EA) (two parts of transportation plan each designed to relieve congestion have independent utility, despite common terminus); *Welch v. U.S. Air Force*, 249 F. Supp. 2d 797, 820-25 (N.D. Tex. 2003) (review of FEIS) (Past relocations and ongoing development of fighter aircraft training programs within the same region have independent utility).

Numerous other independent utility cases are easily distinguishable. In *Texas Committee on Natural Resources v. Van Winkle*, 197 F. Supp. 2d 586, 613-14 (N.D. Tex. 2002), the court found applied each factor in the connected action definition under the CEQ regulations. It concluded that the record contained no evidence of interdependence between a proposed flood control project and other planned actions in the same area. In *Citizens Committee to Save Our Canyons v. U.S. Forest Service*, 297 F.3d 1012, 1028-29 (10th Cir. 2002), even though the Tenth Circuit improperly restricted the definition of connected actions to actual proposals, it was still able to conclude that a proposed ski resort expansion would proceed regardless of whether the resort participated in the proposed land exchange for several small mineral parcels. Similarly, in

Hudson River Sloop Clearwater v. Department of the Navy, 836 F.2d 760, 764 (2d Cir.1988), the Second Circuit found that the Navy would construct its proposed dock regardless of whether it was able to construct upland housing.

Unlike the parties in those three cases, Vulcan has made no showing of independence for the proposed rail line; rather, it has expressed only dependence. The SGR rail line is not part of a larger system like an airport or a transportation network that can function independently, either as a segment or as part of a whole. This rail line will not function without Vulcan's quarry.

(b) The breadth of environmental impact analysis required includes an analysis of alternatives and direct and cumulative effects of both the quarry and the rail line.

Neither tiering, phasing, nor notions of state-federal efficiency can serve as a legal basis to shield the Vulcan quarry from an EIS that evaluates its alternatives and direct effects.

First, tiered environmental impact statements are both impossible and impermissible under these circumstances. Under the CEQ regulations, "tiering" refers to the coverage of general matters in broader environmental impact statements . . . with subsequent narrower statements or environmental analyses . . . incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. 40 C.F.R. § 1508.28. By contrast here, shifting from the proposed rail line to its connected action, the quarry, opens a much broader scope of environmental impacts that require discussion. Indeed, the rail line is a phase of the quarry. This case is the opposite of those that qualify for tiering.

Second, the phasing of the quarry by no means bars the analysis of every phase in the combined EIS. SGR may argue that the cumulative impacts of the rail line and the quarry must be described in the same EIS, but that consideration of alternatives and direct impacts for the connected action may be deferred until the connected action is ripe for proposal.

The Fifth Circuit has already decided this issue contrary to any attempt by SGR to segment the EIS' analysis of the quarry as a connected action. In *Sierra Club v. Sigler*, the Fifth Circuit held that related actions that are not "proposals" must be discussed alongside the proposed action in the direct effects and alternatives analyses of the EIS, not simply in the cumulative impact section. 695 F.2d 957, 978-79 (5th Cir. 1983) (*Sigler* refers to the EIS repeatedly as a type of "cost-benefit analysis" but clarifies that it uses this term informally to refer to the EIS analysis of direct impacts in n.15).

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The proposed action in *Sigler* was a Corps of Engineers permit for a channel deepening, crude oil terminal, and oil pipeline distribution system project in Galveston Bay. The channel deepening, which would extend beyond the proposed crude oil terminal, would generate benefits connected to the proposed action, in the form of additional bulk cargo activities at the Port of Galveston. The relevant portion of the opinion is excerpted below:

> In order for an agency to carry out this broad systematic cost-benefit analysis, it is vitally important that the FEIS relied on by the agency fully and accurately disclose the environmental, economic, and technical costs associated with the project. The extent of that disclosure is the issue in this case.
>
> *Cost-Benefit Analysis in this Case.*
>
> The Second Circuit in [*Chelsea Neighborhood Association v. U.S. Postal Service,* 516 F.2d 378 (2d Cir.1975)] confronted an issue very similar to the one we face here. In *Chelsea,* the Post Office had acquired land in New York City for use in building a new facility. Airspace rights above the facility were granted to the City for use in building public housing. 516 F.2d at 381. The FEIS prepared by the Post Office was challenged, *inter alia,* on the grounds that the Post Office used the benefits of the housing project as a "selling point" and a principal reason to go forward with the facility while ignoring many of the disadvantages that would flow from it. *Id.* at 387. The court held the FEIS deficient on this basis. *Id.* at 388. The skewed cost-benefit analysis in *Chelsea* is remarkably similar to the skewed analysis found here by the trial judge, 532 F. Supp. at 1235, and substantiated by the record.
>
> The trial court in the instant case found the FEIS deficient due to its skewed cost-benefit analysis, and agreed with the holding of *Chelsea* as a "general proposition," 532 F. Supp. at 1236, but held the legal rule of *Chelsea* had been limited to "actual proposals" due to the Supreme Court's ruling in *Kleppe. Id.* Therefore, the court held that *Chelsea* did not compel disclosure of the costs associated with these bulk commodities activities because these activities were speculative possibilities, not actual proposals. It is this legal holding of the district court that the Sierra Club challenges on appeal. It being a legal holding, we make our own determination of its validity. . . .
>
> *Kleppe* addressed the question of whether the Department of the Interior had to prepare an EIS for a broad program to lease federal coal reserves in a four- state area in the western United States. The Court held that the program did not invoke

NEPA as it was not a "proposal." Only the program's parts (issuing a lease, granting a permit) were proposals subject to NEPA. In so holding, the Court interpreted NEPA in the following way:

> The statute [NEPA], however, speaks solely in terms of *proposed* actions; it does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions. Should contemplated actions later reach the state of actual proposals, impact statements on them will take into account the effect of their approval upon the existing environment; and the condition of that environment presumably will reflect earlier proposed actions and their effects. 427 U.S. at 410 n. 20, 96 S. Ct. at 2730 n. 20; *See Environmental Defense Fund v. Marsh*, 651 F.2d 983, 999 (5th Cir.1981).

The Corps' and the trial court's reliance on *Kleppe* is misplaced. In *Kleppe*, the Court was concerned with the point at which NEPA's requirements are triggered by a definitive proposal. In analyzing that issue the Court held that environmental impacts need not be evaluated for actions that are not imminent. Under *Kleppe* then, the Corps need not have prepared an EIS on the bulk commodities terminals if they were not imminent. However, once the Corps *chose* to trumpet the benefits of bulk cargo activities in the EIS as a "selling point" for the oil project, it rendered a decision that these activities were imminent. NEPA therefore requires full disclosure and analysis of their costs. *See Chelsea, supra.* The Corps cannot tip the scales of an EIS by promoting possible benefits while ignoring their costs. Simple logic, fairness, and the premises of cost-benefit analysis, let alone NEPA, demand that a cost-benefit analysis be carried out objectively. There can be no "hard look" at costs and benefits unless all costs are disclosed.

If an agency were permitted to cite possible benefits in order to promote a project, as the Corps has done here, yet avoid citation of accompanying costs by hiding behind *Kleppe*, the cost-benefit analysis in the EIS would be reduced to a sham: such a "cost-benefit analysis" would always be tipped in favor of benefits. *Kleppe* cannot be used to defend a skewed cost-benefit analysis; it was concerned solely with determining when an EIS with its informal cost-benefit analysis must be prepared. Once that threshold is crossed, the analysis must be objective. This case is beyond the threshold at issue in *Kleppe*, since the Corps had to prepare an EIS on the superport project. The issue here is one not discussed in *Kleppe:* once an EIS is required, can the costs of any claimed benefits be ignored? This issue was

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> correctly resolved in *Chelsea,* and as NEPA required it must, *Chelsea* answered it negatively.
>
> We therefore hold that the district court reached an erroneous legal conclusion in failing to apply the principle of *Chelsea* to this skewed cost- benefit analysis. We follow *Chelsea,* apply it to the trial court's well- substantiated factual conclusion that the FEIS is skewed, and hold the FEIS deficient under NEPA.

Sigler, 695 F.2d at 978-79.

Sigler stands for the principle that Vulcan cannot have it both ways. The bulk cargo activities in *Sigler* were beneficiaries of the proposed action that, while speculative and not yet proposed, required analysis of direct effects ("costs and benefits") in the same EIS. Likewise, Vulcan chose to have the quarry phases all benefit from the proposed rail line, and while some of the latter phases may be speculative and not yet proposed, *Sigler* will not permit Vulcan's quarry to hide behind the speculative possibility of "implementation based on market demands." *See* Biological Assessment, Phase I Medina Project 3 (Aug. 2003) (describing implementation in terms of that phrase). It must analyze the direct impacts and alternatives for all phases of the quarry in the same EIS as the rail line, because it has not represented to the STB that it will use the line only for certain phases or stop using the line after a given time. Additionally, it is illogical that Vulcan and SGR would build the railroad based upon any less than development of all 1,760 acres. To do so would likely violate the company's fiduciary duty to its shareholders.

Sigler rested its holding on the duty to discuss direct effects advanced by the plaintiffs, and not simply cumulative, secondary, or indirect effects. The plaintiffs "first argue[d] that since the FEIS relied on the benefits of the bulk cargo activities, the FEIS must also evaluate the adverse effects of those activities. Second, the FEIS should have assessed those adverse effects as cumulative effects of related proposals. Third, the adverse effects should have been examined as secondary or indirect effects of the multipurpose deepwater port." *Id.* at 975. The Fifth Circuit did not reach the latter two arguments, because it did not need to. It had already decided them by establishing that, at minimum, a direct effect analysis of the connected action was necessary. *Id.* at 979 n.21. It follows that once the direct effect analysis is complete for all of the phases of the quarry, those effects will be added to other effects of the proposal to generate the cumulative impact analysis. 40 C.F.R. § 1508.7 (2003).

Sigler makes it clear that the proposed rail line does not exist independently of any phase of the quarry. The phases of development will overlap. These phases will not locate elsewhere, away from the rail line or rest of the quarry; nor will they use exclusively trucks. While not the rule for all phased connected actions, once this quarry is deemed a connected action, every phase

of it will be connected to the proposed rail line, because none of the quarry phases have independent utility with respect to one another. They will all rely on common equipment, a shared crushing unit, and shared personnel and resources. They cannot exist apart from one another or the rail line that will transport at least some of their joint output.

Third, as described at length in the preceding sections, the types of state-federal efficiency factors that may enter into the multifactor federalization test for relatedness do not carry over into the EIS-scoping analysis. While the court stated in *Sylvester* that "ordinary notions of efficiency suggest a federal environmental review should not duplicate competently performed state environmental analysis," 884 F.2d at 401, that factor plays no role in the EIS-scoping analysis, and certainly not after relatedness has been established. Any SGR arguments to that effect should be dismissed out of hand.

II. THE PROPOSED RAIL LINE AND PLANNED QUARRY ARE ALSO CUMULATIVE ACTIONS

It is important to remember that issues of economic and functional dependence are distinct from questions of environmental synergy, and that concerns in both areas may trigger the need for a comprehensive EIS. *Fritiofson*, 772 F.2d at 1241 n.10.

In the event that Vulcan's quarry ripens into a proposal for major federal action, two proposals with potential cumulatively significant impacts will affect the same geography. The severity and type of impact may lead to a determination of this geography as local or regional, but the record will reflect that it must be at least one or the other. The agencies will not be able to retreat arbitrarily to a property line analysis, because the rail line enters and traverses a large portion of the quarry property.

One can easily reframe the EIS-threshold analysis in *Fritiofson* to a combined EIS-threshold analysis that, like the original test, remains consistent with the arbitrary and capricious review standard:

> [i]t is also clear that a decision to forgo preparation of [a combined] EIS may be unreasonable for at least two reasons: (1) the evidence before the court demonstrates that, contrary to the [decision to proceed separately], the [proposals] may have a [cumulatively] significant impact on the environment, or (2) the agency's review was flawed in such a manner that it cannot yet be said whether the project may have a [cumulatively] significant impact.

See Fritiofson v. Alexander, 772 F.2d 1225, 1238 (5th Cir. 1985) (outlining analysis).

Once major federal actions reach the stage of actual proposals, impact statements on them will take into account the effect of their approval on the existing environment; and the condition of that environment presumably will reflect earlier proposed actions and their effects. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.20 (1976). This statement of *Kleppe* requires both direct and cumulative impact analysis in a single EIS, for both proposals, if cumulatively significant impacts may exist. No ambiguity exists in the Supreme Court's command. No delay is permitted until after one proposal proceeds through the EIS process, unless the CEQ's tiering regulation applies, 40 C.F.R. § 1508.28, which it does not. No regional activities are involved; rather, the quarry and the rail line are both site specific.

Significant cumulative impacts resulting from the rail line and the quarry that may trigger the analysis of both proposals in a single EIS may occur in several categories. Both proposals would impact the local rail and highway transportation network, as well as various historic sites. Both proposals might also have a significant direct effect on endangered species and a safe and sustainable water supply attributable to the sole source aquifer for the south central Texas region in the vicinity of their proposed and preferred alternatives. The potential for significant incremental increases in localized particulate matter and fine particulate matter concentrations, regardless of whether they exceed the National Ambient Air Quality Standard, would also merit analysis for each proposal. Among other impacts, noise, vibration, and land use changes, particularly in light of the applicant's statements to the latter effect, may generate the type of cumulatively significant impacts that trigger a combined EIS on that basis.

III. CONSIDERATION OF THE QUARRY ABSENT CONNECTED OR CUMULATIVE ACTIONS

Even in the event that a single EIS for the rail line and quarry are not required, the cumulative impacts of the quarry must be considered as a reasonably foreseeable future action. *Texas Committee on Natural Resources v. Van Winkle*, 197 F. Supp. 2d 586, 614-20 (N.D. Tex. 2002). This holding recognizes and gives effect to the distinction between cumulative impacts and cumulative actions discussed in Part I.A. of this letter. *Id.* at 614-16.

IV. CONCLUSION

In their petition, the applicants string-cited numerous STB cases where the STB had not considered a planned project served by the proposed rail line in its analysis under 49 U.S.C. § 10901. Applicant's counsel referenced these cases in replying to MCEAA's petition, dismissing

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MCEAA's concerns as irrelevant. In fact, because NEPA informs the STB's final decision to grant or deny the exemption under 49 U.S.C. § 10502 and § 10901, a concerned party can never be wrong in simply bringing this point to the STB's attention. But more importantly, in the context of NEPA, now that STB will prepare an EIS, it is now the applicant that is mistaken and whose argument is irrelevant.

MCEAA respectfully requests that you and your agency take action consistent with the principles discussed in this letter, and join the entire analysis of the quarry and the rail line in a single EIS.

Please place a copy of this document in the administrative record for this proceeding.

Very truly yours,

THE GARDNER LAW FIRM
A Professional Corporation

David F. Barton

DFB:ncf
dfb/8675.000/NEPA_connectedaction_letter03

cc: Colonel John R. Minahan
Commander, CESWF
U.S. Army Corps of Engineers
819 Taylor Street
Fort Worth, Texas 76102

cc: Michael P. Jansky, P.E.
Regional Environmental Review Coordinator
U.S. EPA Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733

cc: Robert T. Pine
Supervisor
U.S. Fish and Wildlife Service
10711 Burnet Road, Suite 200
Austin, Texas 78758

#EI-627
RS

Monday, February 23, 2004

VIA FAX: 202/565-9000 and Certified Mail

Ms. Rini Ghosh
Surface Transportation Board
Case Control Unit
1925 K Street, N.W.
Washington, DC 20423-0001

received
2/24/04

RE: STB Finance Docket No. 34284

Dear Ms. Ghosh:

In response to the Notice of Intent to Prepare an Environmental Impact Statement (EIS), I am submitting the following to be considered in the formal scoping process.

I believe under the National Environment Policy Act's (NEPA) implementing regulations, two concurrent proposals with cumulative significant impacts must be evaluated in the same EIS. Clearly, the Southwest Gulf Railroad (SGR) is a wholly owned subsidiary of Vulcan Materials, born of a need to carry mined aggregate from the proposed quarry. This proposed quarry in northern Medina County does not exist. The railroad will not be built if the quarry is not built. Therefore, these are connected actions that under NEPA, must be evaluated in the same EIS. Every impact from both projects must be disclosed in a single document. This study should include direct impacts and alternatives to both projects, including no quarry and no rail line at all.

At a meeting at the Quihi Gun Club in February 2000, Vulcan Materials Southwest President Tom Ransdell stated if the aggregate was not transported by railcar there would be no quarry. Now Vulcan Materials and SGR have stated that if no railroad is built this aggregate must travel by truck to the railroad loading facility. This would result in an estimated 800 to 900 trucks daily moving the mined aggregate, something Vulcan said they would not do. I believe this statement to be a veiled threat to scare the residents of Medina County to favor the railroad. The EIS should require Vulcan Materials and SGR to produce an economic study showing the transportation of aggregate by truck. This process would include loading, transporting, unloading, and reloading the aggregate onto railcar. This economic feasibility study must surely have been completed before such a statement can be made to the STB. Anything less would have been a violation of their responsibility to their stockholders. It should be no problem for Vulcan/SGR to produce evidence of the economic viability of this option and include it in the EIS.

In addition, the following points should be addressed in the EIS:

> Socio economic changes; we need to know the economic value of the incomes lost from hunting leases, residential development not built, homes remaining unsold near the quarry/railroad. The only properties and homes sold in the neighborhood where my husband and I live are a result of the purchasers never hearing of this proposed quarry/railroad. Indeed if we had known of a proposed

quarry/railroad before we bought the property we built our home on, we would have gone elsewhere. Our home and land are our legacy to our children. With the proposed quarry within yards of our homestead, what will be the fate of our children's inheritance? What recourse will they have to stop Vulcan from deciding this proposed quarry is not big enough? How will they stop Vulcan from taking their inheritance to satisfy big business greed? It has been brought to Vulcan's attention that Quihi has many homesteads that were established as far back as 1836. Some of these homesteads would be dangerously close to the path of the proposed railroad. Vulcan has turned a deaf ear to the concerns of the Quihi Historical Society regarding these antiquities. Surely if home sites dating back to the beginning of the community of Quihi are not a concern to Vulcan, the home my husband and I have built will not be a concern as well!

As has happened in other places, wells and septic tanks have been damaged by blasting in quarries. Will Vulcan re-drill our well and our surrounding neighbor's wells should their operations cause these wells in the purposed quarry site to be damaged? The EIS should study the present condition of these surrounding wells.

The EIS should study a requirement to monitor nitrates from blasting in surrounding wells by an independent third party and should study the policies of the quarry operator to clean up these pollutants once found in these wells.

The EIS should contain a study of the migration of birds to and from Mexico and how Vulcan will maintain the proposed quarry in compliance with the Migratory Birds Treaty Act.

A full flood analysis should be completed on all proposed and alternative routes of the railroad and quarry site.

The EIS should include a study of the effects of heavy loaded truck traffic on our unimproved county roads, including the increased costs of maintaining all roads by the county and state.

The EIS should include a study on the safety issues related to grade separation versus grade level crossings at FM 2676 and CR 4516.

An in depth analysis of the fuel storage area on the quarry site must be completed to resolve the dispute arising from Vulcan's claim it is not over the Edwards Aquifer Recharge Zone. Maps from the Edwards Aquifer Association show that this is not true.

Vulcan/SGR hold themselves out to be a common carrier for the expressed purpose of thwarting the will of landowners and homesteaders to maintain the

aesthetics and rural environment. Covenants have been formed with much forethought and expense for this purpose. The EIS should include a study on the effect that additional industry which may, or most likely may not, locate along this rail line have on the aesthetics of this cherished land.

The EIS should include a study of the effects of railcars loaded with crushed aggregate on the air from the proposed quarry site to its destination. Bexar County, Texas, already is struggling to maintain clean air standards. The study should specifically address the effects on the air quality as it passes thru Bexar County as these railcars pass through and indeed along the entire route to its destination in Houston/Galveston, Texas. The EIS should include a study on the capacity of the Union Pacific lines to carry limestone into the already crowed rail traffic in the Houston/Galveston area.

Vulcan/SGR claims to be a "good neighbor" and absurdly uses as evidence the fact that $300,000 homes co-exist in harmony with a quarry in San Antonio, Texas. The EIS should include a study on the effects to the real property values surrounding the quarry/railroad. Vulcan/SGR shows no shame in stating our property value will go up when the quarry/railroad opens.

According to the National Environmental Journal, Vulcan is the seventh worst emitter of toxic chemicals in the United States, based on air, water, land, underground, public sewage, and off-site releases. As a resident of Medina County, Texas I come to the STB with no authority to regulate Vulcan/SGR. The trust of the citizens of Medina County is placed in the hands of the STB. Therefore it is your responsibility to study all combined effects of these connected actions for all proposed and alternate options, including the no railroad no quarry option. Indeed it is your legal requirement as set forth by the National Environmental Protection Act.

Thank you for allowing me to comment on the scope of the Environmental Impact Statement.

Respectfully Submitted,

Cindi Regnier

Cindi Regnier
Member of the MCEAA

Cc: U.S. Senator John Cornyn
U.S. Representative Henry Bonilla
Texas Senator Frank Madla
Texas Representative Timeteo Garza
Medina County Judge Jim Barden
Medina County Commissioner Royce Hartman, Precinct 1
Dr. Robert Fitzgerald, MCEAA President

#EI-626
RS

Tuesday, February 24, 2004

VIA FAX: 202/565-9000 and Certified Mail

Received 2/24/04

Ms. Rini Ghosh
Surface Transportation Board
Case Control Unit
1925 K Street, N.W.
Washington, DC 20423-0001

RE: STB Finance Docket No. 34284

Dear Ms. Ghosh:

In response to the Notice of Intent to Prepare an Environmental Impact Statement (EIS), I am submitting the following to be considered in the formal scoping process.

I believe under the National Environment Policy Act's (NEPA) implementing regulations, two concurrent proposals with cumulative significant impacts must be evaluated in the same EIS. Clearly, the Southwest Gulf Railroad (SGR) is a wholly owned subsidiary of Vulcan Materials, born of a need to carry mined aggregate from the proposed quarry. This proposed quarry in northern Medina County does not exist. The rail road will not be built if the quarry is not built. Therefore, these are connected actions that under NEPA must be evaluated in the same EIS. Every impact from both projects must be disclosed in a single document. This study should include direct impacts and alternatives to both projects, including no quarry and no rail line at all.

Vulcan Materials and SGR have stated that if no railroad is built this aggregate must travel by truck to the railroad loading facility. This would result in an estimated 800 to 900 trucks daily moving the mined aggregate. I believe this statement to be a veiled threat to scare the residents of Medina County to favor the railroad. The EIS should require Vulcan Materials/SGR to produce an economic study showing the transportation of aggregate by truck. This process would include loading, transporting, unloading and reloading the aggregate onto railcars. This economic feasibility study must surely have been completed before such a statement can be made to the STB. Anything less would have been a violation of their responsibility to their stockholders. It should be no problem for Vulcan/SGR to produce evidence of the economic viability of this option and include it in the EIS.

Additionally, the following points should be addressed in the EIS:

> Socio economic changes; we need to know the economic value of the incomes lost from hunting leases, residential development not built, homes remaining unsold near the quarry/railroad. The only properties and homes sold lately in the neighborhood where I live are a result of the purchasers never hearing of this

proposed quarry/railroad. Indeed if my wife and I had known of a proposed quarry/railroad before we bought the property we built our home on, we would have gone elsewhere.

As has happened in other places, wells and septic tanks have been damaged by blasting in quarries. The EIS should study the present condition of the surrounding wells in a two mile radius for documentation should our wells be damaged.

The EIS should study a requirement to monitor nitrates from blasting in surrounding wells by an independent third party and should study the policies of the quarry operator to clean up these pollutants once found in these wells.

The EIS should contain a study of the migration of birds to and from Mexico and how Vulcan/SGR will maintain the proposed quarry in compliance with the Migratory Birds Treaty Act.

A full flood analysis should be completed on all proposed and alternative routes of the railroad and quarry site.

The EIS should include a study of the effects of truck traffic on our unimproved county roads, including the increased costs of maintaining all roads by the county and state.

The EIS should include a study on the safety issues related to grade separation versus grade level crossings at FM 2676 and CR 4516. Texas has the most deaths occurring at railroad crossings of any state in the nation. As I understand, correcting this problem has become a priority with the Texas Department of Transportation. What better time to insure the safety of the citizens of Texas than to put grade separation crossings at these two crossings. Vulcan Materials has agreed to bear the cost of these crossings if required. There would be no expense born by the taxpayers of Texas for this increased safety. Indeed, with this arrangement it seems negligent for the Texas Department of Transportation to do otherwise. If Vulcan Materials/SGR truly cares about safety issues they should be glad for the opportunity to show what good corporate neighbors they are.

An in depth analysis of the fuel storage area on the quarry site must be completed to resolve the dispute arising from Vulcan's claim it is not over the Edwards Aquifer Recharge Zone. Maps from the Edwards Aquifer Association show that this is may not be true.

Vulcan/SGR hold themselves out to be a common carrier for the expressed purpose of thwarting the will of landowners and homesteaders to maintain the

aesthetics and rural environment. Covenants have been formed with much forethought and expense for this purpose. The EIS should include a study on the effect that additional industry which may, or most likely may not, locate along this rail line have on the aesthetics of this cherished land.

The EIS should study the potential impact that blasting may have on the nearby Medina Lake Dam. The Medina Lake Dam received national attention during flooding in July, 2002. At that time there was expressed concern by governmental officials about the structural integrity of the dam. They warned of possible catastrophic failure and ordered the evacuation of all residents below the dam, including portions of the town of Castroville. Fault lines along the Balcones Escarpment run from southwest to the northeast, coincidentally, the same direction as the proposed quarry site to the Medina Dam.

The EIS should include a study of the effects of railcars loaded with crushed aggregate on the air from the proposed quarry site to its destination. Bexar County, Texas already is struggling to maintain clean air standards. The study should specifically address the effects on the air quality as the railcars pass through Bexar County indeed along the entire route to its destination in Houston/Galveston, Texas. The EIS should include a study on the capacity of the Union Pacific lines to carry limestone into the already crowed rail traffic in the Houston/Galveston area.

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According to the National Environmental Journal, Vulcan Materials has been the seventh worst emitter of toxic chemicals in the United States, based on air, water, land, underground, public sewage, and off-site releases. As a resident of Medina County, Texas I come to the STB with no authority to regulate Vulcan/SGR. The trust of the citizens of Medina County is placed in the hands of the STB. Therefore it is your responsibility to study all combined effects of these connected actions for all proposed and alternates to include the no railroad/no quarry option. Indeed it is your legal requirement as set forth by the National Environmental Protection Act.

Thank you for allowing me to comment on the scope of the Environmental Impact Statement.

Respectfully Submitted

Brad Regnier
Board of Directors
Medina County Environment Action Association

Cc: U.S. Senator John Cornyn
U.S. Representative Henry Bonilla
Texas Senator Frank Madla
Texas Representative Timeteo Garza
Medina County Judge Jim Barden
Medina County Commissioner Royce Hartman, Precinct 1
Dr. Robert Fitzgerald, MCEAA President

#EI-641
R21

MEDINA COUNTY
ENVIRONMENTAL ACTION ASSOCIATION
202 CR 450
Hondo, TX 78861
(830) 741-5040 p / (830) 426-2060 f

February 24, 2004

received
2/25/04

VIA FAX: 202/565-9000 and Certified Mail
RRR#

Ms. Rini Ghosh
Section of Environmental Analysis
Surface Transportation Board
ATTN: STB Finance Docket No. 34284
1925 K Street, NW
Washington, DC 20423-0001

Dear Ms. Ghosh:

Re: Analysis under the National Environmental Policy Act of
(1) Vulcan Materials Company's planned Medina County stone quarry
(2) Vulcan Materials Company subsidiary Southwest Gulf Railroad Company proposed rail line to serve Medina County stone quarry

Enclosed please find the scoping comments of the Medina County Environmental Action Association for *Finance Docket No. 34284*, the proposed Southwest Gulf Railroad Company rail line and its connected action, the Vulcan Materials Company quarry.

Sincerely,

Robert T. Fitzgerald

Dr. Robert T. Fitzgerald
President, MCEAA

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34284

SOUTHWEST GULF RAILROAD COMPANY
CONSTRUCTION AND OPERATION—MEDINA COUNTY, TX

MEDINA COUNTY ENVIRONMENTAL ACTION ASSOCIATION

Scoping Comments

Dr. Robert T. Fitzgerald
MCEAA
202 CR 450
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President, Medina County
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Attorney for Medina County
Environmental Action Association

February 24, 2004

February 24, 2002

STB Finance Docket No. 34284

SOUTHWEST GULF RAILROAD COMPANY
CONSTRUCTION AND OPERATION—MEDINA COUNTY, TX

Scoping Comments of the Medina County Environmental Action Association

On January 22, 2004, the Surface Transportation Board's (STB's) Section of Environmental Analysis announced a request for Environmental Impact Statement (EIS) scoping comments under the National Environmental Policy Act (NEPA) for the proposal contained in Finance Docket No. 34284. This proposal would allow the Southwest Gulf Railroad Company (SGR), a wholly-owned subsidiary of Vulcan Materials Corporation (Vulcan) to construct a new rail line from an existing Union Pacific Railroad (UP) main line to Vulcan's planned quarry in north central Medina County, Texas. In response to the Surface Transportation Board's request, the Medina County Environmental Action Association (MCEAA) submits these written comments. These comments aim to identify and clarify issues and impacts that the EIS must discuss and disclose.

MCEAA seeks to ensure that the SEA conducts a full and fair analysis of this project using appropriate methodologies. An EIS informs the decision makers—the STB as well as the public—of the impacts of the proposed SGR line as well as the impacts of alternatives. NEPA requires truthful disclosure about the impacts to the environment and the surrounding community, as well as a fair and unbiased evaluation of alternatives. For the reasons stated here, the search for a better solution has guided MCEAA in drafting these comments to assist the SEA in preparing the SGR EIS.

It remains MCEAA's position that SGR's proposal represents the spawning of a fictional corporate entity from the parent, Vulcan, solely for the purpose of evading federal environmental laws in this proceeding and, once an exemption is granted, attempting to assert eminent domain condemnation power in state court.

Every reviewing body that this proposal encounters should take note of the awesome scope of the applicant's duplicity. Without owning a single parcel of land, Vulcan has entered a community and cut a deal to financially entice a handful of landowners to lease their land for a massive quarry that the rest of the community does not want. To make the quarry as financially profitable as Vulcan desires (and perhaps to make it viable at all, though Vulcan disputes this), a rail line will be required. Owning no

land for such a route, even though a perfectly good route exists on land owned in part by the now-enriched quarry lessors, Vulcan spawns a shell corporation, SGR, which applies for a construction exemption from the STB. In an attempt to shield the quarry, now obviously directly related to the proposed rail line, from any of the environmental analysis that this federal action triggers, Vulcan and its representatives segment the quarry into numerous phases, and lobby agencies with potential jurisdiction over the project relentlessly.

From May of 1999, when Vulcan first begins its own studies, to January of 2004, when STB makes the decision to proceed with an EIS, rather than a less detailed Environmental Assessment (EA), Vulcan conducts study after study at the quarry site and in the rail line area in an attempt to convince the agencies that its two connected projects do not merit a hard look. But during these nearly five years, Vulcan never conducts the three required years of focused counting for two endangered bird species that the U.S. Fish and Wildlife Service says may be present at the site. During these five years, Vulcan never comes forward with an authoritative inventory of wetlands nor monitors for endangered species along its proposed rail routes. During these five years, Vulcan never conducts flood modeling along the creeks that its proposed rail line will cross despite credible evidence from residents that the creek crossings will exacerbate flooding. During these five years, Vulcan never explains to the residents of Medina County why it plans to take their land in state court condemnation proceedings if the quarry supposedly does not need rail to become viable. During these five years, no landowner sells their land to any entity looking to relocate for the purpose of using SGR as a common carrier, because none comes looking. During these five years, Vulcan never explains to Medina County why the quarry and the rail line are not being analyzed together and why their complete impact is not being disclosed to the community.

Now that an EIS is required, Vulcan has no shame. It blames the environmental laws, it blames citizen groups like MCEAA, and it blames the agencies for prolonging the process. It blames everyone but itself. And it continues to use a small group of enriched quarry lessors to pit neighbor against neighbor in Medina County and threaten vocal opponents with the eventual loss of their land for the rail line.

For Vulcan, this EIS (though they had hoped for an EA) is one small part of the larger process of exercising unchecked aggression against a community that does not want them. The more that the scope of the EIS is restricted, the more that its contractors' studies are allowed to provide misleading, incomplete, or inaccurate results, and the more that the EIS fails to provide a complete and detailed picture of both the quarry and the rail line's impacts, the closer Vulcan gets to its goal of entering a community, taking land, and establishing a massive industrial operation without ever having to once disclose its full consequences to the community.

In 1836, people fought and died 40 miles away from here for rights that are now being ignored by Vulcan. Please, don't let them mess with Quihi today.

1.0 FUNDAMENTALS

The Section of Environmental Analysis must address the following fundamental issues consistently throughout the Draft Environmental Impact Statement (DEIS), and in the manner described below, for it to function as a legitimate decision making tool.

1.1 Scope of Study

The DEIS should include consistent and detailed analysis for all impacts and their appropriate geographic extent.

1.1(a) Relatedness and Connectedness

MCEAA incorporates by reference its February 19, 2004 letter to Victoria J. Rutson, Chief of the Section of Environmental Analysis, concerning the scope of the EIS. That letter, which shall be made part of the administrative record in this proceeding, speaks for itself and there is no reason to repeat most of it in these comments, aside from its conclusions.

Vulcan's planned quarry and SGR's proposed rail line are "connected actions" requiring "discuss[ion] in the same impact statement" under the Council on Environmental Quality's (CEQ) regulations implementing NEPA. 40 C.F.R. § 1508.25(a)(1) (2003). Specifically, the proposed rail line is "an interdependent part" of the larger quarry action, and "depends on it" for its justification. *See id.* § 1508.25(a)(1)(iii) (2003).

"The proper test to determine relatedness under 40 CFR § 1508.25(a)(1)(iii) is whether the project has independent utility." *Town of Huntington v. Marsh*, 859 F.2d 1134, 1141-42 (2d Cir.1988); *Hudson River Sloop Clearwater v. Department of the Navy*, 836 F.2d 760, 764 (2d Cir.1988). The independent utility test requires that "[i]f proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the projects should be evaluated together." *Fritiofson v. Alexander*, 772 F.2d 1225, 1241 n.10 (5th Cir. 1985); *Stewart v. Potts*, 996 F. Supp. 668, 683 (S.D. Tex. 1998).

On the facts in this case, the rail line does not possess any real independent utility. Most significantly, the rail line originates at the quarry site. There is no "independent utility" to building an aggregate loading yard at the start of the line, in phase 2 of the quarry site, without the construction of the quarry that Vulcan intends to supply it at that exact site. Construction of the rail line "forecloses options" as to the quarry's location. If the quarry were not a possibility, it would clearly be "irrational, or at least unwise," *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974), to proceed with the rail line. That action is "irrational" absent imminent construction of the quarry through phase 2, and "functional[ly] dependent" on the quarry. Vulcan could not "reasonably consider"

going ahead with the rail line construction if there were no other development to utilize it. *Blue Ocean Preservation Society v. Watkins*, 754 F. Supp. 1450, 1459 (D. Haw. 1991).

Finally, Vulcan has conceded that any assumption that other shippers would use the line is "speculative", that in fact no such demand exists, and that the only "good reason" for building the line is to serve the quarry. Letter from David H. Coburn, Steptoe & Johnson LLP, to Victoria J. Rutson, STB-SEA 1 (January 5, 2004) (Document EI-423); SGR Reply to MCEAA Petition to Revoke 5 (Jun. 9, 2003) (Document 208015).

1.1(b) Cumulative Significance

In the event that Vulcan's quarry ripens into a proposal for federal action, it must be jointly analyzed in the EIS with the rail line as a "cumulative action" under 40 C.F.R. § 1508.25(a)(2). As with a connected action, the regulations mandate a complete analysis, including direct impacts and alternatives, in the same EIS. *Id.* Once major federal actions reach the stage of actual proposals, impact statements on them will take into account the effect of their approval on the existing environment; and the condition of that environment presumably will reflect *earlier proposed actions* and *their* effects. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.20 (1976) (emphasis added). The direct effects and alternatives analysis is necessary for both actions because both must proceed from a common baseline of no impact. Once the direct effects and alternatives for each action have been analyzed side by side in the same EIS, the cumulative impact section of that same EIS aggregates them. To the extent that *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 441 (5th Cir. Unit B 1981), suggests a different result by allowing the agency to "aggregate from the underlying data base," that case only applies to situations where connected and cumulative actions are deemed not present.

1.1(c) Breadth of analysis required for the quarry and rail line as connected actions

Logically, that same side by side analysis of direct effects and alternatives is required for connected actions and their effects. As the CEQ regulations themselves provide, an action need not be "proposed" to be connected so long as it satisfies one of the three tests of 40 C.F.R. § 1508.25(a)(1). Yet the command of the CEQ regulations for full analysis in the same EIS remains the same between § 1508.25(a)(1) and (a)(2). It is simply impossible to argue that *Kleppe*'s statement for what the CEQ regulations later termed cumulative actions under § 1508.25(a)(2) should be ignored in favor of a different result under § 1508.25(a)(1).

It makes no sense to argue that the cumulative impacts of the rail line and the quarry must be described in the same EIS, but that consideration of alternatives and direct impacts for the connected action (quarry) may be deferred until the connected action (quarry) is ripe for proposal. The actions must be analyzed from the same baseline of no action side by side. Only then can their cumulative impacts be determined, also in the same document.

The Fifth Circuit has already decided this issue contrary to any attempt by SGR to segment the EIS' analysis of the quarry as a connected action. In *Sierra Club v. Sigler*, the Fifth Circuit held that related actions that are not "proposals" must be discussed alongside the proposed action in the direct effects and alternatives analyses of the EIS, not simply in the cumulative impact section. 695 F.2d 957, 978-79 (5th Cir. 1983). While the Supreme Court in *Kleppe* addressed (yet, unambiguously resolved) the issue of combined EIS breadth only in dicta, the STB needs to appreciate the directly on point Fifth Circuit precedent it will subvert by adopting the SGR's improvident and self-serving suggestions:

> If an agency were permitted to cite possible benefits in order to promote a project, as the Corps has done here, yet avoid citation of accompanying costs by hiding behind *Kleppe*, the cost-benefit analysis in the EIS would be reduced to a sham: such a "cost-benefit analysis" would always be tipped in favor of benefits. *Kleppe* cannot be used to defend a skewed cost-benefit analysis; it was concerned solely with determining when an EIS with its informal cost-benefit analysis must be prepared. Once that threshold is crossed, the analysis must be objective. This case is beyond the threshold at issue in *Kleppe*, since the Corps had to prepare an EIS on the superport project. The issue here is one not discussed in *Kleppe:* once an EIS is required, can the costs of any claimed benefits be ignored? This issue was correctly resolved in [*Chelsea Neighborhood Association v. U.S. Postal Service*, 516 F.2d 378 (2d Cir.1975)], and as NEPA required it must, *Chelsea* answered it negatively.

Sigler, 695 F.2d at 979.

The DEIS must be generally organized as follows to achieve the purposes behind the command for combined analysis:

- Description of the no action alternative (same for both quarry and rail line)
- Descriptions of proposed and eliminated alternatives to the proposed rail line
- Descriptions of proposed and eliminated alternatives to the planned quarry
- Direct effects analysis
    - For each category of effect, a common and appropriate methodology
    - For each methodology, an analysis applying it to the:
        - No action alternative
        - Action alternatives for the rail line
        - Action alternatives for the quarry
- Cumulative effects analysis
    - Identification of effect categories where cumulative effects will exist
    - For each category of effect, an analysis that adds the effects past, present, and future reasonably foreseeable future actions to:

- The no action alternative, and stops.
- All possible combinations of action alternatives for the rail line and quarry, which includes adding their direct effects.

- A matrix or table, while perhaps useful, cannot substitute for the actual analysis required by this section.

- Only then will it be possible to select a preferred alternative, if applicable.

Sigler makes it clear that the proposed rail line does not exist independently of any phase of the quarry. The phases of development will overlap. These phases will not locate elsewhere, away from the rail line or rest of the quarry; nor will they use exclusively trucks. While not the rule for all phased connected actions, once this quarry is deemed a connected action, every phase of it will be connected to the proposed rail line, because none of the quarry phases have independent utility with respect to one another. They will all rely on common equipment, a shared crushing unit, and shared personnel and resources. They cannot exist apart from one another or the rail line that will transport at least some of their joint output.

1.1(c)(1) Direct effects of rail line and quarry must be analyzed at full build out

For a connected action, the impact on public health and safety from transportation facilities and equipment arises from the full scope of the action that is connected, not just a single phase. The relevant analysis is the full build-out level of rail traffic from the action that will not proceed without, or which is interdependent with, the rail line.

For the SGR proposal, which is a connected action, the full build-out level of rail traffic has not been disclosed. Rather, an estimate from the first few phases of the Vulcan quarry is being used, because the other phases of the quarry, even though obviously interdependent with and connected to the rail line, are being treated as speculative.

This cannot occur. While NEPA does not require a worst case analysis, it does require an analysis of the entire connected action, not simply part of it. Following the principle of *Sigler*, since the rail line claims the benefit of the entire quarry, and since the entire quarry will use the rail line, the direct effects analysis must analyze a full build out scenario.

1.1(c)(2) Consistent use of phasing

The phases of the quarry must be defined at the beginning of the EIS, in the alternatives section for Vulcan's proposed site. Throughout the document, these phases must be used consistently. Analysis should occur, at minimum, for Phase 1 (which Vulcan represents as pre-rail, though it will ultimately use the rail and deliver rock to it from the crushing unit), Phase 2 (rail connection and first expansion of quarry), and full build out.

For the action alternatives, the cumulative impacts analysis should be conducted with the results from the direct effects analysis at full build out.

1.2 Disclosure of All Supporting Data, Reports, and Analysis in the DEIS

STB should not attempt to play "hide-the-ball" with any working papers, data, reports, or analysis used to reach conclusions on any part of the project. Where the STB discusses a methodology, each step, formula, or calculation should be clear and documented. The data necessary to follow those steps, formulas, or calculations completely to the conclusion reached should be placed in the DEIS to allow the public to review and comment on it, and not restricted to internal reports from the contractor or "correction factors" that the DEIS merely refers to. The STB should not hide information from the Administrative Record or decide a matter of agency discretion without referencing and documenting that decision in the DEIS. No analysis or information should appear the FEIS that the public has not had a chance to comment on in a DEIS or SDEIS.

1.3 Reasonable Comment Period for DEIS

MCEAA requests at least 60 days for the public comment period on the DEIS.

1.4 Public Hearing

A public hearing with oral testimony—not a workshop—should be held no sooner than 45 days after the DEIS release. This public hearing should not occur between the Thanksgiving and Christmas holidays, or on the Our Lady of Guadeloupe feast day. Many people in these areas attend church on Wednesdays, so MCEAA recommends holding the hearing on a Monday or Tuesday. It is preferable to have both an afternoon and evening session for the hearing, so that everyone will have a chance to be heard, so that the hearing will conclude at a reasonable hour, and so that there will be no need to pre-register. MCEAA suggests the Bethany Lutheran Church Hall in Quihi as a potential venue with adequate capacity for this hearing. Venues in Hondo may also be explored in the unlikely event that the Hall cannot be reserved in advance of the hearing date.

2.0 ALTERNATIVES

Once it is established that Vulcan's rail line and quarry are connected actions requiring analysis of direct effects and alternatives, as well as cumulative impacts, in the same EIS, Vulcan will make its final stand against full disclosure to the community here, in the alternatives analysis. An extended discussion in layman's terms of what is at stake is in order before proceeding into the legal analysis.

2.0(a) No action - MCEAA's position

The no action alternative to the connected action neither builds a rail line nor builds any quarry facilities. For a connected action, no action is something that is *not the connected action* (i.e., something that has independent utility apart from the connected action) that would occur anyhow. It is illogical to define no action as part of the action itself.

2.0(b) No action - Vulcan's position

MCEAA fully anticipates that Vulcan will have a different interpretation, one that fails to appreciate the distinction provided by the nature of the quarry and rail line as connected actions. Vulcan will tempt STB to take the easy way out of analyzing the connected quarry's numerous impacts by defining the no action alternative in terms of a misstated "either/or" proposition.

Vulcan will ask the STB, as it already has in comments, to define the no action alternative to a quarry and a rail line as a quarry and thousands of trucks. Either Medina County will get a quarry and rail line, or it will get a quarry without a rail line, in which case it will be served by trucks. To Vulcan, the argument has a certain seductive logic: there has to be a quarry to justify any transportation operation, and presumably the quarry is still analyzed, in all its phases, as the no action alternative.

The result assumes the completion of the quarry, conferring a de facto independent utility status on it that the connected action analysis and Vulcan's own words prove does not exist. It yields an EIS where the public and decision-makers never see the impact of the quarry without thousands of trucks lumped in with it, or the impact of doing nothing at all—a result that would be perfectly fine if we were considering, say, an independent federal interstate highway project that was going to be built through part of the quarry site where the quarry was certain to be built with or without the highway. But here, we are considering a rail line that will only be built if the quarry is.

2.0(c) No action – Why Vulcan's position is unreasonable and contrary to law, and why STB must adopt MCEAA's position

However, Vulcan's incorrect argument is predicated on a line of NEPA case law that does not deal with connected actions. In every single case that could justify Vulcan's position, the either/or proposition to reasonably define no action applies as follows:

either the *action* / or something that is *not the action* that would occur anyhow.

No action is obviously the latter "or" result. These cases all proceed from the assumption that no action can be defined "reasonably" as something that is *not the action* that would occur regardless of whether the *action* did. We cannot disagree with that general principle. Here, however, the *action* is a *connected action* with two constituent and interdependent parts. If actions are so bound up and closely related that they cannot be separated, and require side-by-side consideration in the same EIS, then they obviously cannot be juxtaposed against one another in an either/or analysis. The proper analysis to determine the no action alternative is:

either the *connected action* /

or something that is *not the connected action* (i.e., something that has independent utility apart from the connected action) that would occur anyhow

not what Vulcan wants, which is:

either one part of the connected action /

or the other part of the connected action with a substitute for the first part that would occur anyhow

As the definition of "scope" in the CEQ regulations states, scope consists of the ranges of actions, alternatives, and impacts to be considered in an EIS. Actions, alternatives, and impacts—each term is set out and defined separately by the regulation; each term follows from the other. Defining alternatives to an action, including the alternative of *no action*, necessarily requires defining the *action* in a previous step of the scoping process. The agency cannot "undefine" or "redefine" the scope of the action—be it connected, cumulative, similar, or single and unconnected—in a subsequent step if these codified words, which are entitled to the highest deference, mean anything at all.

The general principle that something that is *not the action*, but that would occur regardless of whether the *action* did or did not, can reasonably constitute a no action alternative differs by orders of magnitude from redefining the scope of the action after it has already been defined. The de facto result of independent utility if the quarry is assumed as part of *no action* is no illusion—it is the outright reversal of the connected action determination made one step earlier.

2.0(c)(1) Interstate highway hypothetical

Returning to the earlier federal interstate highway and quarry example, assume a proposed interstate with independent utility that would cross a planned quarry site. Assume that the planned quarry is not a federal action and does not trigger NEPA. Because it has independent utility, the federal highway would occur regardless of whether the quarry ever began operations, and the quarry would begin operations regardless of whether the highway was ever built. The highway and quarry are not connected actions and do not need to be analyzed in the same EIS.

However, assume also that it is reasonably foreseeable that the quarry will begin operations. The Federal Highway Administration, justifiably concerned about the impacts from fine particulate air pollution, decides to assume the operation of the quarry in the no action alternative. The Highway Administration uses the quarry operations to establish a more accurate baseline for its analysis of the interstate routing alternatives. This is perfectly reasonable.

2.0(c)(2) Channel deepening hypothetical

Now, in a different example, assume a proposed channel deepening project in a bay. The proposed channel deepening project requires an EIS. A planned, but not yet proposed, container port is found to be connected to it under the regulations. The channel deepening project claims all of the benefits of the container port to justify itself. The container port, however, could live with the existing channel if it had to. Nevertheless, the channel deepening depends on the larger container port action for its justification, and that is why it is deemed a connected action with the container port under the regulations.

The no action alternative to the connected action neither deepens the channel nor builds any port facilities on the bayshore and uplands. Action alternatives to the connected action involve various reasonable and feasible combinations and locations of channel deepening (including none) and port facilities (including none). Clearly, the agency can eliminate the deeper channel-but-no container port alternative early on, if the facts support that decision. But deeper channels, combined with container ports of varying extent and location, certainly merit further analysis. So does not deepening the channel but still building the port—just not as the no action alternative.

What was a single, unconnected federal action with a scope limited to aquatic environment impacts from dredging and dredge disposal becomes a connected action with a scope encompassing bayshore and upland impacts as well. This is as it should be, because the channel deepening lacks independent utility of its own. Without encompassing these bayshore and upland impacts that it depends on for its justification, the scope of the EIS would be artificially restricted to a level that does not reflect the action that is actually proposed. The case of *Sierra Club v. Sigler* in the Fifth Circuit holds exactly that.

It makes no sense, then, to redefine the scope of the action back to the aquatic environment, and assume the bayshore and upland impacts as a given in the alternatives analysis. The scope of the action has already been decided. The action is the connected action of aquatic environment plus bayshore plus upland, not simply aquatic environment. Stated differently, the action is the connected action of channel deepening and the container port development it depends on for its justification, not simply channel deepening.

To proceed otherwise requires reading the connected action test out of the CEQ regulations. That argument assumes that the differences here are solely semantic, and that the process of defining action, alternatives, and impacts with reference to one another has no meaning so long as a reasonable-looking outcome is achieved. If that were true, then the bayshore and upland impacts could just as easily be added into the cumulative impacts section, rather than considered as part of the no action alternative, *just as they would be in an unconnected single action.* That may be what Vulcan and some in the Federal government want. It is not what they are going to get.

2.0(c)(3) Application to Vulcan's facts

The facts of Vulcan's proposed rail line and planned quarry match the channel deepening hypothetical exactly. We repeat the analysis below.

Now, assume a proposed rail line in a rural area. The proposed line requires an EIS. A planned, but not yet proposed, quarry is found to be connected to it under the regulations. The rail line claims all of the benefits of the quarry to justify itself. The quarry, however, could live with the existing transportation network, namely roads, if it had to. Nevertheless, the rail line depends on the larger quarry action for its justification, Vulcan concedes as much, and that is why it is deemed a connected action with the quarry under the regulations.

The no action alternative to the connected action neither builds a rail line nor builds any quarry facilities. Action alternatives to the connected action involve various reasonable and feasible combinations and locations of rail lines (including none) and quarries (including none). Clearly, the agency can eliminate the rail line-but-no quarry alternative early on, if the facts support that decision. But rail lines, combined with quarries of varying extent and location, certainly merit further analysis. So does not building a rail line but still building the quarry—just not as the no action alternative.

What was a single, unconnected federal action with a scope limited to track-proximate impacts from rail construction and operation becomes a connected action with a scope encompassing quarry site impacts as well. This is as it should be, because the rail line lacks independent utility of its own. Without encompassing these quarry site impacts that it depends on for its justification, the scope of the EIS would be artificially restricted to a level that does not reflect the action that is actually proposed. The case of *Sierra Club v. Sigler* in the Fifth Circuit holds exactly that.

It makes no sense, then, to redefine the scope of the action back to the proximity of the track, and assume the quarry site impacts as a given in the alternatives analysis. The scope of the action has already been decided. The action is the connected action of trackside impact plus quarry site impact, not simply trackside impact. Stated differently, the action is the connected action of building the rail line and the quarry site development it depends on for its justification, not simply building the rail line. No action is something that is *not the action*, whether the action encompasses one or many constituent actions. It defies logic to define no action as part of the action itself.

2.0(d) No action – Legal analysis and further refutation of Vulcan's argument

MCEAA recognizes that a large amount of potentially confusing guidance and case law exists on this point, since the principle that the no action alternative can include something that is *not the action* that would occur anyhow has been accepted in a number of single, unconnected action cases. To assist the agency, we discuss these cases and guidance.

2.0(d)(1) Question 3, CEQ's Forty Questions

CEQ's Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (Mar. 23, 1981), presents an example in question 3 that seems at first to fit this situation exactly. It reads:

> Where a choice of "no action" by the agency would result in predictable actions by others, this consequence of the "no action" alternative should be included in the analysis. For example, if denial of permission to build a railroad to a facility would lead to construction of a road and increased truck traffic, the EIS should analyze this consequence of the "no action" alternative.

Id. at 18027. Again, we cannot disagree. But the question clearly assumes that the facility already exists. The only action assumed in the question is that of constructing the rail line. No connected or cumulative actions intervene. This example provides no guidance beyond implicitly setting out the "either/or" proposition.

2.0(d)(2) Three cases applying the CEQ guidance.

The cases that have applied the CEQ guidance stand only for applying the either/or proposition to unconnected actions with independent utility. They provide no support for the proposition that an action can be redefined into one of its dependent parts when connected actions are involved.

In *Young v. General Services Administration*, 99 F. Supp. 2d 59 (D.D.C. 2000), the General Services Administration (GSA) planned to build two buildings for the U.S. Patent and Trademark Office in Alexandria, VA. No connected actions were involved in the construction. The GSA found that it was reasonably foreseeable that the land, owned

by a private developer, would be developed privately if the government did not build on it. Therefore, the no action alternative assumed private development. This was perfectly reasonable.

Young borrowed most of its analysis from two earlier cases. In *Nashvillians Against I-440 v. Lewis*, 524 F. Supp. 962 (M.D. Tenn. 1981), the no action alternative to a major interstate project assumed the resurfacing of city streets that would need to occur if the interstate were not built. The interstate was not connected in any way to the resurfacing. Both projects would have independent utility, but only one would occur, as the interstate necessarily foreclosed any need to resurface city streets. Here, the quarry does not foreclose any need for the rail line; in fact, it creates the justification.

Nashvillians makes clear that a "do nothing" alternative was discussed. *Id.* at 988. "The FEIS examined in detail a 'no build' alternative which involved not building I-440. . . ." *Id.* This alternative was a sufficient no action alternative because it reasonably included something that was *not the action* (i.e., resurfacing city streets) that would occur anyhow, but did not include any part of the action (building I-440) itself.

The plaintiffs in *Nashvillians* wanted a reasonable no action alternative to be defined as one where nothing occurred. We are not saying that no action means this. We are only saying that no action cannot include any part of the action, and that the no action alternative to the connected action neither builds a rail line nor builds any quarry facilities. No action can mean doing something else that is not part of the action if the facts justify it.

Young also relied on a second case, *Communities, Inc. v. Busey*, 956 F.2d 619 (6th Cir. 1992). In that case, the FAA evaluated a proposal of a regional airport authority to proceed with an airport expansion. The city of Louisville had urban renewal plans that involved both condemnation and purchasing from willing sellers in three neighborhoods near the airport. The court found that these actions were not connected to the airport expansion, and that the city's plans to condemn the neighborhoods had independent utility. *Id.* at 626-27. Consequently, it was proper for the FAA to assume that the neighborhoods would no longer exist in the no action alternative.

The independent utility of the city of Louisville's plans make them the complete opposite of the proposed rail line in this proceeding, which depends on the quarry for its justification. The authority of the city to act independently in this manner is completely distinct from whether a private entity such as Vulcan may assume part of its own connected action as the no action alternative.

2.0(d)(3) Piedmont Heights Civic Club

Most of the remaining basis for Vulcan's position comes out of *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430 (5th Cir. Unit B 1981). Like the three cases above, it stands only for the general principle that a no action alternative can reasonably include something that is not the action but which will occur anyhow.

Piedmont involved three segments of the Atlanta freeway system with independent utility. These three segments were part of a regional transportation plan that was previously determined, in *Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission*, 599 F.2d 1333 (5th Cir. 1979), to not require a comprehensive EIS within the holding of *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), because the elements of the plan had not ripened into concrete proposals for major federal action. *Piedmont*, 637 F.2d at 438. This sort of programmatic ripeness analysis is what we recognize today as the holding of *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726 (1998).

It is important to note that none of these cases displace the connected or cumulative action tests in the CEQ regulations. Had certain elements of the regional transportation plan been concurrently proposed, they may have been cumulative actions. Had the segments not had independent utility, they may have been connected actions. But they were neither of these things.

The plaintiffs in *Piedmont* argued that the EIS should have considered the MARTA transit system as an alternative to the highway segments. But the court found that MARTA would occur anyhow, was part of the baseline analysis, and "amounted to a 'no-build' alternative." *Piedmont*, 637 F.2d at 437. The highway segments would be needed with or without MARTA, and "complemented the system," clearly indicating that the segments and MARTA each had their own independent utility. *Id.* at 438. A similar finding of independent utility for a transit system and highway was made in *Movement Against Destruction v. Volpe*, 361 F. Supp 1360 (D. Md. 1971).

At no time in *Piedmont* does the court ever say that a connected action can be redefined into constituent parts, where one part serves as the no action alternative.

Vulcan likely relies most heavily on this statement:

> However, NEPA does not require an agency to restate all of the environmental effects of other projects presently under consideration. Where the underlying database includes approved projects and pending proposals, the "statutory minima" of NEPA has been met.

Piedmont, 637 F.2d at 441. By "approved projects," the court means MARTA. By "pending proposals" the court means other highway projects in the regional transportation plan. *Id.* at 442. All of these actions have independent utility. The court's statement simply cannot support Vulcan's desired result for a connected action.

Even the dissent in *Piedmont* does not reach the result desired by Vulcan. The dissent would have considered the highway segments as connected actions, but not MARTA. *Piedmont*, 637 F.2d at 443-45. The dissent disagrees with whether MARTA was actually considered as an alternative, no action or otherwise. However, it does not contest the majority's finding that MARTA could have been used as the no action

baseline because it had independent utility, even though the dissent notes that MARTA might have been affected by the highway segments. *Id.* at 444.

2.0(d)(4) Additional cases

Additional cases still do not support the proposition that Vulcan urges, because none of them apply to connected actions or stand for the principle of defining the no action alternative as part of the action itself. *City of Olmstead Falls, Ohio v. FAA*, 292 F.3d 261, 271 (D.C. Cir. 2002) (21 projects with independent utility were properly considered part of the baseline "no action/no-build" alternative); *Grand Canyon Trust v. FAA*, 290 F.3d 339, 343, 347 (D.C. Cir. 2002) (FAA's failure to establish a natural, airport-free baseline noise level in the EA was a failure to evaluate past, present, and future reasonably foreseeable impacts for the EIS-threshold cumulative significance determination; no related actions were involved); *Custer County Action Association v. Garvey*, 256 F.3d 1024, 1037, 1040 (10th Cir. 2001) (Air National Guard's existing flight patterns could be considered the no action alternative for new flight plan, where new plan had independently utility and was not connected action).

MCEAA also notes that in *Dakota, Minnesota, and Eastern Railway Co.—Construction into the Powder River Basin—Finance Docket No. 33407*, STB considered what was clearly a two part connected action: reconstruction of part of an existing track that would only occur if new construction also occurred. In the EIS for that proposal, the no action alternative neither reconstructed the existing track nor added new construction.

2.0(e) No Action – STB's duty to consider alternatives outside of its jurisdiction

Vulcan's attempt to avoid alternatives and direct effect analysis for the quarry cannot be justified by the fact that the STB lacks direct jurisdiction over the quarry site. By defining a truck-served quarry as no action, Vulcan seeks to avoid discussion of any other quarry site alternatives that may arise during the environmental review, including alternative configurations and phasing at the current site. STB must consider the effects of such alternatives. In *NRDC v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972) the government's contention that "the only 'alternatives' required for discussion under NEPA are those which can be adopted and put into effect by the official or agency issuing the statement" was expressly rejected. While other holdings of Morton have been called into question, this one endures. *City of Alexandria v. Slater*, 198 F.3d 862, 868 (D.C. Cir. 1999).

2.1 Purpose and Need

MCEAA understands that Vulcan is entitled to some deference in its quarry site selection. The rock is not going to move; we understand that. Still, Vulcan should be required to disclose the financial dependence of the rail line on the quarry. When will the quarry generate sufficient volume to justify the economy of scale that rail provides? When will rail first become a profitable way to ship? When will rail's profitability exceed that of trucking? When, if ever (and particularly in the maximum production

phases), is rail necessary to make the quarry profitable? Answers to these questions should be provided in terms of planned quarry phases.

2.2 *Requested alternative for consideration*

In view of the above evidence presented, other alternative rail routes should be considered. For example, the Galveston, Houston, and San Antonio (GH&SA) Railroad was built in 1911 for the purpose of facilitating the construction of the Medina Dam. This rail line began at Dunlay, near the origin of the proposed and alternative #3 rail lines. It traversed north over level terrain, and avoided the major part of the Quihi Creek and its floodplain. This route passes near the proposed quarry site.

This route has several advantages over all of the routes presented by SGR for consideration to the STB. It avoids the main portion of the Quihi Creek floodplain and its artesian creek beds, the floodplains of the Cherry and Elm Creeks, thus fewer trestle bridges would be needed. It also avoids the historic areas of Quihi, the Texas Heritage Lands, and for the most part the major areas of buried artifacts.

This route crosses fewer roads. It crosses CR 445, CR 4643, CR 4516, CR 265, and FM 2676. (This does not include the eastern part of CR 4512. This portion of CR 4512 has been unused for the past 5 years and is inactive.) Crossings of FM 2676 and CR 4516 could be located for a more suitable crossing from a safety standpoint, with a better visualization of the crossing from these roads. Although this route is somewhat longer and involves more property owners, some of these property owners are known to favor the quarry and would be expected to be in favor of the railroad on their property. Additional alternative routes should be accepted or rejected on their own merits.

MCEAA requests that the old Medina Dam route be evaluated with the assumption that a grade separated crossing will exist across U.S. 90. This is the applicant's chief complaint about this route, because it would add cost. The cost of the construction of this route, or a variation of this route, should be compared to the costs of the proposed route. Cost alone is not a sufficient justification for the elimination of this alternative, at least not without a showing from the applicant of the type described in section 2.1, of the financial relationship between the quarry and the rail line. It is a feasible route.

2.3 *Selection of rail alternatives*

In selecting and eliminating alternative rail line routes, STB should aim for avoidance of flood impacts, not simply avoidance of the floodplain. The flood impact analysis should be an integral part of the elimination of alternatives from consideration, rather than attempting to use the floodplain map as a proxy before any analysis occurs. As discussed in our scoping comments on flooding, floodplain maps may be out of date and inaccurate, and simply selecting a parameter such as "floodplain width" to justify elimination of a route may not be reasonable without modeling.

3.0 DIRECT EFFECTS

In the direct effects analysis of both the quarry and the rail line, STB must ensure that the contractor is held to a high standard of detailed review and disclosure. Vulcan has done its own cursory studies for five years, hoping for an EA. This EIS must not simply slap together the reports that Vulcan had hoped to place in an EA.

3.1 Flooding

Residents of the project area have been most concerned with flood impacts, and with good reason. Flash flooding in Medina County is common, as are sustained flood events. Just over a year and a half ago, rivers crested at record levels in June of 2002 as accumulations totaled between 40 and 45 inches during a week-long set of storms. The Medina Dam was almost overtopped during this event. On August 1-2, 1998, during a 24-hour period, 32 inches of rain were recorded at Medina, in nearby Bandera County. The U.S. record for extreme point rainfall in a 72-hour period is held by Medina—48 inches during Tropical Storm Amelia in 1978. *See* U.S. Geological Survey Open File Report 03-193, "Major Catastrophic Storms and Floods in Texas," available at http:// http://www.floodsafety.com/USGSdemo/25ormore.htm (last visited Feb. 22, 2004).

Accumulations of 6-9 inches in 6 hours or less leading to flash flood events occur almost annually and can be verified with rainfall data from the National Weather Service's San Antonio office. Even a few inches of rain over 1-3 hours can cause a flash flood. Additionally, the Edwards Aquifer Authority contracts with the South Texas Weather Modification Association (830-569-4186) to conduct cloud seeding year round in Medina County.

To reasonably evaluate the impacts of the quarry and rail line on flash flood and longer term flood events, STB should proceed through the following analysis:

3.1(a) <u>Identify where flooding impacts may be exacerbated.</u>

<u>3.1(a)(1) Impacts from the quarry</u>

The quarry's chief impact will be alterations of, and additions to, runoff flows. The EIS must disclose where these will occur.

- What is the buffer plan for the streams in each phase?
- Will any streams be filled at the quarry?
- How will drainage be handled from the excavated areas of the quarry?

Flood modeling for the quarry, discussed below, will then answer the following questions:

- What will be the flooding impact of increased runoff entering the streams from the quarry?
- Is the construction of a detention pond at the quarry site to decrease peak flood flows a necessary or appropriate mitigation tool?

3.1(a)(2) Impacts from the rail line

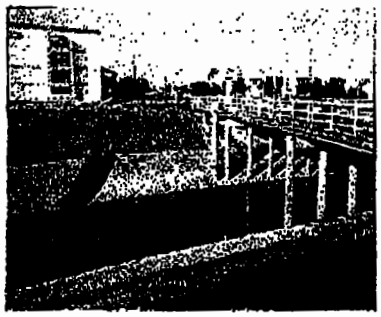
The trestle bridges proposed at the creek crossings of the rail line alternatives represent a severe flood increase hazard. This hazard has been absurdly dismissed as "overstated and unsupported" by SGR's Washington lawyer, who knows nothing about flooding, and some discussion of why these bridges will pose a severe hazard is in order. *See* Letter, David H. Coburn, Steptoe & Johnson LLP, to Victoria J. Rutson, STB-SEA 4 (Jan. 5, 2004) (Document EI-423).

Waterborne debris, composed primarily of tree trunks and limbs, often accumulates on bridges during flood events. Debris accumulations can obstruct, constrict, or redirect flow through bridge openings resulting in flooding, damaging loads, or excessive scour at bridge foundations. The size and shape of debris accumulations vary widely, ranging from a small cluster of debris on a bridge pier to a near complete blockage of a bridge waterway opening. The following picture, taken in 1999 along Clear Creek in Brazoria County, Texas, illustrates the nature of the problem.



This trestle bridge was severely damaged in the 2001 floods associated with Tropical Storm Allison, which produced less rainfall in the Clear Creek watershed than commonly occurs in flash-flood generating events in Medina County.

Even if Vulcan were to take responsibility for channel maintenance around the proposed trestle bridges, that may not eliminate the problem. These two bridges in Houston along Brays Bayou are being replaced along with 12 others simply because they back water up significantly during flood events to generate results shown in the third picture.







Vulcan also seems to believe that the type of bridges it will build, and how it will build them, are questions that can wait until after the EIS.

> The question of whether pile drivers will be used or not, as opposed to several other construction alternatives that might be available for use, will have to await a more complete engineering assessment by SGR, which would take place only after any final STB approval.

Letter, David H. Coburn, Steptoe & Johnson LLP, to Victoria J. Rutson, STB-SEA 4 (Jan. 5, 2004) (Document EI-423). This is obviously not true considering that pier placement and the design of the trestles is going to be *the* issue that controls the flood impact of the bridges.

3.1(a)(3) Impacts from both the quarry and the rail line

Increased flooding impacts from the quarry upstream will be compounded downstream by the bridges. Part of the purpose of analyzing these connected actions

side-by-side is to enable the subsequent determination of connected impacts. The cumulative flood impact may be significant and should be evaluated as it would be for the direct impacts.

3.1(b) Model the impacts on project area subwatersheds

Once the potential impact sources have been identified, their impact should be modeled using modern hydrologic methods, explained below.

3.1(b)(1) Select a modeling method for the watershed and its subwatersheds

This is by far the most important step in the modeling process. It is important that the applicant choose a competent engineering contractor familiar with the South Central Texas region for this part of the EIS.

At a basic level, flood modeling consists of the following steps:

- *A basin model*
  First, the watershed must be defined, along with all of its parameters, including runoff coefficients, channel roughness, and infiltration loss.

- *A design rainfall*
  This is a statistical rainfall, most accurately obtained from NEXRAD radar data from the local National Weather Service office, since the creeks involved in this project likely do not have rain gauges nearby. It is a statistical level of rainfall over a given time span. Appropriate rainfalls to model for the quarry and rail line include those for the 10 and 100-year flood events for a short (such as 6-hour) and longer (such as 24-hour or greater) time span.

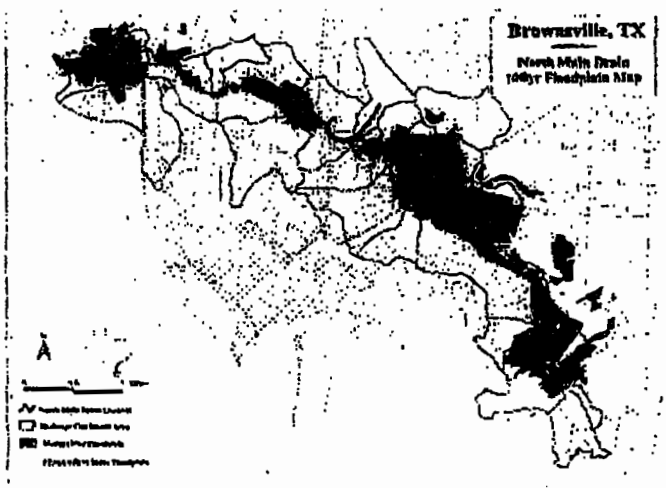
- *A runoff output*
  The two elements above are combined to generate runoff from the entire watershed routed through each reach of the watershed.

- *A water surface elevation*
  Cross sections of the stream channel at given points are combined with the runoff output in a hydraulic model to determine how high the water surface elevation will be at those points of the stream, which is then extrapolated for the remaining points. In the past, these cross sections were surveyed manually, and accuracy was compromised on streams with few such cross sections. Today, digital topography information makes the output much more accurate.

- *Floodplain analysis*
  The water surface elevations can be combined with other topographic information to generate a floodplain for a given design storm. Again, digital information has made this easier.

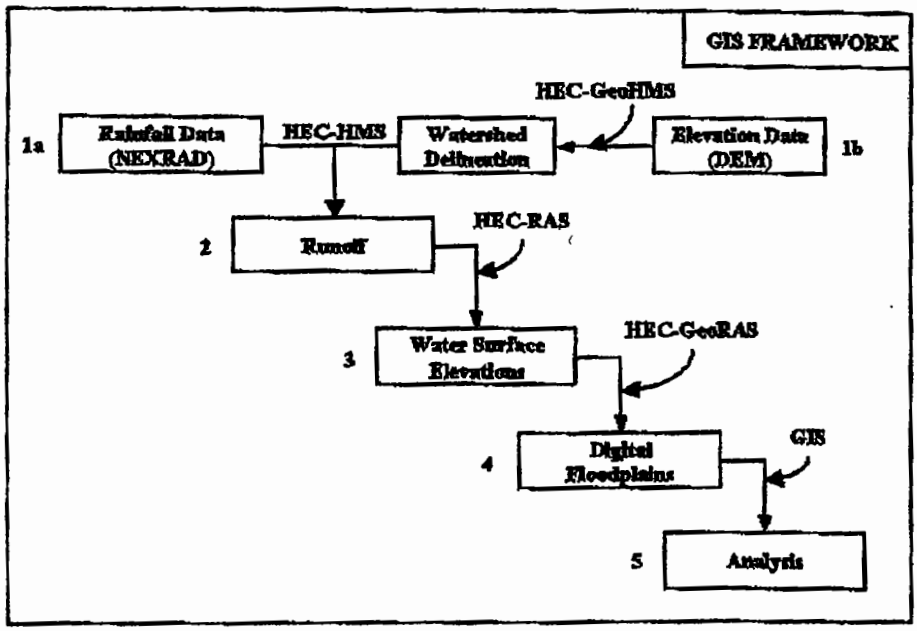
Overall, hydrology and flood modeling have been completely revolutionized since the introduction of NEXRAD radar data in 1994 (available from the local National Weather Service office) and since the introduction of Geographic Information System (GIS) technology in the mid-1990s. With the advent of applications, updates, and tools that linked the U.S. Army Corps of Engineers flood modeling software to these new technologies, flood modeling changed forever.

Therefore, certain methodologies are no longer reasonable or appropriate to evaluate flood impacts. The Corps' HEC-1 hydrologic model, for instance, has been replaced by the HEC-HMS (Hydrologic Modeling System) model. The Corps' HEC-2 hydraulic model has largely been supplanted by HEC-RAS (River Analysis System) to calculate water surface elevations and account for structural effects like bridges. The FEMA floodplain maps for Medina County, while not directly relevant since the impacts of the new project structures will have to be modeled regardless, have not been updated since August of 1980. The location of structures inside or outside of these floodplains should not be used as a shorthand to cut off further analysis. While development in the area may not have increased significantly since that time, STB should anticipate somewhat different results from the floodplain maps simply due to advances in modeling technology alone. One such example of the difference between the new and old models appears below.



Modeled 100-yr floodplain (blue) combined with the FEMA map 100-yr floodplain (green).

We suggest the following framework of analysis:



This framework is essentially the industry standard, certainly in Texas. It is being used by the U.S. Corps of Engineers, which developed most of its elements (http://www.crwr.utexas.edu/gis/gishydro99/hecesri/hec_esri.htm), on flood control projects nationwide, including along Clear Creek in the Galveston District (http://www.clearcreekproject.com/objects/report.html). It is being utilized by the Harris County Flood Control District along with LIDAR (state of the art aerial laser technology that we are obviously not calling for here) to resurvey all of the floodplains in Harris County after Tropical Storm Allison (http://www.tsarp.org/tsarp_over/index.html). It is being used on a neighborhood scale in communities like Brownsville, Texas (http://hydrology.rice.edu/nmd/methodology.htm). And, because it is a scalable methodology, it performs equally well at the subwatershed and watershed levels.

To delineate the watershed and establish the basin model, elevation data will be required. This data is contained in Digital Elevation Models that exist for the entire United States at varying levels of resolution. Free data for Medina County is available at 30m resolution, and much more accurate 10m and 1m data is available commercially. Given the small area covered by this project, obtaining this data should not be a problem. The HEC-GeoHMS applet, available for free from the Corps and for use with HEC-HMS, translates this digital data into watershed parameters for input into the hydrologic model.

Next, the appropriate design storms should be selected. NEXRAD rainfall data for these storms should be obtained from the local National Weather Service office

and/or website. Because few gages exist in this part of Medina County, this data is important to accurately reflect the distribution of rainfall over the watershed.

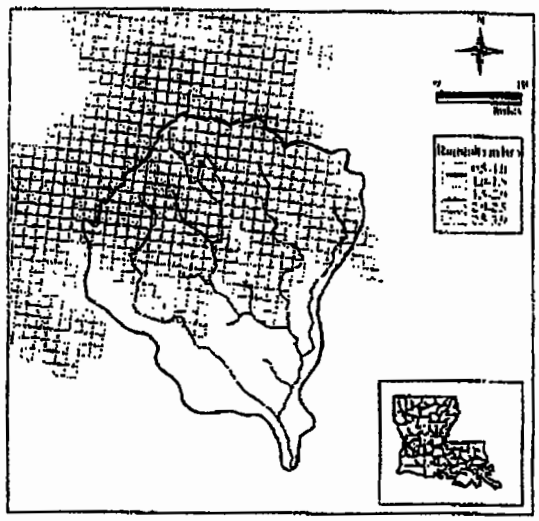
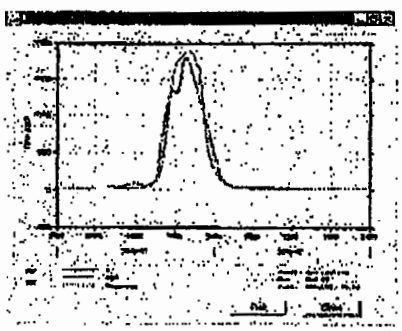
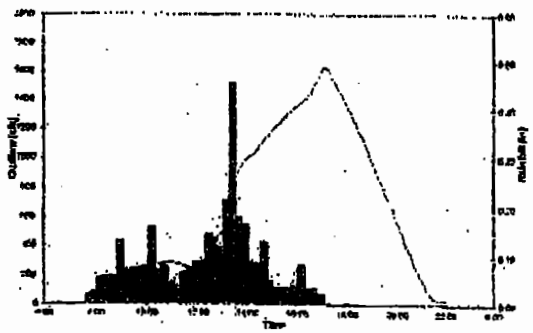


Figure 1.10
Typical NEXRAD radar rainfall data.

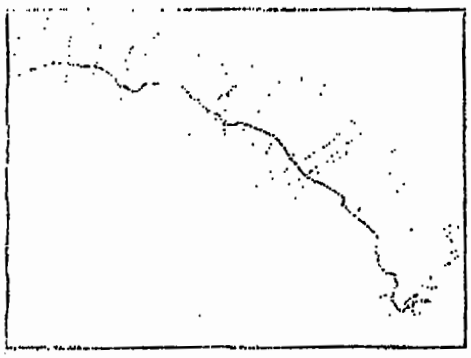
Once the input assumptions have been established, they should be disclosed in the EIS. This is very important since there are a number of different hydrograph and routing methods that are available in HEC-HMS. The assumptions disclosed in the EIS should allow an individual to run HEC-HMS and reach the same result. Particularly important are any adjustments. The model should also be calibrated before it is run.

Hydrographs for key points should be included in the EIS, as well as an overlay between the design storm(s) data and the resulting hydrograph.





In determining the water surface elevations, a wide variety of geometric data should be used to determine stream channel geometry as accurately as possible. Some of the potential inputs are shown below.



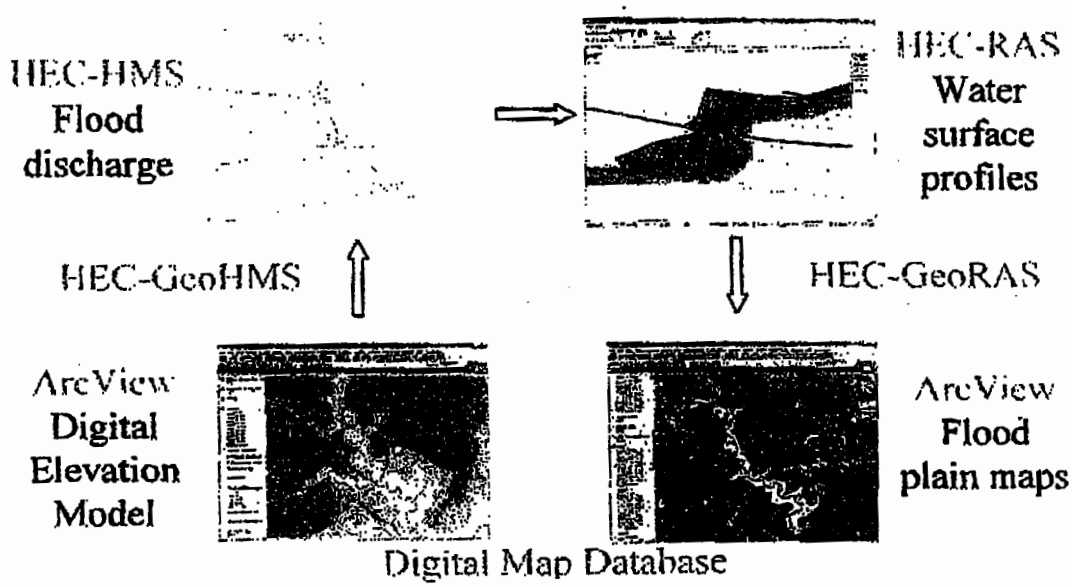


The HEC GEO-RAS applet, also available for free from the Corps of Engineers, enables HEC-RAS cross sections, reach lengths, and roughness values to be extracted from GIS data. Cross sections can be extracted from a TIN, which is a digital representation of terrain. The TIN is created within a GIS utility from a digital elevation model. The cross section alignment layout can also be created by drawing sections in ARC-VIEW.

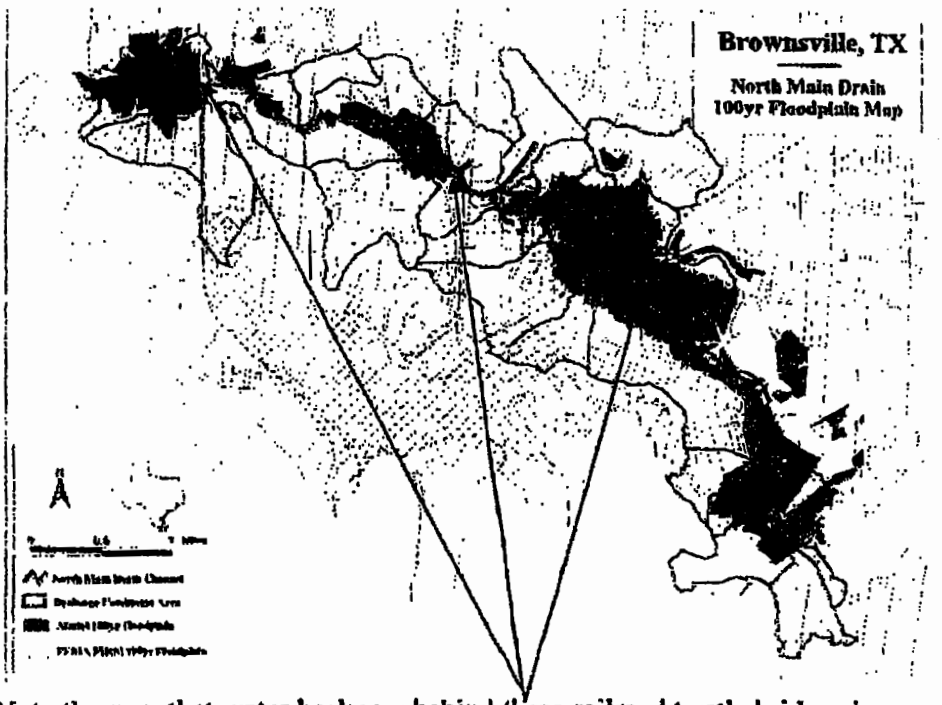
The HEC GEO-RAS cross section creation process generally resulted in sections exceeding a 500-point limit in HEC-RAS. A filter tool in HEC-RAS eliminates unnecessary coordinates from the section according to user specified tolerances. Filtering can be minimized so that the section will maintain a high density of coordinates. The filtering tool in version 3.2 of HEC-RAS does not specifically preserve roughness boundaries, therefore it is desirable to maintain as many coordinates as possible so that roughness boundaries along the channel are not distorted excessively.

The final step is the analysis of impact. Starting with the no action baseline, the digital floodplain outputs can be overlain onto structure locations and aerial photography (digital orthoquads) to accurately determine the extent of existing flood impacts. As discussed in the next section, the impacts for action alternatives can then be modeled and compared in subsequent runs.

Review of the Process



The Final Product



Note the way that water backs up behind three railroad trestle bridges in ways not accounted for on the existing floodplain map.

3.1(b)(2) Analyses of action alternatives

Assumptions for subsequent modeling runs with the action alternatives must be disclosed in the DEIS. In particular, changes in overland flow rate and quantity due to the quarry will depend on a number of assumptions about the impacts on land cover and infiltration that the quarry will have and how its drainage will occur. These changes will primarily affect the hydrologic model (HEC-HMS). Similarly, the bridge effects will primarily affect the hydraulic model (HEC-RAS) and the set of assumptions used there will need to be disclosed. Obviously the bridge effects analysis will need to assume an appropriate level of quarry operations if a particular bridge is located further down in a watershed or subwatershed affected by the quarry.

3.2 Air

From a health effects standpoint, the most severe impact associated with this connected action will come from coarse (PM10) and fine (PM2.5) particulate matter. Both types of particulate matter will be generated during quarry operations (treating the "construction" of the quarry as part of its operation, which, with the exception of structure and road building, it is) and during rail construction and operation.

The planned 1,760-acre quarry will be, as we understand it, the largest quarry in the San Antonio area and will far exceed Vulcan's other area quarries. This a quarry for the next century and its particulate matter emissions will be commensurate with its scope.

In 1997, EPA set a national standard for fine particulate matter that has been judicially upheld and repromulgated. However, in this case, it is not whether the national standard will be exceeded that is important. Since that time, the scientific evidence has advanced even further, beyond the findings that justified EPA's initial decision to set a national standard for PM 2.5 in 1997. The primary issue of increased mortality and health effects due to fine particle air pollution is settled within the scientific community. The research focus has now shifted to identifying which components of fine particle air pollution do the most damage. Therefore, it has required more intensive laboratory study to determine which constituents of particulate matter do the most harm to which internal system.

In a 1998 Sonoma Technology Corporation Report for the City of Houston, Dr. Michael T. Kleinman of the University of California, Irvine, identified two areas of unsettled research at the time. First, he noted "there is also some agreement that exposure to air pollutants at high concentrations can directly or indirectly affect people's hearts." A 2002 article in the *Journal of the American Medical Association (JAMA)* points to the settlement of this issue for particulate matter over the long term. The article concludes:

> Long -term exposure to combustion-related fine particulate air pollution is an important environmental risk factor for cardiopulmonary and lung cancer mortality

C.A. Pope III et al., *Lung cancer, cardiopulmonary mortality, and long-term exposure to fine particulate air pollution.* 287 JAMA 1132-41 (2002).

The other important issue for health effect purposes today is the size of the incremental increase in particulate matter concentration. Dose-response studies indicate significant adverse cardiopulmonary effects from even small incremental increases in particulate matter.

Furthermore, it is near certain that localized exceedances of the national standards may occur for periods sufficient to generate acute and long-term health effects, and perhaps even increased mortality rates, during these projects. The only real question involves how far these localized exceedances will extend. Medina County obviously has no monitoring system of its own. The citizens of Medina County are entitled to find out what these impacts will be and how far from the quarry site and rail line they will travel.

3.2(a) Computerized grid modeling must occur for both the quarry and the rail line

Using an approved modeling program, the EIS should model PM10 and PM2.5 for the quarry and rail line. These two classifications of PM are different, but one is a

subset of the other, so it us understandable to wish to model them together. If that is the case, the EIS must disclose the fraction of each PM type arising from the rail line and the quarry and the basis for that determination.

Baseline emissions will consist mainly of biogenic sources and atmospheric particle formation from those sources. During the modeling:

- The quarry should be treated as an "area source"
- The rail line should be treated as a line source or series of point sources

The EIS must account for all sources during:

- Rail line construction
- Quarry site construction and excavation, which will add to quarry operations
- Quarry operations, including trucks, the crusher, loading trains and trucks, and road dust

The EIS must also include atmospheric particle formation may occur from reactions with volatile organic compound (VOC) emissions from the quarry and rail line construction and operation in its calculations. This increment may or may not add sufficiently to the direct emissions to make them more significant.

All modeling results should be presented graphically in the EIS, preferably in the form of grid outputs or isolines of PM concentration. All assumptions used in the model should be disclosed, particularly the emissions from each source and the way in which quarry phasing increases emissions. Modeling results from the quarry and the rail line should be added and disclosed as the cumulative impact for the action alternatives.

STB cannot wait for the state to analyze these impacts in the state permit process. It must disclose them now in the EIS.

3.2(b) Off-site impacts

The state of Texas does not regulate particulate emissions from uncovered rail cars. These emissions have the potential to add to or create localized particulate matter health effects for those regularly exposed to them. Unregulated particulate emissions from rail cars should be analyzed as follows:

- A general emission rate per carload per rail mile should be calculated
- A general emission rate per carload when the train is stationary should be calculated

3.3 Wetlands

STB should disclose and map both the jurisdictional and nonjurisdictional wetlands in the area of each action alternative. It should also disclose the volume and area of, as well as map the stream fills necessary for bridge construction. The entire wetland delineation should be included as an appendix in the EIS.

3.4 Wildlife

MCEAA incorporates by reference its February 19, 2004 letter to Victoria J. Rutson, Chief of the Section of Environmental Analysis, concerning the required analysis under the ESA that Vulcan has not yet conducted. MCEAA reiterates its conclusion in that letter—which is shared as a policy by the U.S. Fish & Wildlife Service and which the service placed Vulcan on notice of at least three years ago—that three years of focused counting at Phases 2-5 of the quarry site, as well as for the rail line alternatives, is necessary before a valid Biological Assessment (BA) can be published and included with the EIS.

No monitoring has yet been done for any of the rail line alternatives. Three years of monitoring is required for a BA on the quarry site and for these alternatives, and no BA will be complete until that monitoring occurs. The ESA requires this monitoring for two reasons. First, we know that impacts on endangered species will occur as soon as construction begins, not when a given phase is reached. Second, the law requires disclosure of indirect as well as direct impacts from the action under consideration. *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976).

The BA must be included in the EIS so that the public can comment on it.

STB must also look more broadly than the ESA and indicate what plant and animal species are actually present in the project area, as opposed to simply being or not being on a list in an agency office. MCEAA encourages particular focus along streambeds and in riparian areas, in bridge construction areas, where small plant and animal species may emerge only briefly, during and after rainfall events. What is actually going on in these areas in not likely to be on a list and underpins the natural systems that we do know more about.

3.5 Noise

The STB knows how to do a noise analysis for rail. Recent court cases have further instructed it. It is the quarry, however, that presents the real issue here. Given that the quarry will face south (towards residences), it is highly likely that blasting will be audible to these receptors. To do a complete noise analysis, STB must determine:

- When are the operations going to occur for quarry and rail (day or night?)
  - Apply the nighttime weighting penalty if operations will occur at night
- Take background measurements on land crossed by rail alternatives and outside of the "buffer area" properties proposed by Vulcan
- Locate all noise receptors (i.e. residences)
- Do computer modeling of noise from both the quarry and rail line
  - Account for all sources during rail line construction
  - Account for all sources during quarry construction and excavation, which will add to quarry operations

- Account for all sources during quarry operations, including trucks, the crusher, and loading trains
- The results should be added and disclosed as the cumulative impact
- Results should be presented graphically in the EIS
- All modeling assumptions must be disclosed in the EIS

- All mitigation or lack of mitigation decisions must be fully explained and justified

3.6 Environmental Justice

Census 2000 data indicates that Medina County is 45.5% Hispanic. A detailed environmental justice analysis for each alternative must appear in the EIS.

3.8 Cumulative impact: Rail operations

- Will traffic be switched when it reaches the UP main line?
  - If so, where?
  - If not, will the trains operate directly to their final destination?
- Whether or not trains will operate directly to their final destination, or will be switched, the following specific disclosures for the Houston region, a region of severe rail traffic problems, must be made:
  - Is the final destination a rail yard or transloading facility where the aggregate is offloaded onto trucks?
    - If yes, where are these facilities in the Houston region?
    - If no, where are the locations that this aggregate is offloaded in the Houston region?
  - What is the rail traffic impact on the Houston lines that these trains will have to operate on to reach their final destination?
    - These impacts on the rail system are not speculative.
    - Even though Houston has a rail traffic control system that routes traffic to varying lines, the capacities of these lines are known to STB.
      - What will be impact on the capacity of these lines from the rail traffic in this proceeding and from other reasonably foreseeable future actions?
      - What will be the road traffic impact from this proposal's additional rail traffic in Houston, when combined with other reasonably foreseeable future actions, at least for the initial years of quarry operations?
  - Based on the air quality analysis for off-site particulate emissions from rail cars, what is the increment of particulate emissions increase in the Houston area?
    - Is the carrier of these cars prepared to comply with Houston's nonattainment plan provisions relating to railroads?
- Will rail cars of any type (particularly hazardous materials) be stored anywhere along the proposed rail route?

#EI-640
RS

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February 24, 2004

received 2/25/04

Ms. Rini Ghosh
Surface Transportation Board
Case Control Unit
1925 K Street NW
Washington, D.C. 20423-001

RE: STB Finance Docket # 34284
Comments on the Scoping for the SGR EIS in Medina County

Dear Ms. Ghosh:

Thank you for sending me the Notice of Intent to Prepare an Environmental Impact Statement (EIS) for the Southwest Gulf Railroad Company's proposed construction and operation of a seven-mile rail line in Medina County, Texas. I am very disappointed that STB did not feel that a few public workshops would be helpful for the EIS process. I have been working with the Medina County Environmental Action Association (MCEAA) for a while now and have a real good perception of the needs of the impacted individuals in Medina County. Public workshops would not only have given STB an opportunity to improve their public image in Medina County, but would have ensured a better public understanding of the process and the issues to be addressed by the EIS. I disagree with the notion that STB has put forth a concerted public outreach program. One public meeting where citizens were not allowed to voice their opinions in a open forum is not a comprehensive public relations program.

I do appreciate the opportunity to comment on the draft scope document and have included my comments in this letter. The scoping document was fairly thorough, but seemed a bit general. I would have liked to see a little more specificity in exactly what types of issues are going to be addressed. However, I am going to assume that you will be addressing the specific issues that have been brought to your attention by letters and comments from the past notices associated with the EA. I am not going to dwell on any of the issues that I have addressed in the past on the assumption that you will address those in your EIS.

I do not feel that the current scope includes a fair comparison of alternative actions. Throughout the scoping document, almost every section begins with the statement that the issue will be addressed with respect to the proposed action and no reference to the alternative actions. All alternatives should be equally addressed in the EIS. Some can be described and removed from analyses for well-founded reasons, which must be stated in the EIS. However, reasonable and viable alternatives must be analyzed and compared to the proposed action at the same level of effort as the proposed action. Otherwise a fair comparison is not possible and the EIS is not valid. I might point out that several people in the county have suggested alternatives for the railroad that have not been considered to date. I recommend that these alternatives be carefully

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considered in the EIS. MCEAA will be thoroughly reviewing the document for proper analyses and comparison of alternatives when the draft EIS is made available.

The exact location of the proposed action and the alternatives should be released to the public at this time. Landowners should be provided with this information to allow them to determine if the EIS fairly addresses impacts to their land and agricultural operations. Exact routes need to be made now. Changes in alignments can be made as part of mitigation, but for the need for mitigation to be analyzed, the locations must be set and released for public review. The routes should be provided in GIS format to allow the public to critique the routes and impacts to the environment. I recommend that the alternatives be staked and flagged in the field to assist public review of the routes. Again, this could save a great deal of time in the EIS process if the citizens are given good information up front.

The EIS must include at a minimum the proposed action, the three alternative routes, a trucking only alternative, and a no action alternative. The no action alternative must be no quarry and no railroad and no trucks. Again, this allows for fair comparison of the proposed action to no impacts by the action. In addition to these actions, the following actions should also be considered due to their inclusion as part of the proposed action:

- Compare at grade crossings to grade separated crossings for all state and county roads crossed by the railroad.
- Compare trestles to wide span bridges with respect to flooding and other surface water issues
- Compare railroad with 15% trucking to railroad alone.

One of the most important issues that should be addressed is the fact that the quarry should be included in the EIS. The regulations under the CEQ clearly state that actions connected to the proposed action should be included in the EIS analyses. Listed below are the CEQ regulations concerning this issue:

> ***Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (Secs. 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:***
>
> 1. ***Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:***
>   - ***(i) Automatically trigger other actions which may require environmental impact statements.***
>   - ***(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.***
>   - ***(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.***

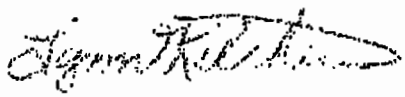
Without question, the railroad is intrinsically connected to the quarry. There is no other reason for the railroad to be constructed except for the quarry. No other industry is in the area that requires rail. By the rule listed above, the construction of the railroad is solely for the

construction of the quarry and the two cannot be separated. Therefore, they are connected actions and both should be addressed in the EIS.

Last, I am concerned that the scope does not include careful analyses of impacts to floodplains. The rail crosses flood plains several times and each crossing has potential for increasing the size of the floodplain. Trestles and bridges tend to become clogged with debris during floods. This slows down flood flows causing increased flooding upstream. This should be addressed for each and every alternative. A preliminary HEC analyses should be included for proper comparison of the alternative and potential impacts to floodplains.

Again, I direct you to the previous letters sent by myself and others that addressed many issues of interest for this EIS. These issues have already been discussed, are part of the public record, and I assume that you will address them. I sincerely appreciate your consideration of these comments and look forward to seeing the final scoping document and draft EIS.

Very truly yours,



Lynn M. Kitchen, Ph.D.
Principal Scientist

Copy: U.S. Senator John Cornyn
U.S. Rep. 23 District Henry Bonilla
Texas Senator Frank Madla
Texas Rep. Timeteo Garza
Robert Fitzgerald, President MCEAA
David Barton, Gardner Law Firm

#EI-645
RR

The Medina County Environmental Action Association, Inc.
202 CR 450, Hondo, TX 78861
Phone 830-741-5040
Fax 830-426-2060

February 25, 2004

Surface Transportation Board
Case Control Unit
1925 K Street
Washington, D.C. 20423-0001

Received
2/25/04

Attention: Rini Ghosh:

Re: Finance Docket No. 34284

Dear Ms Ghosh:

This letter is in further response to the Surface Transportation Board's January 28, 2004, notice of formal scoping process letter. The following outline is presented for consideration of the STB regarding the scoping of Finance Docket Number 34248:

FUNDAMENTALS AND ALTERNATIVES• The rail line and quarry are connected actions that lack independent utility and must be considered in the same EIS

- This means that the direct effects of a rail line and the direct effects of a quarry must both be analyzed in the same EIS
- This means that the cumulative effects analysis must disclose the sum total of no action, a rail line, and a quarry
- The required baseline "no action" alternative must be truly that: no quarry and no rail line
  - Vulcan wants "no action" to be a quarry served by thousands of trucks.
  - But the "action" here is a connected action. It is illogical to assume that "no action" can contain part of the action.
  - This will distort the analysis. We will never know that the impacts of the quarry alone are. If the quarry is assumed, less analysis will occur for its impacts, and it will be impossible to tell what impacts the phasing of the quarry has as time goes on.

- STB should consider the Medina Dam route alternative and assume that it will have a grade crossing over U.S. 90 if that is where it will need to connect to the UP main line.
  - This route should not be assumed to cross U.S. 90 at grade simply to exclude it from further consideration.
- Need for the project and its components vs. financial need
  - What is the financial relationship between the quarry and rail line?
    - Vulcan cannot prove that the rail line will exist without the quarry
    - Can Vulcan prove that the quarry will exist without the rail line? If so, where is that data?
  - What is the financial relationship between the phasing of the quarry and the rail line?
    - When will rail first become a profitable way to ship?
    - When will rail's profitability exceed that of trucking?
    - When, if ever (and particularly in the maximum production phases), is rail necessary to make the quarry profitable?
      - i.e., when does trucking become unprofitable?
  - What is the financial relationship between the quarry and the exclusion of certain alternatives?

2.

- How many trestle bridges can Vulcan afford to build?
- The Medina Dam alternative should not be excluded from consideration simply because it will require a grade separation without a showing of impracticability in the EIS
- No rail line alternative should be excluded from further consideration simply because it may require grade separations without a showing of impracticability in the EIS.

- What is the financial relationship between the quarry and the mitigation of certain alternatives?
  - No rail line alternative should be excluded from further consideration simply because it may require mitigation, including grade separations.
  - If a grade separation is required as mitigation for one road, that grade separation should be assumed for each of the rail line alternatives during the impact analysis
    - The STB should not wait to apply mitigation until after it picks a preferred alternative. The benefits of mitigation that would apply to all rail line routes, such as grade separation over a given highway, should be applied equally to all rail line alternatives.

DIRECT EFFECTS

Cultural resources (Cultural impacts cannot be defined until there are metes and bounds for the 1st choice and alternatives for the rail.)

- Define the area of projected effect for construction. This cannot be defined at this time.
- Define the area of impact for operation based on the results of the impact analysis
  - List the potential impacts (everything from flooding to vibration from bridge construction to noise and aesthetic impacts)

Options for buffer zones must address purchase of additional land, just like in the founding of our railroads to preserve sanctity of surrounding areas.

Geologic factors
Soils

For these issues, the impacts are listed in Lynn Kitchens June 12, 2003 letter.

- The EIS should survey for all of the geologic and soil features listed
- The EIS should consult with agencies with jurisdiction over the Edwards Aquifer to obtain an inventory of these features.
  - That inventory should be in the EIS in the form of a map showing all of the features and all of the alternatives.
- The EIS must answer the following questions
  - Is the karst topography active (are sinkholes forming)?
    The existing karst formations on the quarry site must be evaluated
- Direct impact analysis
  - Building over, filling in
  - Water withdrawal at the quarry
- Cumulative impact analysis
  - Vibration from blasting and train operation
- The agencies with jurisdiction over the Edwards Aquifer should concur with this finding

Land Use: Agriculture/Ranching/Hunting

- For this issue, the impacts are listed in Lynn Kitchens June 12, 2003 letter.
- STB should contact all of the landowners along each of the alternative routes to determine
  - Where ranching and agriculture and hunting activities currently occur

3.

- Where residences are located and in what proximity to the rail line alternatives and quarry site they are
- STB should analyze each category separately because they are different uses
- What STB has done in the past
  - Used the amount of land converted to rail right of way on each property as an indicator of how much impact the line will have on that property
- Impacts from land use will have socioeconomic impact
- Common carrier status will essentially grant condemnation authority to a private citizen and turn Vulcan into a sovereign. This would be a precedent that could never be corrected. That is not intended or expected by rail statutes.
- Why should Medina County be required to support a project that is designed to meet the needs of distant places.

Cumulative impacts: Land use

- Industrialization along the line predicted by Vulcan
  - Corresponding impacts on all categories of land use, including:
    - Residential
    - Hunting
    - Ranching
    - Agriculture
- Impacts from the quarry and rail line on the 4 categories above
- Will there be a negative impact to land values?
  - If so, where?

Flooding

- Must model with appropriate "design storm" rainfall for the statistical 10 and 100 year flood events
- Must select a model that accurately models rapid flash flood events, not one that simply makes steady state assumptions about water in the channel
- What is the buffer plan for the streams?
- Will any streams be filled at the quarry?
- What will be the flooding impact of increased runoff entering the streams from the quarry?

Air

Coarse (PM10) and Fine (PM2.5) particulate matter

- It is not whether the national standard will be exceeded that is important.
- The important issue for health effect purposes is the size of the incremental increase in particulate matter concentration.
- Computerized grid modeling must occur for both the quarry and the rail line
  - The quarry should be treated as an "area source"
  - The rail line should be treated as a line source or series of point sources
  - Account for all sources during rail line construction
  - Account for all sources during quarry construction and excavation, which will add to quarry operations
  - Account for all sources at the quarry, including trucks, the crusher, loading trains and trucks, and road dust
  - The results should be added and disclosed as the cumulative impact
  - Results should be presented graphically in the EIS
  - All modeling assumptions must be disclosed in the EIS
- STB cannot wait for the state to analyze these impacts in the state process. It must disclose them now in the EIS.

Off site impacts

- Unregulated particulate emissions from rail cars must be analyzed

4.

- A general emission rate per carload per rail mile should be calculated
- A general emission rate per carload when the train is stationary should be calculated

Road traffic and grade crossings

- Use the most recent road traffic data ADT available from TxDOT and field verify it if it is an estimate or not within the past 3 years.
  - Statement that "it hasn't changed" makes no sense unless it is verified
- Calculate the accident rate for non-grade separated crossings
  - No accident data exists for these new crossings. STB will not be able to use the familiar Federal Railroad Administration model that it has in the past, and will need to find some other way.

Wetlands

- Disclose and map both the jurisdictional and nonjurisdictional wetlands
- Disclose and map the stream fills necessary for bridge construction
- The entire wetland delineation should be included as an appendix in the EIS.

Wildlife

- What are the plant and animal species that are present in the project area, as opposed to simply being or not being on a list in an agency office?
- No monitoring has yet been done for any of the rail line alternatives
- Three years of monitoring is required for a BA on the quarry site
  - BA must be included in the EIS so that the public can comment on it
  - No BA will be complete until three years of monitoring occur on the quarry and rail line sites.
  - No EIS can be published for three years until this monitoring is complete.
    - Why?
      - Because we know that impacts on endangered species will occur as soon as construction begins, not when a given phase is reached.
      - Because the law requires disclosure of indirect as well as direct impacts from the action under consideration.

Noise

- When are the operations going to occur for quarry and rail (day or night?)
  - Apply the nighttime weighting penalty if operations will occur at night
- Take background measurements on land crossed by rail alternatives and outside of the "buffer area" properties proposed by Vulcan
- Locate all noise receptors (i.e. residences)
- Do computer modeling of noise from both the quarry and rail line
  - Account for all sources during rail line construction
  - Account for all sources during quarry construction and excavation, which will add to quarry operations
  - Account for all sources at the quarry, including trucks, the crusher, loading trains
  - The results should be added and disclosed as the cumulative impact
  - Results should be presented graphically in the EIS
  - All modeling assumptions must be disclosed in the EIS
- All mitigation or lack of mitigation decisions must be fully explained and justified

Cumulative impact: Rail operations

- Will traffic be switched when it reaches the UP main line?
  - If so, where?
  - If not, will the trains operate directly to their final destination?
- Whether or not trains will operate directly to their final destination, or will be switched, the following specific disclosures for the Houston region, a region of severe rail traffic problems, must be made:
  - Is the final destination a rail yard or transloading facility where the aggregate is offloaded onto trucks?
    - If yes, where are these facilities in the Houston region?

5.

- If no, where are the locations that this aggregate is offloaded in the Houston region?
- What is the rail traffic impact on the Houston lines that these trains will have to operate on to reach their final destination?
  - These impacts on the rail system are not speculative.
  - Even though Houston has a rail traffic control system that routes traffic to varying lines, the capacities of these lines are known to STB.
    - What will be impact on the capacity of these lines from the rail traffic in this proceeding and from other reasonably foreseeable future actions?
    - What will be the road traffic impact from this proposal's additional rail traffic in Houston, when combined with other reasonably foreseeable future actions, at least for the initial years of quarry operations?
- Based on the air quality analysis for off-site particulate emissions from rail cars, what is the increment of particulate emissions increase in the Houston area?
  - Is the carrier of these cars prepared to comply with Houston's nonattainment plan provisions relating to railroads?
- Will rail cars of any type (particularly hazardous materials) be stored anywhere along the proposed rail route?

Please place a copy of this outline in the administrative record for FD 34284. Your consideration of this outline is appreciated.

Respectfully submitted,

Robert T. Fitzgerald

Dr. Robert T. Fitzgerald, President
Medina County Environmental Action Association, Inc.

cc: U.S. Congressman Henry Bonilla
U.S. Senator John Cornyn
Texas Senator Frank Madla
Texas Representative Timiteo Garza
Texas Commissioner of Agriculture Susan Combs
Texas Department of Transportation James Randall,
Director, Transportation Planning and Programming
Medina County Judge Jim Barden
Medina County Commissioner Royce Hartman

#EI-652
RS

Post Office Box 93
Hondo, Texas 78861
(830) 741-4041

Quihi & New Fountain Historical Society

received 2/26/04

February 26, 2004

Ms. Rini Ghosh,
Surface Transportation Board
Case Control Unit
1925 K Street NW, Room 500
Washington, DC 20423-0001

Subject: STB Finance Docket 34284, Southwest Gulf Railroad Company

Dear Ms. Ghosh,

As a local organization interested in the "formal scoping" process for the Environmental Impact Statement (EIS) we hope to assist in identifying some of the issues and concerns of the Quihi and New Fountain community. One of the many concerns includes the potential damage to the cultural, historical, and archaeological sites within the area.

We have been informed the Quihi and New Fountain area may be eligible to become a Federal Historic District. And, our group has begun efforts toward that designation by locating and documenting over sixty homes or sites constructed by the original settlers in the mid 1850s. This is a very important part of the history of the development of Texas and of the settlement of the New World. Whatever is left of these first pioneers must be treasured, protected, and maintained or they will be lost to all future generations. We have also identified two important prehistoric Indian sites and it is quite possible that more sites could be located in the adjacent areas.

The EIS must thoroughly address all the cultural, historic, and prehistoric sites in the area and it must identify and document each site. Also, it must provide for the protection and preservation to those sites located anywhere near the proposed quarry or railroad operations. In addition, the EIS should include an investigation of the potential damage to the entire area by flooding, noise, and vibration.

Our recommendations for this project are to route the railroad well around and away from the Quihi and New Fountain communities. Alternatively, eliminate the entire quarry and railroad project. Thank you for the opportunity to express our

concerns and we look forward to hearing from you. If we can be of any further assistance, please contact us.

Sincerely,

Cynthia Lindsey

Treasurer

cc: U.S. Congressman Henry Bonilla, Senator Frank Madla, Senator John Cornyn, Medina County Judge Jim Barden, Pct. 1 Commissioner Royce Hartman

#EI-781
RH

The Medina County Environmental Action Association, Inc.

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Ph 830-741-5040 Fax 830-426-2060

April 18, 2004

received 4/22/04

Ms. Victoria Rutson
Chief
Section on Environmental Analysis
Surface Transportation Board
1925 K Street, NW
Washington, DC 20402-0001

FD 34284

Re: STB Docket 34284

Dear Ms. Rutson:

This letter is a rebuttal to Southwest Gulf Railroad's letter of April 5, 2004. SGR's letter responded to comments made by MCEAA and its legal representation concerning the need for connected action status for the proposed quarry and railroad and their adverse impacts on the environment. Since SGR has seen fit to challenge some of these comments and thus mislead the STB, we feel we must again respond. We trust the STB will, when given all the facts and appropriate data, make a proper and just decision concerning the obvious connected action of the proposed projects. These projects when appropriately studied will be found to be dependent on each other to such a degree that they would not and could not exist without the other for many practical and fundamentally sound financial reasons. These reasons will be discussed in farther detail in Section C.

For clarity's sake MCEAA will follow the same order as used by SGR in its rebuttal.

A. Issues concerning design or bridges/flooding concerns

As a beginning observation it is noted that now SGR has omitted the adjective trestle to define the type of bridges it says can be designed to safely cross streams in the rail line. This may be an oversight on their part, or it may represent the belated realization that span type bridges are the only conceivable type of structure that would afford safe, practical crossing of the Cherry Creek and Quihi Creek flood plains. In an effort to "look good" to the STB, seven tasks are then listed with HDR and "experienced railroad engineering firm" supplied to SGR in consultation. Does this mean this firm will do the projected bridge building? SGR does not say. What is a fact is this. Task #2 coordination with the Medina county Flood Plain Administrator has occurred only once, that being in July 2003. Two subsequent e-mail messages have been sent by the flood plain administrator. The only bridge design submitted thus far is the "standard U. P. Trestle-type Bridge. Also contact with the Corps. Of Engineers was not initiated by Vulcan or SGR but by MCEAA. The only contact thus far is to send instruction on how to obtain a NW Permit 14 to SGR. In reference to task 3, Vulcan has known

for over five years the proposed quarry's location and the streams (Elm and Pole Cat Creeks) whose flow will have to be diverted, yet it is only *now* SGR will "delineate their over all water shed."

In task 6, many factors are discussed including proposed bridge analysis and other "proposed structures" that "may" impact the flood plain and the water shed. This "sounds good" but many other factors are then "added in"; minimum bridge openings, culvert locations and size, bridge lengths and chord heights, bank stabilization and scour protection. Will SGR clean out the entire flood plains above and below their bridges and ***keep them*** clean of vegetation and debris for fifty years so that they will not become materials for plugging culverts and trestle bridges. If so, will they cut and burn, use herbicides or a combination of control measures to accomplish this task? How will SGR obtain the rights to do this on properties they do not own? The final paragraph of this section deserves special attention by STB. SGR graciously offers to accept as a condition or requirement, prior to construction, to undertake appropriate modeling and design efforts with respect to the alignment for the line that it is authorized to construct in order to address stream crossing issues. The above condescending attitude must be very humbling for someone who has thus far been so arrogant which is exactly the way Vulcan and it wholly owned subsidiary SGR have acted.

Again, MCEAA brings forth the question of why an alternative route that avoids flood plain issues, defacement and detraction of historic and archeological treasures; one that would cause fewer traffic and road crossing problems and has in the past proven to be feasible, would be rejected by Vulcan and SGR. The only explanation given is "the old Galveston-Harrisburg-San Antonio Railroad doesn't go where we want to go and is too long." This is partially true in that the route used would have to have some modifications, but even with these alterations, the route would not exceed the existing road distance from the proposed quarry which is 10.5 miles. This alternative route is much more feasible, economical and practical than SGR admits and must be researched by the STB. This alternative route outline was discussed, and on site tour was made with the Medina County Flood Plain Administration on April 13, 2004. It was his opinion that this alternative presented far fewer flooding problems than the SGT proposed or other three alternative routes. MCEAA plans to consult with the Corps of Engineers in regard to this alternative route.

B. Impact of the SGR on Local Groundwater

Here again, SGR is misleading the STB. MCEAA has reviewed several maps of the southern extent of the Edwards Aquifer Recharge Zone, in the region of the southern part of the quarry and SGR rail loop along CR 353. According to maps supplied by SGR, the location of the fuel storage and maintenance area it borders on the southern side of CR 353. This area *is* over the recharge zone for a distance of 688 feet at it greatest extent. Vulcan is aware of this fact, or should be, for we have reported it previously, on two occasions, yet they continue to say that the railroad except for its northern most loop as well as its straight trail loading area as well as the fuel storage area is ***not*** on the recharge zone. Could the explanation for this wishful thinking be based on the fact that the Edwards Aquifer Authority does not allow any fuel storage, above ground or below ground, with or without double containment, over the recharge zone? We do not know for sure, but the answer is probably yes.

Another half truth submitted by SGR is that most of the people in the area receive their potable water from a local water company. This is not the case, however, for those people living around all sides of the quarry who are totally dependent on their Edwards wells. We have asked Vulcan in the past about damage to these wells caused by quarrying, a connected action to the railroad. Their reply was a terse "sue us if you think you can prove we damaged your well." Vulcan tends to rely on the statement in this section that wells can be impacted more significantly by a variety of other factors unrelated to the rail line. Certainly blasting in the quarry will take its toll on these wells and have a greater effect on wells than its railroad. We have verified this with citizens of Tehuacana, Texas where a Vulcan owned quarry disrupted the town's source of water

supply it had enjoyed since its founding and caused them to have to lay a pipeline ten miles long to Mexia, Texas at their own expense to get water.

C. Roadway upgrades associated with Rail—No Build Alternative

MCEAA offers this observation. It is interesting that SGR *now* has inserted the word "Rail" in the No Build Alternative. Question: Does this mean that Vulcan now acknowledges that the No Build Alternative means No Quarry—No Railroad? The real meaning of the no-build comparison is not to build either the railroad or the quarry.

This section is proof positive that from the outset, the proposed quarry and proposed railroad were planned together from every conceivable practical and profitable standpoint. MCEAA quotes Tom Ransdale, President of Vulcan, Southwest Division, "the quarry and railroad must exist together. If there is no railroad, there will be no quarry." MCEAA believed Mr. Ransdale when he made these statements in a public meeting with MCEAA members and we have no reason to doubt the truth of those statements today.

Now let us do some analysis of why these statements are true, contrary to SGR attorneys statement that the quarry could exist without a railroad. Using Vulcan's own data, 85 to 90% of the material to be produced from this 1760 acre quarry over the next fifty years will not be used locally, but would be shipped to the Texas Gulf Coast after connecting with the Union Pacific line at Dunlay, Texas. This would require 850 loaded trucks making round trips each day if the rail line were not built.

For the following reasons this is not only impossible but impractical and unprofitable:

1. A truck would have to be loaded every 34 seconds at the quarry and then unloaded at the rail line at Dunley in an eight hour day; every 85 seconds in a twenty hours work day. This would appear unfeasible.
   We would like for Vulcan to respond to this statement.

2. The infrastructure carrying these trucks consist not of nine miles, but 10.5 miles of roadways-
   CR 353 or 351—2.5 miles, FM 2676—3.5 miles, CR 4516—3.0 miles, CR 4643-- 1.0 and CR445—0.5 miles. These roads are not capable of carrying loads of 75,000 pounds and the upgrade costs involved, as well as the continued upkeep for 50 years, would make the project unprofitable.

3. Add in the costs of the trucks, labor, insurance, fuel, and maintenance needed to keep these trucks in operation. Again, we agree with Tom Ransdell, this type of transport would not be profitable.

4. This volume of truck traffic could not be safely shared with trucks carrying fuel and fertilizer, as well as large agricultural implements in this farming community.

5. MCEAA believes that Vulcan would not open a quarry or railroad if it knew either would not be profitable.

Vulcan has known these facts from the very beginning of this proposed project. Hence, the concept of a railroad supported quarry. This connected action has existed since day one and therefore, since the railroad has been judged to require and EIS, the entire proposed quarry must also be required to have connected action EIS. MCEAA respectfully requests the STB to fulfill its obligations, follow the law and require aconnected action EIS for the entire quarry as the only right thing to do. It is believed a thorough environmental study will disclose evidence and factors not ascertained in the EA's partial study done on a very limited portion of the quarry site.

We believe a thorough EIS on the quarry site will disclose environmental impacts that have far reaching and detrimental effects not only on Medina County but also San Antonio. This will be further discussed in the next section.

D. Depth of mining at Quarry/Size of Quarry

Since SGR acknowledges the quarry's relatedness and connection with the railroad, MCEAA offers these comments in rebuttal. MCEAA would like Vulcan to explain in detail how it plans to operate the proposed quarry. Given the location of the aquifer at the quarry site, the innumerable faults in the limestone, and the unacknowledged and ignored sink holes in the quarry site, we are unimpressed by statements that safe mining practices will insure avoidance of contact with or contamination of the aquifer with its dire consequences. Mining to a depth of 250 feet as Vulcan states would be foolhardy. But what is a safe depth to mine leaving a safe cover over the aquifer, whose configuration is more like a honeycomb than a solid slab of rock? Vulcan points to mining over the Edwards for many years without any problems, but this again is untrue. One thousand two hundred gallons of diesel fuel caused contamination of the aquifer in the Rynonobel spill in December, 1999 with resultant contamination detected later in Comal Springs, New Braunfels, Texas. Again, this issue will be discussed with TCEQ and the EAA, but it is presented to the SEA for the information. The aquifers protection if one of our biggest concerns and having been witness to Vulcan's multiple deceptions over the past five years, we remain skeptical that they can safely mine in this location.

In SGR's last statement concerning quarrying effect on the surrounding wildlife, it will be difficult, if not impossible, to convince deer hunters that their leases will be unaffected by the blasting, machinery noise, trains, lights etc. in the quarry area. We are sure Vulcan will not compensate rancher's loss of income from deer leases.

E. Water Quality Impacts of Quarry

MCEAA disagrees with SGR's opinion that water quality issues would not be affected by the connected action of the quarry. As previously noted, the entire quarry, the northern part of the **connected action** railroad, and the fuel storage and maintenance area are ***all*** on the Edwards Recharge Zone. Also previously noted and contrary to SGR statements, fuel storage, even in above-ground tanks with double containment, over the recharge zone ***is no longer permitted*** by the EAA.

The "minor runoff" water mentioned in this section is from the Elm and Pole Cat Creeks which run thru the middle and lower sections of the proposed quarry. What will be done with this water during 6 to 10 inch rainfalls which have happened several times in the past two decades? Will they be diverted to the west side of the quarry into a real estate subdivision? Will they be allowed to flood the quarry? Again, Vulcan chooses to make a molehill out of a mountain and portray a "no real problem" scenario to the STB. MCEAA cannot stand by and not bring these matters to the STB's attention, and not ask what will be done with the storm water. Vulcan was unable to work its quarry in Helotes Tx for 3 weeks following flooding by the Helotes Creek in 1997.

Again, to say Vulcan has "no knowledge" of recovery complaints about damage to wells secondary to blasting, is a "leap of faith" we are not willing to accept. This is especially true after listening to testimony from the townspeople of Tehuacana, Texas, about their destroyed wells.

F. Quarry Water Usage

In the connected action of the quarry water usage section, water usage is discussed. Floods and droughts are cyclical in this part of Texas and in all likelihood will be for the foreseeable future. Most farmers and ranchers in this area are dependent on irrigation from the Edwards Aquifer to

remain profitable and sustain a livelihood. With an ever growing demand from a rapidly growing population in nearby San Antonio water allocations for agriculture is under increasing pressure. After opening, this proposed quarry will require an increasing amount of water as it increases production. Vulcan should disclose the maximum amount of water it will require at the quarry's maximum production. Should this private enterprise be given special priority over existing farms and ranches? Vulcan has boasted it will become the biggest employer in Medina County if this railroad and connected action quarry become a reality. If this happens, this area will change from agricultural/residential/historical to industrial. The result will be that farms and ranches will fail. An important part of Texas and American culture will literally be covered by dust. There is only so much water in this area and another quarry and railroad are not needed as much as the farms and ranches it will destroy. Consultation between the EAA and MCEAA will occur in the near future concerning these factors.

G. Other Matters

It is MCEAA's understanding that part of the STB function in this permitting process was to analyze data submitted by a reputable environmental firm, obtain comments and information from individuals and groups in the affected area and reach a decision concerning issuing a permit.

We have offered our concerns and comments which we firmly believe are valid and pertinent. For these comments to be ridiculed and called "weird" and "unprecedented" to us shows the desperation of a failing argument to try and influence the STB into somehow finding a way to save these projects. The rules are clear. Vulcan and SGR have tried to circumvent them for whatever reason--- to save money, to gain condemnation power, to obtain land not only in this endeavor but for future use. STB must uphold the law and not be misled and stampeded into making a bad decision, one that could have far-reaching future implications. Vulcan has literally wasted much of the past five years not doing the obvious and necessary research on the quarry/railroad project and now is pressuring the STB to "move forward" rapidly. MCEAA urges the STB to move forward judiciously and rule in favor of a connected action EIS of the railroad and quarry.
It is the right call.

Sincerely,

Robert T. Fitzgerald

Robert T. Fitzgerald, M. D.
President,
MCEAA, Inc.

cc: U.S. Senator John Cornyn
U.S. Representative Henry Bonilla
Texas Senator Frank Madla

MCEAA, Inc., for your Home, Health, and Heritage

#EO-123
RH

SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Economics, Environmental Analysis and Administration

May 7, 2004

Dr. Robert Fitzgerald
Private Landowner/
President, MCEAA
202 CR 450
Hondo, TX 78861

Re: STB Finance Docket 34284, Southwest Gulf Railroad Company - Construction and Operation Exemption - Medina County, TX

Dear Dr. Fitzgerald:

As you know, the Surface Transportation Board's Section of Environmental Analysis (SEA) is conducting an environmental review of a proposed rail line construction and operation in Medina County, Texas, pursuant to the National Environmental Policy Act (NEPA) and related environmental laws, including the National Historic Preservation Act (NHPA). SEA appreciates your interest and participation in the environmental review process as a consulting party under Section 106 of the NHPA and is writing to update you on the next steps in the Section 106 process for this proceeding.

SEA has determined that an Environmental Impact Statement (EIS) is the appropriate type of NEPA document for this proceeding, and has recently completed the Final Scope of Study for the EIS, which we have mailed to you under separate cover. SEA is currently preparing a Draft EIS (DEIS) that will be made available for public review and comment. The DEIS will include a discussion of potential impacts to cultural resources and a draft version of a Programmatic Agreement (PA) prepared pursuant to 36 CFR 800.14(b). Although a preliminary cultural resources assessment of the entire project area has been conducted, the PA will outline the process for additional identification, evaluation, effect assessment and treatments to resolve any adverse effects to significant cultural resources located within the area of potential effect (APE) for the approved corridor.

We look forward to working with you to ensure proper completion of the Section 106 process and will appreciate any comments you may provide on the DEIS and Draft PA, when

available. If you have any questions, please do not hesitate to contact me or Rini Ghosh of my staff at (202) 565-1539.

Sincerely,

Victoria Rutson
Chief
Section of Environmental Analysis

cc: Mr. David Barton, Esq.
Dr. Lynn Kitchen
Dr. Thomas Hester

#EO-121
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SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Economics, Environmental Analysis and Administration

May 7, 2004

Carol Carpenter
President
Schweers Historical Foundation
500 Dresden Wood Dr.
Boerne, TX 78006

Re: STB Finance Docket 34284, Southwest Gulf Railroad Company - Construction and Operation Exemption - Medina County, TX

Dear Ms. Carpenter:

As you know, the Surface Transportation Board's Section of Environmental Analysis (SEA) is conducting an environmental review of a proposed rail line construction and operation in Medina County, Texas, pursuant to the National Environmental Policy Act (NEPA) and related environmental laws, including the National Historic Preservation Act (NHPA). SEA appreciates your interest and participation in the environmental review process as a consulting party under Section 106 of the NHPA and is writing to update you on the next steps in the Section 106 process for this proceeding.

SEA has determined that an Environmental Impact Statement (EIS) is the appropriate type of NEPA document for this proceeding, and has recently completed the Final Scope of Study for the EIS, which we have mailed to you under separate cover. SEA is currently preparing a Draft EIS (DEIS) that will be made available for public review and comment. The DEIS will include a discussion of potential impacts to cultural resources and a draft version of a Programmatic Agreement (PA) prepared pursuant to 36 CFR 800.14(b). Although a preliminary cultural resources assessment of the entire project area has been conducted, the PA will outline the process for additional identification, evaluation, effect assessment and treatments to resolve any adverse effects to significant cultural resources located within the area of potential effect (APE) for the approved corridor.

We look forward to working with you to ensure proper completion of the Section 106 process and will appreciate any comments you may provide on the DEIS and Draft PA, when

available. If you have any questions, please do not hesitate to contact me or Rini Ghosh of my staff at (202) 565-1539.

Sincerely,

Victoria Rutson
Chief
Section of Environmental Analysis

cc: Mr. Donald Schoch

#EO-126
RA

SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Economics, Environmental Analysis and Administration

May 7, 2004

Mrs. Cynthia Lindsey
Quihi & New Fountain Historical Society
P.O. Box 93
190 CR 4512
Hondo, TX 78861

Re: STB Finance Docket 34284, Southwest Gulf Railroad Company - Construction and Operation Exemption - Medina County, TX

Mrs. Cynthia Lindsey:

As you know, the Surface Transportation Board's Section of Environmental Analysis (SEA) is conducting an environmental review of a proposed rail line construction and operation in Medina County, Texas, pursuant to the National Environmental Policy Act (NEPA) and related environmental laws, including the National Historic Preservation Act (NHPA). SEA appreciates your interest and participation in the environmental review process as a consulting party under Section 106 of the NHPA and is writing to update you on the next steps in the Section 106 process for this proceeding.

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Sincerely,

Victoria Rutson
Chief
Section of Environmental Analysis

cc: Ms. Necey Schulte

#EO-125
RR

SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Economics, Environmental Analysis and Administration

May 7, 2004

Mr. Robert Hancock
Chairman
Medina County Historical Commission
Medina County Courthouse
Hondo, TX 78861

Re: STB Finance Docket 34284, Southwest Gulf Railroad Company - Construction and Operation Exemption - Medina County, TX

Dear Mr. Hancock:

As you know, the Surface Transportation Board's Section of Environmental Analysis (SEA) is conducting an environmental review of a proposed rail line construction and operation in Medina County, Texas, pursuant to the National Environmental Policy Act (NEPA) and related environmental laws, including the National Historic Preservation Act (NHPA). SEA appreciates your interest and participation in the environmental review process as a consulting party under Section 106 of the NHPA and is writing to update you on the next steps in the Section 106 process for this proceeding.

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We look forward to working with you to ensure proper completion of the Section 106 process and will appreciate any comments you may provide on the DEIS and Draft PA, when

available. If you have any questions, please do not hesitate to contact me or Rini Ghosh of my staff at (202) 565-1539.

Sincerely,



Victoria Rutson
Chief
Section of Environmental Analysis

#EO-120
RA

SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Economics, Environmental Analysis and Administration

May 7, 2004

The Honorable Henry Bonilla
U.S. House of Representatives
1120 Wurzbach, Suite 300
San Antonio, TX 78230

Re: STB Finance Docket 34284, Southwest Gulf Railroad Company - Construction and Operation Exemption - Medina County, TX

Dear Congressman Bonilla:

As you know, the Surface Transportation Board's Section of Environmental Analysis (SEA) is conducting an environmental review of a proposed rail line construction and operation in Medina County, Texas, pursuant to the National Environmental Policy Act (NEPA) and related environmental laws, including the National Historic Preservation Act (NHPA). SEA appreciates your interest and participation in the environmental review process as a consulting party under Section 106 of the NHPA and is writing to update you on the next steps in the Section 106 process for this proceeding.

SEA has determined that an Environmental Impact Statement (EIS) is the appropriate type of NEPA document for this proceeding, and has recently completed the Final Scope of Study for the EIS, which we have mailed to you under separate cover. SEA is currently preparing a Draft EIS (DEIS) that will be made available for public review and comment. The DEIS will include a discussion of potential impacts to cultural resources and a draft version of a Programmatic Agreement (PA) prepared pursuant to 36 CFR 800.14(b). Although a preliminary cultural resources assessment of the entire project area has been conducted, the PA will outline the process for additional identification, evaluation, effect assessment and treatments to resolve any adverse effects to significant cultural resources located within the area of potential effect (APE) for the approved corridor.

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available. If you have any questions, please do not hesitate to contact me or Rini Ghosh of my staff at (202) 565-1539.

Sincerely,

Victoria Rutson
Chief
Section of Environmental Analysis

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SEA

SERVICE DATE - JANUARY 28, 2004

SURFACE TRANSPORTATION BOARD

Finance Docket No. 34284

Southwest Gulf Railroad Company – Construction and Operation Exemption – Medina County, TX

Decided: January, 22, 2004.

ACTION: Notice of Intent to Prepare an Environmental Impact Statement; Notice of Initiation of the Scoping Process; Notice of Availability of Draft Scope of Study for the Environmental Impact Statement and Request for Comments.

SUMMARY: On February 27, 2003, Southwest Gulf Railroad Company (SGR) filed a petition with the Surface Transportation Board (Board) pursuant to 49 U.S.C. 10502 for authority to construct and operate a new rail line in Medina County, Texas. The proposed project would involve the construction and operation of approximately seven miles of new rail line. Because the effects of the proposed project on the quality of the human environment are likely to be highly controversial, the Board's Section of Environmental Analysis (SEA) has determined that the preparation of an Environmental Impact Statement (EIS) is appropriate. The purpose of this Notice is to notify individuals and agencies interested in or affected by the proposed project of SEA's decision to prepare an EIS and to initiate the formal scoping process. This Notice also announces the availability of a draft scope of study and requests comments on the draft scope of study.

DATES: Comments are due by February 26, 2004.

SUBMITTING ENVIRONMENTAL COMMENTS: If you wish to submit written comments regarding the attached proposed draft scope of study, please send an original and two copies to the Surface Transportation Board, Case Control Unit, 1925 K Street, NW, Washington, DC 20423-0001, to the attention of Rini Ghosh. Please refer to STB Finance Docket No. 34284 in all correspondence addressed to the Board.

FOR FURTHER INFORMATION CONTACT: Ms. Rini Ghosh, Section of Environmental Analysis, Surface Transportation Board, 1925 K Street, NW, Washington, DC 20423-0001, or 512-419-5941 (the project information line). Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339. The website for the Surface Transportation Board is www.stb.dot.gov.

SUPPLEMENTARY INFORMATION:

Background: By petition filed on February 27, 2003, SGR sought an exemption from the Board under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 for authority to construct and operate an approximately seven mile line of railroad in Medina County, TX. The proposed rail line would connect a proposed Vulcan Construction Materials, LP quarry and the Del Rio subdivision of the Union Pacific Railroad Company (UP) at milepost 250, near Dunlay, Texas. SGR would use the new rail line to transport limestone from the proposed quarry to the UP rail line, for shipment to markets in the Houston area, as well as other markets in the Southeast, Gulf Coast, and Rio Grande Valley regions of Texas. Although the primary purpose of the proposed construction is to provide rail service to the quarry site, SGR would hold itself out as a common carrier and provide service to other industries that might locate in the area in the future. In a decision served on May 19, 2003, the Board granted conditional approval to SGR's petition, subject to completion of the environmental review process.

Pursuant to the Board's responsibilities under the National Environmental Policy Act (NEPA), SEA has begun the environmental review of SGR's proposal by consulting with appropriate Federal, state, and local agencies, as well as SGR, and conducting technical surveys and analyses. SEA has also consulted with the Texas Historical Commission (THC) in accordance with the regulations implementing section 106 of the National Historic Preservation Act (NHPA) at 36 CFR Part 800 and identified appropriate consulting parties to the section 106 process.

On October 10, 2003, SEA issued a Preliminary Cultural Resources Assessment report to the section 106 consulting parties for review and comment. The report set forth SEA's preliminary findings and recommendations regarding cultural resources in the proposed project area. THC, the consulting parties, and other individuals submitted comment letters in response to the report; many of the comments addressed environmental concerns not related to cultural resources.

Due to substantial early public interest in the proposed project, SEA has also conducted extensive public outreach and informal scoping,[1] including holding an informational Open House in Hondo, Texas on June 12, 2003. Approximately 200 people attended the Open House and over 100 comment letters were received in response to the Open House.

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[1] Agencies may conduct informal scoping prior to issuance of the Notice of Intent to prepare an EIS. See Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (1981), Question 13.

Based on the nature and content of the numerous public and agency comments received, including the comments on the Preliminary Cultural Resources Assessment report,[2] SEA has determined that the effects of the proposed project on the quality of the human environment are likely to be highly controversial, and that thus, preparation of an EIS is appropriate.[3] At this point in the environmental review process, SEA intends to analyze the potential environmental impacts of the proposed route, the no-action or no-build alternative (i.e., transporting the limestone by truck instead of rail), and three possible alternative routes. We welcome comments on these or additional alternatives.

Environmental Review Process: The NEPA process is intended to assist the Board and the public in identifying and assessing the potential environmental consequences of a proposed action before a decision on the proposed action is made. SEA is responsible for ensuring that the Board complies with NEPA and related environmental statutes. The first stage of the EIS process is scoping. Scoping is an open process for determining the scope of environmental issues to be addressed in the EIS. SEA has developed a draft scope of study for the EIS for public review and comment, which incorporates the issues and concerns raised in the comment letters SEA has received thus far. SEA is soliciting written comments on this draft scope of study. After the close of the comment period on the draft scope of study, SEA will review all comments received and then issue a final scope of study for the EIS.

Following the issuance of the final scope of study, SEA will prepare a Draft EIS (DEIS) for the project. The DEIS will address those environmental issues and concerns identified during the scoping process. It will also contain SEA's preliminary recommendations for environmental mitigation measures. Upon its completion, the DEIS will be made available for public and agency review and comment for at least 45 days. A public meeting will also be held during the comment period for the Draft EIS. The details of the public meeting, including the specific format, location, and date, will be available in the Draft EIS. SEA will then prepare a Final EIS (FEIS) that addresses the comments on the DEIS from the public and agencies. Then, in reaching its decision in this case, the Board will take into account the DEIS, the FEIS, and all environmental comments that are received.

Draft Scope of Study for the EIS:

Proposed Action and Alternatives

The proposed project would involve the construction and operation of a single-track rail line to connect a proposed Vulcan Construction Materials, LP quarry and UP's Del Rio

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[2] All comments received are available on the Board's website at www.stb.dot.gov, by clicking on "Environmental Issues," clicking on "Environmental Correspondence," and then searching the materials under "FD 34284."

[3] See 40 CFR 1508.27(b)(4).

subdivision line. The proposed rail line would extend about seven miles from the quarry site to approximately milepost 250 of the UP line, at a point near Dunlay, Texas. SGR would use the new rail line to transport limestone from the proposed quarry to the UP rail line, for shipment to markets in the Houston area, as well as other markets in the Southeast, Gulf Coast, and Rio Grande Valley regions of Texas. Although the primary purpose of the proposed construction is to provide rail service to the quarry site, SGR would hold itself out as a common carrier and provide service to other industries that might locate in the area in the future.

The reasonable and feasible alternatives that will be evaluated in the EIS are (1) construction and operation of the proposed project along SGR's proposed alignment (including a rail loading facility, consisting of a loading loop or a series of parallel tracks, that would be constructed and operated on the quarry property and is not subject to the Board's jurisdiction), (2) three alternative routes that have been developed to date, as well as other alternatives that might be identified during the scoping process, and (3) the no-action or no-build alternative (this would involve transportation of the limestone by truck from the proposed quarry to the UP rail line, instead of by rail). We welcome comments on these or additional alternatives.

Environmental Impact Analysis

Proposed New Construction

Analysis in the EIS will address the proposed activities associated with the construction and operation of the proposed new rail line and their potential environmental impacts, as appropriate.

Impact Categories

The EIS will address potential impacts from the proposed construction and operation of the new rail line on the human and natural environment. Impact areas addressed will include the effects of the proposal on transportation and traffic safety, public health and worker health and safety, water resources, biological resources, air quality, geology and soils (including any karst features), land use, environmental justice, noise, vibration, recreation and visual resources, cultural resources and socioeconomics. The EIS will include a discussion of each of these categories as they currently exist in the project area and will address the potential impacts from the proposed project on each category, as described below:

1. Transportation and Traffic Safety

The EIS will:

a. Describe the potential impacts of the proposed new rail line construction and operation on the existing transportation network in the project area, including vehicular delays at grade crossings.

b. Describe the potential for train derailments or accidents from proposed rail operations.
c. Describe potential pipeline safety issues at rail/pipeline crossings, as appropriate.
d. Propose mitigative measures to minimize or eliminate potential project impacts to transportation and traffic safety, as appropriate.

2. Public Health and Worker Health and Safety

The EIS will:
a. Describe potential public health impacts from the proposed new rail line construction and operation.
b. Describe potential impacts to worker health and safety from the proposed new rail line construction and operation.
c. Propose mitigative measures to minimize or eliminate potential project impacts to public health and worker health and safety, as appropriate.

3. Water Resources

The EIS will:
a. Describe the existing groundwater resources within the project area, such as aquifers and springs, and the potential impacts on these resources resulting from construction and operation of the proposed new rail line.
b. Describe the existing surface water resources within the project area, including watersheds, streams, rivers, and creeks, and the potential impacts on these resources resulting from construction and operation of the proposed new rail line.
c. Describe existing wetlands in the project area and the potential impacts on these resources resulting from construction and operation of the proposed new rail line.
d. Describe the permitting requirements that are appropriate for the proposed new rail line construction and operation regarding wetlands, stream and river crossings (including floodplains), water quality, and erosion control.
e. Propose mitigative measures to minimize or eliminate potential project impacts to water resources, as appropriate.

4. Biological Resources

The EIS will:
a. Describe the existing biological resources within the project area, including vegetative communities, wildlife and fisheries, and Federal and state threatened or endangered species and the potential impacts to these resources resulting from the proposed new rail line construction and operation.
b. Propose mitigative measures to minimize or eliminate potential project impacts to biological resources, as appropriate.

5. Air Quality Impacts

The EIS will:

a. Describe the potential air quality impacts resulting from the proposed new rail line construction and operation.

b. Propose mitigative measures to minimize or eliminate potential project impacts to air quality, as appropriate.

6. Geology and Soils

The EIS will:

a. Describe the native soils and geology of the proposed project area.

b. Describe the existing karst features of the project area, if any, and the potential impacts to karst features from the proposed new rail line construction and operation.

c. Propose mitigative measures to minimize or eliminate potential project impacts on soils and geology and to karst features, as appropriate.

7. Land Use

The EIS will:

a. Describe existing land use patterns within the project area and identify those land uses that would be potentially impacted by the proposed new rail line construction and operation.

b. Describe the potential impacts associated with the proposed new rail line construction and operation to land uses identified within the project area.

c. Propose mitigative measures to minimize or eliminate potential project impacts to land use, as appropriate.

8. Environmental Justice

The EIS will:

a. Describe the demographics of the communities potentially impacted by the construction and operation of the proposed new rail line.

b. Evaluate whether new rail line construction or operation would have a disproportionately high adverse impact on any minority or low-income group.

c. Propose mitigative measures to minimize or eliminate potential project impacts on environmental justice communities of concern, as appropriate.

9. Noise

The EIS will:

a. Describe the existing noise environment of the project area and potential noise impacts from the proposed new rail line construction and operation.

b. Propose mitigative measures to minimize or eliminate potential project impacts to noise receptors, as appropriate.

10. Vibration

The EIS will:

a. Describe the potential vibration impacts from the proposed new rail line construction and operation.

b. Propose mitigative measures to minimize or eliminate potential project impacts from vibration, as appropriate.

11. Recreation and Visual Resources

The EIS will:

a. Describe existing recreation and visual resources in the proposed project area and potential impacts to recreation and visual resources from construction and operation of the proposed new rail line.

b. Propose mitigative measures to minimize or eliminate potential project impacts to recreation and visual resources, as appropriate.

12. Cultural Resources

The EIS will:

a. Describe the cultural resources environment in the area of the proposed project and potential impacts to cultural resources from the proposed new rail line construction and operation.

b. Describe the ongoing NHPA section 106 process for the proposed project, and propose mitigative measures to minimize or eliminate potential project impacts to cultural resources, as appropriate.

13. Socioeconomics

The EIS will:

a. Describe the demographic characteristics of the project area and the current sources of income.

b. Describe the potential environmental impacts to employment and the local economy as a result of the proposed new rail line construction and operation.

c. Propose mitigative measures to minimize or eliminate potential project adverse impacts to socioeconomic resources, as appropriate.

14. Cumulative and Indirect Impacts

The EIS will:

a. Address any identified potential cumulative impacts of the proposed new rail line construction and operation, as appropriate. Cumulative impacts are the impacts on the environment which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions (for example, Vulcan Construction Materials, LP's proposed new quarry).

b. Address any identified potential indirect impacts of the proposed new rail line construction and operation, as appropriate. Indirect impacts are impacts that are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.

By the Board, Victoria Rutson, Chief, Section of Environmental Analysis.

Vernon A. Williams
Secretary

#EI-780
RQ

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION
745 EAST MULBERRY AVENUE, SUITE 100
SAN ANTONIO, TEXAS 78212-3149

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gardner@tmlf.com

April 19, 2004

received 4/19/04

FD 34284

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
ATTN: STB Finance Docket No. 34284
1925 K Street, NW
Washington, DC 20423-0001

VIA TELEFAX: (202) 565-9000
& CM-RRR #7001 2510 0002 0226 6000

RE: Analysis under the National Environmental Policy Act and Endangered Species Act of:

(1) Vulcan Materials Company's planned Medina County stone quarry; and

(2) Vulcan Materials Company subsidiary Southwest Gulf Railroad Company's proposed rail line to serve Medina County stone quarry.

Dear Ms. Rutson:

This letter is a further response to the letter dated March 10, 2003 (March 10 letter) (Document EI-733) from David Coburn, counsel for the applicant, regarding the scope of environmental analysis. It has some repetition of earlier submissions, but is reasonably inclusive of prior arguments with the addition of issues you requested for further discussion following our conference.

Although the legal argument regarding the connectedness issue is a straight-forward one, the applicants arguments seem to have become so convoluted that the MCEAA feels it necessary to present its legal and factual arguments in a step-by-step analysis in order to lead the agency to the logical conclusion presented herein. Thus, we request your indulgence in working through these issues in this document. We are confident the dividends will warrant the investment.

This letter also addresses an argument raised by a memorandum submitted in *Finance Docket 34314—Bexar County Rural Transportation District—Construction and Operation in Bexar County, Texas* (Toyota), a completely separate and unrelated proceeding from this one. In that

memo (*Toyota* memo) (Document EI-222), counsel in *Finance Docket 34314* addressed a similar, but ultimately distinguishable question regarding the appropriate scope of environmental analysis. Because the STB's concerns expressed to the applicant in *Toyota* go to the heart of defining exactly which circumstances the STB must treat as "connected actions" under the National Environmental Policy Act (NEPA), discussion of the *Toyota* memo's response is appropriate here.

Also appropriate is a discussion of the reality of the major industrial rail build-in today, and how the clear law governing connected actions in an environmental impact statement (EIS) under NEPA affects those projects. Our position, incorporating by reference our 3 previous letters and our scoping comments, is a limited one, and most importantly, is grounded in clear rule of law that provides settled expectations for applicants and citizens alike, but only if the agencies have the courage to deem actions connected when they truly are.

In this proceeding, the applicant's position is without merit and reflects extreme disregard for the consensus policies underlying agency analysis under the National Environmental Policy Act and Endangered Species Act (ESA), as well as their existing regulations and case law. Nowhere in the March 10 letter does the applicant advance an argument that the statutes and regulations are invalid or that the case law requires reversal. Rather, the applicant's misuse and misclassification of legal standards and case law fails to support its position.

I. THE SOURCE OF THE APPLICANT'S FLAWED INTERPRETATION

A. The March 10 Letter Fails to Apply the Connected Action Regulation to the Rail Line

The fatal misinterpretation appears in the third paragraph of the March 10 letter. There, the applicant asserts that "the quarry, which is a non-federal action, could be operated at the Medina County site even if there were no rail line."

The third paragraph of the March 10 letter presumes that the quarry is a non-federal action that will not, and cannot through some operation of law, be included in the EIS. The applicant fails to test this assumption by *properly* applying the relevant connected action regulation, 40 C.F.R. § 1508.25(a)(1)(iii) (defining scope for actions that lack independent utility as those that

"are interdependent parts of a larger action and depend on the larger action for their justification"), anywhere in the letter.

Instead of applying 40 C.F.R. § 1508.25(a)(1)(iii) to the quarry and the rail line, the applicant applies it only to the quarry. Everything in the applicant's March 10 letter centers on whether the unproposed action (the quarry) has independent utility. This ignores the fact that it is the rail line in this proceeding that lacks independent utility when 40 C.F.R. § 1508.25(a)(1)(iii) is applied, and therefore draws the action it is interdependent with (the quarry) into the scope of NEPA analysis. The March 10 letter after paragraph 3 never tests the assumption that the federalized rail line action is independent of, and therefore not connected to the "non-federal quarry," and the remainder of the "analysis" serves solely to obfuscate this deliberate omission.

From this, all other misrepresentations by the applicant flow, including:

- *Improper No Action Alternative*: The statement in the remainder of paragraph 3 that the proper "no action" alternative is a truck served quarry, rather than no quarry and no rail line.

- *Improper Scope of Endangered Species Act Analysis*: The page 3 statement that "STB has no ESA responsibilities for the quarry."

- *Improper Scope of EIS (denying that the rail line and quarry are "connected actions" under NEPA)*: The first denial, without explanation, on page 3 that the quarry and rail line are interdependent parts of a larger action (the third connected action factor of "independent utility" at 40 C.F.R. § 1508.25(a)(1)(iii)).

- *Improper Scope of EIS (denying that the rail line and quarry are "connected actions" under NEPA)*: The attempt, on page 6, to apply the multifactor federalization test for relatedness (a broader test used to determine whether a non-federal action is sufficiently "related" to require analysis in an environmental assessment, that includes "independent utility" as one of several factors), instead of 40 C.F.R. § 1508.25(a)(1), which strictly defines the scope of "connected action" in an EIS, and to equate the two.

- *Improper Scope of EIS (denying that the rail line and quarry are "connected actions" under NEPA)*: The quick retreat from the pretense of applying the inapplicable environmental assessment test and equating it with 40 C.F.R. § 1508.25(a)(1), in the same paragraph, asserting instead that "as stated above, the rail line and the quarry are not connected actions under the CEQ regulations."

- *Improper Scope of EIS (denying that the rail line and quarry are "connected actions" under NEPA)*: The second application, on pages 3–4, of the connected action regulation's "independent utility" factor, 40 C.F.R. § 1508.25(a)(1)(iii), in one direction, to the quarry, without applying it to the action that lacks "independent utility"—the rail line.

- *Improper No Action Alternative*: The restatement on page 7 that the proper "no action" alternative is a truck served quarry, rather than no quarry and no rail line.

- *Improper Scope of Endangered Species Act Analysis:* The argument on pages 8–9 that no biological assessment is necessary for the quarry.

The applicant's analysis for the no action alternative and Endangered Species Act cannot even be understood, and in many of the cases cited does not even apply, unless one assumes that the rail line and quarry are not connected actions under 40 C.F.R. § 1508.25(a)(1)(iii). *See e.g.*, March 10 letter at 7 (applying "no action" alternative cases that would only apply if the rail line were an unconnected action) and 10 (arguing to limit the scope of *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), in the cumulative impact context, where it would apply regardless of whether the actions were deemed connected; this presumes that the quarry would be analyzed as an unconnected action with cumulative impacts rather than as a connected action with direct impacts).

B. Federalization of the Quarry—or the "non-Federal" Project Generally—is Not the Issue

The issue in this case is whether either the rail line or the quarry lack independent utility such that they are "interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1)(iii) (2003). Here, the rail line is a wholly-owned subsidiary of the quarry's owner/operator that is "an interdependent part" of the quarry, lacks any other potential customers, and "depend[s] on" the quarry for its justification.

Both the applicant's March 10 letter and the *Toyota* memo rely exclusively on the "non-federal" nature of the non-rail actions potentially connected to their projects to claim that a connected action is not present. March 10 letter at ¶ 3; *Toyota* memo at 3.

Both the applicant's March 10 letter and the *Toyota* memo cite environmental assessment, rather than EIS, cases to support this position. March 10 letter at 6; *Toyota* memo at 3. Another name for these cases is Finding of No Significant Impact (FONSI) cases. Following the preparation of an environmental assessment, an agency will reach one of two possible outcomes. If an agency finds a significant impact, it must prepare an EIS. If it does not, and if the action does not significantly affect the quality of the human environment independently, the agency must prepare a Finding of No Significant Impact (FONSI) and finalize the decision. 40 C.F.R. §§ 1501.4(c),(e) (2003).

As we have stated previously, and now review, these FONSI cases do not apply in this case, where an EIS will be prepared. Letter from David F. Barton, The Gardner Law Firm, to Victoria J. Rutson, STB-SEA 3–8 (February 19, 2004) (Document EI-601).

1. Review of the inapplicable FONSI case law and why it does not apply

An agency may reasonably limit relatedness at the environmental assessment stage precisely because the NEPA statute is silent on the scope of an environmental assessment, and because 40 C.F.R. § 1508.25 applies only to the EIS. *California Trout v. Schaefer*, 58 F.3d 469, 472 (9th Cir. 1989) ("When the federal action is merely a component of a larger nonfederal project, the process becomes more complicated, because NEPA does not specify the scope of an agency's environmental assessment analysis.").[1]

The analyses for *whether to prepare* an EIS (EIS-threshold) and the *scope* of an EIS (EIS-scoping) differ completely. It is important to understand the cases that correctly and incorrectly apply these principles, in order to limit them to their proper context.

[1] *California Trout*'s citation to *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 398 (9th Cir. 1989), for this principle is somewhat misleading and unnecessary, because *Sylvester*, another environmental assessment case, said correctly that "[the statute] NEPA does not specify the scope of analysis that federal agencies must conduct," but ignored the fact that regulations at 40 C.F.R. § 1508.25 define the scope for an EIS.

When deciding whether to prepare an EIS, an agency considers potentially related actions along with the proposed action. These potentially related actions may be proposed, planned, or speculative.

> The regulation does not limit the inquiry to the cumulative impacts that can be expected from proposed projects; rather, the inquiry extends to the effects that can be anticipated from '[past, present, and] reasonably foreseeable future actions.' . . . The regulations clearly mandate consideration of the impacts from actions that are not yet proposals and from actions—past, present, or future—that are not themselves subject to the requirements of NEPA.

Fritiofson v. Alexander, 772 F.2d 1225, 1241 n.10 (5th Cir. 1985). This distinction arises from the difference between the definitions of "cumulative impact" and "cumulative action." *Cf.* 40 C.F.R. § 1508.7 (defining "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (*Federal or non-Federal*) or person undertakes such other actions.") (emphasis added) and *Id.* §§ 1508.25, 1508.25(a)(2) (defining "scope" as "the range of actions, alternatives, and impacts to be considered in an [EIS]," and defining "cumulative action" as "actions, which when viewed with other *proposed* actions have cumulatively significant impacts and should therefore be discussed in the same [EIS]") (emphasis added).

While an agency must consider the cumulative impacts from "related" actions in its EIS-threshold significance determination, *Id.* § 1508.27(b)(7), and prepare an EIS if the impacts may be cumulatively significant, *Fritiofson*, 772 F.2d at 1238-39 n.7, it need not consider unrelated actions at all.

A multi-factor test (the multifactor federalization test for relatedness) has evolved to determine whether actions must be considered in a proposed federal action's environmental assessment because they are sufficiently "related". These factors, which "federalize" otherwise non-jurisdictional segments of a project at the environmental assessment stage, include, but are not limited to:

(1) whether the regulated activity comprises "merely' a link" in a corridor type project (e.g., a transportation or utility transmission project);

(2) whether there are aspects of the nonjurisdictional activity in the immediate vicinity of the regulated activity which uniquely determine the location and configuration of the regulated activity;

(3) the extent to which the entire project will be within the agency's jurisdiction; and

(4) the extent of cumulative federal control and responsibility.

See Sylvester v. Army Corps of Engineers, 884 F.2d 394, 398-99 (9th Cir. 1989) (quoting similar Corps of Engineers regulations at 33 C.F.R. Part 325 Appx. B, §7(b)(2)).

Sylvester involved the alleged segmentation of a proposed golf course from other portions of a proposed resort at Squaw Valley, California, including a village and additional ski runs. The state completed an environmental impact report on all segments of the proposal, pursuant to state law. *Id.* at 396. The Corps of Engineers, however, issued a FONSI for the federal wetland fill permit after completing an EA describing only the golf course, which was the only segment of the proposal that it had jurisdiction over. The Corps applied the federalization test in its regulations, 33 C.F.R. Part 325 Appx. B, §7(b)(2), and concluded that the other segments of the resort were not related to the golf course for the purposes of NEPA. The court held that NEPA was unclear as to the proper scope of analysis of NEPA review for nonjurisdictional actions, and that the Corps' interpretation was not an impermissible reading of the statute. *Sylvester*, 884 F.2d at 397. In the wake of *Sylvester*, numerous other federal agencies promulgated EIS-threshold regulations similar to the Corps. *See e.g.*, 23 C.F.R. § 771.111(f) (2003) (Federal Highway Administration), 18 C.F.R. § 380.12(c)(2)(ii) (2003) (Federal Energy Regulatory Commission).

Still, courts confronted with challenges to agency FONSIs have often misapplied or collapsed the analysis of relatedness and the analysis of potential significance that comprise the two step EIS-threshold analysis. This typically occurs when the court substitutes the EIS-scoping test, in the Council on Environmental Quality (CEQ) regulations implementing NEPA, for the multi-factor relatedness test. *Cf.* 40 C.F.R. § 1508.25 (2003) (defining EIS scope for connected and cumulative actions). The former cannot apply exclusively until an EIS is

required. The terms of the EIS-scoping test may be used as factors in the relatedness test, but they cannot be the only test of whether an EIS is required.

To surpass the EIS-threshold, the court must deem the agency's "decision to forgo preparation of an EIS . . . unreasonable for at least [one of the] two reasons" outlined in *Fritiofson*:

> (1) the evidence before the court demonstrates that, contrary to the FONSI, the project may have a significant impact on the environment, or (2) the agency's review was flawed in such a manner that it cannot yet be said whether the project may have a significant impact.

Fritiofson, 772 F.2d at 1238. That requires applying both a federalization test for relatedness and a significance test.

By far the best example of an improperly collapsed analysis is *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985). In *Thomas*, the district court upheld the Forest Service's decision to analyze a proposed Forest Service road and several proposed timber sales along the proposed road in separate environmental assessments. Without even consulting the record for a significance determination, the Ninth Circuit reversed the district court and, applying the EIS-scoping test for connected actions at 40 C.F.R. § 1508.25(a)(1)(i)–(iii), deemed the proposals connected and ordered them consolidated in a single EIS.[2]

Thomas' reliance on the EIS-scoping factors at 40 C.F.R. § 1508.25 as inputs to a federalization test for relatedness at the EA stage is perfectly reasonable, but *Sylvester* shows that they are not the only reasonable inputs. *Thomas*' bypass of the significance test is completely impermissible; *Fritiofson* instructs that the court must at least consult the record before making its own determination.

[2] Later courts have noted that Thomas relied most heavily on 40 C.F.R. § 1508.25(a)(1)(iii), the so-called "independent utility" factor in the EIS-scoping test. *See Thomas*, 753 F.2d at 759-60 (discussing Ninth Circuit independent utility precedent); *Blue Ocean Preservation Society v. Watkins*, 754 F. Supp. 1450, 1459 n.8 (D. Haw. 1991) (politely suggesting that the Second Circuit, in *Hudson River Sloop Clearwater v. Department of the Navy*, 836 F.2d 760 (2d Cir.1988), was incorrect to categorize *Thomas* as an application of 40 C.F.R. § 1508.25(a)(1)(ii), the "but for" factor in the EIS-scoping test).

The second factor cited in *Sylvester* is an independent utility-type factor, and some agencies have explicitly codified it as such in their regulations. *See, e.g.*, 23 C.F.R. § 771.111(f) (2003) (Federal Highway Administration). But it should be clear that the federalization test for relatedness in an environmental assessment case differs from the relatedness tests for connected and cumulative actions once an EIS has been triggered.

Early FONSI cases set out slightly different sets of relatedness factors but reached results consistent with *Sylvester*. *See Friends of the Earth v. Coleman*, 518 F.2d 323 (9th Cir.1975) (agency did not have to prepare an EIS for state funded projects in a partially federally funded airport development); *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980) (because federal jurisdiction extended only to river crossing of interstate power line, Corps of Engineers was not required to consider impacts beyond that area); *Friends of the Earth v. Hintz*, 800 F.2d 822, 832 (9th Cir. 1986) (agency not required to consider the impacts of shoreside facilities, such as berthing areas, terminals, roadways, and utility improvements).

In *Save the Bay, Inc. v. U.S. Army Corps of Engineers*, 610 F.2d 322 (5th Cir. 1980), the Corps of Engineers was required to analyze only the environmental consequences of a discharge pipeline's construction and maintenance instead of considering an entire chemical plant in its decision on whether or not to prepare an EIS. *Id.* at 327. The record before the court in that case did not contain facts or circumstances to compel an alternate conclusion. *See also Hoosier Environmental Council, Inc. v. U.S. Army Corps of Engineers*, 105 F. Supp. 2d 953, n.13 (S.D. Ind. 2000) (plaintiffs did not present factual evidence of significance contrary to Corps' conclusion under its regulations that EA did not require cumulative effects analysis of riverboat casinos greater than 100 miles away from the proposed action). However, the Fifth Circuit explicitly stated "We express no opinion as to the proper scope and extent of coverage of an EIS should one have been necessary." *Id.* at 327 n.3.

There are limits to an agency's ability to avoid invoking its jurisdiction under the multifactor federalization test for relatedness. In *Stewart v. Potts*, 996 F. Supp. 668 (S.D. Tex. 1998), an environmental group alleged that the Corps violated NEPA and the Clean Water Act by issuance of a permit to a city to build a golf course. To build the golf course, 200 acres of forest land containing approximately two acres of wetlands had to be cleared. The Corps prepared an EA for the wetlands but declined to perform an assessment of the environmental impact of the rest of the area on which the golf course would be built.

Stewart held that the tasks necessary to construct the proposed golf course—filling of the wetlands and clearing of the forest located on the wetlands—were so interrelated and functionally interdependent as to bring the entire project within the jurisdiction of the Corps and NEPA. The court arrived at this conclusion because the two acres of wetlands were not in a "neat square of land" but were scattered throughout the 200 acre site. The court stated that "[t]o suggest that the Corps has no jurisdiction to consider the environmental impacts of the fragmentation of the forest, even though it has jurisdiction to consider the impacts of the wetlands which coexist underneath those very trees is. . . an impermissible abdication of a federal agency's duties under NEPA." *Id.* at 683-84.

Sometimes, if the agencies lack clear EIS-threshold regulations, the courts simply ignore the multifactor case law and apply their own test. *See Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426 (10th Cir. 1995) (test for whether particular parts of airport master plan could be considered cumulative impacts of the proposed action was whether they were "so interdependent that it would be unwise or irrational to complete one without the others").

This has happened frequently for the "independent utility" factor in the federalization test for relatedness, which many circuits have carried over to the third connection action factor in the EIS-scoping analysis, 40 C.F.R. § 1508.25(a)(1)(iii). *See Utahns for Better Transportation v. U.S. Department of Transportation*, 305 F.3d 1152, 1173 (10th Cir. 2002) (expressing the novel theory that the Tenth Circuit test for whether an action can be considered a cumulative impact—a term with its own definition at 40 C.F.R. § 1508.7—and define the scope of an EIS is the *Airport Neighbors* test); *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1118 (9th Cir. 2000) (ignoring *Sylvester* to say that "We use an 'independent utility' test to determine whether an agency is required to consider multiple actions in a single NEPA review pursuant to the CEQ regulations," as the federalization test for relatedness, before an EIS has even been triggered). Again, analogous to the use of the EIS-scoping test factors in *Thomas*, there is nothing wrong with defining independent utility as a factor in the federalization test for relatedness, or even using it as the primary factor, *Association Concerned About Tomorrow, Inc. v. Dole*, 610 F. Supp. 1101, 1108 (N.D. Tex. 1985) ("Nevertheless, the illogic of a terminus is at best a secondary inquiry . . . shadowed by the independent utility inquiry").

However, when applying the EIS-scoping test, it is important to understand first that while carryover of the independent utility concept from the FONSI cases is permissible, those cases often use independent utility as a proxy for a multifactor relatedness test. Second, EIS-scoping

cases that have carried over the concept, instead of applying 40 C.F.R. § 1508.25(a)(1)(iii) directly, may do so thinking that they may apply other factors in the FONSI cases as well, when in fact the EIS-scoping test is restricted to the terms of the CEQ regulations. While one factor in the EIS-threshold analysis—the "independent utility" factor—may happen to match one of the terms in the EIS-scoping analysis, other reasonable factors in a test for relatedness do not carry over, unless they happen to match the prongs of § 1508.25(a)(1).

For a complete classification of FONSI and EIS cases, please consult the list in the page (s) attached to this letter.

2. *The multifactor federalization test for relatedness has already been applied, and the applicant has lost—the quarry has been deemed related*

It is telling that the applicant is attempting to take a second bite at the apple by applying the inapplicable case law-based multifactor relatedness test for the scope of an environmental assessment in lieu of the clear connected action regulation for the scope an EIS. For if simply federalizing the non-federal project is the issue, rather than establishing the dependence of the federal proposal on an additional project that must be considered part of the "action" and directly analyzed in the EIS, the applicant has already lost. It concedes that "the Board's January 28 Draft Scoping Notice specifically and correctly states that the quarry will be considered under the cumulative impacts analysis of the EIS" and that "the rail line and quarry are related to the extent that the rail line will serve the quarry." March 10 letter at 3. The only test left to apply is the connected action regulation for the scope an EIS.

Yet the applicant would deny the effect of the EIS connected action regulation by substituting the inapplicable relatedness analysis from the environmental assessment stage, with its multiple potential factors, including independent utility. This is why it is essential to classify and separate the case law on environmental assessments and EISs. The applicant's use of environmental assessment cases applying a relatedness test in various forms, including *Save the Bay, Inc. v. U.S. Army Corps of Engineers*, 610 F.2d 322 (5th Cir. 1980), *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1118 (9th Cir. 2000), and *Border Power Plant Working Group v. U.S. Department of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003) is disingenuous and disrespectful of clear rules of law represented by the EIS connected action regulation.

The use of *Wetlands Action Network* by the both applicant's March 10 letter and the *Toyota* memo, and the use of *California Trout* by the *Toyota* Memo, is particularly offensive. *Wetlands Action Network*'s statement that "We use an 'independent utility' test to determine whether an agency is required to consider multiple actions in a single NEPA review pursuant to the CEQ regulations" is an example of sloppy, overbroad language leading to unclear law. *Wetlands Action* Network, 222 F.3d at 1118. The CEQ regulations defining scope, at 40 C.F.R. § 1508.25, apply only to an EIS, not to an environmental assessment, even though they may be used as factors in a relatedness test in a FONSI case. Ironically, it is *California Trout* that points this out. *California Trout,* 58 F.3d at 472.

More disturbing is the fact that both the applicant's March 10 letter and the *Toyota* memo use the *Wetlands Action Network* and *California Trout* FONSI cases to stand for the categorical principle that projects "not financed by federal funding" and not controlled by "federal regulation," March 10 letter at 5, "not [but-for] dependent on the federal action . . . and an independent private project over which the [agency] has no jurisdiction," *id.*, or where "only one of them falls under agency jurisdiction," *Toyota* memo at 3, cannot be connected actions in an EIS. *Wetlands Action Network* and *California Trout*, (which again, like *Save the Bay* and *Border Power Plant Working Group*, are FONSI, not EIS cases), do not even stand for this principle in an environmental assessment, much less in an EIS where they cannot apply. The factors these cases list are just that—factors—meant to be applied by agencies in environmental assessments on a case by case basis, and not as categorical rules.

3. *To resurrect the federalization test from the environmental assessment stage, the applicant seeks to define "action" in the CEQ regulations to mean only "federal action," which it clearly does not.*

Now that an EIS will be required, and the only test left to apply is the connected action regulation, the applicant's only argument is to replace the explicit EIS regulation at 40 C.F.R. § 1508.25(a)(1)(iii) (the independent utility test) with a multifactor, jurisdictional federalization test for relatedness. The applicant posits on page 6 of their March 10 letter, that "all of the independent utility cases relied upon by MCEAA involve two allegedly interdependent projects, each subject to some form of agency review due to agency permitting or funding." That is merely a restated federalization test. Unfortunately for the applicant, 40 C.F.R. § 1508.25(a)(1) contains no requirement that the connected action be subject to agency permitting or funding, be otherwise federal, or even be proposed as opposed to planned. *Compare* 40 C.F.R.

§ 1508.25(a)(2) (2003) (requiring analysis in the same EIS only for "proposals" that are cumulative actions) *with id.* § 1508.25(a)(1) (lacking that requirement for connected actions).

Assume for a moment that the applicant's implicit assertion—that "action" as used in the Council on Environmental Quality regulations means only federal actions—is even arguable:

Federalization of a project not otherwise subject to federal agency review occurs during the environmental assessment stage, when an agency's decision to prepare an EIS turns on whether the action and any related segment does so "significantly." 40 C.F.R. § 1502.3 (2003). In that determination, significance may arise directly from the proposed action, or cumulatively. If "the action is related to other actions with individually insignificant but cumulatively significant impacts . . . [then] [s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." *Id.* § 1508.27(b)(7) (2003). As *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985) and hundreds of environmental assessment cases before and since have recognized, the "other actions" that may be considered in the determination of cumulative significance may be non-federal. A multifactor federalization test for relatedness, which includes independent utility and other potential factors, governs whether these non-federal actions are related enough to the proposed federal project to be included in that significance determination. *Id.*; *Sylvester v. Army Corps of Engineers*, 884 F.2d 394, 398-99 (9th Cir. 1989).

Then, when these other actions are considered in an EIS, if they are not otherwise connected actions (§ 1508.25(a)(1)) or cumulative actions (§ 1508.25(a)(2)), they are considered as merely cumulative impacts (§ 1508.7). A "cumulative impact" is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.*

Having established that even the most remote "actions" considered in an EIS are both federal and non-federal, we turn to the applicant's assertion that those "actions" most directly tied to the federal action—indeed, connected to it—need not be considered if they are non-federal. The result can be no different. The applicant's only justification could be that multiple environmental documents are preferable to one, per the two hypotheticals discussed above. If this were true, STB would consider the quarry solely as a cumulative impact in the rail line EIS, as the applicant desperately wishes at this late date. But it is not. The connected action

regulation exists apart from the cumulative impact regulation for a reason, and the applicant's argument must fail.

C. Consequences of the Applicant's Position

The applicant's flawed view of connected actions in an EIS under NEPA can be distilled into two hypothetical principles:

> First, if an applicant desires to construct what would otherwise be a connected action under 40 C.F.R. § 1508.25(a)(1)(iii), such as a quarry and a rail line, they can avoid analyzing them together in an EIS by proposing the one that lacks independent utility (the rail line) first, or, arguably, the quarry.
>
> Second, if an applicant desires to construct what would otherwise be a connected action under 40 C.F.R. § 1508.25(a)(1)(iii), such as a quarry and a rail line, they can also avoid analyzing them together in an EIS by proposing the federal action (the rail line) first, and then waiting until after that process to see if the nonfederal action requires an EIS.

Both of these hypotheticals are flatly inconsistent with NEPA and the connected action regulation. Underlying this inconsistency is the theoretical argument that two EISs are just as good as one, because the cumulative impact section in the second one will account for the effects of the first (probably after it is built). That ignores the basis for the connected action regulation for EISs, 40 C.F.R. § 1508.25(a)(1) (requiring analysis in the "*same EIS*") (emphasis added), and its three tests, in favor of treating all unproposed actions as connected cumulative impacts. The purpose of 40 C.F.R. § 1508.25(a)(1) is precisely to require the direct effects analysis of both projects at the same time.

II. NATURAL MONOPOLY GOODS AND THE APPLICATION OF THE CONNECTED ACTION REGULATION

We have stated that the application of the connected action regulation need not encompass all actions that come before the agency. Letter from David F. Barton, The Gardner Law Firm, to Vernon Williams, STB 14 (February 20, 2004) (Document 210174). We are not unsympathetic

to the agency's concern about how the connected action regulation may impact similar projects that come before it. Therefore, we will state clearly how limited the application of the connected action regulation should be.

A. Why Natural Monopoly Goods Are Different and More Susceptible to the Connected Action Regulation

Natural monopoly goods include pipelines, power lines, and rail lines. Federal agencies that build or license projects where these goods are often connected to a larger action, or that build or license the larger action, include the Federal Energy Regulatory Commission (FERC) (pipelines and power lines); Army Corps of Engineers, Tennessee Valley Authority (TVA), Bureau of Reclamation, and Bonneville Power Agency (BPA) (dams); Nuclear Regulatory Commission (NRC) (nuclear power plants); Western Area Power Administration, the US Section of the International Boundary and Water Commission (IBWC), and the Bonneville, Southwestern, and Southeast Power Administrations (power lines), and the STB (rail lines).

In many of these cases, the larger action is already a federal action, and its impact dwarfs that of the natural monopoly good. Rarely are pipelines and power lines to nowhere proposed.

Today, however, it is common to see rail lines to nowhere proposed, mainly for the reasons seen in the *Toyota* case. In *Toyota*, the closest line haul carrier, Union Pacific, initially refused to permit its competitor, Burlington Northern Santa Fe (BNSF), to serve a proposed Toyota factory south of San Antonio. BNSF had trackage rights over a nearby line but not over the line from which the new spur to the facility would be built. Union Pacific could have relied (and eventually did rely) on 49 U.S.C. § 10906 to exempt the new rail line from environmental review, since it was short enough to qualify as a spur, if it built the new line itself.

Toyota, however, refused to build the factory if it was not competitively served by rail, that is, by both Union Pacific and BNSF, to avoid a captive pricing situation. This situation does not arise nearly as often in the more monopolistic power line and pipeline goods, often because open access policies have been instituted. However, it is being replicated over and over nationwide with new rail construction. *See Finance Docket 34079—San Jacinto Rail Limited—Build-Out to the Bayport Loop, Texas* (2003) (consortium of chemical shippers seeking build out to end captive pricing); *Finance Docket 34002—Alamo North Texas Railroad—Construction and*

Operation, Wise County, Texas (2002) (prospective quarry and rail line operator seeking build out to avoid captive pricing). It is also the situation with the quarry and rail line operator here.

But if Toyota or another entity paid for another line, to connect to where BNSF could operate, that line, due to its length, would have to undergo environmental review under NEPA. In response, the state of Texas did in fact form and fund the Bexar County Rural Transportation District to build a seven mile connecting rail line that would allow both Union Pacific and its competitor, Burlington Northern Santa Fe, to access the new Toyota factory.

Prior the commencement of the environmental analysis of the rail line, STB consulted the *Toyota* applicant's counsel regarding whether the rail line and the Toyota factory were connected actions. The *Toyota* applicant's counsel gave the responses discussed above, which, to the extent that they did not purport to apply to an EIS, were applicable to any environmental assessment that the STB would have prepared.

However, Union Pacific backed down and offered BNSF trackage rights and built the spur to the factory before an environmental assessment was prepared in *Toyota*. The decision came less than two months after BNSF had gained access to a massive concentration of chemical shippers near Houston, in *Finance Docket 34079—San Jacinto Rail Limited*. But what factors Union Pacific used in its calculation, and whether a "redivision of the map" occurred between the giant line haul carriers and the captive pricing policies they rely on to profit, we will never know.

The *Toyota* case illustrates that the pressure for shippers to step out and build "rail lines to nowhere" before their projects, to avoid captive pricing, has real impacts on the scope of environmental review, even in an environmental assessment. For the shipper to assume the risk that their entire project, which almost certainly has the potential for significant cumulative, if not direct-from-rail environmental impacts thus triggering an EIS, will be reviewed in detail is a major financial decision weighed against the cost of captive service.

Nevertheless, whether the shipper applies to construct the line or whether the line haul carrier that would provide competitive service does, the agency can consider at least two factors at the environmental assessment stage to deem the larger project "unrelated" and thus not part of the determination of whether an EIS will be prepared. This avoids applying the connected action regulation for an EIS, though the agency may still wish to apply its tests among the other factors. Those factors are:

> the extent to which the entire project will be within the agency's jurisdiction; and
> the extent of cumulative federal control and responsibility;

Sylvester v. Army Corps of Engineers, 884 F.2d 394, 398-99 (9th Cir. 1989). *Sylvester* found these factors to be reasonable agency interpretations of NEPA. As discussed above, the agency has wide discretion to consider the relatedness of other actions at the environmental assessment stage. It can even promulgate its own regulations, as the Federal Energy Regulatory Commission (FERC) has. *See* 18 C.F.R. § 380.12(c)(2)(ii) (2003) (listing factors for relatedness of other actions in an environmental assessment).
As discussed below, the agency may also be able to consider a general, as opposed to project specific, independent utility, if the context is proper.

The larger actions potentially related to power line and pipeline projects are almost invariably excluded at the environmental assessment stage by these factors. *See Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980) (because federal jurisdiction extended only to river crossing of interstate power line, Corps of Engineers was not required to consider impacts beyond that area in environmental assessment). Only rail lines are not, and it is easy to see why. Unlike power lines and pipelines, the frequency and nature of operation on rail lines leads to widely varying environmental impacts. Power lines and pipelines, once they are built, have few impacts, and those impacts are consistent. There is not much ongoing responsibility past the construction stage, and what operational impacts do exist are not added to by the larger project. But for heavily used rail lines, or rail lines carrying hazardous cargo, environmental impacts (such as noise, traffic, and in particular for this case, flooding, cultural resource impacts, and air pollution) exist that will likely be added to, significantly, by related projects with similar impacts that therefore must be considered in determining whether an EIS will be prepared.

Examples of related projects where a sufficient amount of the entire project would be within the agency's jurisdiction are limited for natural monopoly goods. *See* Tennessee Gas Pipeline Co., Order Granting, in Part, and Denying, in Part, Rehearing and Request for Reconsideration, 95 FERC ¶ 61,169, 2001 WL 469985 (applying *Sylvester*-type multifactor test in FERC regulations to find that environmental assessment was not required to analyze a proposed nonjurisdictional lateral off of proposed pipeline, or the proposed nonjurisdictional power plant that the lateral would serve, due to insufficient federal control and responsibility over them). In such cases, state environmental review covers the non-federal project.

On the other hand, related projects at the environmental assessment stage may exist in what would properly be termed "cumulative actions" at the EIS stage. Proposals with overlapping rail traffic impacts, such as a rail-served port and a new rail line, would have sufficient relatedness with respect to the agency's jurisdiction despite the lack of any physical connection. Relatedness will also exist when the non-federal action becomes federalized by another agency, because federal jurisdiction will then extend over the entire project. If the rail line will physically connect solely to a federalized action, the actions should be deemed connected if the independent utility test at 40 C.F.R. § 1508.25(a)(1)(iii) is satisfied.

But the biggest problem for STB is using independent utility as one of many factors at the environmental assessment stage. Invariably, because the proposed rail lines will connect directly to the proposed shippers, the rail line will lack independent utility unless (maybe) it is planned to serve a clearly industrial area where a speculative construction project might be justified. This is true even in cases like *Toyota* where the shipper claims that it has alternate means of transportation. Indeed, the courts would likely require a more detailed showing by the applicant, setting aside any confidentiality protection, if such massive projects that will almost certainly require rail service in order to be cost-effective at some date were regularly deemed independent.

The question for STB is if applying the independent utility factor in a relatedness test at the environmental assessment stage always points to an EIS, can it apply a jurisdictional factor at that stage as the sole counterbalance to avoid an EIS? Perhaps it cannot. And perhaps the line haul carriers and shippers have been dreading this day for some time for that reason. The shippers will choose a site that avoids federal environmental permitting requirements. But they cannot avoid the federal requirements that come with rail. Their entire project may thus reach the EIS stage, and be subjected to a detailed review that, while not as rigorous as individual permitting processes, is still more detailed than they would like.[3]

NEPA calls for this analysis for a reason, and that reason is providing a single, comprehensive set of facts for the community and for decision makers. NEPA addresses the tension of divided communities that will experience the entire action, not parts of it. When the state process has not begun, and the applicant is coyly waiting for its rail line before it builds the

[3] One upside to the law for applicable parties may be the incentive for increased reuse of industrial sites in already industrialized areas, rather than "greenfield" development in rural areas.

non-federal project that the line will connect to, the NEPA analysis is not duplicative, but rather complementary. In *Sylvester*, on the other hand, the state had already analyzed the resort surrounding the golf course. The complementary nature of NEPA analysis, when it is unclear whether the project served by the rail is truly non-federal as the applicants claim, prevents the applicant from short-circuiting the process based on the order in which their projects are proposed. Whether the "non-federal" project has in fact commenced the permitting process is itself another factor that the agency could and should use at the environmental assessment stage to determine relatedness.

B. Why the Relatedness Test and the Connected Action Test Will Not Produce Different Results

Once the EIS stage is reached, as in this case, the non-rail part of the action will usually have been deemed related during the environmental assessment stage, as it was in this case. However, "significance" requiring preparation of an EIS can arise independently of impacts from the related actions, *see* 40 C.F.R. § 1508.27(b) (listing significance factors), including "the degree to which the effects on the quality of the human environment are likely to be highly controversial." *Id.* § 1508.27(b)(4). The question then arises, is there a case where a public controversy is present, an EIS is required, but the actions would be "unrelated" for a relatedness test in the environmental assessment, yet "connected" under the EIS connected action regulation?

The answer is no, but even if it happened, it would not be a problem. First, the "independent utility" test of the EIS connected action regulation is likely dispositive enough when used as a factor in the relatedness test during the environmental assessment. Here, the rail line clearly lacks independent utility, as it would in nearly all rail construction cases like this one, where the applicant will both build the rail line and construct the project it serves. However, even if jurisdictional factors outweighed "independent utility" in the relatedness test during the environmental assessment, the connected action regulation does not permit the consideration of jurisdictional concerns at the EIS stage. An agency may blame CEQ for not providing better guidance at the environmental assessment stage, but it cannot reasonably challenge CEQ's connected action regulation for an EIS, which, like all agency regulations, is entitled to the highest deference, on those grounds. The EIS connected action regulation properly excludes jurisdictional concerns because the significance determination whether to prepare an EIS, where jurisdictional concerns may play a role, has already been made. Any further exercise of

jurisdictional limits after that point may lead to an EIS that is practically an environmental assessment.

C. A General "Independent Utility" of Economic Benefit Does Not Apply Here

Road construction projects may enable future development on surrounding lands, and are used by and accessible to the public, and therefore may be said to have a general public independent utility if they are not being built solely to access a piece of land that is not a traffic generator. *See Association Concerned About Tomorrow, Inc. v. Dole*, 610 F. Supp. 1101, 1108-09 (N.D. Tex. 1985). Unlike road projects, rail lines are for private use, and generally connect to private shippers on private land.

Nevertheless, the *Toyota* memo suggests that a general "independent utility" of a rail line as "needed infrastructure to enhance the economic development of the region generally" can meet the "independent utility" test. *Toyota* memo at 8. We express no opinion as to the truth of that statement, for an environmental assessment under the multifactor federalization test for relatedness or under the EIS connected action regulation. But the two FONSI cases that the *Toyota* memo cites, *Wetland Action Network*, 222 F.3d at 1118, and *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 580 (9th Cir. 1998), do not support this position.

Even if such a general "independent utility" were possible, it is not present in this wholly private action. Such a test is contextual. Unlike Toyota, where an economic development area had been defined, commercial property was for sale, and the state was actively and formally pursuing activities on the land surrounding the proposed rail line through its economic development agencies and for the purpose of attracting new businesses, none of that is occurring in Medina County.

It is plausible to find independent utility from general economic benefit where a proposed rail line with no customers will serve a publicly-defined industrial or economic development area, even if that area is in the process of attracting tenants. Such general "independent utility" swallows the regulation, however, when it is applied to a rail line like the one in this proceeding, which crosses private land outside of *any* industrial or economic development area; where, as the applicant concedes, no tenants intend to locate; where the rail line's only customer is a private

entity or consortium that has not yet built their project; and where the rail line is proposed by the same or effectively the same entity that it will serve.

III. THE PROPER ANALYSIS

Notably, we have not discussed the scope of the required Endangered Species Act analysis or the proper no action alternative up to this point. The March 10 letter's circular analysis intermingles these issues to distract from its failure to apply the connected action regulation to the rail line. The ESA issue can be determined independently from, and the no action issues cannot be determined until after, the scope of the EIS.

A logical, orderly analysis would contain three steps:

1. Apply the Endangered Species Act to both the quarry and the rail line, even if the quarry is only considered as a cumulative impact, because the relevant consideration for ESA purposes is the "total impact." *National Wildlife Federation v. Coleman*, 529 F.2d 359, 373 (5th Cir. 1976).

2. Explicitly apply 40 C.F.R. § 1508.25(a)(1)(iii) – the "independent utility factor" to the federal action (the rail line)

3. Determine the "no action" alternative with reference to the scope of the action determined in step 2.

MCEAA has already provided the analysis necessary to complete these simple steps. The additional background that we have provided attempted to preempt and elucidate the fallacies in the applicant's arguments. Unfortunately, because the applicant deliberately did not apply the connected action test to the rail line in their March 10 letter, they proceeded through numerous misrepresentations of the regulations and case law, most of which (such as the *Save the Bay, Border Power Plant Working Group, Wetlands Action Network, Thomas v. Peterson,* and *Save Barton Creek* environmental assessment cases) would not even apply even if the applicant were correct. In other instances, the applicant deliberately misrepresented MCEAA's explicit segregation of the inapplicable *Sylvester* environmental assessment case as though it applied, and likewise applied clearly inapplicable precedents in discussing the no action alternative.

But the consequences of failing to consider a 1760-acre quarry—the largest in the San Antonio area, to serve the nation's ninth and fourth (Houston) largest cities—on flooding, on property, on air quality, on the transportation system, and on the natural surroundings, will be significant. The applicant has no argument, only its misrepresentations to offer, and having spent five years backing itself into an irrevocable moral corner through its initial dishonesty towards the community, it has now made an irresponsible request of the agencies to violate the law through its indefensible March 10 letter. To preclude that, we now restate portions of our prior analysis on the three steps above, with additions to respond to the March 10 letter.

IV. THE PROPER ANALYSIS APPLIED

A. Endangered Species Act

In *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), the Fifth Circuit held that "the relevant consideration," in whether an agency has "adequately considered" the effects of an action under § 7(a)(2), "is the total impact." *Id.* at 373. In *Coleman*, the FWS had found that a segment of Interstate 10 in coastal Mississippi would not "jeopardize the continued existence" of the endangered sandhill crane. However, the FWS had neglected to consider the "residential and commercial development that [could] be expected to result" adjacent to the highway" *Id.* The court found that regardless of the non-federal nature of the development, the agency still had a duty under § 7 and "control[led] the development . . . to the extent that they control[led] the placement." *Id.* at 374.

"Irrespective of the past actions of others," the court wrote, the agencies "have a duty to ensure that the highway and the development generated by it do not further threaten the crane." *Id.* Absent that analysis, it would be "questionable whether the crane could survive . . . the indirect effects of the highway." *Id.* at 373.

By implicating "indirect effects," the Fifth Circuit calls for the same level of consultation inquiry used for direct effects to apply to what may fairly be called "cumulative effects" as the term is understood in the CEQ regulations implementing NEPA. See 40 C.F.R. § 1508.7 (2003) (defining "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable

future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."). The level, or depth, of inquiry must be the same in order to produce the result compelled by the ESA. As applied in *Coleman*, that was "whether the crane could survive." *Coleman*, 529 F.2d at 373.

As MCEAA discusses in its incorporated February 15, 2004 letter on the scope of the quarry and rail line as connected and cumulative actions under NEPA, a cumulative impact analysis will be required in the EIS regardless of whether the rail line and quarry are otherwise analyzed together as connected or cumulative actions. *See* MCEAA Connected Action Letter, Part III (Feb. 15, 2004).

Coleman holds without ambiguity that any BA placed in the EIS must consider all phases of the quarry and rail line. In addition, such a BA must consider the effects now, before operation begins. Coleman did not allow the U.S. Department of Transportation to wait around and see what the effects of Interstate 10 and the foreseeable private development around it would have on the crane. In the same way, the applicant and FWS cannot wait and see what indirect effects blasting and other quarry operations would have on the golden-cheeked warbler or the black-capped vireo. Vulcan concedes that it will have to monitor over the life of the project anyhow—but it is the agencies' duty to analyze today that is at issue.

To date, however, only one phase of the quarry has been studied consistent with FWS protocols. Significantly, the rail loading yard, where the rail line will enter and connect with the quarry, has not been fully surveyed for the golden-cheeked warbler or the black-capped vireo. In an April 22, 2003 letter, from the FWS to Vulcan's environmental analysis contractor, the FWS noted:

> We are particularly concerned about the area noted by STB as the 'straight track loading option'. It appears that the vegetation in this area has not been cleared and may support habitat for one or both of these species.

Letter from Robert T. Pine, FWS Supervisor, to Jana Zyman-Ponebshek, URS ¶ 3 (Document EI-56). Further, several landowners in the area report seeing the birds on their property, which will be crossed by the rail line alternatives.

A procedural requirement of the ESA is a substantive violation for which an injunction may issue. *Thomas v. Peterson*, 753 F.2d 754, 764-65 (9th Cir. 1985). The STB cannot simply ignore *Coleman* and adopt the existing BA for Phase I of the quarry. It must require Vulcan to conduct the additional three years of focused study on Phases 2-5 of the quarry and the rail line alternatives necessary to produce an adequate BA under FWS protocols. Any such BA must be included for comment with the DEIS if it is not used in lieu of a section discussing impacts on threatened and endangered species.

The applicant's March 10 letter makes no serious argument against *Coleman*'s mandate to consider indirect effects. Page 9 of the letter contains a completely irrelevant jurisdictional argument that would not even apply if the actions were unconnected. Page 10 most directly addresses *Coleman*, but misapplies the "control[led] the development . . . to the extent that they control[led] the placement" language, *id.* at 374, to imply that *Coleman* only addresses "but for" cause. Such a scenario would apply much like one factor of the connected action test, 40 C.F.R. § 1508.25(a)(1)(ii) (the "cannot or will not proceed unless. . ." factor). But not only would it be irrational not to apply the ESA requirements to other types of connected actions, but "indirect effects" that "[could] be expected to result," encompass far more than directly connected actions. *Coleman* at 373.

An agency could not, for example, choose to subject some reasonably foreseeable future actions to ESA analysis but not others. Does the applicant seriously argue that wide areas of land adjacent to the rail line, where it anticipates induced development that the STB would "control the development" of "to the extent that they control[led] the placement," requires ESA analysis under *Coleman*, but that the quarry, which is far less speculative—indeed, certain in the applicant's eyes—does not? The applicant, having spent 5 years desperately trying to convince the agencies that the as-yet-unpermitted and unproposed quarry will proceed independently from the rail line cannot receive the benefit of this sort of sophistry. The "indirect effects" in *Coleman* were just as speculative as the private induced development is here, only over a slightly smaller area. Therefore, *Coleman* indicates that the speculative nature of reasonably foreseeable private development does not distinguish the quarry.

Further, what would be the purpose of considering "indirect effects" from only those future actions that tied to the federal action through "but for" causation? Those same actions, if truly "but for," would already be part of the connected action under 40 C.F.R. § 1508.25(a)(1)(ii) (the

"cannot or will not proceed unless. . ." factor). But the Fifth Circuit in *Coleman* said "indirect" not "direct," and said "[could] be expected" not "cannot or will not proceed."

The Tenth Circuit has spoken clearly on the issue, in *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985):

> Plaintiffs argue that, even if the Corps can consider effects of changes in water quantity, it can do so only when the change is a direct effect of the discharge. In the present case, the depletion of water is an indirect effect of the discharge, in that it results from the increased consumptive use of water facilitated by the discharge. However, the Corps is required, under both the Clean Water Act and the Endangered Species Act, to consider the environmental impact of the discharge that it is authorizing. To require it to ignore the indirect effects that result from its actions would be to require it to wear blinders that Congress has not chosen to impose. The fact that the reduction in water does not result "*from direct federal action does not lessen the appellee's duty under § 7 [of the Endangered Species Act*]." *National Wildlife Federation v. Coleman*, 529 F.2d 359, 374 (5th Cir. 1976). The relevant consideration is the total impact of the discharge on the crane. *Id.* at 373. In *National Wildlife Federation*, the Fifth Circuit held that the federal agency was required to consider both the direct and the indirect impacts of proposed highway construction, including the residential and commercial development that would develop around the highway interchanges. Similarly, in this case, the Corps was required to consider all effects, direct and indirect, of the discharge for which authorization was sought.

Riverside Irrigation District, 758 F.2d at 512-13.

In *Riverside Irrigation District*, the District's argument to avoid ESA applicability was a jurisdictional one similar to the one that appears on pages 3 and 10 of the applicant's March 10 letter. The District, subject only to the Clean Water Act in this case, styled its dam proposal as an otherwise non-federal action, attempting to restrict *Coleman* to the direct effects of major federal actions under NEPA. The applicant seeks to style its quarry in the same fashion and similarly attempt to restrict *Coleman* to the direct effects of its federal action (the rail line).

Here again the applicant desires a result like one of the hypotheticals above, where the order of proposal between the federal and non-federal project would be outcome determinative and would undercut the cumulative analysis called for by the statute. The Tenth Circuit soundly rejected this approach and no circuit has challenged its affirmation, or the Fifth Circuit's original interpretation which leads ineluctably to the same result. So long as some federal action is involved, all direct and indirect impacts of the federal action must be considered.

Operation of the quarry is at least a reasonably foreseeable indirect effect of the rail line, in that, like reduced flows from a dam to facilitate consumptive use in *Riverside Irrigation District*, once the rail line is in place it will be utilized. The dam enabled water transfers with the indirect effect of reduced flows that impacted endangered species. The rail line will enable quarry operation and output with the indirect effect of degraded and destroyed habitat for endangered species from those operations. Simply because the quarry has another option besides the proposed federal action that it could use to enable quarry operation and output does not excuse the indirect effects that the rail option will generate once it is constructed.

Finally, the applicant states on page 10 that "there is no potential endangered species habitat along the proposed rail line." This is unsupported by the documentation provided to the STB to date. No biological assessment has been conducted for the rail line alternatives. To date Vulcan has completed a biological assessment on phase 1 of the quarry, which did not include the rail line. Nor have three years of focused counting per U.S. Fish & Wildlife requirements been completed for the rail loading area and loop, which, as page 6 of the August 2003 Biological Assessment states, are part of Phase 2 of the quarry. A complete Biological Assessment, including three years of focused counting, has only been completed for Phase 1. Even so, because the rail line will at least enable indirect effects from the quarry once it is constructed, a full analysis of the quarry site is merited, given that the agency "control[s] the development . . . to the extent that they control the placement." *Coleman* at 529 F.2d at 374.

Of course, because the rail line and quarry are connected actions under NEPA, the above simply illustrates that the scope of the ESA analysis will encompass the entire quarry site regardless of whether it is treated as part of the direct effects of a connected action, or the indirect effects of a cumulative impact.

B. Connected Actions Under the National Environmental Policy Act

40 C.F.R. 1508.25(a)(1)(iii)—Are interdependent parts of a larger action and depend on the larger action for their justification.

The proposed rail line and all phases of the planned quarry (including the construction and operation of the rail line into the site) fall within this factor as connected actions. The proposed rail line is an interdependent part of the larger quarry action, and depends on it for its justification. Therefore, the quarry is a connected action whose direct and cumulative impacts, as well as alternatives, must be analyzed alongside those of the rail line in the same EIS.

Connected actions are defined in a manner consistent with the criteria recognized in the independent-utility cases. *Fritiofson*, 772 F.2d at 1242; *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 439 (5th Cir.1981). The Second Circuit has affirmatively acknowledged that "The proper test to determine relatedness under 40 CFR § 1508.25(a)(1)(iii) is whether the project has independent utility." *Town of Huntington v. Marsh*, 859 F.2d 1134, 1141-42 (2d Cir.1988); *Hudson River Sloop Clearwater v. Department of the Navy*, 836 F.2d 760, 764 (2d Cir.1988).

The independent utility test requires that "[i]f proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the projects should be evaluated together." *Fritiofson*, 772 at 1241 n. 10; *Stewart v. Potts*, 996 F. Supp. 668, 683 (S.D. Tex. 1998).

On the facts in this case, the rail line does not possess any real independent utility. Most significantly, the rail line originates at the quarry site. There is no "independent utility" to building an aggregate loading yard at the start of the line, in phase 2 of the quarry site, without the construction of the quarry that Vulcan intends to supply it at that exact site. Construction of the rail line "forecloses options" as to the quarry's location. If the quarry were not a possibility, it would clearly be "irrational, or at least unwise," *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974), to proceed with the rail line. That action is "irrational" absent imminent construction of the quarry through phase 2, and "functional[ly] dependent" on the quarry. Vulcan could not "reasonably consider" going ahead with the rail line construction if there were no other development to utilize it. *Blue Ocean Preservation Society v. Watkins*, 754 F. Supp. 1450, 1459 (D. Haw. 1991).

At every turn in this proceeding, Vulcan and SGR have stated that the rail line's sole purpose is to serve the quarry. SGR's counsel has represented that "The SGR line would be used to transport aggregate between the quarry and a point near Dunlay, Texas, where the SGR line would connect with a Union Pacific Railroad line." Letter from David H. Coburn, Steptoe & Johnson LLP, to Victoria J. Rutson, STB-SEA 1 (January 5, 2004) (Document EI-423). Even so, Vulcan and its wholly-owned subsidiary continue to insist that their fictional division justifies the evasion of the legally required combined analysis of their two projects' direct effects under NEPA. SGR's counsel insists that "the appropriate no action alternative is the alternative of a truck served quarry." *Id.* at 2.

SGR and Vulcan also claim that other shippers "may locate in the area in the future" and plans to hold itself out as a common carrier. *Finance Docket 34284*, Petition of Southwest Gulf Railroad Company for Exemption 3, 5 (February 27, 2003). Rather than allow the NEPA process to account for the changes in land use such development might bring, SGR and Vulcan want it both ways. Fortunately, SGR counsel's own words show that the rail line has no independent utility of its own.

In response to a criticism that the rail line would cause a significant increase in industrial and commercial development along its length, Mr. Coburn responded:

> SGR at this point is not aware of any specific shippers that may locate on the line, other than Vulcan. While the line will be operated as a common carrier line and thus open to use by other shippers, SGR has no information at this time about other shippers that may locate in the area. *Accordingly, any assessment of the level of commercial and industrial development that could develop along the line is speculative.*

Letter from David H. Coburn, Steptoe & Johnson LLP, to Victoria J. Rutson, STB-SEA 1 (January 5, 2004) (Document EI-423) (emphasis added). Clearly, it would be "irrational" to assume that the rail line can proceed independently on the basis of speculation.

The applicant's March 10 letter fails to alter this analysis. Rather than apply the connected action regulation to the federal action, the rail line, the applicant applied it only to the non-federal quarry. The regulation must be applied to all potentially connected actions,

including the federal action, to avoid making the order or timing of proposal outcome determinative.

This case is rare because it is the federal action itself that lacks independent utility. The applicant's March 10 statements do nothing to disprove its earlier statements to this effect. Page6 of the letter states remarkably that "SGR has never claimed that the rail line is dependent on the revenues of the quarry." Given that the applicant's counsel has stated on the record that future development is "speculative" and that the Vulcan Materials quarry is the only possible customer for the Vulcan Materials subsidiary rail line, this statement cannot be taken seriously.

Logically, the same side by side analysis of direct effects and alternatives that occurs for single actions is required for connected actions and their effects, once the agency deems them "connected". As the CEQ regulations themselves provide, an action need not be "proposed" to be connected so long as it satisfies one of the three tests of 40 C.F.R. § 1508.25(a)(1). Yet the command of the CEQ regulations for full analysis in the same EIS remains the same between § 1508.25(a)(1) and (a)(2). It is simply impossible to argue that *Kleppe*'s statement for what the CEQ regulations later termed cumulative actions under § 1508.25(a)(2) should be ignored in favor of a different result under § 1508.25(a)(1).

It makes no sense to argue that the cumulative impacts of the rail line and the quarry must be described in the same EIS, but that consideration of alternatives and direct impacts for the connected action (quarry) may be deferred until the connected action (quarry) is ripe for proposal. The actions must be analyzed from the same baseline of no action side by side. Only then can their cumulative impacts be determined, also in the same document.

The Fifth Circuit has already decided this issue contrary to any attempt by the applicant to segment the EIS' analysis of the quarry as a connected action. In *Sierra Club v. Sigler*, the Fifth Circuit held that related actions that are not "proposals" must be discussed alongside the proposed action in the direct effects and alternatives analyses of the EIS, not simply in the cumulative impact section. 695 F.2d 957, 978-79 (5th Cir. 1983). While the Supreme Court in *Kleppe* addressed (yet, unambiguously resolved) the issue of combined EIS breadth only in dicta, the Fifth Circuit also spoke clearly and on point:

> If an agency were permitted to cite possible benefits in order to promote a project, as the Corps has done here, yet avoid citation of accompanying costs by hiding

> behind *Kleppe*, the cost-benefit analysis in the EIS would be reduced to a sham: such a "cost-benefit analysis" would always be tipped in favor of benefits. *Kleppe* cannot be used to defend a skewed cost-benefit analysis; it was concerned solely with determining when an EIS with its informal cost-benefit analysis must be prepared. Once that threshold is crossed, the analysis must be objective. This case is beyond the threshold at issue in *Kleppe*, since the Corps had to prepare an EIS on the superport project. The issue here is one not discussed in *Kleppe:* once an EIS is required, can the costs of any claimed benefits be ignored? This issue was correctly resolved in [*Chelsea Neighborhood Association v. U.S. Postal Service*, 516 F.2d 378 (2d Cir.1975)], and as NEPA required it must, *Chelsea* answered it negatively.

Sigler, 695 F.2d at 979.

Sigler stands for the principle that Vulcan cannot have it both ways. The bulk cargo activities in *Sigler* were beneficiaries of the proposed action that, while speculative and not yet proposed, required analysis of direct effects ("costs and benefits") in the same EIS. Likewise, Vulcan chose to have the quarry phases all benefit from the proposed rail line, and while some of the latter phases may be speculative and not yet proposed, *Sigler* will not permit Vulcan's quarry to hide behind the speculative possibility of "implementation based on market demands." *See* Biological Assessment, Phase I Medina Project 3 (Aug. 2003) (describing implementation in terms of that phrase). It must analyze the direct impacts and alternatives for all phases of the quarry in the same EIS as the rail line, because it has not represented to the STB that it will use the line only for certain phases or stop using the line after a given time.

Sigler rested its holding on the duty to discuss direct effects advanced by the plaintiffs, and not simply cumulative, secondary, or indirect effects. The plaintiffs "first argue[d] that since the FEIS relied on the benefits of the bulk cargo activities, the FEIS must also evaluate the adverse effects of those activities. Second, the FEIS should have assessed those adverse effects as cumulative effects of related proposals. Third, the adverse effects should have been examined as secondary or indirect effects of the multipurpose deepwater port." *Id.* at 975. The Fifth Circuit did not reach the latter two arguments, because it did not need to. It had already decided them by establishing that, at minimum, a direct effect analysis of the connected action was necessary. *Id.* at 979 n.21. It follows that once the direct effect analysis is complete for all of the phases of the

quarry, those effects will be added to other effects of the proposal to generate the cumulative impact analysis. 40 C.F.R. § 1508.7 (2003).

Sigler makes it clear that the proposed rail line does not exist independently of any phase of the quarry. The phases of development will overlap. These phases will not locate elsewhere, away from the rail line or rest of the quarry; nor will they use exclusively trucks. While not the rule for all phased connected actions, once this quarry is deemed a connected action, every phase of it will be connected to the proposed rail line, because none of the quarry phases have independent utility with respect to one another. They will all rely on common equipment, a shared crushing unit, and shared personnel and resources. They cannot exist apart from one another or the rail line that will transport at least some of their joint output.

C. The No Action Alternative

The no action alternative to the connected action neither builds a rail line nor builds any quarry facilities. For a connected action, no action is something that is *not the connected action* (i.e., something that has independent utility apart from the connected action) that would occur anyhow. It is illogical to define no action as part of the action itself.

However, Vulcan's incorrect argument is predicated on a line of NEPA case law that does not deal with connected actions. In every single case that could justify Vulcan's position, the either/or proposition to reasonably define no action applies as follows:

either the *action* / or something that is *not the action* that would occur anyhow.

No action is obviously the latter "or" result. These cases all proceed from the assumption that no action can be defined "reasonably" as something that is *not the action* that would occur regardless of whether the *action* did. We cannot disagree with that general principle. Here, however, the *action* is a *connected action* with two constituent and interdependent parts. If actions are so bound up and closely related that they cannot be separated, and require side-by-side consideration in the same EIS, then they obviously cannot be juxtaposed against one another in an either/or analysis. The proper analysis to determine the no action alternative is:

either the *connected action* /

or something that is *not the connected action* (i.e., something that has independent utility apart from the connected action) that would occur anyhow

not what Vulcan wants, which is:

either one part of the connected action /

or the other part of the connected action with a substitute for the first part that would occur anyhow

As the definition of "scope" in the CEQ regulations states, scope consists of the ranges of actions, alternatives, and impacts to be considered in an EIS. Actions, alternatives, and impacts—each term is set out and defined separately by the regulation; each term follows from the other. Defining alternatives to an action, including the alternative of *no action*, necessarily requires defining the *action* in a previous step of the scoping process. The agency cannot "undefine" or "redefine" the scope of the action—be it connected, cumulative, similar, or single and unconnected—in a subsequent step if these codified words, which are entitled to the highest deference, mean anything at all.

The general principle that something that is *not the action*, but that would occur regardless of whether the *action* did or did not, can reasonably constitute a no action alternative differs by orders of magnitude from redefining the scope of the action after it has already been defined. The de facto result of independent utility if the quarry is assumed as part of *no action* is no illusion—it is the outright reversal of the connected action determination made one step earlier.

Interstate highway hypothetical

Returning to the earlier federal interstate highway and quarry example, assume a proposed interstate with independent utility that would cross a planned quarry site. Assume that the planned quarry is not a federal action and does not trigger NEPA. Because it has independent utility, the federal highway would occur regardless of whether the quarry ever began operations, and the quarry would begin operations regardless of whether the highway was ever built. The highway and quarry are not connected actions and do not need to be analyzed in the same EIS.

However, assume also that it is reasonably foreseeable that the quarry will begin operations. The Federal Highway Administration, justifiably concerned about the impacts from fine particulate air pollution, decides to assume the operation of the quarry in the no action alternative. The Highway Administration uses the quarry operations to establish a more accurate baseline for its analysis of the interstate routing alternatives. This is perfectly reasonable.

Channel deepening hypothetical

Now, in a different example, assume a proposed channel deepening project in a bay. The proposed channel deepening project requires an EIS. A planned, but not yet proposed, container port is found to be connected to it under the regulations. The channel deepening project claims all of the benefits of the container port to justify itself. The container port, however, could live with the existing channel if it had to. Nevertheless, the channel deepening depends on the larger container port action for its justification, and that is why it is deemed a connected action with the container port under the regulations.

The no action alternative to the connected action neither deepens the channel nor builds any port facilities on the bayshore and uplands. Action alternatives to the connected action involve various reasonable and feasible combinations and locations of channel deepening (including none) and port facilities (including none). Clearly, the agency can eliminate the deeper channel-but-no container port alternative early on, if the facts support that decision. But deeper channels, combined with container ports of varying extent and location, certainly merit further analysis. So does not deepening the channel but still building the port—just not as the no action alternative.

What was a single, unconnected federal action with a scope limited to aquatic environment impacts from dredging and dredge disposal becomes a connected action with a scope encompassing bayshore and upland impacts as well. This is as it should be, because the channel deepening lacks independent utility of its own. Without encompassing these bayshore and upland impacts that it depends on for its justification, the scope of the EIS would be artificially restricted to a level that does not reflect the action that is actually proposed. The case of *Sierra Club v. Sigler* in the Fifth Circuit holds exactly that.

It makes no sense, then, to redefine the scope of the action back to the aquatic environment, and assume the bayshore and upland impacts as a given in the alternatives analysis. The scope of the action has already been decided. The action is the connected action of aquatic environment plus bayshore plus upland, not simply aquatic environment. Stated differently, the action is the connected action of channel deepening and the container port development it depends on for its justification, not simply channel deepening.

To proceed otherwise requires reading the connected action test out of the CEQ regulations. That argument assumes that the differences here are solely semantic, and that the process of defining action, alternatives, and impacts with reference to one another has no meaning so long as a reasonable-looking outcome is achieved. If that were true, then the bayshore and upland impacts could just as easily be added into the cumulative impacts section, rather than considered as part of the no action alternative, *just as they would be in an unconnected single action*. That may be what Vulcan and some in the Federal government want. It is not what they are going to get.

Application to Vulcan's facts

The facts of Vulcan's proposed rail line and planned quarry match the channel deepening hypothetical exactly. We repeat the analysis below.

Now, assume a proposed rail line in a rural area. The proposed line requires an EIS. A planned, but not yet proposed, quarry is found to be connected to it under the regulations. The rail line claims all of the benefits of the quarry to justify itself. The quarry, however, could live with the existing transportation network, namely roads, if it had to. Nevertheless, the rail line depends on the larger quarry action for its justification, Vulcan concedes as much, and that is why it is deemed a connected action with the quarry under the regulations.

The no action alternative to the connected action neither builds a rail line nor builds any quarry facilities. Action alternatives to the connected action involve various reasonable and feasible combinations and locations of rail lines (including none) and quarries (including none). Clearly, the agency can eliminate the rail line-but-no quarry alternative early on, if the facts support that decision. But rail lines, combined with quarries of varying extent and location, certainly merit further analysis. So does not building a rail line but still building the quarry—just not as the no action alternative.

What was a single, unconnected federal action with a scope limited to track-proximate impacts from rail construction and operation becomes a connected action with a scope encompassing quarry site impacts as well. This is as it should be, because the rail line lacks independent utility of its own. Without encompassing these quarry site impacts that it depends on for its justification, the scope of the EIS would be artificially restricted to a level that does not reflect the action that is actually proposed. The case of *Sierra Club v. Sigler* in the Fifth Circuit holds exactly that.

It makes no sense, then, to redefine the scope of the action back to the proximity of the track, and assume the quarry site impacts as a given in the alternatives analysis. The scope of the action has already been decided. The action is the connected action of trackside impact plus quarry site impact, not simply trackside impact. Stated differently, the action is the connected action of building the rail line and the quarry site development it depends on for its justification, not simply building the rail line. No action is something that is *not the action*, whether the action encompasses one or many constituent actions. It defies logic to define no action as part of the action itself.

MCEAA recognizes that a large amount of potentially confusing guidance and case law exists on this point, since the principle that the no action alternative can include something that is *not the action* that would occur anyhow has been accepted in a number of single, unconnected action cases. To assist the agency, we discuss these cases and guidance.

CEQ's Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (Mar. 23, 1981), presents an example in question 3 that seems at first to fit this situation exactly. It reads:

> Where a choice of "no action" by the agency would result in predictable actions by others, this consequence of the "no action" alternative should be included in the analysis. For example, if denial of permission to build a railroad to a facility would lead to construction of a road and increased truck traffic, the EIS should analyze this consequence of the "no action" alternative.

Id. at 18027. Again, we cannot disagree. But the question clearly assumes that the facility already exists. The only action assumed in the question is that of constructing the rail line. No

connected or cumulative actions intervene. This example provides no guidance beyond implicitly setting out the "either/or" proposition.

The cases that have applied the CEQ guidance stand only for applying the either/or proposition to unconnected actions with independent utility. They provide no support for the proposition that an action can be redefined into one of its dependent parts when connected actions are involved.

In *Young v. General Services Administration*, 99 F. Supp. 2d 59 (D.D.C. 2000), the General Services Administration (GSA) planned to build two buildings for the U.S. Patent and Trademark Office in Alexandria, VA. No connected actions were involved in the construction. The GSA found that it was reasonably foreseeable that the land, owned by a private developer, would be developed privately if the government did not build on it. Therefore, the no action alternative assumed private development. This was perfectly reasonable.

Young borrowed most of its analysis from two earlier cases. In *Nashvillians Against I-440 v. Lewis*, 524 F. Supp. 962 (M.D. Tenn. 1981), the no action alternative to a major interstate project assumed the resurfacing of city streets that would need to occur if the interstate were not built. The interstate was not connected in any way to the resurfacing. Both projects would have independent utility, but only one would occur, as the interstate necessarily foreclosed any need to resurface city streets. Here, the quarry does not foreclose any need for the rail line; in fact, it creates the justification.

Nashvillians makes clear that a "do nothing" alternative was discussed. *Id.* at 988. "The FEIS examined in detail a 'no build' alternative which involved not building I-440. . . ." *Id.* This alternative was a sufficient no action alternative because it reasonably included something that was *not the action* (i.e., resurfacing city streets) that would occur anyhow, but did not include any part of the action (building I-440) itself.

The plaintiffs in *Nashvillians* wanted a reasonable no action alternative to be defined as one where nothing occurred. We are not saying that no action means this. We are only saying that no action cannot include any part of the action, and that the no action alternative to the connected action neither builds a rail line nor builds any quarry facilities. No action can mean doing something else that is not part of the action if the facts justify it.

Young also relied on a second case, *Communities, Inc. v. Busey*, 956 F.2d 619 (6th Cir. 1992). In that case, the FAA evaluated a proposal of a regional airport authority to proceed with an airport expansion. The city of Louisville had urban renewal plans that involved both condemnation and purchasing from willing sellers in three neighborhoods near the airport. The court found that these actions were not connected to the airport expansion, and that the city's plans to condemn the neighborhoods had independent utility. *Id.* at 626-27. Consequently, it was proper for the FAA to assume that the neighborhoods would no longer exist in the no action alternative.

The independent utility of the city of Louisville's plans make them the complete opposite of the proposed rail line in this proceeding, which depends on the quarry for its justification. The authority of the city to act independently in this manner is completely distinct from whether a private entity such as Vulcan may assume part of its own connected action as the no action alternative.

Most of the remaining basis for Vulcan's position comes out of *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430 (5th Cir. Unit B 1981). Like the three cases above, it stands only for the general principle that a no action alternative can reasonably include something that is not the action but which will occur anyhow.

Piedmont involved three segments of the Atlanta freeway system with independent utility. These three segments were part of a regional transportation plan that was previously determined, in *Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission*, 599 F.2d 1333 (5th Cir. 1979), to not require a comprehensive EIS within the holding of *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), because the elements of the plan had not ripened into concrete proposals for major federal action. *Piedmont*, 637 F.2d at 438. This sort of programmatic ripeness analysis is what we recognize today as the holding of *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726 (1998).

It is important to note that none of these cases displace the connected or cumulative action tests in the CEQ regulations. Had certain elements of the regional transportation plan been concurrently proposed, they may have been cumulative actions. Had the segments not had independent utility, they may have been connected actions. But they were neither of these things.

The plaintiffs in *Piedmont* argued that the EIS should have considered the MARTA transit system as an alternative to the highway segments. But the court found that MARTA would occur anyhow, was part of the baseline analysis, and "amounted to a 'no-build' alternative." *Piedmont*, 637 F.2d at 437. The highway segments would be needed with or without MARTA, and "complemented the system," clearly indicating that the segments and MARTA each had their own independent utility. *Id.* at 438. A similar finding of independent utility for a transit system and highway was made in *Movement Against Destruction v. Volpe*, 361 F. Supp 1360 (D. Md. 1971).

At no time in *Piedmont* does the court ever say that a connected action can be redefined into constituent parts, where one part serves as the no action alternative.

Vulcan likely relies most heavily on this statement:

> However, NEPA does not require an agency to restate all of the environmental effects of other projects presently under consideration. Where the underlying database includes approved projects and pending proposals, the "statutory minima" of NEPA has been met.

Piedmont, 637 F.2d at 441. By "approved projects," the court means MARTA. By "pending proposals" the court means other highway projects in the regional transportation plan. *Id.* at 442. All of these actions have independent utility. The court's statement simply cannot support Vulcan's desired result for a connected action.

Even the dissent in *Piedmont* does not reach the result desired by Vulcan. The dissent would have considered the highway segments as connected actions, but not MARTA. *Piedmont*, 637 F.2d at 443-45. The dissent disagrees with whether MARTA was actually considered as an alternative, no action or otherwise. However, it does not contest the majority's finding that MARTA could have been used as the no action baseline because it had independent utility, even though the dissent notes that MARTA might have been affected by the highway segments. *Id.* at 444.

Additional cases still do not support the proposition that Vulcan urges, because none of them apply to connected actions or stand for the principle of defining the no action alternative as part of the action itself. *City of Olmstead Falls, Ohio v. FAA*, 292 F.3d 261, 271 (D.C. Cir.

2002) (21 projects with independent utility were properly considered part of the baseline "no action/no-build" alternative); *Grand Canyon Trust v. FAA*, 290 F.3d 339, 343, 347 (D.C. Cir. 2002) (FAA's failure to establish a natural, airport-free baseline noise level in the EA was a failure to evaluate past, present, and future reasonably foreseeable impacts for the EIS-threshold cumulative significance determination; no related actions were involved); *Custer County Action Association v. Garvey*, 256 F.3d 1024, 1037, 1040 (10th Cir. 2001) (Air National Guard's existing flight patterns could be considered the no action alternative for the new flight plan, where the new plan had independent utility and was not a connected action).

MCEAA also notes that in *Dakota, Minnesota, and Eastern Railway Co.—Construction into the Powder River Basin—Finance Docket No. 33407*, STB considered what was clearly a two part connected action: reconstruction of part of an existing track that would only occur if new construction also occurred. In the EIS for that proposal, the no action alternative neither reconstructed the existing track nor added new construction.

Vulcan's attempt to avoid alternatives and direct effect analysis for the quarry cannot be justified by the fact that the STB lacks direct jurisdiction over the quarry site. By defining a truck-served quarry as no action, Vulcan seeks to avoid discussion of any other quarry site alternatives that may arise during the environmental review, including alternative configurations and phasing at the current site. STB must consider the effects of such alternatives. In *NRDC v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972) the government's contention that "the only 'alternatives' required for discussion under NEPA are those which can be adopted and put into effect by the official or agency issuing the statement" was expressly rejected. While other holdings of Morton have been called into question, this one endures. *City of Alexandria v. Slater*, 198 F.3d 862, 868 (D.C. Cir. 1999).

V. SELECTED SITE SPECIFIC CONCERNS DESERVING FURTHER MENTION

Without assessing the relative importance of the issues raised by MCEAA that must be addressed in the EIS that were previously raised, we address a selection of issues which deserve further mention.

This project is an attempt by a corporate entity to assume the position of a sovereign to enable it to condemn property to further its corporate purposes to the detriment of people and culture who would not otherwise give their property at any price to this unwelcome neighbor.

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Following being rebuffed by a legitimate rail line to provide rail service to an encroachment by a noisy, dusty, thirsty and unsightly quarry on the serenity of the Texas Hill Country, Vulcan/SGR now seeks to create havoc by its avarice. Vulcan/SGR has likely procured all the property it can by purchase or lease. Most of the remaining residents who could be affected by the quarry and railroad have placed deed restrictions on their property to thwart further purchase of their property. Vulcan/SGR knows this and they know they have to have condemnation power in order to impose their project on this quiet community.

Quarrying in Texas is currently undergoing close scrutiny, as evidenced by the recently appointed Governor's committee to address quarry operations throughout the state, especially permitting requirements for new operations, such as the one at issue here. See http://www.senate.state.tx.us/75r/senate/members/dist24/pr04/p030104a.htm It must be noted regarding the permitting concern that the San Antonio region, which tentatively includes Medina County, the proposed quarry's location, is currently subject to being placed in non-attainment for air quality. This issue must be studied through the EIS process.

The current publicly announced proposal of Vulcan to employ trestle crossings of flood prone areas is totally unacceptable. They state these will not pose impediments to the free flow of water for the "legendary" flash floods of this region without benefit of any engineering or geologic evaluation, which is absurd. The recent regional flooding which has resulted in over 20 deaths lends credence to the arguments presented by the MCEAA and must be studied as part of the EIS.

Quarry operations typically have a severe impact on water tables in affected areas surrounding quarries. No mention or study of this impact has been addressed by Vulcan/SGR to date and it must be. The rural areas surrounding the proposed quarry are dependent upon the sole source aquifer which is under a significant area of the quarry. This water is the lifeline and drinking source for the people of the area and the entire Edwards Aquifer dependent area, which includes San Antonio, Texas. Numerous endangered species are identified as dependent upon the Edwards Aquifer. All of these issues must be addressed by the EIS.

The cultural significance of the region is an emotional issue for those possibly affected by the quarry. This issue has not been adequately addressed and must be evaluated through the EIS. Remember the comment in Dr. Hester's letter presented in our previous mailings in which he

stated something to the effect that Vulcan could not have picked a worse place in Texas to build a railroad. That was only from the historical and archeological aspect.

As a final issue in this section, truck transport for the quarry's product is a practical impossibility. Based upon the facts presented by Vulcan/SGR in their submissions to the STB, 850 trucks a day will be required to handle the intended work load. The approximate impact of that would require a truck to leave the quarry about every 80-90 seconds during a 20 hour day. That would be a continuous circle of trucks approximately one mile apart, if they went 40 miles per hour average. If there is even a small traffic problem, the traffic could be backed up for miles. Half of this circle of truck traffic would traverse State Hwy FM 2676. At present it is a very nice road, but built for only 58,000 lbs of vehicle weight. A loaded gondola truck of limestone weighs 78,000 lbs.

In addition to the physical damage to the roads the 850 trucks per day will totally destroy the aesthetics of the Quihi Historical Area. It must be noted the truck route cuts through the heart of the village of Quihi. The 125 trucks per day coming through Quihi that Vulcan says will run even with a railroad, will destroy the aesthetics of this historical settlement. At least part of CR 4516 is likely the last remaining remnant of the historic General Wolls road of the 1800's that starts in Mexico and comes through the western part of Texas, and ends in San Antonio. This road was frequently traveled in that era, and also was significant in some of the battles. But it gets worse.

The terrain on most of the other half of the road circle is a narrow gravel road (part of CR 365) that has a stream of water going across it - Quihi creek, *no bridge*. Few cars use this part of CR 365 due to the rough terrain. It is generally limited to pickup traffic. This part of CR 365 has been like this practically forever. Medina County Commissioner Hartman says the county has no solution regarding the creek crossing, yet Vulcan thinks it will be able to use this road for 78,000 pound trucks. It does get worse.

The part of the 'circle' that would be shared by two-way traffic with Vulcan's gravel trucks - CR 4516 to Castroville - is narrow. It is difficult for cars to pass each other going in opposite directions. There is no shoulder - it is constantly crumbling. Cherry Creek crosses that section of CR 4516 three times. In a two inch rain on March 14, 2004, this creek flooded, as is a frequent occurrence.

The EIS must address this issue in the context of the connected actions. It is not unthinkable that Vulcan/SGR made up this ridiculous alternative to scare people, in hopes of making the rail look good. Vulcan/SGR must show how they intend to make the trucking alternative work with the connected action quarry.

This movement of consciousness leads one to only one conclusion - they did not open the quarry first because the quarry is dependent upon the railroad to make a profit. The quarry alone would not make money. Moreover, Tom Ransdell, Vulcan's local representative, told MCEAA in January, 2000, that they would not open the quarry without a railroad. This is further proof that the quarry and railroad are connected actions.

The ill-conceived and legally and factually incorrect assertions of the Coburn, March 10, 2004, letter fail to address or even acknowledge much of the foregoing. MCEAA is disgruntled with the often misleading information and arguments presented by the applicant. STB/SEA is the stopgap for ferreting out the truth. It is incumbent that the EIS address all these issues.

VI. CONCLUSION

This letter, although prepared prior to Mr. Coburn's April 5, 2004, to your office offers argument that will respond to much of what he stated in that letter. Although Mr. Coburn's April 5, 2004, addresses numerous issues from the perspective of the applicant, his letters are nothing more than his argument of the, quite likely, skewed findings of the applicant, without benefit of the independent analysis an EIS will provide. MCEAA obviously has different facts and opinions which would apply to most everything he stated in that letter, but it will forego further argument in this document, which is already extensive. MCEAA's and similarly aligned entities previous, and I would expect future, offerings addressing their concerns have touched on most, if not all, of what Mr. Coburn addressed in his April 5, 2004, letter.

At stake in the scoping decision in this proceeding is the full disclosure of the impacts of a major industrial project on a growing community. The applicant has spent five years attempting to segment and foreclose the analysis through various means to avoid disclosing the impacts of the rail line and the quarry that it will solely serve. Having backed itself into a corner, it has run out of arguments to stop what NEPA clearly intends—the production of information for decision-makers and a community divided and questioning the merits of this connected action. NEPA was passed to address this tension by providing what people wanted most—facts about all

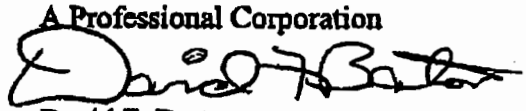
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of the impacts—and avoiding piecemeal process where the information would be lost and the full impacts unknown.

The case law and connected action regulation are clear. While Vulcan is quick to blame project opponents for delay, it is time that the weak arguments and foundational flaws of the applicant's submissions along with the March 10 letter be retired after five years of overuse, and that the agencies get on with providing the citizens of Medina County the full, direct effect analysis of the rail line and quarry to which they are entitled.

Very truly yours,

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David F. Barton

DFB:cf
Enc.
dfb1/8675.001/NEPA/Second response to March 10 Coburn-4904-Revised

cc: Rini Ghosh, STB-SEA (same)
Surface Transportation Board
ATTN: STB Finance Docket No. 34284
1925 K Street, NW
Washington, DC 20423-0001

Finance Docket 34282
Medina County Environmental Action Association
Attachment to Letter

EIS cases – Applying connected action regulation or test

Piedmont Heights Civic Club, Inc. v. Moreland	637 F.2d 430 (5th Cir.1981)
Sierra Club v. Sigler	695 F.2d 957 (5th Cir. 1983)
Chelsea Neighborhood Association v. U.S. Postal Service	516 F.2d 378 (2d Cir.1975)
Town of Huntington v. Marsh	859 F.2d 1134 (2d Cir.1988)
Hudson River Sloop Clearwater v. Department of the Navy	836 F.2d 760 (2d Cir.1988)
Texas Committee on Natural Resources v. Van Winkle	197 F. Supp. 2d 586 (N.D. Tex. 2002)
Welch v. U.S. Air Force	249 F. Supp. 2d 797, 820-25 (N.D. Tex. 2003)
Blue Ocean Preservation Society v. Watkins	754 F. Supp. 1450 (D. Haw. 1991)
City of Williams v. Dombeck	151 F. Supp. 2d 9 (D.D.C. 2001)
Sierra Club v. Dombeck	161 F. Supp. 2d 1052 (D. Ariz. 2001)
Shoshone-Paiute Tribe v. U.S.	889 F. Supp. 1297 (D. Idaho 1994)
Citizens Committee to Save Our Canyons v. U.S. Forest Service	297 F.3d 1012 (10th Cir. 2002)

Environmental Assessment cases – Applying relatedness test that is inapplicable here

Fritiofson v. Alexander	772 F.2d 1225 (5th Cir. 1985)
Stewart v. Potts	996 F. Supp. 668 (S.D. Tex. 1998)
Sylvester v. Army Corps of Engineers	884 F.2d 394 (9th Cir. 1989)
Thomas v. Peterson	753 F.2d 754 (9th Cir. 1985)
Friends of the Earth v. Coleman	518 F.2d 323 (9th Cir.1975)
Winnebago Tribe of Nebraska v. Ray	621 F.2d 269 (8th Cir. 1980)
Save the Bay, Inc. v. U.S. Army Corps of Engineers	610 F.2d 322 (5th Cir. 1980)
Friends of the Earth v. Hintz	800 F.2d 822 (9th Cir. 1986)
Save the Yaak Committee v. Block	840 F.2d 714 (9th Cir. 1988)
California Trout v. Schaefer	58 F.3d 469, 472 (9th Cir. 1989)
Northwest Resource Information Center v. National Marine Fisheries Service	56 F.3d 1060 (9th Cir. 1996)
Morongo Band of Mission Indians v. Federal Aviation Administration	161 F.3d 569 (9th Cir. 1998)

Wetlands Action Network v. U.S. Army Corps of Engineers	222 F.3d 1105 (9th Cir. 2000)
Airport Neighbors Alliance, Inc. v. United States	90 F.3d 426 (10th Cir. 1995)
Utahns for Better Transportation v. U.S. Department of Transportation	305 F.3d 1152 (10th Cir. 2002)
Vieux Carre Property Owners, Residents, and Associates, Inc. v. Pierce	719 F.2d 1272, 1278 (5th Cir. 1983)
Save Barton Creek Assn. v. FHWA	950 F.2d 1129 (5th Cir. 1992)
Citizen Advocates for Responsible Expansion, Inc. v. Dole	586 F. Supp. 1094 (N.D. Tex. 1984)
Association Concerned About Tomorrow, Inc. v. Dole	610 F. Supp. 1101 (N.D. Tex. 1985)
Sierra Club v. U.S. Department of Energy	255 F. Supp. 2d 1117 (D. Colo. 2002)
Border Power Plant Working Group v. U.S. Department of Energy	260 F. Supp. 2d 997 (S.D. Cal. 2003)
Hoosier Environmental Council, Inc. v. U.S. Army Corps of Engineers	105 F. Supp. 2d 953 (S.D. Ind. 2000)
Tennessee Gas Pipeline Co.	95 FERC ¶ 61,169, 2001 WL 469985
Coalition for a Livable Westside v. HUD	1997 U.S. Dist. LEXIS 8860

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FD 34284

April 22, 2004

received 4/22/04

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
ATTN: STB Finance Docket No. 34284
1925 K Street, NW
Washington, DC 20423-0001

VIA TELEFAX: (202) 565-9000
& CM-RRR #7001 2510 0002 0226 6031

RE: STB Finance Docket No. 34284 -- Analysis under the National Environmental Policy Act and Endangered Species Act of:

(1) Vulcan Materials Company's planned Medina County stone quarry; and

(2) Vulcan Materials Company subsidiary Southwest Gulf Railroad Company's proposed rail line to serve Medina County stone quarry.

Dear Ms. Rutson:

This letter is a further comment by the Medina County Environmental Action Association (MCEAA) regarding the application of the Southwest Gulf Railroad Company's ("SGR") proposed rail line to serve its parent company's, Vulcan Materials Company ("Vulcan"), stone quarry. The purpose of this letter is to bring to your attention the Wall Street Journal, April 22, 2004, Editorial "Let There Be Blight." Attached.

This editorial speaks to the point raised by us in regard to Vulcan's application – following its inability to convince landowners to sell it the property needed for its railroad – to seek acquisition of eminent domain power of condemnation through the application by the SGR to become a common carrier pursuant to the rail regulations. SGR's application for common carrier status for a rail service for which there is no evidence it will ever serve anyone other than Vulcan is no less a sham than the sham blight ordinance application in Norwood, Ohio, which is referenced in the editorial. It is clear the proposed rail line is not a public use consistent with a public necessity. This fact is not merely tangential to the proposed EIS process.

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Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
April 22, 2004
Page -2-

The EIS is "more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions." 40 CFR § 1502.1. Allowing the vast power of eminent domain and its potentially adverse impact on the culture and history of a community is inextricably intertwined with the EIS process and the ultimate permitting process.

Very truly yours,

THE GARDNER LAW FIRM
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David F. Barton

DFB:cf
Enc.
d:\b1\8675.001\NEPA\l-rutson-42204eminent domain

cc: Rini Ghosh, STB-SEA
Surface Transportation Board
ATTN: STB Finance Docket No. 34284
1925 K Street, NW
Washington, DC 20423-0001
(w/enc.)

Let There Be Blight

And, lo, the city fathers looked upon a choice piece of property and declared, "Let there be blight." And there was blight.

And it was good too—at least for the Ohio businessman who wants that land for a $125 million development, and for the city of Norwood, which wants that developer for the new tax dollars it hopes he'll bring in.

Governments find more ways to take your property.

There's just one hitch: A handful of small businesses and homeowners don't want to sell. Earlier this week, with the help of the Washington, D.C.-based Institute for Justice, they took their case to state court, arguing that the designation of their neighborhood under the city's blight ordinance was a sham. It sure didn't help Norwood's case that even the author of the study used by the city to justify that finding conceded in court that it would not be "reasonable" to describe the area as "blighted" or "deteriorated."

Alas, this abuse of eminent domain is part of a larger pattern across America. We've written about some of these cases before, most recently the effort by a California city (rightly thwarted by a federal judge) to condemn land purchased by a church so it could be sold to Costco. Last month in Connecticut, the state's high court narrowly upheld the city of New London's right to transfer its powers of eminent domain to a private corporation for economic development. In New Jersey, owners of ocean-front property in the shore town of Long Branch are fighting city efforts to take their homes and replace them with condos and townhouses.

And yesterday Michigan's Supreme Court reconsidered a controversial 1981 decision—a landmark case in eminent domain law—that saw the blue-collar neighborhood of Poletown condemned and delivered on a platter to General Motors. Notwithstanding the millions in taxpayer subsidies GM received, and the razing of 1,200 homes, the plant ended up delivering only about half the number of jobs promised.

Notice anything similar about all these cases? Whereas years ago the "public use" provision of the Fifth Amendment meant invoking eminent domain for, say, a highway or school, expansive court rulings now allow local politicians to seize private property from Citizen A and hand it over to a Citizen B they believe will prove a better class of taxpayer.

The slippery slope here is obvious. Because businesses will always pay governments more than homeowners (and large businesses will yield more than small), it's no coincidence that governments tend to invoke eminent domain powers on behalf of the rich and politically well-connected at the expense of the mom-and-pop shop or the family that simply wants to keep the home it's lived in for generations.

We grant that in Norwood's case all but a handful of holdouts have agreed to sell their land to the developer. We might even concede that the city, now swimming in red ink, would do better fiscally with the Crate & Barrel it's hoping to entice to the spanking new mall it has planned. But the thing about Constitutional property rights—the reason we have a Fifth Amendment—is that they're not supposed to be hostage to what the majority wants. To the contrary, the Founders wrote the right to property into the Constitution not only to secure a citizen's right to his home and livelihood but to serve as a check on government power.

At the very least, shouldn't the burden be on those who would take the homes and businesses of others rather than on those who want only to keep what's theirs?

#EI-789
RS

The Medina County Environmental Action Association, Inc.
202 CR 450, HONDO, TX 78861 *Phone* 830-741-5040
www.dontmesswithquihi.com *Fax* 830-426-2060

April 27, 2004

Ms. Victoria Rutson, Chief
Section of Environmental Analysis
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20402-0001

received
4/28/04

Re: FD 34284
Proposed Southwest Gulf Railroad
Medina County Project

Dear Ms. Rutson:

In SEA's letter of April 19 to David Coburn, you asked for information concerning the wholly truck-served quarry alternative. MCEAA would also like STB to have additional information concerning this alternative. We urge the STB to obtain the following data concerning this alternative as well as any other pertinent data STB believes to be appropriate.

1. The average loading time per truck required for the 850 trucks in an 8 hour day.
2. The number of trucks that would be on the 5 county (4 paved and 1 unpaved) and one state road at any one time.
3. The number and type of intersections these trucks would have to negotiate.
4. The speed these trucks would be traveling (average for each road).
5. The distance between trucks at any one time during an 8 hour day.
6. Alternative routes these trucks would travel in event of traffic delays, accidents, road repairs, which would occur frequently during the 50 year life of the quarry.

The above data would not only be helpful to the STB, but also would be invaluable to the Texas Highway Department and to the Medina County government, whose roads would be traveled.

In conclusion, the above data, in addition to the data already requested, would demonstrate that Vulcan never intended to have a wholly truck-served quarry. It would also prove the fact that the proposed quarry and rail line are connected actions and the need for an EIS for the quarry is not only met but justified.

Respectfully,

Robert T. Fitzgerald

Dr. Robert T. Fitzgerald, President
MCEAA, Inc.

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Proposed Southwest Gulf Railroad
Medina County Project

April 27, 2004
Page 2

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cc: U.S. Senator John Cornyn
600 Navarro St. Suite 210, San Antonio TX 78205
U.S. Representative Henry Bonilla
11120 Wurzbach, Suite 300, San Antonio, TX 78230
Texas Senator Frank Madla
P.O. Box 12068, Austin, TX 78711-0268
Medina County Judge Jim Barden
1100 16th Street, Rm 102, Hondo, TX 78861
Pct. 1 Commissioner Royce Hartman,
1100 16th Street, Rm 102, Hondo, TX 78861
David Casteel, TexDOT
District Engineer, San Antonio District
4615 N.W. Loop 410, San Antonio, TX 78229
David Barton, Attorney, The Gardner Law Firm
745 E. Mulberry Ave., Suite 100, San Antonio, TX 78212

#E-649
RS

Feb. 23, 2004

Surface Transportation Board
Case Control Unit
1925 K Street NW.
Washington, DC 20423-0001

Received
2/26/04

Att: Ms. Gloss.

Dear Ms. Gloss:

As President of the Quiri and New Fountain Historical Society, I would like to let you know we are very concerned about the 60 historical homes and sites that are in the area where where the railroad and Quarry is to be constructed. This society is composed of residents of Medina County who was dedicated to preserving the history of this area.

Our main concern is the flooding of this area where some of the homes are located. Some flooding has occured when big rains 6-7 inch. Come in the Elm and Quiri Creek. Heavy debris comes down and blocks

the culverts and then the water runs out of the creeks and floods.

The blasting would destroy some of the rock homes close to the Quarry. Our house close to the area already has started cracking from a previous blast 30 miles away. It would also destroy some of our water supplies including the Edwards Aquifer. A ranch just N.W. of the proposed Quarry has a cave (very deep) with gushing water running through the cave.

The dust from the railroad and trucks will be very bad for residents who have problems with allergies.

I would appreciate your time given this matter.

Sincerely,
Nancy Schmitt, President
Quihi & New Fountain Historical Society
1901 - 22nd St.
Hondo, Texas 78861

#EI-695
RH

February 20, 2004



Surface Transportation Board
Case Control Unit
1925 K Street, NW
Washington, DC 20423

Attention: Rini Ghosh

Re: STB Finance Docket No. 34284

Dear Ms. Ghosh:

Because of Vulcan Materials Company's very good environmental record, the rural location for the proposed rail line and the company's demonstrated social responsibility, the Schweers Historical Foundation concurred with the STB's October decision to require of the company a Cultural Resources Assessment. We are disappointed that a small, but vocal, group of Medina County citizens have succeeded in further delaying the Medina Project and making it so controversial that the STB must now require an Environmental Impact Statement. We offer here our comments on the STB's proposed scoping notice, with which we concur.

The Schweers Historical Foundation is a beneficiary of Vulcan's commitment to social responsibility. When purchasing land for the rail right-of-way, the company obtained two, old historic, rock homes built by German immigrants. Descendants of the homes original owners met with Vulcan intending to buy the homes if possible. Vulcan agreed to give the homes to a 501(c)(3) corporation formed by family members. From the very beginning, Vulcan assured us that the homes would be ours regardless of the eventual outcome of the Medina Project.

To consider our support for Vulcan a quid pro quo, as some have suggested, is to under estimate our original concerns about the quarry and railroad and our ability to learn about the mining process and what the impact on the area Vulcan's Medina Project might have. After numerous visits to Vulcan, research into the company's history and record, we are convinced Vulcan goes to great lengths to minimize negative impacts and strives to promote the advantages its activities will have on the environment, wildlife and human community. We believe that the proposed scope of the EIS is adequately described in the STB's proposed scoping notice and that no further studies are warranted. We offer our views below on each area identified in the scoping notice.

Impact Categories Pertaining to the Rail Line Construction and Operation

1. **Transportation and Traffic Safety.** The lightly populated rural area, consisting of farmland and pasture, traversed by the rail line precludes disruption of any major transportation arteries. A manifold increase in truck traffic on the narrow county roads has the potential to adversely impact driving safety more than a short rail line. Until the uplands of the limestone escarpment are reached nearer the quarry site, the

land along the rail line is flat. Well maintained tracks, the gradually sloping grade and the slow speed of the train indicate to me that derailment worries are of low priority. Visibility is good at the proposed roadway crossing sites for the rail line. With the addition of warning signs, lights and crossing-arm barriers, I believe it unlikely that train/vehicle collisions will occur. A hundred-car train, approximately a mile long, traveling at 20 miles per hour will take about 3 minutes to pass through the roadway crossing site. With the expectation that only two train trips a day will occur, initially, the closing time for the road will be only 12 minutes in a 24 hour day. When train traffic increases, perhaps Vulcan could schedule the train departures and returns during low traffic times.

2. **Public Health and Worker Health and Safety.** I would expect Vulcan to hire a rail construction company of good repute and possessing of a construction safety record commensurate with industry standards for both worker and public safety. Well sign-posted potential hazards such as ditches or parked equipment and night-time caution-lights where needed during construction, would greatly reduce unsafe situations. Fencing of the right-of-way, rail road signs, warning signals with flashing lights and barrier-arms at grade crossings, as well as proper maintenance of tracks and trains will make the operation of the trains as safe as any endeavor of this kind.
3. **Water Resources.** In the vicinity of the rail line, there are two subsurface water sources, the Edwards Aquifer and the Carrizo Sand Aquifer. I believe the surface soil disruption for creation and operation of the rail bed will not interfere with the recharge, flow or seepage of these aquifers. The Preliminary Cultural Resources Assessment Report by STB and its choice of route quite adequately address the question of the creeks, wetlands and their watersheds traversed by the proposed rail line. Near the SHFs property, Vulcan would build a trestle to cross the dry portion of the Quihi Creek. The trestle's location is east of the Quihi Creek wetlands and small lake formed by a spring in a limestone depression. To suggest the track bed will create flooded areas, as the Medina County Environmental Action Association has done, is to beg the question, "Why would geologists, engineers and VMC build tracks in a location that requires constant flood damage-control of its own equipment?"
4. **Biological Resources.** For several years, Vulcan has been working in concert with local, state and federal officials to conduct a study of the area's native plants, animal life and their habitats. A review of Vulcan's environmental record confirms that the company is an excellent steward of all phases of the environment in which it operates.
5. **Air Quality Impacts.** SHFs concern about air-borne limestone dust was greatly lessened when we learned of Vulcan's washing process to remove dust particles from the crushed stone before loading it in the rail cars. The movement of rail line construction equipment along the county's graveled roads will create a greater problem with dust. The roads could be dampened to prevent some of the dust. With the infusion of tax dollars into the county coffers, perhaps some of the graveled roads can be paved, thus reducing the amount of existing dust, and thereby, raising the air quality.
6. **Geology and Soils.** From its southern point on the UP Railroad, the seven miles of rail spur will cross sandy loam of limestone and dark waxy clays overlaying gravel beds of the Rio Grande Plains and encounter the Balcones Escarpment. This limestone upland is a dividing feature between the farming region in the south and the Hill Country ranch and hunting land of the Edwards Plateau in the north. The Balcones Escarpment and the Edwards Plateau are extensive geological features covering or running through most of central Texas. They are traversed by major

interstate highways, numerous other roadways, most of Texas's major rivers and many communities. By comparison, the impact, the SGRs seven miles of single track will have on the geological features, will be minimal. Erosion that might occur in some areas along the track can be prevented by supplemental planting of native grasses and shrubs.

7. **Land Use.** The rail line will travel through farm and/or ranchland throughout its length. Where possible, I believe Vulcan proposes to place the easement along property boundary lines to leave intact the areas of cultivation and pasturage. Land already leased and cleared for a gas pipeline could provide for additional right-of-way. VMC owns land that part of the track will cover; other property owners have leased right-of-way to the company. I can see very little negative impact the rail line will have on the land it travels through.
8. **Environmental Justice.** The communities of Dunlay and Quihi and the city of Hondo are made up of descendants of the German and Alsatian immigrants who settled this area in the mid 1800s. Mexican-Americans are the largest minority making up more than 40% of the population. There are few Black residents. To my knowledge, none live in the area where the proposed rail line is to run. Because of the national down-turn in the economy, coupled with the low income associated with small family farms and ranches and a general lack of jobs, many in the area could be considered in the low-income group. The infusion of money into the area in the form of wages, taxes and charitable contributions would be a considerable boon to the residents.
9. **Noise.** By city standards, rural areas are not noisy places. The advantages, attendant upon the development of the railroad, far out-weigh the occasional sounds of the railcars moving along the tracks. If the train's engines, cars and tracks are well maintained, the noise should be minimal. When sounds become familiar, they tend to fade into the background.
10. **Vibration.** The STB's Section of Environmental Analysis undertook a vibration study. We do not believe that this issue warrants further study.
11. **Recreation and Visual Resources.** To my knowledge, only hunting leases, and a gun club provide recreational opportunities near the proposed route of the rail line. The SHFs vision for a small historical park surrounding the William and Henry homes is far into the future. The beauty of the undeveloped ranchland, the hills and the occasional sighting of wildlife are enjoyable to many. I can not imagine that a narrow, one-line railroad, duly obscured by the trees and brush that flourish along fence rows, will even be noticed except when the train passes by.
12. **Cultural Resources.** The STBs Preliminary Cultural Resources Assessment, completed in October 2003, does an excellent job of generally describing the area's cultural resources. We understand that the Texas Historical Commission will play a role in any further assessment of cultural resources impacts.
13. **Socioeconomics.** The STBs proposed route for the SGR will take it close to two tiny Texas communities, Dunlay and Quihi. These communities do not have the population to sustain their own post offices, or their own school systems. The populations consist of farmers and ranchers actively pursuing agri-business, retired individuals and others who commute to nearby towns to work. The new rail line and the quarry it serves would not adversely impact minority or a low-income group. Quite to the contrary, it would provide jobs for the people, taxes to the schools and county and additional income to churches, merchants and others providing services in the communities.
14. **Cumulative and Indirect Impacts.** Hondo is not on my 1879 map of Medina County. The railroads, the Galveston, Harrisburg and San Antonio Railway and the

International and Great Northern Railroad arrived in the county in 1881 and 1882, respectively. Castroville turned down the opportunity to have the GH&SA pass through its town. Hondo was built on the GH&SA and soon grew into the county's major distribution center. By 1892, the county seat was moved from Castroville to Hondo and the city prospered. I do not believe the SGR will turn Quihi into the county seat; but, it will bring a measure of prosperity to the area that is not likely to arrive in any other form, anytime soon. So as not to lose the rural nature of the area that is so appealing to its inhabitants, I suggest planning for improved prosperity and population growth. Plans to upgrade roadways, manage subdivision development, rethink regulations of water-well and septic systems should be considered. County government should expect to increase fire and police protection and to expand health facilities.

In conclusion, Medina County covers 1,331 square miles; the proposed single rail-line will traverse only seven linear miles of its rural and partly undeveloped pasture-land. While fewer than a hundred residents actively oppose the quarry and rail-line, there are approximately 40,000 county residents. The majority of whom will benefit from the much needed economic boost of new jobs, additional taxes to improve the school system, upgraded roadways in part of the county and many other social and charitable advantages of having a large, international company at work in the community.

Sincerely,

Carol Carpenter

Carol Carpenter
President, (2003-2004)
Schweers Historical Foundation

cc: The Hon. John Cornyn, U.S. Senator
The Hon. Henry Bonilla, U.S. Representative, 23rd District
The Hon. Frank L. Madla, Texas State Senator, District 19
The Hon. Timeteo Garza, Texas State Representative, District 80
Mr. Bill Martin, Texas Historical Commission

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The Medina County Environmental Action Association, Inc.
202 CR 450, HONDO, TX 78861 *Phone* 830-741-5040
www.dontmesswithquihi.com *Fax* 830-426-2060

May 20, 2004

Ms. Victoria Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
1925 K Street NW
Washington, DC 20423-0001



Re: STB Finance Docket 34284
Proposed Vulcan Materials Company/Southwest Gulf Rail Line
Quihi, Medina County, Texas

Dear Ms. Rutson:

At the present time, we understand that the STB is in the process preparing an Environmental Impact Study of the proposed SGR rail line, and determining the extent of the inclusion of the quarry in the EIS.

The people of this area that would be affected are very concerned about the permanent environmental changes that this fifty-plus year project would cause. This is a historic/agricultural/residential area that would be changed forever by the enormity and magnitude of this 1760 acre quarry and the 7.5 mile rail through the historic area of Quihi and its floodplain. The people of this area have already made known these concerns in detail in their scoping comments.

Enclosed is a petition, began April 24, 2004, which has been signed by 537 persons who would be affected by this project if it were allowed to proceed. The petition is as follows:

PETITION

I am opposed to the proposed Vulcan/Southwest Gulf Railroad project for a quarry and rail line in Quihi, Medina County, Texas because of the many harmful impacts this project will have on this area, including our air, water, roads and historical heritage.

In addition, unless the Surface Transportation Board makes the decision in accordance with certain legal requirements to study both, the quarry will not be included in the Environmental Impact Study..

I, the undersigned, therefore, request that the STB do a connected action study of both the quarry and the railroad in the EIS.

These signers include the majority of the persons residing in the Quihi area, as well as persons who would otherwise be affected. We targeted persons who would be affected by:

- Pollution from noise, dust, vibration, blasting
- Loss of water supply due to damage to water wells and septic systems
- Danger of traffic congestion from the trains and trucks
- Loss of historic structures by flooding and loss of the aesthetic value of these structures by the proximity of the rail line in the Quihi area
- Environmental changes in the water supply and air purity
- Dangers of flooding and increased flooding of property and roadways

These signatures show the continuing and ever-growing sentiment against this project, and that the commitment and resolve of the people has not changed. People are still sending in signatures, and it appears as though we will have another mailing of signatures to you shortly. When this is completed, we anticipate that between 90 and 95% of the people living in the area of this project will have signed.

Also enclosed is a map showing the residences in the Quihi area, and a map showing the sixty-plus historic sites thus far documented in the Quihi area which have been submitted to the Texas Historical Commission. Both show the floodplain areas, and the SGR proposed and alternate routes through the floodplain.

We present these signatures as evidence that the over-whelming majority of the persons in the area who know about this project are opposed to it. We submit it for your consideration and judgment in helping the STB reach a correct and just decision.

Sincerely,

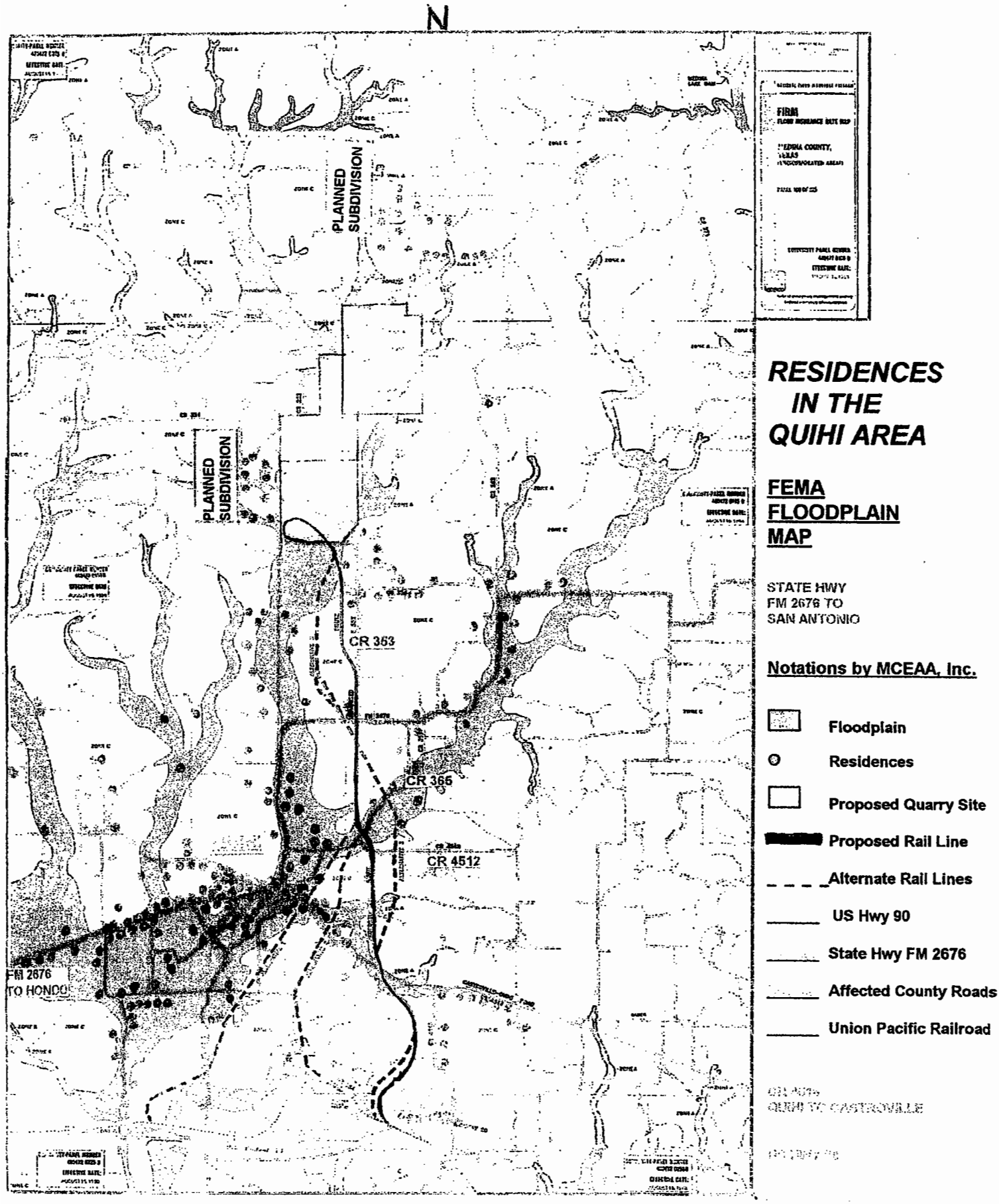
Robert T. Fitzgerald

Dr. Robert T. Fitzgerald, President
MCEAA, Inc.

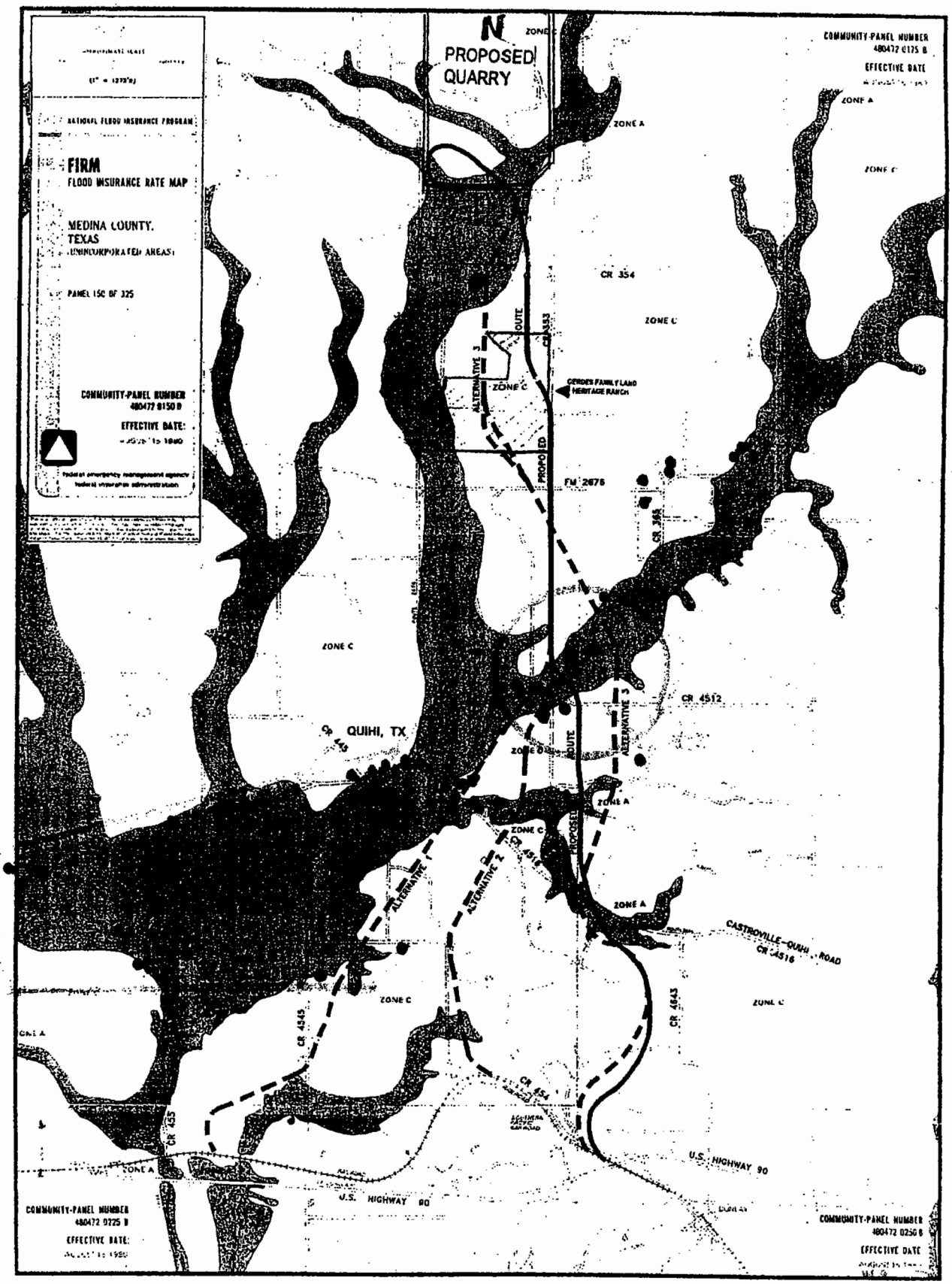
Encl. Maps
Petition signatures - 83 pages

cc: U.S. Senator Kay Bailey Hutcheson
U.S. Senator John Cornyn
U.S. Representative Henry Bonilla
Texas Senator Frank Madla
David Barton, Gardner Law Firm

MCEAA, Inc., for your Home, Health, and Heritage


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PLANNED SUBDIVISION
PLANNED SUBDIVISION
CR 353
CR 366
CR 4512
FM 2676
TO HONDO
FIRM
RESIDENCES
IN THE
QUIHI AREA
FEMA
FLOODPLAIN
MAP
STATE HWY
FM 2676 TO
SAN ANTONIO
Notations by MCEAA, Inc.
Floodplain
Residences
Proposed Quarry Site
Proposed Rail Line
Alternate Rail Lines
US Hwy 90
State Hwy FM 2676
Affected County Roads
Union Pacific Railroad

MEDINA COUNTY, Texas



Historical Sites ***Floodplain Area***