

HEI-1725
RA

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION
745 EAST MULBERRY AVENUE, SUITE 100
SAN ANTONIO, TEXAS 78212-3167

DAVID F. BARTON
WM. RICHARD DAVIS (Retired)
JAY K. FARWELL
DAWN B. FINLAYSON
GREGORY M. HUBER
R. WES JOHNSON†
MARY Q. KELLY (Of Counsel)
BRAD L. SKLENCAR††
WILLIAM W. SOMMERS
THOMAS J. WALTHALL, JR.
† Board Certified-Consumer & Commercial Law
†† Board Certified-Labor & Employment Law
Texas Board of Legal Specialization

TELEPHONE
(210) 733-8191

TELECOPIER
(210) 733-5538

E-MAIL ADDRESS
gardner@tglf.com

October 6, 2005

Ms. Rini Ghosh
Section of Environmental Analysis
Surface Transportation Board
ATTN: STB Finance Docket No. 34284
1925 K Street, NW
Washington, DC 20423-0001

VIA EMAIL
& Regular Mail

RE: STB Finance Docket No. 34284 -- Adequate analysis under NEPA for:

- (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. Ghosh:

MCEAA has reviewed the recent submission, EI-1675, by the applicant, Vulcan/SGR ("Vulcan"), dated September 15, 2005. That letter transmits a report from one of Vulcan's consultants to the agency, concerning historic resources near one of Vulcan's eastern alternatives, the "SGR Eastern Route."

In the companion letter to this one, responding to EI-1664, the applicant's September 7, 2005 letter, we note that the creation of the "SGR Eastern Route," rather than a direct response to MCEAA's Medina Dam Alternative, resembles an analogize-instead-of-analyze strategy to eliminate alternatives disfavored by the applicant.

As we explain in our companion letter, it is possible that all alternatives in this proceeding will have impacts to historic sites; some more, some less. However, attempting to eliminate otherwise viable alternatives from consideration through the use of preliminary, conclusory statements regarding environmental impacts that remain to be analyzed is impermissible. The applicant has it exactly wrong when it states that it "has previously identified

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

Ms. Rini Ghosh
October 6, 2005
Page -2-

. . . various *impacts* associated with the Eastern Route (unrelated to cultural resources) that it believes warrant rejection of that Route” (emphasis added).¹ For the reasons given in our companion letter, none of the *impacts* cited by the applicant in its conclusory statements, including cultural resource impacts, amount to any significant difference with any of the other proposed alternatives. What matters are the feasibility criteria which, as MCEAA has explained, are by and large physical parameters controlling whether or not a functional rail line between Dunlay and the quarry can be built. The applicant is in no position to draw conclusions about environmental impacts associated with any of the alternatives in this proceeding, because it continues to refuse to provide the agency with the information necessary to conduct the analysis.

In this proceeding, the Area of Proposed Effect for the National Historic Preservation Act (NHPA) process is a rather arbitrary 1000 feet on either side of the rail line. The NHPA permits such a preliminary delineation in order to identify listed historic sites and potentially listed historic sites early on in the process, so that design changes to avoid adverse effects can be incorporated into the project for their protection.²

Under NEPA, however, the NHPA Area of Proposed Effect is irrelevant. Historic sites may be impacted by any single one or combination of environmental impacts. That necessarily implies that the true extent of the impact is known only after the environmental impact analysis. Therefore, a conclusory statement regarding perceived impacts to historic sites cannot be used alone or used as part of a sandbagging strategy to eliminate an alternative.

That is particularly true in this proceeding, where many of the most relevant direct and cumulative impacts, including flooding and vibration impacts, have yet to be completely analyzed.

The preliminary conclusions of Vulcan’s consultant for the “SGR Eastern Route” appear to be as follows:

- The consultants state that no documented historic sites or properties exist within the 1000-foot Area of Proposed Effect.³

¹ EI-1675.pdf at 1.

² See 36 C.F.R. § 800.4–800.6 (2004).

³ EI-1675.pdf at 5.

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Rini Ghosh

October 6, 2005

Page -3-

- Based on a survey of area human history, and followed up by a driving tour of the area to eliminate clearly disturbed areas, the consultants determined “High Probability Areas” for archeological resources.⁴
- After a paper and web survey and a driving tour of the area, the consultants identify nine “potentially eligible” historic sites for listing on the National Register.⁵
- The consultants conclude that these nine potentially eligible sites are not likely eligible for designation as a historic district.⁶
- The consultants arrive at a general conclusion that “intensive cultural resource investigations are warranted” in the area, but this phrase is not defined further.⁷

By comparison, the alternatives analyzed in the Draft Environmental Impact Statement have numerous eligible historic and archeological sites within the Area of Proposed Effect.⁸ Most of the alternatives, including the Proposed Route, have as many or more eligible sites within their Area of Proposed Effect as the “SGR Eastern Route”.⁹ Such sites also exist adjacent to the Area of Proposed Effect for these alternatives, though it is unclear whether they have all been identified. Because other impacts that may contribute to historic and archaeological site impacts remain unknown, it is premature to conclude that historic site impacts along the “SGR Eastern Route” are any more severe than any other alternative presently under consideration.

Finally, the Draft Environmental Impact Statement uses a different methodology to identify potential “probability areas” for archaeological resources than Vulcan’s consultant uses here.¹⁰ However, both approaches appear to result in deferral of further archeological surveys until the Programmatic Agreement is implemented. As MCEAA has stated, it prefers that these surveys occur up front. One possible cooperative means of accomplishing that would be for MCEAA’s

⁴ EI-1675.pdf at 5, 26–31.

⁵ EI-1675.pdf at 5, 33 and 42–51.

⁶ EI-1675.pdf at 51.

⁷ EI-1675.pdf at 51.

⁸ Draft Environmental Impact Statement at 3-67 to 3-68.

⁹ See Draft Environmental Impact Statement at 3-52 (map).

¹⁰ Compare EI-1675.pdf at 5, 26–31 with Draft Environmental Impact Statement at 3-62 and 3-63 and with Draft Programmatic Agreement, Technical Memorandum (I-4), Supplement to the Preliminary Cultural Resources Assessment at 28–30.

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Rini Ghosh

October 6, 2005

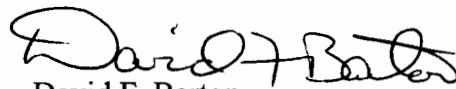
Page -4-

cultural resources expert, Dr. Tom Hester, to talk with the consultants at González, Tate, & Iruegas, and jointly establish a priority schedule for field studies. We do not know for certain if Dr. Hester is available for such a collaboration, but to our members it makes more sense than doing nothing and waiting to find archeological sites during construction.

Very truly yours,

THE GARDNER LAW FIRM

A Professional Corporation



David F. Barton

DFB:cf

dfb/8675.001/l-stb - September 05_Eastern RouteGTireport

cc: U.S. Congressman Henry Bonilla
Senator John Cornyn
Senator Kay Bailey Hutchison
Texas Agriculture Commissioner Susan Combs
Texas Senator Frank Madla
Texas Representative Tracy King
County Judge James Barden
County Commissioner, Pct. 1, Chris Mitchell
County Floodplain Administrator Pat Brawner
Texas Historical Commission Executive Director Larry Oaks