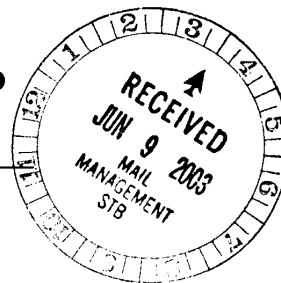


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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



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**

**ENTERED
Office of Proceedings**

JUN 9 2003

**Part of
Public Record**

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June 9, 2003

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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

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,

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

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

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

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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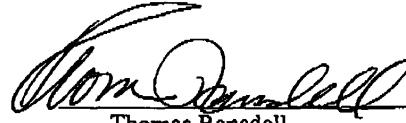
Attorneys for Southwest Gulf
Railroad Company

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 to \$10,000 for each offense.



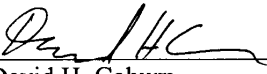
Thomas Ransdell

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