

VIA EMAIL Diana.Wood@stb.gov
AND REGULAR MAIL
Diana Wood
Surface Transportation Board
Office of Environmental Analysis
395 E Street, SW
Washington, DC 20423-0001

RE: STB Docket No. FD 34284-Southwest Gulf Railroad Company
Construction and Operation Exemption-Medina County, Texas
Noncompliance with Mitigation Requirements
Request to Suspend Construction Pending Compliance

Dear Ms. Wood:

By this letter, the Medina County Environmental Action Association (“MCEAA”) brings to your attention Southwest Gulf Railroad Company’s (“SGR”) noncompliance with Mitigation requirements 51 and 77 of the Board’s Final Decision (STB Served Dec. 18, 2008). MCEAA further requests that you refer this noncompliance to the Board and that your office and/or the Board take action to enforce the foregoing mitigation requirements and suspend construction pending compliance with those requirements.

Both mitigation condition 51 and 77 were mitigation conditions suggested by the Office of Environmental Analysis and imposed by the Board in its Final Decision, as distinguished from mitigation voluntarily agreed to by SGR. Final Decision at 1 (“[W]e agree with SEA’s analysis of alternatives and find that SEA’s final recommended environmental mitigation, all of which we are imposing, is adequate to address the potential environmental effects identified in the course of the environmental review.”). Mitigation condition 51 of the Board’s Final Decision requires the replacement of trees along the entire route.¹ Mitigation condition 77 of the Board’s Final Decision requires compliance with a programmatic agreement to protect cultural resources.² As the Office of Environmental Analysis is aware, that programmatic agreement in this case includes a Resolution Plan dated August 17, 2017.

¹ Mitigation condition 51 of the Board’s Final Decision provides:

During rail construction, SGR shall replace mature trees at a 3:1 ratio and shall monitor these replacement trees to ensure a survival rate of 80 percent. If the removal of old timber trees is unavoidable, SGR shall replace old timber trees at a ratio of 10 trees for each one lost and shall monitor these replacement trees to ensure a survival rate of 80 percent.

² Mitigation condition 77 of the Board’s Final Decision provides:

SGR shall comply with the terms of the PA, developed pursuant to 36 CFR 800.14(b), which has been executed by all required parties.

I. SGR's Noncompliance with Mitigation Condition 51

Construction has been ongoing. MCEAA members have not observed any replacement of trees during this time.

The latest update from SGR, EI-26244, submitted December 20, 2017, states that the last activity regarding mitigation condition 51 occurred August 22, 2017. That activity was "Tree Study Complete. Tree replacement plan being developed to optimize survival and obtain beneficial results in terms of landowner preference, screening capabilities and public need." The alleged Tree Study has not been publicly posted. Nor does there appear to be replacement of trees occurring anywhere along the alignment.

At a minimum, under mitigation condition 51, SGR should be accounting for how many trees have been destroyed, how many have been or will be replaced, and when replacement will occur, to the Office of Environmental Analysis. MCEAA requests such enforcement by STB here.

The significance of mitigation condition 51 and its importance to MCEAA becomes clear when viewed in context with SGR's noncompliance with mitigation 77, to which we now turn.

II. SGR's Noncompliance with Mitigation Condition 77

The programmatic agreement in this case includes a Resolution Plan dated August 17, 2017. In a direct response to MCEAA's comments on the draft resolution plan, the Office of Environmental Analysis said the following:

7. MCEAA Question – The Resolution Plan provides for consultants' comments. We see no mention in the correspondence of OEA, Texas Historical Commission and Southwest Gulf Railroad with each other that our comments are being used or considered. We hope that the Final Resolution Plan will use our knowledge of the District to preserve its eligibility for the National Register. ***If the landscaping, vegetation, and brochure solution is adopted as contained in the correspondence noted above, will the UQRHD remain eligible for the National Registry?***

OEA Response – ***Yes.***

EO-2925 at 9 (Transmittal of Resolution Plan to ACHP with cover letter) (emphasis added). The UQRHD is the Upper Quihi Rural Historic District, which the environmental analysis process in this case recognized as National Register Eligible. Final EIS at 4-3; *see also* Final Decision at 4.

The landscaping and vegetation solution in the Resolution Plan is a key part of the "General Approach to Mitigation" identified in the Resolution Plan. EO-2925 at 15 (Resolution Plan page 3). Indeed, the mitigation identified in the Resolution Plan is expressly binding on SGR through the Programmatic Agreement (PA) and mitigation condition 77. The Resolution Plan states:

This effects resolution plan (Resolution Plan) has been prepared ***pursuant to Stipulation IV of the PA*** and also reflects input from consulting parties. This Resolution Plan provides (1) a discussion of consideration for developing mitigation under the applicable NHPA regulations and the general characteristics of the historic properties that may be adversely affected by the Project; (2) ***a description of the mitigation*** relative to the 11 historic properties and the Upper Quihi Rural Historic District (UQRHD) potentially adversely affected, the steps taken to avoid and minimize adverse effects, ***and how the proposed mitigation will serve to mitigate unavoidable minimized effects***; and (3) a conclusion summarizing the role of the Resolution Plan.

EO-2925 at 13 (Resolution Plan page 1) (emphasis added).

The landscaping and vegetation mitigation in the Resolution Plan is more fully described in the Plan as follows:

Where existing vegetative coverage is limited, vegetation will be added to make vegetative screening more dense at impacted properties. . . . Mitigation will be appropriate to the nature of the adverse effect and the significance of the resource, and be of comparable scope as the severity of the impact on the resource. As vegetative screening plans are developed for specific locations, these will be shared with the STB and SHPO and available for posting on the STB's website and sharing with consulting parties.

EO-2925 at 15 (Resolution Plan page 3). This requirement was reiterated in the cover letter:

Within 12 months of initiating construction, SGR shall submit landscaping plans to STB and SHPO showing details of the plant material that will be installed in the vegetative buffers at sites HDR-AR-02, HDR-AR-04, HDR-AR-10, and HDR-AR-11.

EO-2925 at 3 (Transmittal of Resolution Plan to ACHP with cover letter).

The landscaping and vegetation mitigation in the Resolution Plan, and the ability to review it, was the basis for the Texas Historic Commission's conclusion that the Upper Quihi Rural Historic District would remain National Register-eligible. EI-26189.³ The Office of Environmental Analysis relied on that conclusion in responding to MCEAA's comment on the draft Resolution Plan, quoted above.

MCEAA has contacted the Texas Historical Commission to determine if landscaping and vegetation mitigation plans have been submitted. As of March 28, 2018, the Texas Historical Commission has stated that no such plans have been submitted.

Therefore, MCEAA requests enforcement of mitigation condition 77 to require the submittal of landscaping and vegetation mitigation plans by SGR.

III. Conclusion

SGR is not in compliance with mitigation conditions 51 and 77 of the Board's Final Decision. Without compliance with condition 51, there will not be compliance with condition 77, regardless of whether or when plans are submitted. The STB, through the Office of Environmental Analysis and the Board, should enforce those mitigation conditions immediately and order SGR to suspend construction activity until such time as SGR complies.

Sincerely,

Robert T. Fitzgerald, MD
President
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³ The Texas Historical Commission is the state historic preservation officer (SHPO).