

#EI-21151



CULTURAL HERITAGE PARTNERS, PLLC
innovation for preservation

VIA EMAIL

October 22, 2015

Surface Transportation Board
Office of Environmental Analysis
Attn: Diana Wood
395 E. St. SW, Room 1110
Washington, DC 20423-0001

Re: *STB Docket No. FD 34284- Southwest Gulf Railroad Company- Construction and Operation Exemption- In Medina County, Texas; Development of a new Programmatic Agreement pursuant to Section 106 of the National Historic Preservation Act, 54 USC § 306108*

Dear Ms. Wood:

Our law and public policy firm focuses on clients exclusively in the cultural heritage sector. We have extensive experience with federal and state laws concerning cultural resources, including the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA).

Our firm represents two clients in the above-referenced matter: the Medina County Environmental Action Association, Inc. ("MCEAA"), a non-profit association of concerned property owners, and Jerry Johnston ("Mr. Johnston"), owner of property formerly referred to as the Mangold Farm. The MCEAA was a consulting party in the process that resulted in the 2008 Programmatic Agreement, and Mr. Johnston has requested consulting party status as Southwest Gulf Railroad ("SGR") now plans to construct its rail line across his land. We are aware that at least twenty-two members of MCEAA have also requested consulting party status in this matter. We submit the following comments on behalf of both clients regarding the development of a new programmatic agreement pursuant to Section 106 of the National Historic Preservation Act for STB Docket No. FD 34284.

Our clients raise the following objections, detailed below:

1. Implementation of the procedures of the Surface Transportation Board ("STB") in requesting comment on the Draft Amended Programmatic Agreement ("Draft PA") has been rife with errors, extensions, and oversights, resulting in a justifiable lack of confidence in STB's approach and prejudicing the Consulting Parties' ability to comment effectively on the Draft PA.
2. SGR's position that the environmental review process is complete based upon STB's 2008 approvals is inconsistent with regulatory obligations to reassess impacts of the rail line on the surrounding environment.

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3. SGR has chosen the Modified Eastern Bypass Route, also referred to as the Weiblen Modification, which would severely and irreparably impact archaeological resources of potential national and state significance located on the Johnston property and elsewhere in the Area of Potential Effect (APE).
 4. The Modified Eastern Bypass Route was not properly studied in the Final Environmental Impact Statement, a fact admitted by SGR's own counsel.
 5. STB has already undermined the Section 106 process by engaging engineering firm HDR to conduct archaeological and historic assessments along the route prior to approval of the Draft PA, which governs how the APE is measured and requires consultation to determine appropriate scope of the study.
 6. The Draft PA is inadequate in that it assumes no Tribes wish to be consulting parties. Tribes have not been afforded the opportunity to review surveys of the Johnston property to assess whether the proposed rail line affects their interests. Notice to the Tribes has been insufficient.
 7. The Draft PA is inadequate in that it provides no recourse for resolution of public objections.
 8. Mitigation contemplated in the Draft PA is wholly inadequate for destruction of a known archaeological site possessing artifacts over 10,000 years old and of potential national and state significance.
- 1. The STB's implementation of procedures requesting comment on the Draft PA has been rife with errors, extensions, and oversights, resulting in a justifiable lack of confidence in STB's approach and prejudicing the Consulting Parties' ability to comment effectively on the Draft PA.**

Implementation of STB's process in this matter was riddled with errors and did not allow for full and complete review by Consulting Parties. Letters inviting the participation of Consulting Parties in developing the Draft PA were sent out on August 13, with a 30-day deadline to accept or decline. The deadline has been extended multiple times due to errors by STB. These errors have included setting an incorrect response deadline and providing an incorrect map with the wrong or missing routes. The STB extended at the eleventh hour the process again because of inadequate public notice. Also, the "corrected" map supplied by STB removed the original Eastern Bypass Route while leaving the other two approved routes. It is unclear to our clients whether the removal was deliberate or another error. In short, the implementation of STB's procedures has undermined the community's confidence in this process and prejudiced the Concurring Parties' ability to comment effectively on the Draft PA.

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Additionally, we express concern that STB seems bent on short-circuiting the Section 106 process by not allowing for any Concurring Party meetings, or for meaningful public examination and input¹ (see correspondence from Diana Wood to Dr. Fitzgerald, dated 9/8/2015), and by rubber stamping the expired 2008 Programmatic Agreement. STB is required to conduct a full Section 106 review in light of the expiration of the 2008 Programmatic Agreement, and our clients are prepared to engage in a measured, deliberate Section 106 process that does not cut corners.

2. SGR's position that the environmental review process is complete based upon STB's 2008 approvals is inconsistent with regulatory obligations to reassess impacts of the rail line on the surrounding environment.

STB has informed the Consulting Parties that it will not reinitiate or revisit the environmental review process, relying on STB approvals from 2008. The documents developed to comply with the National Environmental Policy Act (NEPA) are now almost eight years old, and certainly outdated.

40 CFR § 1502.9(c) requires that agencies "have in place a management process or tool that periodically reassess the impacts of a proposed action and the environment in which the action would occur." SGR's and STB's position that the environmental review process is complete based upon STB's 2008 approvals is not consistent with regulatory obligations to reassess impacts of the rail line on the surrounding environment. At this stage, many years after the STB approvals, the language and intent of the regulations require a reevaluation of the NEPA procedures formerly undertaken and the resulting documents. Since the 2008 approvals and SGR's selection of its route, the existence or condition of threatened and endangered species, uses of the land, and industry and technology standards utilized for environmental reviews may have changed dramatically. With regard to cultural resources in particular, the STB relied on presumptions that the Eastern Routes would not impact the Quihi Rural Historic District, considered by STB to be more significant than the Upper Quihi Rural Historic District. Yet the Keeper of the National Register of Historic Places notes that insufficient study has been conducted to determine the boundaries of these two districts, and in fact, they may constitute a single historic district—meaning that conclusions based on this distinction may be void.

Additionally, new parties may now need to be involved in the process; until SGR selected its route for the rail line, those parties – including several regional Tribes – likely did not appreciate the potential impacts of the construction on the region's cultural resources and archaeological record, particularly because the Modified Eastern Bypass Route was not

¹ Per the ACHP, under 36 CFR § 800.2(d), "At a minimum, the Agency Official has to provide an opportunity for the public to examine the results of the agency's effort to identify historic properties, evaluate their significance and assess the undertaking's effects upon them" (<http://www.achp.gov/106q&a.html>).

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sufficiently studied in the EIS (see Objection 4 below). Others, such as Mr. Johnston, were not landowners at the time.² Additional governmental parties should be invited to participate as Consulting Parties due to water resources and wetlands on Mr. Johnston's ranch that may be impacted by the rail route (such as the Army Corps of Engineers, Fish & Wildlife Service, Federal Emergency Management Agency, Texas Commission on Environmental Quality, and Texas Department of Transportation).

3. SGR has chosen the Modified Eastern Bypass Route, also referred to as the Weiblen Modification, which would severely and irreparably impact archaeological resources of potential national and state significance located on the Johnston property and elsewhere in the APE.

Construction of the Modified Eastern Bypass Route would adversely impact identified and not yet identified archaeological resources of potential national and state significance located on the Johnston property and possibly also the neighboring Jones property. Dr. Thomas Hester, a renowned archaeologist at the University of Texas, and Consulting Party in this matter, has documented Site 41ME133 (the Buddy Mangold site) on Mr. Johnston's property, and concluded that the site contains artifacts dating to 10,800 years ago and possessing an incredibly extensive archaeological record of great significance. Additionally, according to Dr. Hester, the Modified Eastern Bypass Route goes straight through Site 41ME132, an American Indian campsite for at least 10,500 years. Dr. Hester states that there is a high likelihood of finding similar sites nearby, including on Mr. Johnston's property, and also for identifying sinkholes used as American Indian burial sites. In fact, Dr. Hester concludes in a letter to Diana Wood dated Nov. 19, 2007, "The best possible resolution of this issue of the western Mangold [now Johnston] property would be for all potential railroad routes to be moved slightly to the east, thus leaving this particular area of interest (and of potential National Register quality) wholly untouched." An MCEAA member also reported a pattern of several mounds on the quarry land, at the southern end where rail loop and crushers will be located. The entire Quihi area is an historical and archaeological treasure, with many features in place and interrelated.

While we are aware of highly significant sites located on Mr. Johnston's property, there has never been a comprehensive study of the property to inventory the sites fully. Dr. Hester noted in his Nov. 19, 2007 correspondence with Diana Wood, "There have been no definitive archaeological surveys or studies of any route, and the well-meaning tidbits assembled by URS, by STAA (not linked with this issue), and a couple of Austin-area

² The Advisory Council on Historic Preservation explains, "While Section 800.3(f) requires that [the identification of consulting parties] be done at the initiation of the review, the Agency Official should also be sensitive to the need to involve additional consulting parties at later stages in the process, as potential project impacts become better understood and the interests of other parties become clearer" (<http://www.achp.gov/106q&a.html>).

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consulting firms have not provided any sort of comprehensive picture of the local prehistory.”

Our clients assert their strong objections to the selection of the Modified Eastern Bypass Route, which will severely and irreparably impact archaeological resources of potential state and national significance located on the Johnston property, and potentially impact sacred burial grounds and traditional cultural properties of significance to American Indian tribes.

4. The Modified Eastern Bypass Route was not properly studied in the Final Environmental Impact Statement, a fact admitted by SGR’s own counsel.

During the environmental review process, the STB commissioned a supplemental environmental impact statement to assess in greater detail impacts to historic and cultural resources of three alternative rail routes: the Eastern Bypass, the MCEAA Medina Dam Alternative, and SGR’s Modified Medina Dam Alternative. The Modified Eastern Bypass Route, also known as the Weiblen Modification, was not studied properly. As SGR’s counsel noted, “The Supplemental Draft EIS did not undertake an intensive analysis of the Weiblen Modification” (letter from David Coburn to STB dated 9/5/2007).

The Supplemental EIS noted that in-depth study of the modification was not needed because it was a slight modification of two alternatives already being examined, and that all seven alternatives would cause some impact to farmland. Such conclusion fails to recognize the presence of potentially nationally and state significant archaeological resources on Mr. Johnston’s property would be irreparably and adversely affected by this “slight modification.” In addition, there are several hydrologic elements on the Johnston property, including natural springs, that were not included in the Final EIS analysis (see Objection 2). There are additional safety considerations that should also be analyzed; the unmodified Eastern Bypass Route crosses County Road 4516 at a far safer place (flat land, with good visibility in both directions) than it crosses 4516 in the Modified Eastern Bypass Route (at the bottom of a hill, in a curve, at a T intersection.) The Supplemental EIS seems to argue that the only purpose in the Weiblen Modification is to reduce impacts to farmland, stating that shifting impacts from one landowner to another is an insufficient reason to choose one route as environmentally preferred over another. Such analysis is woefully lacking and omits entirely consideration of material adverse impacts created by the Weiblen Modification.

The Supplemental EIS, while relying on such a thin argument for not properly studying the Weiblen Modification, also foreshadows our clients’ concerns. The Supplemental EIS concludes, “The Eastern Bypass Route would have greater combined cultural resource impacts than MCEAA Medina Dam Alternative and SGR’s Modified Medina Dam Alternative.” The document also notes that the Eastern Bypass Route is the “most archaeologically sensitive of the three Eastern Alternatives.” Had STB properly studied the Weiblen

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Modification route, it would have concluded that those cultural resource impacts are even more severe on the Modified Eastern Bypass Route, tipping the scales in favor of the other alternative routes.

Had proper study been conducted with regard to cultural resources along the Modified Eastern Bypass Route, it would be clear to all parties that the Modified Eastern Bypass Route would adversely impact archaeological sites of potential national and state significance and that the MCEAA Medina Dam Alternative Route and the unmodified Eastern Bypass Route are the environmentally preferable choices of the Eastern Routes.

5. STB has already undermined the Section 106 process by engaging engineering firm HDR to conduct archaeological and historic assessments along the route prior to approval of the Draft PA, which governs how the Area of Potential Effect (APE) is measured and requires consultation to determine appropriate scope of the study.

STB is attempting to cover for its lack of sufficient study of the Modified Eastern Bypass Route by hiring HDR, an engineering firm, to conduct archaeological and historic assessments along the route prior to consultation regarding the appropriate Area of Potential Effect (APE) and scope of the study, both of which are considered in the Draft PA. Our clients and the other consulting parties should have ample time to weigh in on the determination of APE and on the scope and methodology of the HDR study prior to its commencement. Instead, as Diana Wood notes in her August 13, 2015 letter to consulting parties announcing the re-initiation of the Section 106 process:

SGR's consultant, HDR, Inc., is now in the process of preparing archaeological and historic assessments along the area of potential effects (APE) to assess archaeological resources and evaluate the eligibility of identified resources for inclusion in the National Register of Historic Places. HDR plans to conduct an intensive cultural resources survey of the proposed rail line construction, based on a GIS model that determines high, medium, and low probability areas, and will also perform intensive on-site shovel and systematic backhoe trench testing and evaluate all buildings, structures, objects, districts, and historic landscapes of historic age (over 45 years old) within the APE.

Our clients respectfully request a copy of the HDR scope of work and for HDR to cease and desist its assessment until such time as STB may receive comment on the proposed Area of Potential Effect in the Draft PA, which differs from the 2008 Programmatic Agreement, and on the appropriateness of the scope of work.

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a. APE

Because the APE is the area within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, multiple factors must be considered in defining its boundaries (e.g., physical impacts, and potential visual, auditory and vibration impacts). A single undertaking may have multiple, nested APEs based on the scale of the undertaking and types of anticipated impacts. 36 CFR § 800.16(d).

The Draft PA anticipates two different APEs to account for direct (300 feet either side of the right-of-way) and indirect (1,000 feet either side of the right-of-way) project effects. Typically, a showing that the APE captures all elements of the project cannot be done until preliminary design/engineering is completed, as anticipated in the Draft PA under Stipulation I.B (“At the end of the preliminary design phase for construction of the railroad, the STB will consult with SGR and the SHPO to determine how the APE should be adjusted to reflect any changes to the design and actual limits of disturbance”). According to the draft scope of work that our clients received through a Freedom of Information Request in May 2015, HDR has presented a proposal for resource identification efforts that will take place within an APE that is not informed by the preliminary engineering design. Our clients ask SGR to demonstrate that their proposed construction footprint does not exceed the width of the 600-foot direct effects APE, which should include *all* areas used for project staging and temporary construction, not just the railroad corridor.

With respect to the 1,000-foot buffer for indirect effects, the Draft PA establishes that construction may adversely affect the Upper Quihi Rural Historic District. As a Rural Historic Landscape District, the characteristics for which this historic district achieves its National Register eligibility focus on its physical context and traditional agricultural patterns. The types of project impacts that might alter those characteristics are indirect effects, such as intrusion on viewshed, noise, and vibration. The 1,000-foot APE has not been demonstrated to reflect actual limits of noise, vibration, and other indirect effects that may occur once the railroad begins operations. SGR must demonstrate that the 1,000-foot buffer is sufficient to avoid adverse effects on the physical context and traditional agricultural patterns that constitute the eligibility characteristics of the Upper Quihi Rural Historic District.

b. Scope of Work

HDR’s draft proposal sets out a very basic statement of work that fails to address the Draft PA’s directive to locate traditional cultural properties (TCPs), and cultural or historic landscapes that may be eligible for listing in the National Register. Further, it does not specifically address Texas standards, and – if state-owned property will be crossed – it does not mention the Texas Antiquities Code’s permitting, reporting, or curation requirements.

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Moreover, HDR's proposed scope of work depends heavily on a cursory and inadequate GIS modeling procedure:

- The only natural resource used in HDR's model appears to be water crossings. The model fails to consider other water sources such as cenotes and arroyos, which are common in the area, nor does it factor in the presence and use of other natural resource locations, such as chert outcrops or other lithic resource locations.
- HDR's heavy reliance on topographic data by using slope and elevation to dismiss certain areas is faulty. Topographic elevation-derived/DEM data contains inaccuracies of many feet; while preliminary modeling can be developed from these data, the protocol must include field testing to establish the model's validity. The Scope of Work makes no indication that the model will be field-verified, instead relying wholly on GIS modeling. HDR will likely miss significant sites under this protocol. (LIDAR, when available, is preferred.)
- HDR's modeling procedure does not use the presence or absence of known sites as a refining tool. Characterizing sites within or near the APE that are located in similar settings would enhance the reliability of the model.
- The methodology appears to be developed for survey in southeast or coastal Texas, rather than for the topography and archeological resources of the region at issue, and suggests unfamiliarity with local archaeology.³ The Draft PA should require knowledge of Texas archaeology and the involvement of geomorphologists to ensure the collection of complete and reliable data.

Finally, it is important to note that, according to Dr. Hester, sites on Mr. Johnston's ranch are distinctive in that occupational material is found mixed in Uvalde Gravel deposits on hills and knolls on the ranch. This phenomenon was wholly unexpected and means that careful geoarchaeological and geomorphological assessment of all of the gravel hills in SGR's route must be conducted to determine if similar sites exist. Traditional shovel tests are futile in this environment and a much better research perspective is required to design a program of survey and site identification.

6. The Draft PA is inadequate in that it assumes no Tribes wish to be consulting parties. Tribes have not been afforded the opportunity to review surveys of the Johnston property to assess whether the proposed rail line affects their interests. Notice to the Tribes has been insufficient.

³ Just this past summer, Mr. Johnston met at his property with SGR's Erik Remmert and an SGR lawyer and showed SGR the springs. Mr. Remmert reported that he had no idea they existed.

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Tribes have not been adequately informed that there are identified archaeological sites and a high likelihood of additional sites on the Johnston property that will be impacted by the Weiblen Modification and were not included in the EIS analysis. Six tribes have already participated in this matter through submissions to the STB. Accordingly to Dr. Hester, several tribes are known to have been in the Medina County area over time, including the Comanche, Kiowa, Lipan Apache (represented by the Mescalero Apache), and Wichita. Once the six currently participating tribes, other historically relevant tribes, and perhaps additional tribes learn about resources that will be impacted by the Weiblen Modification and the sites already discovered on Mr. Johnston's property, we expect they will have great interest in participating; regional tribes may have long-held traditions about sacred places and culturally significant sites in the area. STB and SGR are well-aware that the route will impact known American Indian sites, meaning that there is excellent potential for sacred sites to be impacted, as well.

In addition, in the Keeper's review of the Determination of Eligibility for the Quihi and Upper Quihi Historic Districts makes several findings relevant to tribal resources. The Keeper observes that the districts have significance for pre-contact and historical archaeological resources, and – importantly – that the STB fails to provide sufficient information to determine the presence and eligibility of cenotes, or other potential sacred, religious, or traditional properties that may be eligible as TCPs. Based upon a 2007 report by the Tap Pilam-Coahuiltecan, the Keeper states that TCPs likely exist within or adjacent to the historic district. The Keeper strongly encourages the STB to work with the tribes to define the significance of the cenotes and other TCPs within the district.

In light of this background, the Draft PA's assumption that no Tribes wish to be consulting parties is ill-conceived and demonstrably incorrect. We urge STB to ensure that tribal interests are adequately considered and represented in its procedures.

7. The Draft PA is inadequate in that it provides no recourse for resolution of public objections.

The Draft PA states in Section X, "At any time during implementation of the measures stipulated in this Agreement, should an objection pertaining to this Agreement be raised by a member of the public, including but not limited to the consulting parties the STB shall consult further with the Council and SHPO, as needed, in an attempt to resolve any appropriate objection within a period of 30 calendar days. If the objection cannot be resolved within the 30 day period, the STB and SGR shall continue with implementation of the project and this PA."

Without a more robust procedure for resolving public objections, the STB, Vulcan, and SGR expose themselves to the risk of a succession of lawsuits initiated by the consulting parties and other members of the public to interpret and enforce the PA.

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8. Mitigation contemplated in the Draft PA is wholly inadequate for destruction of a known archaeological site possessing artifacts over 10,000 years old and of potential national and state significance.

While the Draft PA refers to avoidance as an important approach to the mitigation of effects on archaeological resources, the focus of the Resolution Plan is data recovery. Avoidance of a site is not the same as preservation. The Advisory Council on Historic Preservation advises that the management of archaeological resources be undertaken with a spirit of stewardship in recognition of the non-renewable nature and public values of such resources ("An archaeological site may have important values for living communities and cultural descendants in addition to its significance as a resource for learning about the past; its appropriate treatment depends on its research significance, weighed against these other public values" (<http://www.achp.gov/archguide.html#archsites>)). An archaeological site with components that reflect 11,000 years of human occupation would certainly have important values for living communities and cultural descendants. In-depth consultation will be required to arrive at a mutually agreeable minimization and mitigation plan should SGR continue pursuing the Modified Eastern Bypass Route.

Conclusion

The studies conducted to date, however inadequate, indicate the MCEAA Medina Dam Alternative route would be a much less destructive path for the construction of this rail line. Our clients urge SGR to adopt this route.

If SGR instead persists in pursuing the Eastern Bypass Route, our clients urge SGR to stick to the original Eastern Route without the Modification. Doing so will likely impact fewer heritage resources than the Modified Eastern Bypass Route. Proceeding with the Modified Eastern Bypass Route will most likely require expensive mitigation of many sites and will likely require SGR to thread the needle through prehistoric archaeological sites, American Indian burials, traditional cultural properties, and culturally significant sinkholes, among other sites.

SGR's counsel has requested that "SEA allow SGR the option to determine based on final engineering and further study of the area that it could construct its line adhering to the originally proposed Eastern Bypass Route should any irremediable problems arise with the Weiblen Modification." Our clients urge SGR to recognize that the cultural and environmental resources present on the Johnston property present an "irremediable problem" with the Weiblen Modification.

Thank you for your time and attention.

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Regards,



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Attorney at Law, on behalf of MCEAA and Jerry Johnston

CC: Bill Martin, Texas State Historic Preservation Officer
Charlene Dwin Vaughn, Advisory Council on Historic Preservation
Chairman Daniel R. Elliott III, Surface Transportation Board
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