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November 4, 2015

Via E-Mail

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

Re: STB Docket No. FD 34284, Southwest Gulf Railroad Company; Development of a New Programmatic Agreement

Dear Ms. Wood:

I am writing on behalf of Southwest Gulf Railroad (SGR) in response to Cultural Heritage Partners' October 22, 2015 letter on behalf of the Medina County Environmental Action Assn. and Mr. Jerry Johnston ("MCEAA letter").

While purporting to be a response to the STB's invitation for comments on the draft amended programmatic agreement (PA) for SGR's rail project, in fact the letter amounts to a challenge to the STB's December 18, 2008 decision in this proceeding authorizing construction by SGR of its line along the Modified Eastern Bypass Route, one of three alternative alignments authorized for construction by the STB. That decision followed extensive environmental and cultural resources analysis of each alternative alignment that were prepared in this proceeding consistent with National Environmental Policy Act and the National Historic Preservation Act. Indeed, the STB's environmental reviews and Section 106 processes relative to the choice of routings for the SGR line were extensive, and included preparation of a Supplemental EIS to assess impacts to a cultural landscape that the SGR line will in fact avoid.¹ It also merits note

¹ The STB's then-called Section of Environmental Analysis issued a Draft Environmental Impact Statement (DEIS) in 2004 that contained an in-depth study of four possible rail alignments. In response to the DEIS, SEA received approximately 120 written comment letters, as well as comments at two public meetings. After careful review of all comments, as well as additional information submitted by SGR, SEA decided to prepare a Supplemental Draft Environmental Impact Statement (SDEIS) in 2006. The SDEIS focused on evaluation of three new eastern alternative rail routes that would avoid potential

that the STB's decision, which was challenged by MCEAA in 2009, was affirmed over that entity's objections by the U.S. Court of Appeals for the Fifth Circuit. *Medina County Environmental Action Ass. v. STB*, 602 F.3d 687 (5th Cir. 2010).

The time for questioning the STB's decision to allow construction along one corridor versus another is thus long passed. Yet the MCEAA letter does just that – it seeks no specific changes to the PA but raises broad and false allegations designed to impugn the integrity of the NEPA and Section 106 processes followed by the STB in this proceeding and asks that SGR be required to construct its line along a different alternative, the so-called Medina Dam Alternative. The letter amounts to an abuse of the process that the STB's Office of Environmental Analysis appropriately established for seeking comments on the amended PA given the expiration of the prior PA.

The STB and the other signatory parties should now proceed to finalize that amended PA, which was carefully crafted to protect any cultural resources that might be impacted by the SGR line. This will allow a project long ago authorized by the STB to move forward, subject to all of the protections afforded to cultural resources by the well-crafted amended PA. Below, we will address some of the specific points raised by MCEAA so that these can be put to rest.

As noted, several of the issues raised in the MCEAA letter in fact relate to the NEPA process that was undertaken for the project, including the consideration of alternatives. For example, MCEAA asserts the Modified Eastern Bypass Route was not properly studied in the Final EIS. MCEAA Letter at 5. As the STB made clear in its public notice regarding the amended PA, however, the NEPA process for this project is closed. The STB completed the NEPA process in May 2008 and, as noted, issued a final decision approving the proposed rail line for construction on any one of three alternative alignments (including the Modified Eastern

impacts to the historically sensitive Quihi area; discussion of extensive additional historic property identification efforts following issuance of the DEIS; and additional noise analysis. A more detailed study of three rural historic landscape districts in the area (the Quihi Rural Historic District, the New Fountain Rural Historic District, and the Upper Quihi Rural Historic District) was also included in the SDEIS. After extensive consultation with agencies, tribes, and members of the public, as well as consideration of comments received on the DEIS and SDEIS, SEA issued a FEIS in 2008. In response to concerns raised during the SDEIS process, the FEIS assesses the Modified Eastern Bypass Route, a modification to the Eastern Bypass Route that circumvents the Weiblen property and Castroville West Subdivision. SEA concluded that the Eastern Bypass Route (including the Modified Eastern Bypass Route) and the MCEAA Medina Dam Alternative are the environmentally preferred alignments. The FEIS includes over ninety mitigation measures to minimize the potential effects of construction and operation of the project, including requiring a PA for addressing potential impacts to historic and cultural sites. Further, ACHP was actively engaged in the Section 106 process undertaken by SEA.

Bypass Route) on December 18, 2008. Therefore MCEAA's "comments" related to project routing and the environmental review process are not germane to the sole issue currently before the Board, the amendment of the PA.²

MCEAA claims that the STB has regulatory obligations to "reassess" the potential impacts of the rail line because the NEPA process was concluded in 2008. MCEAA Letter at 3. However, time alone does not invalidate an EIS. *Coker v. Skidmore*, 941 F.2d 1306, 1310 (5th Cir. 1991) (15 year old EIS upheld); *Becker v. Federal Railroad Admin.*, 999 F. Supp. 2d 240, 249 (D. Conn. 1996) ("[EIS] done eighteen years ago does not necessarily make it either stale or no longer useful."). Rather the question is whether the original proposed action has substantially changed or there are significant new circumstances or information relevant to the project and its environmental impact. 40 C.F.R. § 1502.9; 49 C.F.R. § 1105.10(a)(5). Thus, the passage of time is not determinative as to the continued validity of an EIS – the need to supplement arises only with a significant change in circumstances or new information. Tellingly, MCEAA points to *no* new circumstances or information that would trigger the need for a supplement in this case. In fact, circumstances have not materially changed – no significant new information regarding the project or the surrounding environment has arisen. As MCEAA itself notes, the preferred route being pursued by SGR is one of the preferred alternatives discussed in the Final EIS. There is no basis for the Board to undertake any further analysis under NEPA.

With regard to the Section 106 issues raised in MCEAA's letter, we believe their concerns are already covered by the amended PA for the project. For example, MCEAA states that there has never been a comprehensive study of the Johnston property and that there is a high likelihood of finding additional sites there and elsewhere. MCEAA Letter at 4. The FEIS specifically acknowledged that there may be additional unidentified sites along the route. *See* FEIS at 2-31 ("Even though only one documented prehistoric site has been recorded in the Modified Eastern Bypass, it is probable that other sites exist."). Indeed, the original PA and amended PA were specifically developed to address the possibility of further discoveries, and further surveys and consultations are part of the process outlined in the amended PA. Thus, the execution of the PA is not the end of the cultural resources review process, and the amended PA provides precisely for the very on-going, consultative process that MCEAA professes to want.

² MCEAA quotes from a September 5, 2007 letter of SGR counsel to suggest the EIS analysis of the Modified Eastern Bypass Route was inadequate. MCEAA Letter at 5. However, the quote is taken out of context. The statement that "an intensive analysis" of the alternative was not undertaken in the DEIS was in reference to the fact that the alternative was a minor modification of the Eastern Bypass Route, which had been extensively studied in the DEIS. Moreover, the letter was referring to the Draft EIS, not the final, and the Final EIS set forth further analysis of the Modified Eastern Bypass Route. *See* FEIS Section 2.5. Indeed, as noted, the Modified Eastern Bypass Route was determined to be one of preferred alternatives.

MCEAA also expresses concern that the Modified Eastern Bypass Route 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).” MCEAA Letter at 4. The Modified Eastern Bypass Route was specifically developed in response to comments to avoid impacts to the Weiblen farm and the Castroville West Subdivision. *See* FEIS Section 2.5. While SGR has made every effort to limit impacts to Mr. Johnston’s property, SGR cannot fully avoid that property while staying within the approved route. That is not a new fact; it has been known for years and was considered during the EIS and Section 106 processes and in the STB’s final decision.

MCEAA nonetheless expresses concern that the route will impact the so-called Buddy Mangold site (41ME133), as well as an American Indian campsite, neither of which is located within the direct APE for the line.³ However, SGR has always planned to avoid these sites and in fact with HDR’s assistance is currently delineating a preferred ROW within the Modified Eastern Bypass corridor that will move the line even further away from both these sites, as well as from the springs on the Johnston property.

MCEAA asserts that the STB has undermined the Section 106 process by engaging HDR to conduct archaeological and historic assessments along the route prior to approval of the Draft PA. As you know, HDR has not been engaged by the Board, but instead by SGR. HDR was contracted by SGR to assist with delineation of a final route within the approved Modified Eastern Bypass corridor, as well as to conduct initial studies to determine the appropriate inventory and evaluation strategies that would allow the proper assessment of potential impacts of the project. However, all Section 106 survey work is currently on hold until the amended PA is executed. Only after the amended PA is executed, will HDR initiate survey work pursuant to the terms of that PA.

MCEAA also questions the APE and whether it has been properly adjusted based on preliminary design/engineering. MCEAA Letter at 7. SGR has completed preliminary design/engineering and has consulted with the STB and SHPO regarding the appropriate APE. The SHPO and the Board have agreed that an APE of 300 feet on either side of the ROW for direct impacts, and 1,000 feet for indirect effects, is appropriate for this project. In response to

³ The previously recorded site, 41ME132, is located approximately 600 ft. north of the proposed APE on the Johnston property. There was no evidence of this site near or within the proposed APE on the Johnston property. The Texas Archeological Society chose site 41ME132 as the location of its 2004 volunteer field school. After excavating 6, 2 x 2 meter units throughout the site, the group did not recover any diagnostic artifacts or features (TAS Bulletin 2004). To date, there has been no professional study of site 41ME132 to evaluate its age and or integrity.

MCEAA's request, SGR confirms that the construction footprint will not exceed the width of the 600 foot direct effects APE, including staging and temporary construction areas. We also note that the amended PA allows for APE adjustments based on future design changes, if necessary. PA at § IB.

MCEAA raises several questions about HDR's draft scope of work (SOW), which we are happy to answer:

- Regarding traditional cultural properties (TCPs) and cultural/historic landscapes, the STB sent a letter in August 2015 inviting local historical groups and 20 separate Native American Tribes to comment on the PA, and pursuant to the PA, will continue to consult regarding the SOW and TCPs and other resources within the APE. This outreach to Native American tribes is only the latest in the STB's extensive efforts throughout the course of this proceeding.⁴
- As required by the amended PA, Texas state laws, standards and guidelines will be considered in any survey and identification work that is undertaken once the PA is in effect. PA § II(A)(2). At this time, the APE does not include state-owned property or involve sub-entities of the State of Texas, and as such, a Texas Antiquities Permit is not required.
- HDR's archaeological survey model does not exclude any areas within the APE from survey. All areas are covered via pedestrian surface survey methods. Where appropriate, shovel testing will be carried out.
- The GIS model and overall methodology for the SOW were designed specifically for this project based on over 20 years of Texas archaeological experience. The GIS model proposed utilizes topography/ground cover, distance to water, and soils data to help inform where shovel testing might be required. Due to the lack of large-scale survey data (i.e., site locations) in the immediate area, reliance on a refining model would have potentially provided distorted information. If conditions in the field differ from the GIS-

⁴ The following Native American Tribes were contacted: Alabama-Coushatta Tribe of Texas, Alabama-Quassarte Tribal Town, Apache Tribe of Oklahoma, Caddo Nation, Cherokee Nation of Oklahoma, Choctaw Nation of Oklahoma, Coushatta Tribe of Louisiana Lovelin Poncho, The Delaware Nation, Kialegee Tribal Town, Kickapoo Traditional Tribe of Texas, Kiowa Tribe of Oklahoma, Mescalero Apache Tribe, Poach Band of Creek Indians, Quapaw Tribe of Oklahoma, Seminole Nation of Oklahoma, Thlopthlocco Tribal Town, Tonkawa Tribe of Oklahoma, Tunica-Biloxi Tribe of Louisiana, United Keetoowah Band of Cherokee Indians, and the Wichita and Affiliated Tribes.

informed model, methods will be modified in such a way as to maximize artifact identification and recovery.

MCEAA claims that the PA's provision regarding the resolution of public objections is inadequate, but provides no specific suggestions as to how the provision could be improved. MCEAA Letter at 9. Section XI of the amended PA in fact provides an open and fair dispute resolution process, allowing any person to raise objections and to have those objections considered in a timely manner by the STB, SHPO and Council. These provisions are not unlike any number of other PA's entered by the STB and other federal agencies.

MCEAA asserts that the mitigation contemplated in the amended PA is inadequate, but again provides no specific suggestions as to how the PA could be improved. MCEAA states that while the PA refers to avoidance, the focus of the Resolution Plan is data recovery. MCEAA Letter at 10. However, the PA is clear that the resolution plan is to include "an emphasis on avoiding, where possible". PA at IV(A)(1). Data recovery only comes into play where avoidance is infeasible. *Id.* at IV(D).

As noted above, SGR is working with local landowners to devise a final routing within the approved Modified Eastern Bypass Route corridor that minimizes impacts to known cultural, historic and environmental resources. MCEAA notes that "in-depth consultation" will be required on mitigation. The amended PA appropriately provides for such consultation throughout the Agreement's implementation.

Finally, it bears note that MCEAA has been raising unsubstantiated objections to the construction of the SGR rail line ever since it was proposed over a decade ago. Its latest letter is more of the same. There is nothing in its letter that merits any further changes to the amended PA, or any other action by OEA or the other signatories to the amended PA. We therefore respectfully request that the amended PA be finalized and executed.

Sincerely,



David H. Coburn
Cynthia Taub

cc: Victoria Rutson, Office of Environmental Analysis
Cathy Nadals, Office of Environmental Analysis
Bill Martin, Texas State Historic Preservation Officer
Charlene Dwin Vaughn, Advisory Council on Historic Preservation