

**The
Gardner
Law
Firm**
A Professional Corporation

David F. Barton
Jay K. Farwell
Dawn B. Finlayson†††
Kelly E. Foster
Gregory M. Huber
R. Wes Johnson†
Mary Q. Kelly
Daniel P. McCarthy††
William W. Sommers
Marc A. Stroope
Craig Taliaferro
J.P. Vogel
Thomas J. Walthall, Jr.
†Board Certified-Consumer & Commercial Law
††Board Certified-Civil Trial Law
†††Board Certified-Labor & Employment Law
Texas Board of Legal Specialization

July 21, 2008

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

VIA ELECTRONIC FILING

Re: Finance Docket 34284, Southwest Gulf Railroad—Construction and
Operation Exemption—Medina County, Texas

Dear Secretary Quinlan:

Roughly two weeks ago, the Austin Field Office of the U.S. Fish and Wildlife Service (FWS) revisited and began reevaluating the endangered species surveys and biological assessments submitted by Vulcan/SGR in this proceeding. Consultation under Section 7 of the Endangered Species Act may be required as a result of the reevaluation. For that reason, the Board's licensing determination should not issue until Vulcan/SGR's endangered species obligations for its 1700-acre Edwards Aquifer recharge zone quarry site and rail line in Medina County are clarified.

Habitat for the listed endangered golden-cheeked warbler (*Dendroica chrysoparia*) has been found and delineated on the Kennerly property, on the northern fence line of the quarry site, along with the warblers themselves. The warbler nests and raises its young in exclusively in the Edwards Plateau region of Texas and migrates annually between there and Central America. It comes to Texas in March and leaves in July. It prefers mixed Ashe juniper or oak woodland that is disappearing due to clearing for development and grazing.

The Kennerly property is the site of a relatively small scale proposed land clearing for agricultural purposes. The landowner, Mr. John Kennerly, sought a small federal agricultural extension grant for his project, which he did not receive. In the application process, however, it was determined that habitat for the warbler, as well as the warblers themselves, existed on his property at the northern border of the quarry.

Upon information and belief, including a follow up conversation with Mr. Kennerly, he met with the following FWS staff last week to delineate the habitat on his property and discuss mitigation:

Ms. Joy Nicholopoulos – Texas State Administrator for FWS Ecological Services
(512) 927-3557

Mr. Adam Zerrenner – Field Supervisor, FWS Austin Field Office
Dr. Tim Schumann – Biologist, FWS Austin Field Office
Ms. Allison Arnold – Biologist, FWS Austin Field Office
(512) 490-0057

In the course of the delineation it was noted that the directly adjoining Phases 2-5 of the adjacent quarry property had not been surveyed for the warbler. FWS indicated that approximately ten days ago (prior to the date of the Kennerly delineation), FWS received a letter or document that altered the status quo with respect to its prior determinations for the Vulcan/SGR quarry and rail loop site. FWS stated it intended to reexamine the studies of the Phase 1 quarry/rail area that had been submitted by Vulcan/SGR, as well as the status of the site as a whole, considering such issues as staleness of the prior studies (the existing data is over five years old), adequacy and scope. FWS requested the contact info for Vulcan's local representative to discuss these matters, and the name and phone number of Mr. Eric Remmert of Vulcan was provided.

It is unknown at this time exactly what prompted FWS to reevaluate, whether the letter came from Vulcan/SGR or internally. The FWS Austin Field Office has, as of late 2007, completed endangered species habitat mapping over the entire Edwards Plateau, which MCEAA incorporates by reference here. Simultaneously, the FWS Austin Field Office has begun a crackdown on developers who had been clearing large areas of habitat over the Edwards Aquifer Recharge Zone without obtaining incidental take permits or developing habitat conservation plans under the Endangered Species Act. *See* Sig Christensen, *Another Project Near Bullis is Probed*, S.A. EXPRESS NEWS, July 22, 2008 http://www.mysanantonio.com/military/Another_project_near_Bullis_is_probed.html. Essentially, it has become clear that the ESA's prohibition against unpermitted and unmitigated clearing of endangered species habitat was not being enforced by FWS in this area until recently.

These recent FWS actions have become front page news in San Antonio, as unlawful clearing has encroached on the Army's Camp Bullis Military Reservation northwest of the city. Camp Bullis' parent, Fort Sam Houston, inside the City, has called for the creation of a multi-county habitat conservation plan, as quoted below:

Fort Sam Houston, in search of ways to protect its Camp Bullis training range, will call today for creation of a multi-county Regional Habitat Conservation Plan that would tighten development and add protections for five endangered species.

The regional conservation plan, proposed by the U.S. Fish and Wildlife Service and supported by Fort Sam, would likely require that Camp Bullis-area developers chip in to pay for low-cost conservation easements in agricultural lands if they clear trees and foliage that could be used by the migratory golden-cheeked warbler.

...

Under the plan supported by Fort Sam, a developer could acquire land anywhere in Golden-Cheeked Warbler Recovery Unit 5. The recovery area includes all of Bexar, Comal and Kendall counties, and parts of Medina, Bandera, Kerr, Blanco and Hays counties — land that is far cheaper than that next to Bullis.

"Medina is important because it has low-cost land. Right now it's too far away to develop," Fort Sam environmental attorney Jim Cannizzo said, calling it perfect warbler territory.

Sig Christensen, *Conservation Ideas Studied*, S.A. EXPRESS NEWS, July 21, 2008, <http://www.mysanantonio.com/military/25750194.html>

Regardless of the impetus, however, it appears FWS may no longer believe that its prior determinations inside the quarry property boundaries—to include the rail loading area that FWS has previously expressed concern about in EI-56 and EI-600—are sufficient to allow this project to move forward.

Counsel was not present for the Kennerly delineation and is relying on Mr. Kennerly's notes of the meeting and statements, which have proven accurate in the past. Obviously the existence of the warblers and their habitat at the border of the quarry represents new evidence, as does the new FWS mapping data. The STB has a duty to assess its current environmental documentation against this all of this new data for accuracy, particularly given the conclusions in the Final EIS regarding the lack of cumulatively significant habitat impact. *See e.g.*, Final EIS at 3-16.

For purposes of this proceeding, the FWS' reevaluation calls into question the NEPA documentation with respect to endangered species, biological resources, and the

warbler in particular, for all of the reasons MCEAA gave four years ago in EI-602 (attached) and which it reurges here, most emphatically with respect to cumulative impacts. Again, as MCEAA has noted to the Board and to the SEA numerous times, it is a situation where Vulcan/SGR has not accurately represented the facts to the agencies, requiring reanalysis to bring the agencies' records into compliance with the law.

Why the entire quarry site was not surveyed at the start, and why anyone would believe that the remaining fragmented areas that will remain uncleared on the site (at present, but not for an extended time) will support warblers, is beyond comprehension, given the noise and vibration from blasting, excavation, and processing. *See* EI-602 at 9. The assumption that noise and vibration will be confined to the quarry site boundaries is conclusory, as is the assumption that any on-site habitat to be cleared in later years of quarry operations would not be impaired from the outset by encroaching mining. It is also absurd to assume that the identified habitat across the northern fence line will not be impaired when blasting and excavation approach the fence, to say nothing of whatever contributions there are from the plant site and loading operations, which have only been conclusorily described in the Final EIS, pages 3-20 to 3-22. The Final EIS itself notes that "the sound [of blasting] will be very audible in the northern portion . . . of the study area." *Id.* at 3-20.

The survival of the golden cheeked warbler and the cumulative impacts of development on its habitat and recovery are ultimately the responsibility of FWS and every citizen. However, there are also requirements that affect this STB proceeding and its environmental documentation, first and foremost that the documentation accurately reflects the site conditions and likely presence or absence of endangered species.

In an April 22, 2003 letter, from the FWS to Vulcan's environmental analysis contractor, the FWS noted:

We are particularly concerned about the area noted by STB as the 'straight track loading option'. It appears that the vegetation in this area has not been cleared and may support habitat for one or both of these species.

Letter from Robert T. Pine, FWS Supervisor, to Jana Zyman-Ponebshek, URS ¶ 3 (Document EI-56). To MCEAA's knowledge, that concern, which is now also implicated by the revised rail loading loop location, has never been answered.

Whether and how it is answered depends in part on whether Vulcan/SGR seeks or is seeking incidental take permit authority and whether FWS requires adequate surveys of the entire quarry site as MCEAA previously urged in EI-602 and elsewhere in the record. What is clear is that the record the STB was proceeding on up through the Final EIS for endangered species and biological resources is now being reevaluated, has changed due to new data cited herein, and is likely to change further. These developments place an obligation on the STB to contact FWS, determine full scope of the situation, and await

clarification of the record accordingly. STB should request a status report from FWS and a copy of whatever letters and documents have caused FWS to revisit its prior determinations, and place those documents in the record for this proceeding.

In *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), the Fifth Circuit held that “the relevant consideration,” in whether an agency has “adequately considered” the effects of an action under the ESA, “is the total impact.” *Id.* at 373. “Irrespective of the past actions of others,” the court wrote, the licensing agency “ha[s] a duty to ensure that the . . . development generated by it do[es] not further threaten” endangered species. *Id.* Absent that analysis, it is “questionable whether the [species] could survive . . . the indirect effects of the [project].” *Id.* at 373. Even if most of the harm to habitat and the species will occur away from the loading loop, the EIS must state the “total impact,” which has not been accurately disclosed throughout this project’s entire scope to date.

Very truly yours,

/s/

David F. Barton
COUNSEL FOR MEDINA
COUNTY ENVIRONMENTAL
ACTION ASSOCIATION, INC.

cc: All parties of Record (3)

Dr. Robert Fitzgerald
Medina County Environmental Action Association
202 Cr 450
Hondo, TX 78861

VIA REGULAR MAIL

David H. Coburn
Steptoe & Johnson LLP
1330 Connecticut Ave NW
Washington, DC 20036-1795

VIA CERTIFIED MAIL
RRR # 7005 1820 0003 5262 9246

Richard H Streeter
Barnes & Thornburg
750 17th Street NW Ste 900
Washington, DC 20006

VIA CERTIFIED MAIL
RRR # 7005 1820 0003 5262 9239

and

Victoria Rutson
Section of Environmental Analysis
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

*VIA REGULAR MAIL AND
ELECTRONIC FILING*

#E1-602
R2**THE GARDNER LAW FIRM**A PROFESSIONAL CORPORATION
745 EAST MULBERRY AVENUE, SUITE 100
SAN ANTONIO, TEXAS 78212-3149DAVID F. BARTON
WM. RICHARD DAVIS
JAY K. FARWELL
GREGORY M. HUBER
R. WES JOHNSON¹
BRAD L. SKLENCAR⁰
WILLIAM W. SOMMERS
THOMAS J. WALTHALL, JR.
KEVIN M. WARBURTONTELEPHONE
(210) 733-8191TELECOPIER
(210) 733-5538E-MAIL ADDRESS
gardner@telf.com⁰ Board Certified-Consumer & Commercial Law¹ Board Certified-Labor & Employment Law
Texas Board of Legal Specialization

February 19, 2004

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
ATTN: STB Finance Docket No. 34284
1925 K Street, NW
Washington, DC 20423-0001**VIA TELEFAX: (202) 565-9000**
& CM-RRR #7001 2510 0002 0226 5676

Re: Analysis under the Endangered Species Act of:

- (1) Vulcan Materials Company's planned Medina County stone quarry; and
- (2) Vulcan Materials Company subsidiary Southwest Gulf Railroad Company proposed rail line to serve Medina County stone quarry.

Dear Ms. Rutson:

Medina County Environmental Action Association (MCEAA) incorporates herein by reference its letter dated February 15, 2004, requesting that the planned Vulcan Materials Company (Vulcan) quarry and the rail line proposed by Vulcan's wholly owned subsidiary Southwest Gulf Railroad Company (SGR) to serve it be analyzed together as connected and/or cumulative actions in the same environmental impact statement (EIS).

In this letter, MCEAA requests that the STB initiate a mandatory inquiry under § 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. § 1531-1544 (2000), to determine "whether any threatened or endangered species may be present" in the area of the proposed action. MCEAA requests that the scope of inquiry encompass all phases of the quarry, not simply the proposed rail line in phase 2 to which they are connected.

This requires, according to U.S. Fish and Wildlife Service (FWS) protocols-and-precedent at Phase 1 of the quarry site—three years of focused counting for threatened and endangered species. MCEAA further requests that a new Biological Assessment be prepared, as the existing version prepared by the applicant solely for Phase 1 of the quarry fails to address the connected action. The scope of the inquiry must match the scope of the connected action that these actions represent under the Council on Environmental Quality (CEQ) regulations, 40 C.F.R. §§ 1500-

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -2-

1508 (2003) implementing the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f (2000).

FACTS

Southwest Gulf Railroad Company (SGR), a wholly owned subsidiary of Vulcan, plans to construct and operate a rail line to connect a planned Vulcan stone quarry to the Union Pacific Railroad Company (UP) main line in Medina County, Texas, about 30 miles west of San Antonio.

Vulcan plans to locate its new quarry in the north central part of Medina County. The quarry would produce crushed stone aggregate for highway and other construction purposes at great distance from the proposed project. Vulcan plans to proceed with the quarry in phases. Phase 1 consists of excavation, in accordance with a site plan, on a portion of the 1,760 acres that Vulcan currently leases, as well as construction and operation of a crushing unit. Trucks and trains would haul materials from the site in Phase 1. Later Phases would expand excavation from Phase 1 to other portions of the 1,760 acres.

During Phase 1, Vulcan will construct a rail service facility to allow material generated from the mining operation to be delivered to remote markets by rail directly connected to the plant area. As stated in an August 2003 Biological Assessment for Phase 1 of the quarry prepared for Vulcan, the rail facility would require approximately seven miles of new rail track directly connecting the quarry operation to the main line rail intercept near Dunlay, Texas.

On February 27, 2003, Vulcan's wholly owned subsidiary, SGR, filed a petition with the U.S. Surface Transportation Board (STB) seeking an exemption under 49 U.S.C. § 10502(b) for authority to construct and operate approximately 7 miles of single track railroad directly connecting the quarry operation to the main line rail intercept near Dunlay, Texas. Although the primary purpose of the proposed construction is to provide rail service to the quarry site, SGR desires to hold itself out as a common carrier and provide service to other industries that might locate in the area in the future. Private citizens own a majority of the land in and adjacent to the easement that SGR will require, as well as lands potentially impacted by the quarry. Many of these private citizens and their neighbors oppose the quarry and its rail line and are members of MCEAA.

On January 22, 2004, the STB determined that the effects of the proposed rail line on the quality of the human environment are likely to be highly controversial, and therefore ordered the

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -3-

preparation of an environmental impact statement (EIS). The current draft EIS scope of study includes direct effects only from the rail line, not from the quarry.

On April 22, 2003, the U.S. Fish and Wildlife Service (FWS) responded to an inquiry from Vulcan's representative. Letter from Robert T. Pine, FWS Supervisor, to Jana Zyman-Ponebshek, URS (Document EI-56). That letter discussed several FWS concerns with the quarry site.

The applicant has prepared and submitted a Biological Assessment (BA), Phase I Medina Project (Aug. 2003), to FWS. SGR's counsel provided it to STB on September 2, 2003 (Document EI-285). This BA covers only the first phase of the Vulcan quarry and is an update of an October 2001 submission that lacked sufficient monitoring data for that phase. Neither BA includes the SGR rail line and its alternative routes or any other phase of the quarry. Biological Assessment, Phase I Medina Project 24 (Aug. 2003) ("This report represents the 'Biological Assessment' for Phase I of the long-term project").

Two listed endangered species that occur in Medina County are songbirds: the black-capped vireo (*Vireo atricapillus*) and the golden-cheeked warbler (*Dendroica chrysoparia*). The vireo nests in Texas mainly during April through July and migrates to Mexico in the winter. To nest, it relies on low woody brush typically cleared or overgrazed by deer and livestock. Vireos return year after year to the same area, approximately 2 to 4 acres in size.

The warbler nests and raises its young in exclusively in the Edwards Plateau region of Texas and migrates annually between there and Central America. It comes to Texas in March and leaves in July. It prefers mixed Ashe juniper or oak woodland that is disappearing due to clearing for development and grazing. Like the vireo, it is an exceptional songbird well known to the landowners in Medina County.

Other listed species appear on pages 11-12 of the August 2003 Biological Assessment.

THE BIOLOGICAL ASSESSMENT MUST INQUIRE WHETHER PROTECTED SPECIES ARE PRESENT FOR ALL PHASES AND ALTERNATIVES OF THE QUARRY AND RAIL LINE

A. Statutory Framework

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -4-

Section 7 of the ESA imposes on Federal agencies the duty to "insure that actions authorized, funded, or carried out" by them do not jeopardize the continued existence of any threatened or endangered species or result in the destruction or modification of habitat of such species which the Secretary of Interior determines to be critical. ESA § 7(a)(2) (2000).

An agency proposing to take an action must inquire of the FWS, as the Secretary's delegate, "whether any threatened or endangered species may be present" in the area of the proposed action. *Id.* If the answer is affirmative, the agency must prepare a "biological assessment" (BA) to determine whether such species "is likely to be affected" by the action. ESA § 7(c)(1) (2000). The ESA specifically provides that the BA requirement can be fulfilled in an EIS as part of the procedural requirements established by NEPA. *Id.*

If, after completing the BA, STB determines that an action may affect proposed or listed threatened or endangered species or their proposed or designated critical habitat, it must formally consult with FWS as the Secretary's delegate. ESA § 7(b)(3)(A) (2000). FWS will then provide STB with a written statement—the Biological Opinion (BiOp)—explaining how the proposed action will affect the species or its habitat. *Id.* If the FWS concludes that such action will result in jeopardy or adverse habitat modification, the BiOp must outline any "reasonable and prudent alternatives" (RPAs) that the FWS believes will avoid that consequence, § 7(a)(2), (b)(3)(A). When the Service offers RPAs, it also issues a written statement (known as the Incidental Take Statement) specifying the terms and conditions under which an agency (and through the agency, the applicant) may "take" the species, § 7(b)(4)(C).

B. *Activities Between FWS, Vulcan, and/or STB to Date Are Not Adequate*

The applicant may also consult with FWS individually, while agency action is still prospective. ESA § 7(a)(3) (2000). Such consultation has the same effect as later consultation with the agency, if FWS makes conclusions consistent with § 7(b)(4). Likewise, if the BA does not "identify[] any endangered or threatened species which is likely to be affected" by the action, the inquiry ceases. ESA § 7(c)(1) (2000).

FWS first became involved with Vulcan's quarry project on June 15, 2000, nearly three years prior to SGR's filing of its petition for exemption with STB, when it sent a letter to Tom Ragsdell of Vulcan to inform him of the potential for the proposed quarry to impact federally listed and proposed threatened and endangered species. This letter takes the place of any "inquiry" to determine "whether any species which is listed or proposed may be present" under § 7(c)(1). FWS also visited the site on April 16, 2001.

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -5-

As early as March of 2002, before a BA with a valid set of monitoring data had even been completed, Vulcan and FWS appeared to reach an understanding concerning the phasing of the quarry and the studies that FWS will require. FWS began by stating that three consecutive years of focused surveys are required to verify the absence of the golden-cheeked warbler and black-capped vireo from the site. Letter from Dawn Whitehead, FWS, to Dr. William J. Rogers, West Texas A&M University ¶ 5 (March 20, 2002), in MCEAA Petition to Revoke Exemption (May 20, 2003).

The letter goes on to pay lip service to the FWS' duty to investigate the entire project.

The [FWS] must consider the impacts of development projects, such as the proposed quarry, in their entirety, and cannot consider the potential impacts of particular phases or segments of a project without taking into consideration the other project phases or project segments. Typically the [FWS] requires that adequate assessments for endangered species be conducted for all phases or segments for a particular project up front, before any habitat destruction or "take" of endangered species is authorized on any part of the project.

Id. at ¶ 6. The FWS then allows the applicant to draw an arbitrary time-line, based on the specter of market conditions, beyond which the analysis cannot pass.

However, given the long life span of the project and incremental nature of potential impacts associated with the proposed quarry project, it would not be prudent for the Service to require surveys over the entire quarry property at this time. Some portions of the quarry property may not be impacted by quarry operations for 10, 20, 30, or 40 years into the future.

Id.; See also Biological Assessment, Phase 1 Medina Project 2 (Aug. 2003) ("similar detailed assessments for the future phases will be performed . . . closer time-wise and consequently more relevant to the actual implementation of that particular phase"). Where the time-line is as speculative as it for this quarry project it is unlikely this analysis would suffice even for a FONSI case where the connection between all the phases of the quarry and the rail project are so clearly interconnected. As MCEAA's February 19, 2004 connected action letter makes clear, this analysis does not apply once an EIS has been triggered. The scope of the action is a connected action, and STB inquiry of FWS, and if necessary, consultation, should proceed accordingly.

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -6-

Sierra Club v. Sigler, 695 F.2d 957, 978-79 (5th Cir. 1983), makes it clear that the proposed rail line does not exist independently of any phase of the quarry. The phases of development will overlap. These phases will not locate elsewhere, away from the rail line or rest of the quarry. While not the rule for all phased connected actions, once this quarry is deemed a connected action, every phase of it will be connected to the proposed rail line, because none of the quarry phases have independent utility with respect to one another. They will all rely on common equipment, a shared crushing unit, and shared personnel and resources. They cannot exist apart from one another or the rail line that will transport at least some of their joint output.

Therefore, an inquiry as to "whether any species which is listed or proposed may be present" on all phases must occur, despite FWS' red herring:

Surveys conducted by Vulcan would expire 3 years after completion, so Vulcan would have to conduct additional surveys at additional expense in the future for those areas not impacted within three years of the initial surveys. If the Service were to require that Vulcan conduct three years of presence/absence bird surveys over its entire property up front, Vulcan may be inclined to immediately bulldoze all areas where no endangered species were recorded, and to maintain those areas in a barren condition to avoid having to conduct additional surveys on those areas in the future.

Id. This completely overblown scenario illustrates FWS' seemingly bottomless and ever-increasing contempt for the Act they are charged with implementing, and raises three issues.

1. Three years of focused counting for threatened and endangered species is required before any activity on the site.

First, according to FWS, three years of monitoring data are required to, at minimum, support a BA that concludes that the golden-cheeked warbler and black-capped vireo are not present at a site. We express no opinion as to whether Vulcan's data and methods constitute "best available scientific and commercial data" under § 7(c)(1). Currently, Vulcan only has data for Phase 1. So, if Vulcan is in such a hurry to bulldoze the entire site, they can just go ahead and sit down and wait the three years it will take for them to gather the monitoring data necessary to support the BA finding of no endangered species on the entire site. Or, if endangered species are found, to support the incidental take permit under ESA § 10 they will need to clear the site. Of course, this is exactly the data required by the scope of the action now being analyzed in an EIS, which includes all phases of the quarry. The screening surveys

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -7-

performed in the purported later phases of the quarry/rail project do not represent the three year focused surveys required to satisfy FWS's requirements. See Biological Assessment, Phase 1 Medina Project 3, 25 (Aug. 2003) (describing progress on quarry phases to date and future plans to follow up on Phase 1 results in other phases).

2. Without three years of focused counting, agency decisions to proceed will be arbitrary and capricious, despite the phasing.

Second, the FWS postulates that Vulcan will have to resurvey the later phases of the project anyhow, so that somehow justifies delaying the BAs for those phases entirely. This is flatly inconsistent with the ESA's prohibition against "take". ESA § 9(a)(1)(B) (2000). While the ESA's consultation requirement extends only to "jeopardiz[ing] the continued existence" of a species, § 7(a)(2), it would certainly be arbitrary and capricious for the agencies to proceed given the nature of FWS' assumptions.

Under the ESA, "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct." ESA § 3(19). In particular, regulations define "harass" as an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. 50 C.F.R. § 17.3 (2003). "Harm" in the definition of "take" in the Act means an act which actually kills or injures wildlife. *Id.* Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. *Id.*

Vulcan has already received an affirmative answer from FWS regarding whether any species which is listed or proposed may be present in the area of the quarry. But Vulcan has only performed a BA for phase 1 of the quarry. Without focused counts "based on the best available scientific and commercial data," it will not be possible to identify "any endangered species or threatened species which is likely to be affected" by the quarry and rail line. The focused count is the method required by FWS and was the method used in Phase 1. It is unacceptable not to maintain it as a minimum requirement for the other phases. While the screening level results may suggest the absence of appropriate habitat, the BA gave those results in Phase 1 no effect before focused counts confirmed them. In the absence of focused counts, FWS cannot guarantee that the applicant will not take a species during quarry excavation and operations, or during rail construction and operation.

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -8-

Underlying the segmentation of the focused count is FWS' baseless assumption that a take will not occur during the phases of quarry excavation and operations, including the rail line. The BA's conclusions on this issue border on the absurd, consisting of only a bald assertion for blasting on page 23.

For instance, two listed endangered species of salamander—the San Marcos salamander and the Texas Blind salamander—may have their potential sinkhole habitat on the property filled, and at minimum impacted by noise, dust, and blasting vibrations. Additionally, there are endangered species of arachnids known to inhabit karst and cave formations in the surrounding area of the projects. Vulcan and FWS have not even conducted more than a cursory screening of the entire quarry site for these species. The BA also acknowledges that, while Vulcan will attempt to avoid jurisdictional wetlands, it may not be able to, nor has it inventoried, studied, or committed to avoid non-jurisdictional, isolated wetlands, such as sinkholes and vernal pools, where these species may be present. Biological Assessment, Phase 1 Medina Project 3, 10 (Aug. 2003). The BA concludes only that “no jurisdictional wetlands were identified” in the study areas. *Id.* at 9.

In addition, the golden-cheeked warbler and black capped-vireo may be present in dense woodland habitat found in purported later phases of the quarry, as well as along the proposed rail line alternatives. *Id.* at 6. It is even clear from the BA that the golden-cheeked warbler exists within auditory proximity to the property line. *Id.* at 15. But while the BA makes much ado about not finding either bird on site during its screening surveys, any conclusion that these species are not present is premature.

3. The ESA requires that consultation inquiry account for indirect effects from the proposed action.

In *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), the Fifth Circuit held that “the relevant consideration,” in whether an agency has “adequately considered” the effects of an action under § 7(a)(2), “is the total impact.” *Id.* at 373. In *Coleman*, the FWS had found that a segment of Interstate 10 in coastal Mississippi would not “jeopardize the continued existence” of the endangered sandhill crane. However, the FWS had neglected to consider the “residential and commercial development that [could] be expected to result” adjacent to the highway” *Id.* The court found that regardless of the non-federal nature of the development, the agency still had a duty under § 7 and “control[led] the development . . . to the extent that they control[led] the placement.” *Id.* at 374.

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -9-

"Irrespective of the past actions of others," the court wrote, the agencies "have a duty to ensure that the highway and the development generated by it do not further threaten the crane." *Id.* Absent that analysis, it would be "questionable whether the crane could survive . . . the indirect effects of the highway." *Id.* at 373.

By implicating "indirect effects," the Fifth Circuit calls for the same level of consultation inquiry used for direct effects to apply to what may fairly be called "cumulative effects" as the term is understood in the CEQ regulations implementing NEPA. See 40 C.F.R. § 1508.7 (2003) (defining "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."). The level, or depth, of inquiry must be the same in order to produce the result compelled by the ESA. As applied in *Coleman*, that was "whether the crane could survive." *Coleman*, 529 F.2d at 373.

As MCEAA discusses in its incorporated February 15, 2004 letter on the scope of the quarry and rail line as connected and cumulative actions under NEPA, a cumulative impact analysis will be required in the EIS regardless of whether the rail line and quarry are otherwise analyzed together as connected or cumulative actions. See MCEAA Connected Action Letter, Part III (Feb. 19, 2004). *Coleman* holds without ambiguity that any BA placed in the EIS must consider all phases of the quarry and rail line. In addition, such a BA must consider the effects now, before operation begins. *Coleman* did not allow the U.S. Department of Transportation to wait around and see what the effects of Interstate 10 and the foreseeable private development around it would have on the crane. In the same way, STB and FWS cannot wait and see what indirect effects blasting and other quarry operations would have on the golden-cheeked warbler or the black-capped vireo. Vulcan concedes that it will have to monitor over the life of the project anyhow—but it is the agencies' duty to analyze today that is at issue.

To date, however, only one portion of the quarry project has been studied consistent with FWS protocols. Significantly, the rail loading yard, where the rail line will enter and connect with the quarry, has not been fully surveyed for the golden-cheeked warbler or the black-capped vireo. In an April 22, 2003 letter, from the FWS to Vulcan's environmental analysis contractor, the FWS noted:

We are particularly concerned about the area noted by STB as the 'straight track loading option'. It appears that the vegetation in this area has not been cleared and may support habitat for one or both of these species.

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -10-

Letter from Robert T. Pine, FWS Supervisor, to Jana Zyman-Ponebshek, URS ¶ 3 (Document EI-56). Further, several landowners in the area report seeing the birds on their property, which will be crossed by the rail line alternatives.

A procedural requirement of the ESA is a substantive violation for which an injunction may issue. *Thomas v. Peterson*, 753 F.2d 754, 764-65 (9th Cir. 1985). The STB cannot simply ignore *Coleman* and adopt the existing BA for Phase I of the quarry. It must require Vulcan to conduct the additional three years of focused study on all phases of the quarry and the rail line alternatives necessary to produce an adequate BA under FWS protocols. Any such BA must be included for comment with the DEIS if it is not used in lieu of a section discussing impacts on threatened and endangered species.

CONCLUSION

In closing, we wish to restate our rationale, and the law's rationale, for requiring a combined analysis of the full scope of these two connected actions in a single EIS and a single BA. The members of MCEAA are willing to be reasonable in the discussion and mitigation of impacts from the quarry and the rail line. What we cannot support is the unlawful taking of land for alternatives whose impacts are never fully studied.

It is obvious from the decision to conduct focused counting for endangered species only on Phase 1 of the quarry—when Vulcan had both the time and the resources since 1999 to conduct counts for the entire quarry and all rail line alternatives—that Vulcan was trying to play it cute, hoping that the future phases of the quarry would lack sufficient “relatedness” under the multi-factor federalization test to fall within the scope of the environmental assessment. Once the blasting started, the later phases would take care of themselves. But the EIS changes that plan. The years of wasted time and the expense that Vulcan will have to incur to conduct focused counting over the next three years are not our fault, nor are they the fault of the Endangered Species Act. Vulcan knew what it had to do and chose to take a risk to do less than what was logically required under the law, regulations and case precedent. Now that Vulcan has dug this hole, the agencies should stop and fill it in rather than help dig it deeper, if they want Vulcan to have any chance of digging a hole at all.

The EIS will not have a valid BA for endangered species until the focused counting occurs over the entire quarry site and rail line alternatives. Three years should give Vulcan and

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

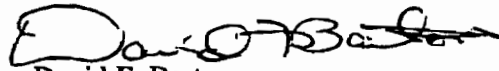
Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -11-

its contractor plenty of time to look for any quarry site alternatives, besides no action, that they may choose to analyze in the combined EIS.

Please place a copy of this letter in the administrative record for FD34284.

Very truly yours,

THE GARDNER LAW FIRM
A Professional Corporation


David F. Barton

DFB:ncf
d/fb/8675.000/ESA_letter02

- cc: Colonel John R. Minahan
Commander, CESWF
U.S. Army Corps of Engineers
819 Taylor Street
Fort Worth, Texas 76102
- cc: Michael P. Jansky, P.E.
Regional Environmental Review Coordinator
U.S. EPA Region 6
1445 Ross Avenue, Suite 1200
Dallas, Texas 75202-2733
- cc: Robert T. Pine
Supervisor
U.S. Fish and Wildlife Service
10711 Burnet Road, Suite 200
Austin, Texas 78758