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March 22, 2005

Ms. Victoria Rutson
Chief
Section of Environmental Analysis
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

**Re: STB Finance Docket No. 34284, Southwest Gulf Railroad Company –
Construction and Operation Exemption – Medina County, TX**

Dear Ms. Rutson:

This will reply on behalf of Southwest Gulf Railroad Company ("SGR") to the January 10, 2005 submission of the Gardner Law Firm, attorneys for the Medina County Environmental Action Association ("MCEAA"). In that submission, MCEAA makes four arguments – (1) the quarry and rail line are connected actions; (2) SEA has failed to consider the cumulative impact of the quarry and rail line on hydrology and flooding; (3) SEA has failed to consider the rail line's cumulative impact on San Antonio railways and roadways and (4) SEA has failed to comply with the Endangered Species Act. We will address each of these points below.

I. The Proposed Rail Line and the Quarry Are Not "Connected Actions"

The main focus of the MCEAA's comments is the reiteration of its previous assertion that the Board should consider the environmental effects of the proposed Vulcan Construction Materials LP ("Vulcan") quarry as part of the Environmental Impact Statement ("EIS") for the seven-mile Southwest Gulf Railroad line. This "connected action" argument permeates not only the comments of the Gardner Firm submitted on behalf of the MCEAA, but virtually all of the other comments submitted by MCEAA and its members and other consultants (Adams Environmental) in this proceeding. Notably, neither EPA nor any other federal or state agency has taken issue with SEA's views of this issue.

MCEAA's comments are flawed for the same reason SGR previously pointed out in its March 10, 2004 letter addressed to you on this matter ("March 10 Letter"). MCEAA ignores the dispositive fact here: that the Board's approval or exemption of the SGR rail line is not an

approval of the quarry, and that the quarry will operate even if the rail line is not approved. Both the Council on Environmental Quality's ("CEQ") regulations and controlling Supreme Court precedent confirm that for this reason, the quarry's own environmental effects should not be considered as direct impacts in the EIS.

A. The Rail Line and Quarry Are Not "Connected" Under CEQ's Three-Part Test

Though MCEAA consumes nearly forty pages to make its argument, its connected action argument is narrow. Under CEQ regulations, actions are "connected" only if they "(i) automatically trigger other actions which may require EISs; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1) (2004). Here, MCEAA never argues that the first two prongs of this test apply. MCEAA has not claimed that the quarry "automatically triggers" another action requiring an EIS, or that it "cannot or will not proceed" unless the Southwest Gulf rail line is approved first. Rather, MCEAA asserts only that the quarry and rail line are connected as "interdependent" actions under the CEQ test's third prong. MCEAA Comments at 8.

There is good reason why MCEAA's assertion is so limited. The quarry plainly passes the first two prongs of the CEQ test. The quarry will not be "automatically triggered" by the Board's approval of the rail line, because the quarry can operate using trucks to haul extracted limestone to local markets and the neighboring Union Pacific line for longer shipments. March 10 Letter at 2. Indeed, SGR provided a number of examples in its May 4, 2004 submission to you concerning quarries similar to Vulcan's Medina County quarry that use trucks to transport their aggregate. That same letter also further detailed the feasibility of truck operations at the quarry if no rail option were available.

For this same reason, there is no claim under CEQ's second prong that the quarry "will not proceed unless" the Board approves the rail line "previously or simultaneously." Not only can the quarry operate without the rail line in place, its operation is increasingly imminent, as discussed in our February 15, 2005 letter to you. SGR recently reported to the Board that Vulcan has received temporary air quality standard permits from the Texas Commission on Environmental Quality, and is in the process of obtaining further environmental permits from the Texas Commission. Once those permits are obtained, Vulcan intends to initiate operations of its temporary rock crusher at the quarry. The stone from these initial operations will be used for preparing for the quarry's long-term operation, and may also be trucked for sale into local markets. See February 15 Letter at 3.

The quarry and rail line also cannot be considered "interdependent" under the CEQ test's third prong. The plain language of § 1508.25(a)(1)(iii) states that for two projects to be "interdependent," they must be "parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1)(iii). This test is not met here. MCEAA has failed to

identify any “larger action” on which the proposed rail line and the quarry “depend for their justification,” and there simply is none. The Vulcan quarry is not part of any overarching development project, but is fully capable of standing on its own fours. “Interdependent” means “mutually dependent,” signifying a *reciprocal* relationship between two entities that rely on *each other*. *Webster’s Third New International Dictionary* at 1177 (1981). The quarry and the rail line are not *mutually* dependent, because the quarry does not rely on the rail line for its existence.

This reasoning is consistent with NEPA. It is settled law that actions are not “connected” for purposes of an EIS if one of the actions will proceed regardless of whether the other receives federal approval. For example, in *Hudson River Sloop Clearwater, Inc. v. United States Department of Navy*, 836 F.2d 760 (2d Cir. 1988), the Second Circuit held that the Navy’s decision to build a battleship pier in New York harbor was not connected to its plan to build military housing to serve the pier. Although the housing would depend on the pier’s construction to be viable, the actions were not connected because the Navy planned to “proceed with the operational aspects of the homeport with or without the housing.” *Id.* at 764.

Likewise, in *Sylvester v. United States Army Corps of Engineers*, 884 F.2d 394 (9th Cir. 1989), the court ruled that the Corps appropriately evaluated the environmental impacts of a wetlands permit it granted for a golf course without considering the impacts caused by the new resort where the golf course would be located. Noting that the developer had already “begun building” the other portions of the resort, the Ninth Circuit found that the “federal and private portions of the project[]”—the Corps’ approval of the golf course permit and the private construction at the rest of the resort—were not “joined to each other.” *Id.* at 396, 400.

And in *Citizens’ Comm. to Save Our Canyons v. United States Forest Service*, 297 F.3d 1012, 1023-24 (10th Cir. 2002), a case highly analogous to this one, the Tenth Circuit held that the Forest Service need not consider a ski resort’s development of a chair lift on privately owned land in its EIS for a different federal action. At issue in *Citizens’ Committee* was the Forest Service’s approval of both a master development plan for the Snowbird ski resort, and a mineral land exchange between Snowbird and the Service. The Tenth Circuit reasoned that because Snowbird “would have developed th[e] area” where it located its chair lift “regardless of whether the [land exchange] occurred,” the Forest Service had properly performed its analysis. *Id.* at 1029; *see also, e.g., Piedmont Heights v. Moreland*, 637 F.2d 430, 437 (5th Cir. 1981) (subway system properly part of no build alternative where subway would be build regardless of proposed highway); *Coalition for a Livable Westside v. HUD*, 1997 U.S. Dist. LEXIS 8860 (S.D.N.Y. 1997) (projects not connected where developer would proceed even if federally-funded project not approved); *Nashvillians Against I-440 v. Lewis*, 524 F. Supp. 962 (M.D. Tenn. 1981).

The quarry and rail line here fit squarely within this long line of cases. Just as in *Hudson River*, the quarry will proceed “with or without” completion of the rail line, because trucking is an alternative if necessary. And just as in *Citizens’ Committee*, Vulcan will develop the quarry “regardless of whether” the rail line is approved. Thus, the quarry’s independence from the rail

line is established beyond any doubt. As SGR pointed out in its February 15 letter: The rail line does not yet exist, but the permitting process is underway for the quarry.

Indeed, the fact that the quarry is likely to begin at least some operations prior to the rail line's construction exposes the illogic of MCEAA's comments to its core. MCEAA asserts that the Board is attempting to "avoid analyzing . . . what would otherwise be a connected action . . . by [address]ing the one that lacks independent utility (the rail line) first." MCEAA Comments at 33. But this reasoning only confirms, not refutes, the propriety of the Board's scope of review: The Board is not "avoiding" any review of the quarry. Rather, the quarry is already proceeding toward functionality without any NEPA review -- by the Board or otherwise -- because no EIS review is required for it to commence operations. See March 10 Letter at 4 n.6. Moreover, to the extent the rail line will cause environmental impacts associated with the quarry, the Board has already begun considering those cumulative effects in the Southwest Gulf EIS.

Thus, in view of the quarry's obvious independence, it is MCEAA that misconstrues the "independent utility" test, not the Board as MCEAA contends. See MCEAA Comments at 9. MCEAA argues that SGR and the Board have erred in concluding that the CEQ's use of the term "action" in its regulations means only "federal action," but this is not what we have said. *Id.* at 30. SGR has not argued that only two "federal actions" may be considered "connected" under NEPA. What matters is that because the quarry is not dependent on *any* federal action, the Board's decision on the rail line simply will not determine whether the quarry proceeds—particularly since the quarry is outside the Board's jurisdiction. Accordingly, the Board's decision to assess only the quarry's cumulative impacts caused by the rail line, rather than the quarry's direct impacts, fully advances NEPA's objectives. The connected action rule was designed to prevent federal agencies from breaking down what should be considered in one EIS into two—not to force agencies to consider environmental effects over which they have no control. See, e.g., *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002) (purpose of connected action rule is to avoid "failing to prepare one comprehensive environmental impact statement" for the federal action in question); *Wetlands Action Network v. United States Army Corps of Eng'rs*, 222 F.3d 1105, 1118 (9th Cir. 2000) (same).¹

¹ MCEAA also argues that "[i]f the rail line has independent utility," its environmental costs must be considered along with any benefits. MCEAA at 34. Of course, while SGR correctly pointed out in its March 10 Letter that the proposed rail line has an independent utility because it improves the area's transportation infrastructure and may be used by other future shippers, see March 10 Letter at 2 n.3, because the quarry is not dependent on the rail line, and because the Board is not considering whether to approve the quarry, it is unnecessary and inappropriate for the Board to speculate about the costs and benefits of potential future uses of the rail line by shippers that might choose to locate along the line at some point. NEPA requires only that agencies consider effects that are reasonably known or ascertainable.

B. The Quarry Is Not an “Effect” of the Rail Line Under *Public Citizen*

As the Board correctly pointed out in the DEIS, the Supreme Court’s recent decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752, 124 S.Ct. 2204 (2004), reaffirms that the EIS scope has been appropriately defined here. In *Public Citizen*, the Supreme Court clarified that where the federal action in question is not the proximate cause of an environmental effect, the agency should not include that effect within its EIS:

[A] “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. . . . NEPA requires “a reasonably close causal relationship” between the environmental effect and the alleged cause[, which this Court has] analogized . . . to the “familiar doctrine of proximate cause from tort law.”

Id. at 2215. Thus, the Court held that because the ultimate authority for allowing cross-boundary truck movements from Mexico belonged to the president and not the Department of Transportation (“DOT”), the DOT had acted lawfully in excluding the air quality impacts of such trucking from its EIS. This was true even though the regulations promulgated by the DOT governed safety licenses for Mexican trucks to operate in the United States. “Where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions,” the unanimous Court wrote, “*the agency cannot be considered a legally relevant ‘cause’ of the effect.*” *Id.* at 2217 (emphasis added).

The Supreme Court’s holding in *Public Citizen* applies with particular force in this case. For the same reason that the quarry and proposed rail line are not “connected actions,” the quarry is not an “effect” of the Board’s action: the quarry will exist with or without the Board’s approval of the rail line. Accordingly, just as the President’s authority over cross-boundary trucking in *Public Citizen* negated any need for the DOT to consider that traffic’s air impacts, the Board need not review the quarry’s environmental effects here because, as an agency charged with addressing primarily matters related to rail carriers, it has no control over the quarry.

MCEAA tries to avoid this result by claiming that *Public Citizen* was an environmental assessment (“EA”) case, and that the test for determining whether a project is “federally related” for EA purposes is irrelevant. See MCEAA Comments at 25. Again, MCEAA flatly misreads the law. *Public Citizen* had nothing to do with whether a private action has been sufficiently “federalized” to demand consideration under NEPA. *Public Citizen* specifically held that where, as here, the agency lacks authority to approve a project, the project’s environmental impacts cannot be considered an “effect” of the federal action. 124 S.Ct. at 2217.

Nor is there any ground for finding that the quarry is a “major Federal action” under NEPA. MCEAA erroneously asserts that SGR has “conceded” that approval of the rail line will “federalize” the quarry as well, but SGR has never made any such statement. See MCEAA Comments at 29. Quite the contrary, the cases referenced in SGR’s March 10 letter only

reinforce the very holding of *Public Citizen* -- namely, that an agency should not consider the effects of an action that, as in this case, is neither caused by the federal action nor subject to the federal agency's jurisdiction.

The Fifth Circuit enunciated this principle in *Save the Bay v. United States Army Corps of Engineers*, 610 F.2d 322, 327 (5th Cir. 1980). There, the court rejected a challenge that the agency had improperly limited its environmental evaluation to the impacts of a discharge permit, rather than also including those of the "massive manufacturing plant" using the permit. The court ruled that, just as the quarry here can use trucks rather than the proposed rail line to haul aggregate, the Corps had acted properly in not assessing the entire facility's environmental impacts, because the plant had "[a]t least one alternative method of discharge, not requiring any Corps permit." *Id.* at 326, 327; *see also South Carolina v. O'Leary*, 64 F.3d 892, 899 (4th Cir. 1995) (analysis properly limited despite fact that approval of shipment of 409 spent nuclear fuel rods preserved ability to continue with plans for subsequent 24,000-rod shipment, because smaller shipment did "not depend upon the viability" of later shipment); *Alliance to Protect Nantucket Sound, Inc. v. United States Dep't of the Army*, 288 F. Supp. 2d 64 (D. Mass. 2003) (even though wind testing tower would facilitate later construction of ocean wind farm, the two projects were not "connected" because tower, built first, did not depend on agency approval of farm for its utility).

Similarly, the Ninth Circuit held in *Wetlands Action Network v. United States Army Corps of Engineers*, 222 F.3d 1105 (9th Cir. 2000), that the Corps had acceptably restricted its environmental consideration to a wetlands fill permit and not the effects of an upland development related to the permit. Because the Corps did "not have independent jurisdiction over the parts of the [upland] development that do not require the filling of wetlands," the court ruled that the development's effects were not caused by the permit: "[T]he project certainly could proceed without the permit and, as the Corps notes, is currently proceeding without the permit. Additionally, the project is not financed by federal money and state and local, not federal, regulations control the overall design." *Id.* at 1117 (emphasis omitted).

Together, these decisions make it overwhelmingly clear that the Board has properly determined to consider only the cumulative environmental impacts associated with the quarry in this case. As the Board noted in the DEIS, the quarry's environmental effects fall under the jurisdiction of Texas and local authorities, and those agencies are addressing the environmental impacts in accordance with the laws they enforce. But NEPA serves to ensure that *federal agencies* "carefully consider" the environmental impacts of their actions, and that the information concerning these impacts are "made available to the larger" public interested in this federal decisionmaking. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). These purposes would not be served by requiring the Board to address the quarry's environmental impacts in the SGR EIS when the quarry is, as the *Public Citizen* court put it, an action that the Board can choose neither to approve nor refuse. *See* 124 S.Ct. at 2216.

II. SEA Has Adequately Addressed Hydrology/Flooding Issues

MCEAA argues that SEA has failed to adequately address potential flooding impacts from the rail line and has instead impermissibly relied on Vulcan's voluntary mitigation measures to address such impacts. This is simply not true. The DEIS reveals that SEA consulted with various federal and other agencies with respect to groundwater impacts (FEMA, Corps of Engineers and Medina County Floodplain Administrator). See DEIS 4-29 through 4-41. Based on these consultations, SEA determined that any of the alternative routes could give rise to some impacts on flooding and stream sedimentation. SEA then determined that a combination of the extensive mitigation volunteered by SGR (in the form of hydrological testing and design studies), and the extensive additional mitigation proposed by SEA (proposed mitigation measures 13-29), would adequately address these impacts.

These proposed mitigation measures address precisely the flooding and related concerns raised by MCEAA, *e.g.*, they require that SGR comply with reasonable FEMA requirements prior to commencing construction activities in the 100 year floodplain; that SGR conduct a floodplain study and coordinate with the Medina County Floodplain Administrator; that SGR obtain any required Section 404 permits from the Corps of Engineers and that SGR use best management practices to minimize erosion and reduce the potential for oil and fuel spills. These and other measures hardly constitute delegation of agency duties to SGR. If adopted, SGR would be required, as a condition to its exemption, to comply with these conditions. (In that regard, MCEAA may be under the mistaken impression that because SGR volunteered mitigation measures -- which is perfectly appropriate in the NEPA process -- that adherence to these measures is voluntary if they are adopted by the Board. That is not true; SGR will be required to adhere to all of the mitigation measures adopted by the Board.

The very cases cited by MCEAA establish that NEPA does not impose on an agency "a substantive requirement that a complete mitigation plan be actually formulated and adopted." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989); *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 176 (5th Cir. 2000). Rather, the agency need only discuss mitigation "in sufficient detail that to ensure that environmental consequences have been fairly evaluated." *Robertson* at 352; *Westphal* at 176. Here, SEA not only discussed the issues in detail, but did in fact propose a detailed set of mitigation measures tailored to address the issues that it raised.

MCEAA also criticizes SEA for failing to assess the flooding impacts that it claims will follow from the development of the quarry. SGR's response to MCEAA's connected action argument addresses this point; SEA is simply under no obligation to assess quarry impacts in its DEIS beyond the cumulative impacts that were thoroughly addressed. Further, SEA's cumulative impacts analysis does address the quarry's impacts on water resources and concludes that the cumulative impacts would not be significant. It also bears note that Vulcan will need to

obtain approval from the Texas Commission on Environmental Quality of a Water Pollution Abatement Plan and stormwater permit before it can proceed with its quarry operations.

While MCEAA asserts that SEA's environmental review of water resources impacts from the rail line and quarry are inadequate, it fails to offer any specific mitigation measures that it believes should have been proposed. The absence of any discussion of specific measures that might be considered underscores that MCEAA's critique merits no extended consideration.

III. Any Impacts of SGR's Traffic on Other Rail Lines is Not Properly Addressed in This Proceeding

MCEAA has presented unsubstantiated information suggesting the routing for SGR's traffic on UP's lines through San Antonio. MCEAA contends that the addition of SGR-originated trains to the traffic already handled by UP on its lines through that City will trip a threshold at one grade crossing in San Antonio (Zarzamora at Merida) that would suggest the need for a grade separation there and that it would add traffic to other grade crossings in the area. MCEAA -- which presented no such data prior to now -- claims that this "indirect impact" should be considered in the Final EIS.

SGR is not aware of any EA or EIS previously prepared by SEA that assesses the impact of a new rail line on traffic handled by the existing rail line to which the new line will connect. The primary reason that SEA does not assess such impacts is the fact that there are too many variables in knowing how the existing railroad will handle the traffic proposed to be generated by the new rail line. For example, in this proceeding, SGR has no way of assessing exactly how UP will route its traffic, whether that traffic will be handled in conjunction with other trains, whether it will route the traffic through any specific crossing, the time of day that the traffic will pass through the crossing, what the level of highway traffic will be at each crossing on the existing line at the time that the new rail line is actually constructed and service inaugurated, etc. For example, MCEAA assumes that all of the SGR trains would traverse through the Zarzamora Street/Merida Street crossing in San Antonio. In fact, according to a UP official responsible for UP rail operations in the San Antonio area,² it is quite likely that at least some of those trains -- handling a percentage of aggregate traffic that would head south toward Corpus Christi -- would exit the UP line that crosses that street prior to reaching that crossing, using a UP line that branches off of the UP line that crosses Zarzamora. Moreover, that same UP official is unaware of any significant crossing delay issues at the Zarzamora/Merida crossing discussed by MCEAA.

Further, not only are there too many variables to allow for meaningful assessment, but were such an analysis undertaken there is no obvious limit to how far to go with it. In other words, if it is appropriate to assess the impacts of the SGR traffic as it passes through San Antonio, then why not "follow" the traffic beyond that City to other points where it might have

² John D. Hopkins, Director of Terminal Operations for UP.

some impact on some grade crossing? The process would prove never-ending, and would quickly become a speculative game of the sort that is not consistent with the purposes of NEPA.

Apart from these fundamental problems with opening the door to the type of assessment sought by MCEAA is the fact that the STB cannot in this proceeding impose mitigation on another railroad in the form, *e.g.*, of requiring that railroad to construct a grade separation at some particular crossing. Simply stated, UP is not a party to this proceeding and thus there is no basis on which any type of mitigation condition could be imposed on it.

Moreover, assessments about the need for separation of grades at a specific crossing are matters properly left to knowledgeable state and federal highway officials who have access to the full range of relevant data and considerations relevant to such determinations. There are elaborate processes in place to assess the need for a grade separation at any particular crossing, and sophisticated analyses are required before any determination can be made about whether or not to construct a grade separation.

The Railroad-Highway Grade Crossing Handbook issued by the Federal Highway Administration describes the type of analysis required to assess the need for grade separation. See

<http://www.fhwa.dot.gov/tfhrc/safety/pubs/86215/86215.pdf> at pages 63-91. According to the Handbook, safety, operational and cost considerations must be analyzed in detail in connection with any decision concerning the separation of rail and highway grades. Further, the Handbook notes (at page 91) that given the difficulty of assessing the costs and benefits of grade separation, these are ultimately matters of engineering judgment, and are not merely (as MCEAA suggests) a matter of simple formula based on the amount of vehicle delay at a specific crossing.

State highway officials are authorized to make these types of judgments, and to do so in consultation with the relevant railroad. Limited public and other resources dictate that a careful weighing process is needed before a decision on grade separations can be made for any particular intersection. Also, engineering assessments of the feasibility of constructing a crossing have to be made before a determination can be made concerning any particular rail/highway intersection. The Texas Department of Transportation is guided in such decisions by Texas Administrative Code § 25.75(b), which provides that, with respect to new crossings, a grade crossing will be allowed provided that, "the crossing will not be unduly hazardous to the traveling public." MCEAA has not shown that SGR's traffic will result in any undue hazard to the traveling public and its unsubstantiated figures and calculations cannot substitute for the work of expert public safety officials on these matters.

Moreover, the State of Texas has just announced an agreement with UP to relocate certain rail lines away from city centers. See the press release at www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2005-03-18.1403 While it is not known what impact, if any, this initiative might have on the UP lines in San Antonio, the initiative underscores that such matters are the proper reserve of government officials and officials from the relevant railroads, in this case UP.

In short, it is not SEA's role or that of the Board to require, as MCEAA has asked it to do, that a grade separation on the line of railroad A be constructed as a result of the NEPA process concerning a line proposed for construction by railroad B. These are matters that are, and should remain, the bailiwick of public transportation officials and officials of the relevant railroad.

IV. SEA Has Properly Accounted for the Endangered Species Act

MCEAA's allegations that SEA has failed to comply with the Endangered Species Act (ESA) in the DEIS are without merit. First, as demonstrated above, the quarry and the rail line are not connected actions. Thus, MCEAA's arguments with regard to the quarry's direct impact are irrelevant. Second, SEA has adequately considered the cumulative indirect impacts of the quarry on endangered species as discussed in the DEIS. Third, SEA has properly considered the potential for the rail line to impact threatened and endangered species in accordance with the ESA.

SEA conducted a review of the species potentially occurring in the quarry area. The US Fish and Wildlife Service (FWS) informed SEA that two federally listed species had a possibility of occurrence in the area—the Black-capped Vireo and the Golden-cheeked Warbler. SEA conducted surveys of the rail line and its alternatives and concluded that neither species was in the area of the proposed rail line and that there was a lack of suitable habitat in the area of the rail line. DEIS at 3-26. MCEAA argues that SEA's actions were not sufficient; however, the mere fact that MCEAA disagrees with the SEA's findings does not invalidate the findings set forth in the DEIS.

MCEAA also claims that the SEA's analysis is inadequate because it does not consider potential impacts from the quarry and from future development along the line. Both claims fail to correctly assess the relevant law or facts.

SEA considered the cumulative impacts of the quarry development on threatened and endangered species, specifically noting that the area within the quarry "could provide suitable habitat." DEIS at 3-26. SEA then considered the biological assessment for the quarry conducted by Vulcan in considering the indirect cumulative impacts of the quarry. MCEAA alleges that Vulcan's assessment is inadequate because of the phased plan accepted by FWS. However, there is no requirement that a biological assessment take a specific form, and the regulations provide for agency discretion. 50 C.F.R. §402.12(f)(1)-(5); *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1215-16 (9th Cir. 2004). FWS is the expert agency for these matters and its determinations are entitled to deference. *Id.* at 1218. FWS believes that the assessment and monitoring plan submitted by Vulcan is protective and, contrary to MCEAA's allegations, FWS's determination is neither arbitrary nor capricious, but is based on the FWS's expertise in the area. Likewise SEA's actions in relying on the agency charged by Congress with expertise in this area is also neither arbitrary nor capricious. Finally, MCEAA's allegations fail to note that when the additional phases of the quarry are opened that the quarry would be subject to the provisions of

Section 9 of the ESA, including the requirements prohibiting the taking of any federal listed species in the area to be developed. 16 U.S.C. §1538.

MCEAA also claims that SEA should consider impacts to the threatened and endangered species from future land development along the rail line, citing *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976). MCEAA's reliance on *Coleman* in this case is misplaced as the facts in *Coleman* are not relevant here. The court in *Coleman* noted that the FEIS for that project stated that private development always accompanies the construction of a major highway and the proposed construction would be in a critical habitat for an endangered species. By contrast, the construction of short rail lines such as proposed here do not consistently bring extensive development. SGR will be a rail common carrier, but if and where additional shippers will locate along the line is unknown at this time. Moreover, unlike *Coleman*, where the proposed alignment would destroy known habitat, neither the proposed alignment, nor the alternatives will impact known habitat. Contrary to the assertions of MCEAA, *Coleman* does not require an agency to consider effects from all potential future development, no matter how speculative, that may occur in some unspecified future time.³

SEA did conclude that there could be some biological impacts and proposed mitigation based on comments from the Texas Department of Parks and Wildlife. Agencies may rely on mitigation measures to reach a no jeopardy determination, if the measures are subject to enforceable obligations. *Selkirk Conservation Alliance v. Forsgern*, 336 F.3d 944, 955-56 (9th Cir. 2003); Here, the Board retains authority to enforce any final mitigation measures it might impose as part of its final decision, assuming that SGR is permitted to construct its line. *Selkirk* at 1219, 1220 (agency's consideration of relevant factors and requirement of specific mitigation were adequate to meet ESA requirements).

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³ The ESA regulations define cumulative effects as "effects of future State or private activities, not involving Federal activities that are **reasonably certain** to occur within the action area." 50 C.F. R. § 402.02 (emphasis added)

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In summary, contrary to the assertion of MCEAA, the relevant law and facts show that the rail line and the quarry are not connected actions and that the SEA has properly considered the cumulative impacts of the quarry in the DEIS and has complied with the ESA. Furthermore, consideration of rail movement on the UP line, a railroad that is not part of this action, is not properly within the scope of this EIS.

Sincerely,

A handwritten signature in black ink, appearing to read "David H. Coburn", with a long horizontal flourish extending to the right.

David H. Coburn
Sara Beth Watson
Lincoln Davies

Attorneys for Southwest Gulf Railroad

cc: Ms. Rini Ghosh
Ms. Jaya Zyman-Ponebshek