

STEPTOE & JOHNSON^{LLP}

ATTORNEYS AT LAW

David H. Coburn
202.429.8063
dcoburn@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Tel 202.429.3000
Fax 202.429.3902
steptoe.com

July 16, 2008

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

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

Dear Secretary Quinlan:

This letter is written on behalf of petitioner Southwest Gulf Railroad (“SGR”) in response to a July 9, 2008 letter submitted by the Medina County Environmental Action Association (“MCEAA”). MCEAA wrote in response to a July 7 SGR letter asking the Board for prompt final action in this proceeding and for some modest modifications of four of the environmental mitigation conditions set forth in the Final EIS issued in this proceeding. SGR will respond here to two issues raised by MCEAA.¹

First, MCEAA argues that the Board should await the completion of a Memorandum of Understanding between SGR and Medina County before issuing its decision. The argument is disingenuous. MCEAA has argued to the County that it should await an STB decision before finalizing an MOU. See attached May 2008 article from Hondo Anvil, entitled “MCEAA Hoping County Will Approve Revised MOU, But Later.” As the headline suggests, MCEAA’s President is telling the County that the MOU might have to be different if the STB does not

¹ To the extent that MCEAA misrepresents the history of this proceeding and its role, SGR will not burden the Board with a response. MCEAA’s opposition notwithstanding, the quarry is moving forward and, with this Board’s authorization, the proposed rail line will likewise become a reality. Both projects in fact have broad local support from business and other leaders in the community, and will bring jobs and opportunity to the area in an environmentally constructive way.

Honorable Anne Quinlan
July 16, 2008
Page 2

allow the railroad to be built, since in that case more road improvements would be required to serve the larger number of trucks that would be needed to serve the quarry. He is quoted as saying that, "To prepare an MOU now, without the all-truck scenario, would be ridiculous." He is also quoted in the same article as stating that, "I just can't see what objection the county judge would have against waiting" – a presumed reference to waiting for an STB decision before completing an MOU.

While arguing to the County that the County should await an STB decision before executing an MOU, and simultaneously arguing to the STB through its counsel that the STB should await an MOU before issuing a decision, MCEAA's strategy of promoting delay or gridlock becomes clear. MCEAA has in fact injected itself into the Vulcan/SGR/County MOU discussions, with the result that the MOU process has been needlessly delayed. It cannot now be heard to argue to the STB that it should await completion of the County discussions.

Putting aside the fact that MCEAA is at odds with itself on the MOU issue, SGR strongly disagrees that a final STB decision on SGR's pending petition for exemption (a conditional grant of that petition has previously been issued) should be tied in any way to whether or not an MOU is ultimately reached with the County. SGR, Vulcan and the County have been in discussions with one another over a variety of issues, including grade crossing safety and road improvements, for many months now. While progress toward a decision is being made, the process has been delayed as a result of many factors, including MCEAA's decision to oppose an agreement that the parties had been negotiating for some months and to inject its own views into the process.

Whether an agreement will be reached, whether it will be approved by the County Commissioners, and when that may happen are all questions to which there is no clear answer at this time. Issues remain to be resolved and, assuming that they are resolved, any agreement that might be reached would then need to be considered by the Commissioners, a process whose outcome cannot be predicted with certainty. Thus, for the Board to await the County process before issuing a decision in this proceeding would put this proceeding into a potential black hole. Doing so is clearly not warranted given the determination already made by the Board in its May 19, 2003 conditional decision finding SGR's proposal consistent with the national rail transportation policy. Moreover, the MOU being discussed with the County does not -- and in light of the Board's exclusive jurisdiction over this proceeding could not -- bear on the question before the Board as to whether SGR's rail line meets the statutory standards for exemption. Nor would any MOU supersede the mitigation conditions recommended by SEA. Indeed, if SEA believed that an MOU with the County was a necessary ingredient for any decision to be issued in this proceeding, it is reasonable to conclude that it would not have issued its Final EIS.²

² As MCEAA notes, SEA had been made aware that discussions were on-going with the County prior to issuing its Final EIS.

Honorable Anne Quinlan
July 16, 2008
Page 3

In fact, certain of the mitigation conditions recommended by SEA in its Final EIS contemplate that SGR will consult with the County *prior to construction*, which SGR is doing through its discussions about a possible MOU. For example, recommended mitigation condition F-4 provides that, “SGR shall consult with Medina County prior to beginning rail line construction regarding the rail line crossing of county roads and shall adhere to Medina County’s reasonable recommendations regarding the design of these crossings.” Other recommended mitigation conditions (F-5 and F-8) require that SGR consult with the County about minimizing vehicular delay during rail construction and about maintenance and repair of grade crossing warning devices. These are among the matters being discussed with the County and that will be resolved (through an MOU or otherwise if no MOU is agreed) prior to construction. There is no reason for the Board to modify these conditions such that these matters would have to be resolved prior to a Board decision, a modification that MCEAA effectively seeks.

MCEAA also takes issue with SGR’s proposed changes to two of the mitigation measures proposed in the Final EIS. One of these is F-31, which as currently written would impose on SGR a water monitoring requirement that exceeds the monitoring SGR will be required to conduct under the NPDES permit that SGR will be obligated to obtain for the rail line prior to construction. MCEAA argues that SGR should be required to monitor for total suspended solids during construction and operation of its line. However, SGR will be required under its NPDES permit to implement various erosion control practices and inspect erosion controls as required by the permit. SGR will also be required to maintain a spill prevention control and countermeasure plan (SPCC Plan). Further, Vulcan will be required by the separate stormwater NPDES permits to be issued for quarry construction and for quarry operations to sample water quality during quarry operations, including at the rail loading loop and at the fueling/maintenance facility. Vulcan will also be required to maintain its own SPCC Plan. In short, the various water quality permit requirements imposed on SGR and Vulcan will satisfy the interests sought to be achieved by recommended Measure F-31. Further, it bears note that there are a total of 25 mitigation measures recommended in the Final EIS that relate to groundwater and surface water. Many of these relate to spill prevention and erosion/sediment control. See, e.g., recommended mitigation measures F-22, F-24, F-26, F-35 and F-43, among others.

MCEAA also finds fault with SGR’s proposed modification of mitigation measure F-61, which concerns monitoring the moisture content of the aggregate prior to transportation. SGR’s modification is simply designed to make clear that wetting the limestone aggregate prior to transportation would be required only where necessary to prevent dust dispersion. This measure thus protects the community interest that is at stake, as do various dust control provisions set forth in the air quality permit issued to Vulcan by the Texas Commission on Environmental Quality. MCEAA’s letter does not explain why SGR’s proposed modification of the moisture monitoring condition would not satisfy the concerns that have been raised by certain members of the community.

Honorable Anne Quinlan
July 16, 2008
Page 4

For the above reasons, SGR urges the Board to move forward to issue a decision in this proceeding and to modify the four mitigation conditions as per SGR's July 7 submission.

Respectfully,

A handwritten signature in black ink, appearing to read "David H. Coburn", followed by a long horizontal flourish.

David H. Coburn
Attorney for Southwest Gulf Railroad

cc: All parties of record
Ms. Victoria Rutson, SEA

MCEAA hoping county will approved revised MOU, but later

By William Hoover
ANNE HERALD CORRESPONDENT

The question on the minds of supporters and members of the Medina County Environmental Action Association is what action will Medina County Commissioners take regarding the county's Memorandum of Understanding with Vulcan Materials Company. The MOU is supposed to delineate Vulcan's financial responsibilities in regard to improving and maintaining county roads, as well as installing, maintaining and upgrading rail crossings for the mining company's Southwest Gulf Railroad.

In anticipation of a possible rail line being built, some landowners in the path of the route have placed covenants on their land prohibiting its use for railroads. This action compelled Vulcan to pursue the power of eminent domain by applying for a federal Surface Transportation Board's license to serve as a public common carrier railroad.

In earlier stages of Vulcan's attempt to open the 1,760-acre quarry, the MCEAA had wanted the county to adopt an MOU as soon as they could to address Vulcan's responsibilities in regard to exacerbating flooding, road maintenance and possible railroad crossings. However, now that the nine-year fight is nearing a climax, with the STB expected to rule on SGR's common carrier status rail permit this year, the MCEAA believes the county should wait. By waiting, the county could tailor the MOU to the specific route permitted by the STB, if any. If STB denies SGR a common carrier license, the MCEAA said the MOU could be limited to Vulcan's responsibility regarding roads and flooding.

At the Medina County Commissioners Court meeting on April 28, MCEAA President Dr. Robert Fitzgerald, the association's lawyers David F. Barton and Brian Pietruszewski, asked the commissioners to allow the organization and public to have the opportunity to review the document and make comments before the court voted on approving the MOU. Barden and the court agreed to wait for feedback before considering Vulcan's MOU. The judge asked MCEAA's legal counsel to review the document and make suggestions regarding the MOU.

Barton and Pietruszewski, of the Gardener Law Firm, reworded several paragraphs in the MOU clearly delineating the burden of responsibility regarding the installation, maintenance and improvement of roads and railroad crossings used for the quarry would be borne by Vulcan and not Medina County taxpayers.

Vulcan project manager Erik Remmert said the revised MOU's requirement for Vulcan to bear the costs for maintaining the county roads

use and railroad crosses is inappropriate because Vulcan would be paying hefty taxes, just like residents do, to have the county maintain roads. However, the MCEAA believes Vulcan's tax income should be used for more than just maintaining Vulcan Quarry's infrastructure, as explained in the revised MOU.

"We have given Judge Barden what he asked for," said Fitzgerald, who has led the fight to regulate Vulcan's local activities since 1999. He wanted our attorneys to point out all the weak spots in the MOU Vulcan and he put together. What we want is a flexible document which will take into account the cost of infrastructure improvements that will be needed in this county over the next 50 years because of the quarry. The quarry's trucks will be utilizing county roads while their trains will be crossing them. We need to protect the citizens and the county and put the burden of the cost where it belongs."

When Vulcan first started pitching the idea of a railroad almost 10 years ago, the MCEAA says Vulcan gave assurances or at least suggested they would build grade-separated railroad crossings. The grade-separated crossings would allow traffic to pass overhead on FM 4676 and CR 4516. It sounded good, but no promises or timelines were written. Now Vulcan says they will build and use regular at-grade railroad crossings until the Texas Department of Transportation tells them traffic conditions require them to build an overpass and create the grade-separated crossings as an added safety measure.

"A Fortune 500 can afford to build overpasses, especially since they make the materials from which overpasses are made," said Fitzgerald. "The company has been making highways for years and they know how much the roads cost, but they want Medina County to be a good neighbor and buy the roads and crossings for them."

Vulcan has high hopes the county court will be generous with taxpayer funds, but the public subsidy would be against the will of the taxpayers, according to Fitzgerald. "The way I look at it, commissioners court is supposed to represent the public who elected them and not private industries," he said. "I just can't fathom the county court representing private industry over the people who voted them into office."

The court's argument that Vulcan quarry will provide added tax income to the county is misguided, according to the MCEAA. They believe no amount of money can compensate for the disruption and lowering of the quality of life that will be caused if a 100 car railroad is allowed to cross local flood plains four times a day, dividing Texas Heritage Farms and

crossing FM 2676 in historic Quihi to reach the 1,760-acre quarry site over the Edwards Aquifer Recharge Zone.

"You can't put a value on quality of life," said Fitzgerald. "Who knows how many trains will be on the tracks in 50 years?"

A new MOU may need to be negotiated if the SGR is not granted a federal permit with the power to condemn land. If the STB then denies SGR a common carrier permit, the county will have wished they focused more on roads, said the MCEAA president. "The growth of the county is going to continue and the commissioners court does not even know where the rail route will be yet, or if there will even be a rail route," said Fitzgerald, who thinks Vulcan should upgrade more roads than just CR 353 as stated in the original MOU. CR 353 is the entry road to the quarry site.

Nothing is lost by waiting, and being patient would avoid having to do things twice, according to Fitzgerald. "If the STB doesn't permit the SGR and give them the power to condemn land, Vulcan said they will operate the quarry using all trucks," he said. "That would mean 1,400 trucks a day--700 going in and 700 leaving with heavy loads. What kind of road improvements will they need for that? You would need a totally different MOU, so why adopt one now? To prepare an MOU now, without the all-truck scenario, would be ridiculous."

If the railroad is not approved on the federal level, Vulcan would need to improve and maintain many more of the county's light duty roads, according to the MCEAA.

"If people have a covenant preventing railroads, they are not going to want 1,400 gravel trucks going (through) Quihi," said Fitzgerald. "So it is important for people to tell commissioners they really should adopt a flexible MOU that takes into account the growth of the county and the growth of the quarry."

According to the environmental organization, Vulcan's SGR railroad is actually a private line and not a common carrier. "It is not (a common carrier) and never will be," said Fitzgerald. "It is a railroad for Vulcan's quarry, period. The Texas Justice Foundation is itching to get a hold of something like this because they really want to reign in eminent domain abuse. We don't have a commitment from (TJF) but every time we talk they say, 'Keep us informed and let us know if they start condemning anything because we really want to hear about that.' And we keep them informed."

Fitzgerald plans to talk with Barden and the other commissioners to convince them of the wisdom of not adopting Vulcan's version of the MOU. "Our lawyers showed the commissioners why Vulcan's MOU is so unfair and

inadequate," he said. "Once it is signed, it is good for 50 years. Vulcan would have excellent legal standing to oppose changing it. And, Vulcan is not going to simply volunteer to build a new overpass."

The newly proposed MOU addresses the same issues but, once national and state standards are met, rail crossings would be required to become grade-separated crossings. "It has trigger points for when Vulcan must upgrade rail crossings, while the original MOU does not," said Fitzgerald. "In our MOU, if they don't do something when required by objective criteria, then we can take them to court and, even if we lose, Vulcan has to pay the court cost."

When the traffic standards are met, TxDOT will require a grade-separated rail crossing on FM 2676, which is a state road. The MCEAA believes the county should have the same standards and requirements for county roads. "We should have equal treatment from our local government equivalent to what TxDOT is giving us in regard to highway safety and protection with railroad crossings," said Fitzgerald. "I just can't see what objection the county judge would have against waiting. We are going to go to all the county commissioners to discuss the MOU with them and try to win their support."

Vulcan, in their MOU, said they are only going to improve CR 353 because that is the only road their trucks will use. "That is crazy," said Fitzgerald. "You know they will go out 354, 351, 252 and probably 251, up towards Bandera. The county says they will put load limits on the road. But, if you talk to a Medina County Sheriff's Officer, who would have the job of enforcement, they say they cannot patrol those roads and keep the trucks off of them. That is absurd to have in the MOU because it is not enforceable. The way the current MOU is, the county taxpayers would pay for an overpass on CR 4516 if it was needed for traffic safety, and that is not fair."

The MCEAA wants to know if the STB told Vulcan they needed some document or agreement with the county commissioners to add to the Environmental Impact Statement, to cover their liability, before rendering a decision on SGR's common carrier status. The EIS was requested by the STB Section of the Environmental Analysis and, after going through a draft and supplemental phase, is now in its final stage of being completed.

Fitzgerald urges anyone interested in a better MOU between Vulcan and the county, regarding maintaining roads and upgrading railroad crossings, to come to the commissioners meeting on Monday, June 9, when the MOU will be discussed.