



David F. Barton
Wm. Richard Davis (Retired)
Jay K. Farwell
Dawn B. Finlayson
Gregory M. Huber
R. Wes Johnson†
Mary Q. Kelly
William W. Sommers
J.P. Vogel
Thomas J. Walthall, Jr.
†Board Certified-Consumer & Commercial Law
Texas Board of Legal Specialization

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Victoria Rutson
Section of Environmental Analysis, Chief
U.S. Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

VIA E- FILING

Charlene Dwin Vaughn
Assistant Director
Federal Permitting, Licensing, and Assistance Section
Advisory Council on Historic Preservation
Old Post Office Building
1100 Pennsylvania Avenue, NW, Suite 803
Washington, DC 20004

***VIA FAX (202) 606-8647
AND REGULAR MAIL***

F. Lawrence Oaks
Executive Director
Texas Historic Commission
P.O. Box 12276
Austin, TX 78711-2276

***VIA FAX (512) 475-4872
AND REGULAR MAIL***

Dear Agency Consulting Parties:

Re: U.S. Surface Transportation Board Finance Docket No. 34384
Southwest Gulf Railroad – Construction and Operation – Medina County, TX
NHPA Section 106 Consultation

Thank you all for your participation in and contribution to the consultation meeting this past Monday in San Antonio.

This letter will serve to restate and amplify the position of our client, the Medina County Environmental Action Association (MCEAA), with respect to the applicant's mitigation proposal for the proposed route, which is the subject of the ongoing consultation.

The issue is twofold: First, because the information is not adequate in its own right to result in a guarantee, MCEAA and the majority of non-agency consulting parties allied with it are going to apply the mitigation hierarchy of avoid, minimize, and mitigate and insist on avoidance given the existence of two eastern alternatives that have been deemed environmentally preferable in the SDEIS.³ MCEAA and the allied consulting parties will essentially apply the precautionary principle.

I brought this out in the meeting when I stated that MCEAA does not support any alternative for any rail line. The eastern alternatives are as good as it is going to get, and MCEAA recognizes that, which is why it concurred with the SDEIS finding that the two eastern routes were environmentally preferable. But it is a fact of life that residents opposed to the general idea of this project are not going to “support” any one route; rather, they will apply a precautionary principle and object least to the routes that are less impacting. In the end, there will never be “support,” but both this firm and MCEAA recognize that there is a difference between political objection and grounds for litigation, and if the mitigation hierarchy is followed, the likelihood of the latter is significantly reduced if not eliminated.

Second, and closely related to this idea of “support,” is the idea now being pushed by Vulcan/SGR in the reinitiated consultation that some guarantees can substitute for information and result in support. This is what Vulcan/SGR is selling the agencies, most specifically the Advisory Council (ACHP) and the Texas Historic Commission (THC). What MCEAA and the majority of non-agency consulting parties said at the meeting on Monday was first, “What standard are these tradeoffs being made under?” and second, “We aren’t buying, because we’ve already got a better deal.” Thus, while it may have been frustrating to THC and ACHP that MCEAA did not come out and express “support” for one route over another, even if it was not the Vulcan/SGR Proposed Route, from MCEAA’s perspective there is no reason to try to reach consensus on the Proposed Route at all. The agencies could sign an agreement for one of the eastern routes tomorrow, but regardless of whether MCEAA would “support” that agreement, that’s not what the purpose of the meeting Monday was. Monday’s meeting was to determine whether the consulting parties could reach consensus on the Vulcan/SGR Proposed Route in such a way that any agreement could be negotiated specifically for that route, which, it would be understood, would ultimately be the route constructed. The bottom line is that the agency consulting parties should not be concerned with whether MCEAA will “support” a NHPA agreement for the eastern routes; rather, they should be paying attention to the fact that very few of the non-agency consulting parties seem to support doing anything more with the Vulcan/SGR Proposed Route at this time.

In light of these facts, the more Vulcan/SGR insists on the Proposed Route, the more process and more delay there will be, regardless of any action taken by MCEAA. That result is compelled by where the process stands at this point, and, as we noted earlier,

³ The record demonstrates that the two eastern alternatives are reasonable and feasible and the agency would easily be upheld in any challenge to the contrary.

the facts on the ground and the position of a majority of the non-agency consulting parties is not going to change.

II. The “cost” of overcoming avoidance in the mitigation hierarchy is a very high one.

To continue for a moment with the idea of bridging the gap between information and guarantee in the previous section: The agencies should consider that it may well be impossible to provide a sufficient guarantee to resolve adverse effect without the type of final design information that the applicant and the agencies deem so onerous. That is something that it may be difficult to see from the inside of the process, much like an observer affects their observation in physics. However, it is clear that if a process is set up that permits the applicant to proceed on the basis of less than final information, there is a corresponding introduction of uncertainty into other decisions and analyses contingent on that information. Thus it may well be that the price of overcoming the environmental and historic advantages of avoidance in the mitigation hierarchy is a price that the applicant is unwilling to pay. If I were making an economics of the law argument, I would further point out that this result is entirely rational, despite not being preferred by Vulcan/SGR, given the existence of two viable eastern alternatives likely to be licensed whose cost differential relative to the Proposed Route is less than the cost of final design on the Proposed Route.

Cost, as we pointed out, is not an appropriate consideration at this point in the process. If Vulcan/SGR wants to take it up at final argument before the Board, that is its prerogative, but it has no place in the NHPA consultation. What is significant, however, is that this threshold agreement by NEPA/NHPA agencies to allow applicants to save money and defer final design is now playing out its logical consequence, which is, the information cost of overcoming avoidance in the mitigation hierarchy is a very high one.

Further, this information burden is one that, given the record in this case and the conclusions of the SDEIS in particular, the ACHP, STB-SEA, and THC cannot suddenly lower at this stage by putting the blinders on and signing off on the Proposed Route if Vulcan/SGR makes enough promises and pays enough money. There must be a connection between the information on impacts and the mitigating promise; there must be a connection between the promise and an enforceable guarantee; and collectively these guarantees must overcome the adverse effects of the Proposed Route and the advantages of avoidance, which they will not.

III. Consultation on the Proposed Route should be terminated after Vulcan/SGR’s follow up submission.

The situation that the consulting agencies, particularly THC and ACHP, face now with their information requests is an intractable one. The issue we believe was correctly stated by THC at the meeting is whether the design features can be mitigated. Yet the consulting parties do not have, and the applicant does not intend to provide, design detail that could overcome the preference for avoidance in the mitigation hierarchy. The result is

an endless spiral that ironically, Vulcan/SGR, the party that continues to push the Proposed Route, complained about. It seems to MCEAA that a guarantee of avoidance must be matched, as a practical matter, with a guarantee of similar certainty—not an estimate, not a back of the envelope, not a “trust us.” The danger is that any decision to form an agreement regarding the Proposed Route, which will not be supported by MCEAA or a majority of the non-agency consulting parties, will be taken on a standardless basis, because guarantees of similar certainty cannot be provided due to the assumptions and state of the information in the record.

Vulcan/SGR of course, offers promises in lieu of additional information. But as a practical matter, the lens anyone reviewing this project will be looking at it through, if it is ever reviewed, is the lens of “Why was the Proposed Route chosen over the environmentally preferred eastern routes?” That seems to go directly to whether the licensing agency and consulting agencies have adequately dealt with uncertainty over adverse effects from the Proposed Route, which was (in part) the issue in a case remanded to the STB in 2003. What MCEAA is saying is, you all can start down that long, arduous road for the Proposed Route in another consultation process, but the facts of impact along the Proposed Route are not going to change and are not going to be resolvable through that process.

Because the facts on the ground and the position of a majority of the non-agency consulting parties is not going to change, termination of consultation on the Proposed Route is warranted per 36 C.F.R. 800.7(a). The adverse effects of the Proposed Route are largely unmitigable, and the mitigation hierarchy of avoid, minimize, and mitigate should be applied. Reasonable and feasible alternatives exist that satisfy the mitigation hierarchy and which the licensing agency has deemed environmentally preferable, with the SHPO’s concurrence. The conclusions of the licensing agency’s SDEIS on these points is supported by a rational basis and will likely be upheld.

Very Truly Yours,

THE GARDNER LAW FIRM
A Professional Corporation


David F. Barton

COUNSEL FOR PARTY
MEDINA COUNTY ENVIRONMENTAL
ACTION ASSOCIATION