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Texas Board of Legal Specialization

October 2, 2008

Victoria Rutson
Surface Transportation Board
Case Control Unit
Washington, DC 20423
Attention: Victoria Rutson
STB Finance Docket No. 34284

VIA E-FILING

Dear Ms. Rutson:

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

On behalf of my client the Medina County Environmental Action Association (“MCEAA”), I have conferred with senior personnel from the U.S. Fish and Wildlife Service (“FWS”) in light of your recent memorandum to the Board and Director of Proceedings urging the issuance of a final decision in this case. EO-1035 (Sept. 9, 2008).

With respect, the facts of the situation are not as represented in your memorandum, according to the FWS senior staff I have conferred with. The FWS position in this case has not changed from requiring the entire 1700 acres to be surveyed prior to the commencement of construction. Indeed, FWS senior staff stated that the agency “prefers not to piecemeal” such projects, “does not condone” what has been proposed by Vulcan/SGR here, and “always frowns upon that.” The situations where phasing has been permitted, it was explained, were limited to a genuine change in circumstances or situations where lack of resources prevented FWS from “ground truthing” the information received in an applicant’s environmental reports, essentially tacitly permitting the applicant to violate the law.

Here, it is undisputed that Vulcan/SGR will use and transport material from the entire 1700 acres. The noise, vibration, and lighting from initial phases of operation, the rail line and loading area, and the plant site will undeniably affect habitat and species in phases to be developed later, as well as surrounding properties where habitat exists and where species have been observed and noted. The Biological Assessments in the record indicate that Vulcan/SGR's own environmental consultants have "heard" endangered golden-cheeked warblers on adjacent properties. In addition, John Kennerly, the resident owner of the property immediately to the north of the quarry site, has seen, while accompanied by two other persons who corroborate his account, endangered golden-cheeked warblers on the road leading to his property, approximately 1/4 mile from the quarry site boundary. FWS has documented endangered species habitat on the Kennerly property.

Vulcan/SGR's stated intent to utilize the entire 1700 acres for its project makes phasing of endangered species studies inappropriate and illegal given the record evidence of habitat in and adjacent to the action area.

I further disagree with your statement that a "favorable determination is forthcoming" from FWS based on an August 26, 2008 phone call with SEA. The senior staff I spoke to were not a part of that phone call. They stated to me that the review process of what has been done and what is still required to be done at the site is ongoing. The "favorable determination" previously promised is subject to being overruled pending the outcome of that review.

MCEAA disagrees with the memorandum's conclusion that the STB's ESA consultation and NEPA responsibilities with respect to biological resources/endangered species have been satisfied. Based on prior correspondence pointing out the requirement of cumulative analysis, the legal implications should be obvious. E.g., EI-8398, EI-602.

The STB may think it can do a segmented, piecemeal analysis restricted to the rail loading loop and leave the implications of ESA compliance at the rest of the site to be resolved between Vulcan/SGR and FWS at some future date. It cannot. Regardless of whether Vulcan/SGR can be independently restrained from commencing construction by *its* ESA obligations under ESA section 10, that does not mean the STB has completed *its own* under ESA section 7 and NEPA.

I hereby verify that facts stated herein are true and correct to the best of my knowledge based on my conversations with senior FWS staff.

Very truly yours,

/s/

David F. Barton
COUNSEL FOR MCEAA, INC.