

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34284

**SOUTHWEST GULF RAILROAD COMPANY
CONSTRUCTION AND OPERATION—MEDINA COUNTY, TX**

MEDINA COUNTY ENVIRONMENTAL ACTION ASSOCIATION

Comments on the Supplemental Draft Environmental Impact Statement

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I. THE PREFERRED ALTERNATIVE

The Medina County Environmental Action Association (MCEAA) is encouraged by the finding of the Supplemental Draft Environmental Impact Statement (SDEIS) that two of the three eastern alternatives are “environmentally preferable.” It is clear that one of these two alternatives will ultimately be chosen as the preferred alternative in the Final EIS, per 40 C.F.R § 1502.14(e).

The analysis of the SDEIS further shows that the MCEAA Medina Dam Alternative consistently rates as the least impacting alternative across nearly all impact categories, and particularly for those impacts most likely to be adverse, including but not limited to flooding, land use, cultural resources, and transportation and traffic safety.

For those reasons, further discussed below, the Section of Environmental Analysis should adopt the MCEAA Medina Dam Alternative as the preferred alternative in the Final EIS.

However, MCEAA is under no illusions regarding how the STB sees the balance of power between communities and paper railroads such as Vulcan’s. The STB, not Congress, has made a fundamental policy choice to grant construction and operation licenses to paper railroads, without fully considering or acknowledging some of the ramifications of that choice. *See extended discussion*, MCEAA DEIS comments at 13-19. The result is an extension of corporate leverage over communities far beyond that necessary to achieve market benefits. *Cf.* Surface Transportation Board News Release, Dec. 20, 2004, Statement of former Chairman Roger Nober (“Where shippers want rail competition, rail construction proposals continue to provide the opportunity both to

construct *and to negotiate based on the right to construct.*”) (emphasis added). Indeed here, there is no competitive service benefit, because there is only one market participant, and, as the project is currently structured and will likely remain for the foreseeable future, only one proposed operator, which is the same entity.

Nevertheless, through these comments MCEAA will foreclose any argument by Vulcan for the STB to select multiple alternatives, including Vulcan’s original Proposed Route, in the licensing decision, per the result in Finance Docket No. 34435, *Ameren Energy Generating Co.—Construction and Operation Exemption—in Coffeen and Walshville, IL* (Feb. 17, 2006). That type of result would skew the positions of the parties such that the actual citizens of the project area would be forced to give up additional leverage in order to achieve a result that had already been designated as the preferred alternative back in the Final EIS. That will not occur. A lawsuit which might not otherwise be necessary will be filed to stop it if it does. MCEAA will not trade present leverage for the applicant’s future promises, and will litigate any licensing decision that approves the Proposed Route, because that alternative, unlike the environmentally preferred alternatives, has significant adverse impacts that cannot be mitigated. For many reasons, not least being the contents of the SDEIS and the County’s desire to agree on mitigation based on the preferred alternative identified in the Final EIS—which will be one of the eastern alternatives now shown as environmentally preferable in the SDEIS—the Proposed Route is now effectively off the table.

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To make it unmistakably clear to the three STB members who ultimately review this record:

Vulcan may want you to allow them to build the Proposed Route as one of the options of any license that is ultimately granted. MCEAA's position is that the Proposed Route has significant impacts that cannot or have not been adequately mitigated. The Section of Environmental Analysis and Vulcan currently, at the time of the SDEIS, appear to say that the Proposed Route can be or has been adequately mitigated. A decision along the lines of the result in *Ameren*, allowing the Proposed Route, forces the community to give up present leverage, whereas the applicant need only give up its future promises to mitigate adverse impacts on its Proposed Route. *Those future promises cost the applicant nothing*, yet under an *Ameren*-type result, the community is expected to give up present leverage just to secure a benefit that your own Section of Environmental Analysis has already identified as preferable.

Your counterpoint may be that NEPA does not guarantee a substantive outcome. That is true. However, you can also make a decision instead of punting to the applicant or the courts.

Look at what really happened here. To appease the landowners agreeing to lease the quarry to it, who reside to the east, the applicant originally proposed an alignment to the west (Proposed Route), over land owned by persons without a stake in the quarry. Thus, the applicant proposed to the quarry lessors that they could have their cake and eat it too, by pushing all the transportation costs off on their neighbors, which must have seemed like a good deal when the quarry leases were signed. After the objections of the western landowners were raised, it was found that this original route had several problems, including floodplain and cultural resource impacts, that were going to require a good deal of cost to mitigate, if it was even possible to do so. All this time, the applicant moved to cut off discussion of routes to the east, in part to protect the lessors' interests. Finally it was shown, and your own Section of Environmental Analysis agreed, that eastern routes were feasible. Lo and behold, the supplemental draft EIS showed that two of the eastern routes (MCEAA Medina Dam Alternative and SGR Eastern Route) were reasonable, feasible, had fewer impacts and were environmentally preferable. The state agency with oversight over one of the major impact areas, the Texas Historic Commission, has expressly concurred with the selection of preferred alternatives in the supplemental draft EIS issued by your own Section of Environmental Analysis, and has rejected the applicant's offer of mitigation money in exchange for support of the Proposed Route.

By licensing the Proposed Route, you would likely force us to repeat the process above, even though the facts will not change, in a later resolution of this case, and to pay twice for it.

In this case, the applicant also thought it could have its cake and eat it too. The Proposed Route was shorter and appeared cheaper, and no doubt helped sway the would-be quarry lessors. Part of the true cost of the applicant's choice is shown in the additional mitigation needed for the Proposed Route, but the economically efficient result would be to avoid those costs entirely and allow the applicant to use that money for more beneficial purposes. To the extent the applicant argues that the eastern routes have costs of their own, such as greater length, the alleged burden of those costs *now*, which do not offset the costs of mitigating the original Proposed Route, could have been avoided by making a wiser choice at the start. The applicant's costs to date—such as property acquisition, which is entirely recoverable—and psychological investment in the Proposed Route are absolutely irrelevant now. The cost of ill-advised prior decisions cannot be used to offset or allege that it would now be a bad or unduly costly idea to do what the record before you shows would have made the most sense from the start.

Finally, the Medina County Judge has stated to STB his desire to work out mitigation once a preferred alternative is selected. EI-2561 (Oct. 13, 2006). The County's mitigation will address specific road and crossing issues tied to a specific route—which the County Judge has identified in his letter to you as whatever the final preferred alternative is. This illustrates yet more work that a decision by the Board to license more routes than the Final EIS preferred alternative would undo. What possible justification is there for you, in Washington, DC, to overturn the County's good-faith efforts to negotiate mitigation? And what good comes of preventing those efforts, intended so that such mitigation can be binding and implemented with the license instead of potentially preempted after it, by your giving the applicant the final say in the route selection? None.

For these reasons, the licensing decision should be restricted to the preferred alternative identified in the Final EIS.

II. THE SDEIS DEMONSTRATES THAT THE MCEAA MEDINA DAM ALTERNATIVE SHOULD BE THE PREFERRED ALTERNATIVE IN THE FINAL EIS.

40 C.F.R § 1502.14(e) requires the agency to identify its “preferred alternative” (singular) “in the final statement.” As the SDEIS amply demonstrates throughout, the least impacting alternative is the MCEAA Medina Dam Alternative. In general, with some exceptions, MCEAA is pleased with the increased level of detail and increased level of discussion exhibited by the SDEIS. In addition, the mapping and comparative presentation of alternatives has improved noticeably from the DEIS and reflects a level of effort in those areas that deserves high praise and future emulation.

The SDEIS shows that MCEAA Medina Dam Alternative is the least impacting alternative in the following key impact categories, among others:

1. Length of Floodplain Crossed

The MCEAA Medina Dam Alternative crosses streams higher in the floodplain, where they are of lower stream order (a proxy for flow). As a result, it crosses less floodplain, causing any cut, fill, or bridge work to have far less impact on runoff and flood routing in what has been shown to be a flood-prone area, particularly further down in the watersheds where the other alternatives cross. The DEIS and SDEIS do not contain any mitigation conditions that would require span type bridges or that would otherwise guarantee zero increase in or significant modification to the floodplain from bridges, earthwork, cuts or fills. In the absence of such conditions, adverse impacts are certain and floodplain avoidance is the only remedy.

2. Acres of Prime Farmland Soils Impacted

The MCEAA Medina Dam Alternative impacts the fewest number of acres of irrigated and other prime agricultural land, which currently serves as the major economic activity in the project area. Combined with proposed mitigation condition 5A (regarding the replacement of any irrigation system that would be severed, or the realignment of the line to accommodate that system), the MCEAA Medina Dam Alternative will have the least impact on existing

economic productivity, by retaining the maximum acreage of prime soils available for agriculture.¹

3. Number of properties crossed

Also significant is the fact that the MCEAA Medina Dam Alternative would cross fewer properties than every other route, equaling Vulcan's Proposed Route. Vulcan's premature investment in properties along its Proposed Route is irrelevant and completely recoverable. It is important from a land use standpoint that the environmentally preferable MCEAA Medina Dam Alternative is no more disruptive than Vulcan's Proposed Route, as the SDEIS documents.

4. Acres of Rural Historic Districts crossed

As the Section of Environmental Analysis correctly noted in the SDEIS, the three historic districts "are a significant resource in the project area." SDEIS at 6-42. The eastern alternatives "would cause fewer impacts to cultural resources and would not traverse the boundaries of the Quihi Rural Historic District." *Id.* Avoidance of these significant features is certainly an adequate and independent ground to find the eastern alternatives environmentally preferable to the four central routes studied in the DEIS, as the historic studies in Chapter 5 and Appendix F demonstrate, and as the Section of Environmental Analysis correctly found, in this SDEIS. Table 5.3-9 of the SDEIS finds that the MCEAA Medina Dam Alternative has the lowest ranking of cultural resources impacts of any alternative. This low ranking is extremely important because it is based on impacts to the historic districts in the project area as a whole, without favoring any one building or site. Such an approach is appropriate here, where there are numerous sites and features in need of preservation and/or restoration. As future development occurs, the odds of, and opportunities for such preservation and restoration, through purchase, investment, governmental protection, and donation, increase greatly if the historic districts are disrupted as little as possible by this new industrial use and kept intact.

MCEAA would only add that the other three impacts described above are also significant and provide additional grounds to support the finding that eastern alternatives are environmentally preferable to the central alternatives. The four factors above,

¹ In light of these facts and those in the paragraph immediately following, the Texas Farm Bureau's recent letter supporting the Proposed Route is revealed for the transparent buy-off that it was. As with other impacts, including flooding and cultural resources, merely crossing fewer properties does nothing to eliminate the more significant impacts of the Proposed Route relative to the eastern routes.

together with others described herein, also render the MCEAA Medina Dam Alternative superior to the SGR Eastern Route. What is most important from a comparative standpoint is that the flood risk is eliminated, the economic impact to existing agriculture and property is minimized, and the integrity of the Rural Historic Districts is preserved. The MCEAA Medina Dam Alternative does those things and more to a degree that no other alternative can match. The MCEAA Medina Dam Alternative also crosses fewer Farm-to-Market and County roads than any of the eastern alternatives, and does so in safer locations.

Relative to the SGR Eastern Alternative and Proposed Route, the MCEAA Medina Dam Alternative has greater impacts, and then only marginally, in impact categories where all of the alternatives have a negligible impact to begin with in the first place. Thus, unlike flooding, economic and property impacts, and cultural resource preservation, the fact that operating the locomotives over the MCEAA Medina Dam Alternative produces a 0.2 ton per year increase in emissions of particulate matter (PM) means little when PM emissions from all of the rail alternatives are well below significant levels. The Section of Environmental Analysis has correctly determined that the marginally longer length of the eastern alternatives (2-3 miles) is not a distinguishing factor in their environmental impact. SDEIS at 6-42.

Similarly, the fact that the MCEAA Medina Dam Alternative would displace 16 more acres of habitat than the Proposed Route does not translate into a clearly more adverse impact, given that the habitat to be cleared is relatively common in the project area. Assuming for the moment that the representations that have been made with respect to the lack of potential for endangered species are true, the impact is still insignificant.

Likewise, the aquatic resources impacted by the MCEAA Medina Dam Alternative are primarily isolated man-made stock ponds and are likely not subject to substantial regulatory requirements, if any.

III. THE APPLICANT'S ORIGINAL PROPOSED ROUTE HAS ADVERSE IMPACTS THAT CANNOT AND/OR HAVE NOT BEEN ADEQUATELY MITIGATED

As the DEIS acknowledged, construction and operation “would have adverse effects to cultural resources within the areas of potential effect of all of the potential rail alignments” that comprise the four central alternatives studied in that document. DEIS at 4-117 (discussing unavoidable adverse impacts). These impacts “could not be completely mitigated by the measures set forth in [DEIS] Chapter 5 [Mitigation].” *Id.*

A. *MCEAA Agrees That A Supplemented Draft Programmatic Agreement Should Be Circulated to Consulting Parties*

It is still unclear at this time whether the old Programmatic Agreement contains adequate mitigation for the environmentally preferable eastern alternatives, much less the central alternatives, and MCEAA discusses that issue further elsewhere in these comments. By “old” or “draft” “Programmatic Agreement,” MCEAA is referencing the draft document created pursuant to Section 106 of the National Historic Preservation Act and contained in Appendix I-3 of the DEIS. That draft was completed before the extensive studies contained in Appendix F of the SDEIS, and now obviously requires updating.

The DEIS states that the draft Programmatic Agreement at that time would address the greater impact on cultural resources caused by the central alternatives, but more is known about the extent of cultural resources now, due to the SDEIS, than at the

time of the DEIS. Thus, the SDEIS correctly states that development of a new Programmatic Agreement will occur. SDEIS at 5-45.

The need to redo the Programmatic Agreement is a frustrating example of the consequences of poor choices by the applicant at the beginning of this process. A Programmatic Agreement must address the entire area of proposed effect, and must essentially, as MCEAA understands it, treat all alternatives fairly such that the adverse effects from all potential alternatives are resolved. In other words, it appears that the new Programmatic Agreement cannot assume that the preferred alternative in the Final EIS, or even the two environmentally preferable alternatives in the SDEIS, will ultimately be the only ones licensed.

It is clear from the proportionally greater impact on cultural resources caused by the central alternatives that any portion of a new Programmatic Agreement addressing those areas affected by those routes would have to contain more avoidance, minimization, and mitigation measures than the portions of the new Programmatic Agreement that address the preferred eastern alternatives.

Yet the whole point of resolving adverse effects is to develop alternatives that avoid, minimize, and mitigate the impacts, which brings the process full circle. Unless it is possible for the Programmatic Agreement to focus solely on the preferable eastern alternatives, the entire revision may be a moot exercise if the three STB members add insult to injury and decide to license one of the central alternatives, such as the Proposed Route, in addition to a preferred eastern alternative. The SDEIS clearly concludes that the best way to reduce impacts is to avoid the historic districts, so what is the point of preparing an Agreement that contains, in part, heavier mitigation in the event that

avoidance does not occur? At some point, the priority of avoidance over mitigation has to intervene. No one at the Corps of Engineers goes around saying, “Well, we’ve got 400 acres of wetlands that you could reasonably and feasibly avoid, but I guess if you bank 400 man-made ones over in the mitigation bank we’ll call it a wash and you can have the permit.”²

The nature of much of the adverse impact³—aesthetic and visual—compels the conclusion that avoidance is the priority remedy, followed by minimization, followed by mitigation. We do not see any evidence of the latter in the old draft Programmatic Agreement. Mitigation for aesthetic and visual impacts is by nature compensatory, and the old draft Programmatic Agreement makes no such commitments. Rather, the old draft Programmatic Agreement purports to set out a framework to resolve adverse effects of all kinds. In reality, however, if aesthetic and visual impacts are going to occur and are going to be resolved, they will be resolved no differently now (i.e., through avoidance) than they will be later, because the scale of the impacts extends over wide areas of the historic districts that some of the less preferable alternatives bisect. In other words, the remedy can be accomplished now, and there is no reason for it not to be.

² And though the National Historic Preservation Act is a procedural statute, it is now clear that Courts are requiring procedural compliance with the obligation to resolve or at least guarantee (through a programmatic agreement) the resolution of adverse effects in their entirety. *Mid States Coalition for Progress v. STB*, 345 F.3d 520, 554 (8th Cir. 2003).

³ MCEAA notes that there are other components of the adverse impact not stated in the SDEIS but which may yet be stated in the Final EIS, including flood risk due to the amount of floodplain crossed by each alternative. In addition, all four of the DEIS alternatives would bisect the state-designated Gerdes Family Land Heritage Ranch, whereas neither of the two SDEIS environmentally preferred alternatives are known to have such impacts.

If, on the other hand, the remedy is deferred so as to not inform the selection of alternatives, it undermines the entire SDEIS finding of an adverse impact to cultural resources by the central alternatives. It is difficult to see under that latter scenario what could be done to mitigate the adverse impacts later, because the old draft Programmatic Agreement proposes no such mitigation. The result under the old approach is a daisy chain of processes purportedly resolving adverse effects that still leaves the ultimate decision of how to address the impacts in the hands of the applicant, which is impermissible, because it does not actually resolve the adverse effect. Instead, it leaves the applicant in exactly the same position they were in at the start of the licensing process.

In sum, MCEAA believes that the timing of the SDEIS and its finding that only the MCEAA Medina Dam Alternative and SGR Eastern Route are environmentally preferable present a unique opportunity to focus the Programmatic Agreement on those two alternatives going forward, without the need to address substantial additional mitigation that the central alternatives from the DEIS would otherwise require.

B. Other Selected Adverse Impacts From the Proposed Route

1. Texas FS gas pipeline

The Proposed Route operates on top of or immediately parallel and adjacent to the active Texas FS gas pipeline for several hundred feet. The dangers of co-locating rail lines and active pipelines have been documented by the railroads themselves,⁴ and it is

⁴ See Finance Docket No. 34079, *San Jacinto Rail, Ltd.—Construction and Operation Exemption—Build Out to the Bayport Loop, TX* (Union Pacific response to discovery request of Galveston Bay Conservation and Preservation Association) (Powerpoint presentation entitled “Utility Lines v/s Railroads”).

not desirable for the agency to license such practices when other alternatives are available.

2. Flooding

The floodplain impacts from the central alternatives are further discussed in our previous letters, contained in Appendix B-2 of the SDEIS. These impacts are extremely adverse and are not addressed by the proposed mitigation, which merely defers analysis to the applicant at a post-licensing date. Unresolved floodplain impacts are one of several adequate and independent reasons why the STB should not license the applicant's Proposed Route.

IV. SELECTED CONTINUED OBJECTIONS AND PROBLEMS WITH ANALYSIS

A. *Vibration*

It is well settled that excessive vibration can damage groundwater wells and other types of subsurface wells. *See e.g., Stafford v. Thornton*, 420 S.W.2d 153 (Tex.App.—Amarillo, 1967); *Comanche Duke Oil Co. v. Texas Pac. Coal & Oil Co.*, 298 S.W. 554 (Tex.Com.App. 1927); *Bennett v. Texas-Illinois Gas Pipeline Co.*, 113 F.Supp. 788 (E.D. Ark. 1953) *and cases cited therein*; *Piorkowski v. Liberty Mut. Ins. Co.*, 228 N.W.2d 695 (Wis. 1975); *Ziegler v. Wonn*, 118 N.W.2d 706 (Wis. 1963); *Marigold Coal, Inc. v. Thames*, 149 So.2d 276 (Ala. 1963); *Hoyt v. Amerada Petroleum Corp.*, 69 So.2d 546 (La. App. 1953).

Because it repeated the DEIS methodology on this issue, the SDEIS makes the same conclusory statement regarding vibration from the quarry not leaving the quarry boundaries and overlapping with vibration impacts from the rail line. It is not necessary for the rail and quarry vibrations themselves to occur simultaneously. Rather, the issue is

the cumulative effect of that vibration over time on the integrity of subsurface wells in the project area. It is obvious that the issue has not been addressed so far.

B. Noise

A similar objection to the one for vibration applies to the noise analysis. Subject to and without waiving this objection, MCEAA agrees with the SDEIS mitigation condition that would reduce, to the point of minimization or outright avoidance of, any significant noise impacts from the rail line by adjusting the alignment. MCEAA asserts, however, that this condition must have a guarantee written into it such that any adjustment to the alignment must result in the noise impact falling below the level of significance. Otherwise, it is not possible to claim that the mitigation condition would truly eliminate the significant impact. The current mitigation condition does not have such a guarantee.

C. Flooding

Currently, there are no substantive mitigation conditions related to bridges, creek crossings, and cut and fill in floodplain areas. Rather, the analysis necessary to determine substantive mitigation is impermissibly deferred to the applicant, after the licensing decision. As a result, the analysis of floodplain impacts is unable to contribute to the selection of a preferred alternative and an alternative to be licensed.

Three other points on the analysis of flood impacts arose after reading the SDEIS:

- State the methodology for the “watershed area intercepted” calculation in Table 3.5-1
- The flood maps in the SDEIS are cited as 2006 FEMA maps. Do these maps actually contain 2006 data or are they just year 2006 maps containing older data in digital format? At the time of the DEIS, the last FEMA mapping of the area had occurred in 1980.
- Floodplains and streams are not aligned with the base map in Figure 3-4 (they appear off-center). The question is, which one of them (the streams

or the floodplains) is aligned with the features on the base map, and which one is shifted?

It is also noteworthy that, for all three of the impacts discussed above, no state regulatory process exists to analyze and then avoid, minimize, or mitigate the impact.

V. FOLLOW UP COMMENTS TO THE DEIS

A. *Cumulative Impact on San Antonio's Railways and Roadways*

In its DEIS comments in January 2005, MCEAA demonstrated the admitted additive impacts of this project on the overburdened rail system in San Antonio.⁵ It is physically impossible for eastbound traffic from this project to turn off of its route before crossing three streets at grade in San Antonio that have been shown to exceed or nearly exceed the USDOT criteria for grade crossing delay. MCEAA DEIS comments at 50-51 (identifying Zarzamora, Brazos, and Flores Streets).

Since that time, there have been numerous significant developments, some negative and many positive. These developments should be, at a minimum, noted in the agency's response to comments in the Final EIS and discussed in the cumulative impacts section.

First, derailments and collisions continue to occur at a rate that defies comprehension. Since May 2004 there have been over 15 serious incidents in the San Antonio area resulting in death, serious injury, and property destruction.⁶ For anyone

⁵ As also demonstrated previously, MCEAA, with members in San Antonio, has standing to raise these issues in a judicial forum, but such standing questions are irrelevant in the administrative process, where the agency has an independent duty under NEPA to address significant additive environmental impacts that are certain to occur.

⁶ An incomplete list of 8 appears in Brian Chasnoff, *Officials Demanding Answers In UP Wreck*, S.A. EXPRESS-NEWS, Oct. 18, 2006, at A1, available at

who is not aware, the city has been the locus of railroad disasters in recent years, including a spill into the San Antonio River and a chlorine release following collision that killed four. And, if anyone bothered to review the historical record, they would find that the justified outrage is not new, it is just directed at a common target now that the industry has consolidated. The tracks in and approaching San Antonio have seen similarly spectacular accidents and levels of accidents since the 1980s, when trade with Mexico ramped up.⁷

Fortunately, the last three years have also seen major progress. In 2005 Texas voters approved state bond authority to relocate rail lines from urban areas.⁸ Governor Rick Perry signed his own agreements with Union Pacific and BNSF regarding the need for relocation and how such relocation would occur.⁹ Public discussion about the need to relocate and upgrade rail lines in San Antonio is moving in the right direction. Political leadership is united on the need to address land use and transportation conflicts posed by the current system and provide for a better one.

At the same time, investments are being made to upgrade the existing system. What effect this will have on relocation is unclear. In 2005 Union Pacific upgraded its South San Antonio Railyard, which is located where the Del Rio subdivision, used by this project, and the Laredo subdivision enter the city parallel to one another. Located immediately adjacent to this yard is the Port of San Antonio (former KellyUSA), which

<http://www.mysanantonio.com/news/traffic/stories/MYSA101806.01A.train.derailement.34fd89d.html>. *See also* <http://www.mysanantonio.com/news/specialcoverage/>

⁷ The June 22, 1997 collision in Devine (Medina County), the November 18, 1988 and 1986 MoPac derailments in San Antonio being a few of many examples.

⁸ <http://www.sos.state.tx.us/elections/voter/2005novconsamend.shtml>

⁹ http://www.governor.state.tx.us/priorities/transportation/UPR_memorandum/view and http://www.governor.state.tx.us/priorities/transportation/rail_relocation/view

continues to expand with booming international trade. Traffic due to foreign trade generally through the city continues to skyrocket, and Union Pacific is hiring at a record pace to try and keep up. The Port is developing the East Kelly Rail Port to speed up and accommodate increased switching and intermodal traffic specifically, and all rail traffic generally. Meanwhile, this past November, the new Toyota truck plant opened. Union Pacific also continues to upgrade existing track and add workers as business expands.

MCEAA is not trying to resolve the San Antonio rail system in the context of this proceeding. To the extent Vulcan tries to accuse MCEAA of that, they are overreacting and mischaracterizing MCEAA's comments.¹⁰ MCEAA does not seek to impose mitigation requirements on Vulcan at locations in San Antonio. Rather, the focus is on vindicating the purpose of the environmental impact statement, which "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision. Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

What MCEAA is seeking on this issue is acknowledgment from the agency in its environmental disclosure document:

¹⁰ A misguided, hard-line, blinders-on approach arguing that this project will not contribute significantly to rail traffic on a line it must traverse ignores the fact that every additional impact is progressively *more* significant when a significant condition already exists, as it does here. [There is recent NEPA case law from the Circuit Court of Appeals level on this point which it is not necessary to cite with particularity at this time.] Equally misguided is reliance on conclusory statements that the traffic will be routed without problem.

- Acknowledgment that there has been a problem with rail traffic and grade crossing delay on the line that Vulcan proposes to route its traffic over, and that this is the context in which this project is being proposed.
- Acknowledgment that, to the extent it functions as the exclusive economic regulator of the railroads and promotes the Rail Policy of the United States, 49 U.S.C. § 10101, the STB has an interest in actions that eliminate these problems and improve the rail system in San Antonio. STB is not a disinterested bystander waiting for service problems to occur down the road.
- Acknowledgment that there are numerous present and reasonably foreseeable future actions that may have, along with this project, cumulative impacts on the efficiency and safety of the existing rail system in San Antonio. The impact of many of these projects is positive (i.e., congestion reducing) in nature, and may well be reasonably interpreted as cancelling out any additive impact from this project, making further cumulative impact analysis unnecessary in this EIS.

The purpose of this acknowledgement by STB in the Final EIS is to communicate to citizens and the political leadership of the region involved in rail planning, including new Congressman Ciro Rodriguez, state representatives, county, city, and regional planning organizations, that context matters when evaluating down-line rail impacts, and that STB understands that context for San Antonio. The acknowledgment that the federal regulatory agency in charge of these issues is paying attention is more important than the Beltway may realize to a local political leadership that has been frustrated with some of the federal response to the situation here and which has largely reached consensus on the need for future proposals. The EIS document, though it may appear to address a small project, is nonetheless also a federal document that addresses a larger audience

throughout government and is “used . . . to plan actions and make decisions,”¹¹ as the issues in this proceeding have shown.¹²

B. Historic Preservation

The Texas Historic Commission endorses the eastern routes. It has rejected a proposal by Vulcan to support a Proposed Route with additional mitigation in favor of avoidance of the impact. This is the proper application of the avoid-minimize-mitigate hierarchy in the determination of preferred alternatives. Clearly if the Texas Historic Commission thought that the impacts of the Proposed Route could be mitigated, it would have supported Vulcan’s proposal, but it did not. Vulcan’s desire to pay less overall by paying a little for mitigation cannot change the facts on the ground, as reflected in the SDEIS.

C. Air Permit Settlement, Connected Action, and No Action

The applicant’s counsel has informed the Section of Environmental Analysis of the recent settlement of a contested case regarding the air permit for the quarry. The effect of this settlement certainly demands the agency’s attention, but for different reasons than insinuated in prior letters from the applicant.

By signaling the resolution of the air permit, the applicant was essentially signaling a completion of state permitting processes for the quarry. Interesting, then, that it was even necessary, given that the applicant represented to the Section of Environmental Analysis and to us and continue to maintain, as far as we know, the right to open the quarry with a

¹¹ 40 C.F.R. § 1502.4 (2006).

¹² For example, the Medina County Judge has stated to STB his desire to work out mitigation once a preferred alternative is selected. EI-2561 (Oct. 13, 2006). That process may have to wait until the Final EIS, because there are still two environmentally preferable alternatives at this stage. This illustrates yet more work that a decision by the Board to license more routes than the preferred alternative would undo.

temporary permit. MCEAA informed the applicant that we would fight any effort to open the quarry with a temporary permit in federal district court through a temporary restraining order and injunction once dirt was moved. That never came to pass.

It was necessary, of course, both because a permanent permit is required for permanent new sources under the Clean Air Act and because the applicant was otherwise unable to even begin to support its claim that the quarry had independent utility and could proceed without the rail line, thus arguably removing it from the scope of a potential connection action under NEPA.

The quarry still has not opened since the settlement agreement, and the Section of Environmental Analysis and the Board can take that for whatever strategic value it may have, particularly as to the viability of trucking option as the no action alternative, which MCEAA contests.

The viability of the no action alternative is made more questionable by the applicant's desire to pay less money—which is not an interest that may be factored into the NEPA analysis at this stage—and avoid an eastern alternative.¹³ The applicant now claims that the cost of the eastern routes exceeds the cost of the no action trucking alternative. This is impossible given their own earlier representations that eastern routes, including several they designed themselves, were feasible AND the fact that they still, after more than seven years, still have not opened the quarry and have not begun trucking.

¹³ An anonymous letter was received by MCEAA making arguments along these lines. Certain MCEAA members believe a resident not active in the organization in the Quihi area wrote the letter, but cannot say for sure. In any case, it is included as an attachment to these comments because it should be considered by STB as part of the record. The comments in the anonymous letter, however, do not reflect any official position of the MCEAA or any of its members.

If the status quo continues and the applicant protests the agency's refusal to license its Proposed Route at all, the immediate response should be an order designating the quarry and the rail line as connected actions under NEPA, because time and the applicant's own conduct will have shown that the current formulation of the no action alternative is invalid.

It is highly doubtful that the relative increased cost of an eastern alignment (if any increased cost in fact exists) would exceed the cost of mobilizing for a trucking alternative without the certainty of a rail license. Yet the applicant has stated publicly and to the agency that it will pursue the trucking option absent licensing of their Proposed Route. That statement alone should trigger a connected action, because it indicates that the quarry is in fact dependent on the rail line and that the timing of the quarry opening (and thus trucking) is being controlled by developments in the rail process. If trucking is not imminent, now that the state permitting for the quarry is complete, then trucking is not a viable no action alternative and never has been, and this is a connected action, end of story.

Copies via regular mail to:

John Cornyn, U.S. Senator
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David Leibowitz, Texas House of Representatives
Tracy King, Texas House of Representatives
Jim Barden, Medina County Commission
Larry Oaks, Texas Historical Commission