



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

November 19, 2007

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

**VIA E- FILING**

Dear Ms. Wood:

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

This letter makes additional comments for the record on the Draft Programmatic Agreement on behalf of the Medina County Environmental Action Association (MCEAA). Some members of MCEAA are also submitting their own letters separately.

As currently proposed, the content of Part II of the Draft PA dealing with the field surveys is critical. Most of what the Draft PA proposes to assess the adverse effects and resolve them in Parts III-IV appears consistent with generally accepted practice, but how hard Vulcan/SGR's consultant has to look to find historical resources is what will determine if those latter requirements even get applied.

MCEAA objects that Part II.A of the Draft PA is particularly problematic because it delegates more discretion to the applicant than even the relatively lenient regulations of the Advisory Council on Historic Preservation permit. While Part II.A promises that STB will ensure compliance with applicable standards, sole discretion to determine to conduct surveys "as may be necessary" is vested in the applicant and those it hires. This is too open-ended to comply with the law.

First, there are some responsibilities, particularly with respect to the Tribes and their cultural resources, that cannot legally be left to the sole discretion of the applicant.

MCEAA envisions situations that might arise, particularly given Vulcan/SGR's desire to reserve final right of way decisions until after the licensing proceeding, that would potentially place the discretion of the application in conflict with the agencies' responsibilities to the Tribes. Even with STB supervision of the results of an identification, the discretion involved in the predicate identification step should be resolved as we propose two paragraphs below.

Second and more universally, the primary remaining issue at the preconstruction stage will be archeological sites, assuming that the other historic sites and areas identified in the SDEIS are avoided as appears to be the current consensus. Lacking in the record at this point is an on the ground archeological survey of the entire right of way that will be used. Vulcan has objected to performing such study in the NEPA process until a final route is determined. That leaves the Draft PA. Again, to our knowledge, whatever right of way will have been chosen will have gaps in its archeological assessment to date, though some areas have been able to be looked at. *See* SDEIS Appendix F at 5-6.

MCEAA proposes replacing Vulcan's sole discretion in Part II.A with a requirement for Vulcan/SGR's consultant and representatives from the state and federal cultural resource agencies (THC and ACHP) to twice complete pedestrian reconnaissance on the remaining portions of the Area of Proposed Effects (APE) along the right of way to be constructed, both before the right of way is cleared of vegetation, and after. The Tribes shall be notified immediately upon discovery of any potential Tribal cultural resource with the APE. Further, each pedestrian reconnaissance shall be accompanied by a report to STB consistent with the requirements of Part II.B, subject to MCEAA's comments on that subsection below:

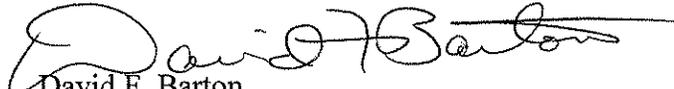
The term "historic property" in Part II.B should be revised to read "historic resource" to account for resources that may be identified on the sub-property level.

Finally, regarding some of the letters submitted by MCEAA members that we have been advised of and given copies of, we would point out to the agency that while some do not expressly reference sections of the Draft PA, they are quite explicit and clear in making what amount to (1) calls to widen the APE; (2) suggestions for where additional survey is appropriate, both in the context of the draft PA and EIS; (3) citations of particular archeological sites warranting pedestrian reconnaissance within or near the APE. We ask that they would be understood in this light. A couple of the letters, such as the one from the Balzens, who have commented throughout this proceeding, do not include addresses since they are being submitted through MCEAA. To the extent STB does not already have their addresses, STB is asked to respond through MCEAA.

Thank you for your work on the Draft PA. MCEAA is hopeful that its objections will be addressed so that they will not need to be made again.

Very Truly Yours,

**THE GARDNER LAW FIRM**  
A Professional Corporation

  
David F. Barton

**COUNSEL FOR PARTY**  
**MEDINA COUNTY ENVIRONMENTAL**  
**ACTION ASSOCIATION**

COPIES TO:

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***