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RQ

January 12, 2004

Ms. Victoria Rutson, Chief  
Section of Environmental Analysis  
Surface Transportation Board  
1925 K Street, NW  
Washington, D.C. 20402-001

**RE: Finance Docket #34284—Southwest Gulf Railroad Company—Petition for Exemption from 49 U.S.C. Section 10901 to Construct and Operate a Rail Line in Medina County, Texas**

Dear Ms. Rutson:

As you know, I am an environmental consultant currently representing the Medina County Environmental Action Association, Inc. (MCEAA) in their efforts to ensure that the applicant, the Southwest Gulf Railroad (SGR), complies with the National Environmental Policy Act (NEPA) and all other environmental permits required for construction and operation of the railroad. In addition, I have been asked to assist MCEAA in their efforts to assure that the property rights of landowners are duly respected by SGR.

MCEAA selected me to assist in their cause because I have over 20 years of environmental and ecological experience, and I have worked with numerous federal and state agencies to acquire necessary environmental permits for my clients. In addition to working experience, I have taught undergraduate and graduate-level classes at the University of Texas at San Antonio on environmental impact analysis and other similar courses. I emphasize my credentials only to point out that, in all of my years of working with environmental issues, I have never witnessed a case such as this where a federal agency is so openly biased toward the applicant and is subsequently demonstrating little or no regard for public opinion. I understand that the STB was created to encourage construction of railroads, but as a federal agency, STB is also mandated to follow and comply with NEPA guidelines.

MCEAA recently provided to me a set of correspondence between the Surface Transportation Board (STB) and SGR over a period ranging from August 2003 to December 2003. A majority of this correspondence contained arguments by SGR designed to convince STB that an environmental impact statement (EIS) would not be necessary for this proposed action.

In my professional history, I have traditionally served as an advocate for the permit applicant. In every case, without exception, the lead agency required the applicant to prove beyond any doubt

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that no significant impacts would be impinged on the environment. Facts and data, not opinions, were required from the applicant to prove this point. Further, in my experience the applicant is required to provide substantive information when addressing concerns from the public. Each comment should be addressed individually or in groups, with well-prepared arguments and facts to back up those arguments. Most important, regardless of how “uneducated” the commenters may seem, they were provided with a response that addresses each issue of concern with facts and logical arguments. NEPA requires that all comments be addressed in a response document. In fact, many of the issues or comments posed to SGR by various commenters were completely disregarded and were not addressed in the response document.

In this regard, I would like to point out a few comments that I have in regard to the correspondence that I have reviewed so far.

On August 4, 2003 David Coburn provided responses to public comments offered to STB at the public meeting. In response to comments concerning flooding, SGR presented no facts to justify any of the opinions they expressed. MCEAA is justifiably concerned about flooding, as many of the homes in the area are close to the 100-year floodplain, and any changes in floodplain characteristics could result in flooding of those homes. MCEAA strongly requests that SGR be asked to provide detailed and factual engineering information concerning expected impacts to floodplains caused by the construction of the railroad. MCEAA also requests that detailed floodplain analyses be conducted for all alternatives so that the alternative with the least impact to flooding could be selected, or so that construction of the preferred alternative could be modified to cause no impact to the 100-year floodplain.

SGR states in its correspondence to STB (July 18, 2003) that the project will cause minimal impacts to wildlife and agriculture. This assumption is based on a biological assessment conducted by its own consultant and staff and “coordinated” with the U.S. Fish and Wildlife Service (USFWS). In their correspondence, SGR implies that the USFWS is not concerned about potential negative impacts to threatened or endangered species by stating that the work was coordinated with the USFWS. In reality, the USFWS has yet to officially comment on the biological assessment, or on any of the surveys conducted to date. The only official USFWS correspondence with SGR was sent to URS on April 22, 2003. In this letter, the USFWS states that while there is no designated critical habitat for any species in Medina County, the agency is concerned about the area noted by STB as the “straight loading track option” because it appears that vegetation in this area supports habitat for the golden-cheeked warbler or black-capped vireo.

Correspondence from SGR also fails to mention the Texas Parks and Wildlife Department’s (TPWD’s) concern about impacts to various vegetation communities and sensitive species, specifically to habitat types and wetlands. Several recommendations were made by TPWD that were disregarded. It is also disturbing that SGR did not request a site-specific search of the TPWD database, a practice that is universally accepted as standard operating procedure for any biological assessment.

Regarding the issue of cultural resources, SGR addresses only historic structures, ignoring the fact that archeological features constitute a major issue in the area. The necessity of investigating archeological features is not even mentioned. Throughout the correspondence I reviewed, SGR seems to “downplay” the opinions of the public and the Texas Historic Commission (THC). No references are made in SGR correspondence to documents provided by the THC concerning opinions on cultural resource impacts; however, in a letter dated October 29, 2003 to Ms. Victoria Rutson, the THC clearly states that more surveys are needed to identify cultural resources in the area of potential effect. In addition, the THC stated that it was very concerned about the lack of thoroughness and good scholarship in the preliminary document. This is the only document that has been provided thus far as a study for this project. Other archeologists have reviewed the document and have had the same concern as to its inadequacy, and I have to question the wisdom of producing such an document without performing thorough onsite surveys. Finally, the THC pointed out a number of errors and inconsistencies in the document, including simple facts such as the date Mexico was granted independence from Spain. The report also misstated the Native American tribes present in Texas and failed to mention notable tribes that may have an interest in the project. These tribes are being contacted by MCEAA.

At the very least, we expect SGR to provide logical, fact-based answers to comments directed to them from the public. If federal agencies such as the USFWS have provided comments, they should be included, or at least referenced, in the arguments.

According to NEPA, the lead agency may require an EIS prior to the preparation of an EA. This important decision about whether or not to require an EIS should not be based on information provided by a highly-biased applicant; however, it appears that STB has made a decision based solely on opinions offered by the applicant, completely disregarding comments and concerns from the general public and even state agencies. The decision to waive an EIS would be understandable if the applicant’s responses to public comments were well-researched and factually based; however, this is not the case in this situation.

As you know, the NEPA process requires that an environmental assessment be conducted to determine whether or not an EIS is needed. The environmental assessment will result in only one of two decisions: (1) a finding of no significant impact, or (2) a record of decision that will result in either requiring an EIS to be prepared, or determining that the project cannot be conducted without significant impacts to the environment. I write this letter in the sincere hope that the STB will comply with NEPA procedure and ensure that environmental assessment conclusions are based on a thorough analysis of factual information, presented in a professional and scholarly manner. STB should address all issues of concern by the public or at least provide well-founded arguments as to why these issues are not addressed. I also would request that STB address all public comments in a respectful and professional manner. This project will impact individuals, the properties of individuals, and the environment. Overall, these impacts may or may not be significant. However, on an individual basis, impacts will be significant, and the feelings of those people being impacted should be acknowledged and respected.

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Thank you again for the opportunity to provide you with these comments. I may seem somewhat passionate in my response in this letter, but I have been asked to represent this group from a technical point of view to ensure that SGR complies with NEPA and to ensure that STB addresses all aspects of the environment in the EA. At this point I do not have a high level of confidence that this is happening. I am not trying to stop the project, however, I am mandated to ensure that if the project is approved by STB, the approval was based on sound, scientific data and not opinions and all impacts to the environment were addressed and properly mitigated.

Thank you for your time and consideration. I very much look forward to reviewing the draft EA when it is available.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lynn M. Kitchen". The signature is fluid and cursive, with a long horizontal stroke at the end.

Lynn M. Kitchen, Ph.D.  
Principal Scientist

Copy:           U.S. Senator John Cornyn  
                  U.S. Rep. 23 District Henry Bonilla  
                  Texas Senator Frank Madla  
                  Texas Rep. Timeteo Garza  
                  Robert Fitzgerald, President MCEAA  
                  David Barton, Gardner Law Firm