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March 10, 2004

Via HAND DELIVERY

Ms. Victoria J. Rutson  
Chief  
Section of Environmental Analysis  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

Re: **Finance Docket No. 34284, Southwest Gulf Railroad Company  
-- Construction and Operation Exemption -- Medina County, TX**

Dear Ms. Rutson:

We are writing on behalf of the Southwest Gulf Railroad Company ("SGR") in response to certain issues raised in four recent submissions by the Medina County Environmental Action Association ("MCEAA") in this proceeding. These are two February 19, 2004 letters addressed to SEA, a February 20, 2004 "Letter for Placement in the Record" which MCEAA filed with the Board on the merits side of this proceeding,<sup>1</sup> and February 24, 2004 "Scoping Comments" submitted in response to the January 28 Notice of Intent to Prepare an Environmental Impact Statement and Notice of Initiation of Scoping Process and Draft Scope ("Draft Scoping Notice") served by the Board.

In its submissions, MCEAA argues that the scope of the Board's forthcoming Environmental Impact Statement ("EIS") for the proposed seven mile SGR common carrier rail line should be expanded to include the direct impacts of a proposed quarry. That quarry, which would be served by the rail line (together with any other businesses that might choose to locate on or near the line), is to be

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<sup>1</sup> SGR will respond here to the environmental issues raised in MCEAA's February 20 "merits" letter and will submit a separate response, to be filed with the Board on the merits side of the proceeding, responding to other arguments raised by MCEAA in that submission.

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developed by an SGR sister corporation, Vulcan Construction Materials LP (“Vulcan”).<sup>2</sup> MCEAA alleges that the rail line and the quarry are “connected actions,” and therefore that the direct impacts of both must be considered in the EIS under the applicable Council on Environmental Quality (“CEQ”) regulations.

MCEAA’s rambling and convoluted submissions appear to skirt a key fact concerning the SGR rail line and the Vulcan quarry, namely, that the only project for which SGR seeks federal action in the form of STB exemption is a rail transportation project, not a quarry project. Vulcan has consistently stated that a quarry, which is a non-federal action, could be operated at the Medina County site even if there were no rail line. Such a quarry would be served by trucks, which would transport the limestone aggregate, which will be the product of the quarry, over local roads to a remote rail loading facility that would be located near the same point proximate to the Union Pacific line to which the SGR’s line would otherwise connect. SGR thus understands that the “no action” alternative to be assessed in the EIS is, correctly, not “no rail line, no quarry,” but rather “no rail line, truck-served quarry.”<sup>3</sup>

As shown below, the Board has no obligation under NEPA to assess anything other than the direct environmental impacts of the rail line and the “cumulative impacts” of the line and the proposed Vulcan quarry. Both the CEQ regulations and National Environmental Policy Act (NEPA) case law clearly show that the quarry and the rail line are not interdependent connected actions, as MCEAA alleges. Rather, the Board’s January 28 Draft Scoping Notice specifically and correctly states that the quarry will be considered under the cumulative impacts analysis of the EIS. SGR submits that such an approach is fully consistent with NEPA, and the relevant case law, which MCEAA consistently misinterprets in its submission.

SGR will also address here bogus arguments raised by MCEAA in one of its February 19 letters, in which MCEAA argues that the Endangered Species Act (“ESA”) requires the STB to revise the

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<sup>2</sup> Both SGR and Vulcan Construction Materials, LP are wholly owned by Vulcan Materials Company.

<sup>3</sup> While the rail line is not a prerequisite for a quarry to be developed, SGR’s proposed seven mile rail line will significantly enhance the efficiency of transportation of aggregate between the quarry and the national rail system, while also facilitating the possibility that other businesses that utilize rail transport may, at some future point, locate in the area to be served by SGR’s common carrier line. Not only will the rail line allow for more productive and efficient transportation of the bulk product of the quarry (and the products of any other businesses that choose to take advantage of the line), SGR has every reason to believe that the line will bring with it environmental benefits -- including safety and air quality benefits -- when compared to the alternative of hundreds of trucks per day traveling local roads to and from UP line. In these ways, SGR will serve the public need by providing an improved transportation infrastructure in the area.

existing biological assessment for the quarry and that actions to comply with the ESA to date have been inadequate. To state the obvious, the quarry is not an STB undertaking, nor is it funded, authorized, or permitted by the Board. The Board has no ESA responsibilities for the quarry. Moreover, the Draft Scoping Notice specifically stated that the EIS would describe the threatened and endangered species and potential impacts to such species from the rail construction and operation. The approach outlined in the Draft Scoping Notice is consistent with the Board's responsibilities under the ESA.

**I. The Proposed Rail Line and Quarry Are Not Interdependent Connected Actions**

CEQ regulations define "connected actions" as actions which "(i) automatically trigger other actions which may require EISs; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1) (2003). Thus, connected actions are federal actions that are so closely related that it would be irrational to consider them in separate environmental reviews under NEPA, such as two segments of one federally-funded highway. *See Daniel R. Mandelker, NEPA Law and Litigation* § 9.11-9.16 (2d ed. 2003).

In this case, the rail line and quarry are separate events that meet none of the three CEQ "connected action" tests. Under the first CEQ test, the construction of the rail line will not "automatically trigger" the development of the quarry, which is a private action that will proceed whether or not the rail line is built. Under the second test, the quarry can be developed as a truck-served quarry regardless of whether the rail line moves forward or not. And, under the third test, the quarry and rail line are not interdependent parts of some larger action. Thus, there is no basis on which the EIS must or should be expanded to consider the direct impacts of the quarry, a private action outside the Board's jurisdiction and not dependent on the rail line.

Cumulative impacts, on the other hand, may arise from non-federal actions, and CEQ sets forth no requirement of interdependence, only that the projects be "related." The standard for when two projects must be considered concurrently under NEPA, in their entirety, as "connected actions" is clearly much higher than for when the cumulative impacts of two projects must be considered in a single project review. *See Coalition for a Liveable Westside v. United States HUD*, 1997 U.S. Dist. LEXIS 8860 (S.D.N.Y. 1997) (connected actions are those that are interdependent, not those that are merely interrelated).

Under the cumulative impacts standard, in contrast to the connected action tests, the rail line and quarry are "related" to the extent that the rail line will serve the quarry. Therefore the cumulative impacts of the quarry are appropriately considered in the forthcoming EIS, even though the two projects do not meet the tests of being "connected." The Draft Scoping Notice properly recognizes this.

The quarry is not a "connected action" with the rail line because, as discussed above, the quarry is not dependant on the rail line, and could exist even if there were no rail line. Thus, the cases cited by MCEAA finding interdependent connected actions are readily distinguishable. For example, in *Thomas*

*v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985), the Ninth Circuit held that a logging road was a “connected action” with the timber sales for which the road was built. In *Thomas*, there would be no timber sales if the road were not built as that portion of the forest would be inaccessible to loggers. *Id.* Here, however, the mining at the quarry could go forward with or without the rail line because of the availability of trucks to haul the aggregate. Indeed, numerous quarries are currently in operation that are not served by rail lines, including, for example, other exclusively truck-served quarries operated by Vulcan.<sup>4</sup> The Board in fact considered and approved construction of a rail line to a currently truck-served aggregate quarry operated by Martin Marietta in *Alamo North Texas Railroad Corporation -- Construction and Operation Exemption -- Wise County, TX* without analyzing the direct impacts of the quarry.<sup>5</sup> In short, contrary to MCEAA's claims, the Vulcan quarry is not dependent on the proposed rail line, and the two projects are therefore not interdependent “connected actions.” See *Citizens' Comm. To Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1023-24 (10th Cir. 2002) (federal land exchange and a master development plan were not connected actions because the development plan would proceed whether or not the exchange occurred); *Coalition for a Liveable Westside v. U.S. HUD*, 1997 U.S. Dist. LEXIS 8860 (S.D.N.Y. 1997) (finding that because developer would proceed with project regardless of whether the other federally-funded projects went forward, those projects were not connected actions).

It also bears note that the quarry is not dependent on the federal action sought by SGR (i.e., exemption of the rail line) or, for that matter, on any federal action that might trigger a NEPA analysis.<sup>6</sup> The typical situation where actions have been found to be “connected” involves two federal actions approved or implemented by the same federal agency. For example, in *Thomas v. Peterson*, *supra*, the

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<sup>4</sup> Exclusively truck-served Vulcan quarries include Geronimo Quarry (Mico, Texas), Helotes Quarry (Helotes, Texas); 1604 Quarry (San Antonio, Texas).

<sup>5</sup> STB Finance Docket No. 34002 (Aug. 30, 2002).

<sup>6</sup> The quarry will be required to obtain certain permits from the state such as air permits. However, the issuance of such permits does not trigger NEPA. See 15 U.S.C. § 793(c) (EPA actions under the Clean Air Act exempt from NEPA); *Save the Bay, Inc. v. U.S. Army Corps of Engineers*, 610 F.2d 322, 326 (5th Cir. 1980) (holding that issuance of a Clean Water Act NPDES permit does not trigger NEPA). Given that the quarry is not subject to NEPA analysis, MCEAA's claim at page 2 of its February 19 letter that Vulcan has decided to proceed with the quarry in phases to avoid various regulatory requirements is entirely unsupported. The phases to which MCEAA appears to refer are merely steps in the biological assessment process adopted in consultation with the U.S. Fish and Wildlife Service as part of a responsible, programmatic approach to providing accurate and detailed information concerning threatened and endangered species for assessment at various times during the life of the quarry. The “phase I” area for biological assessment encompasses both the initial quarry site and sufficient reserves for approximately the first 20 years of quarry operation. The northern terminus of the SGR line was also encompassed within the phase one area.

road and the associated timber sales would both occur on U.S. Forest Service lands, and therefore both “projects” were under the jurisdiction of the Forest Service. *Thomas*, 753 F.2d at 759. Similarly, in *Oregon Natural Res. Council v. Marsh*, the court addressed whether the Corps of Engineers was required to combine three dams to be constructed into a single EIS. 832 F.2d 1489, 1497 (9th Cir. 1987), *rev'd on other grounds*, 490 U.S. 360 (1989). These situations are vastly different from the instant case where the quarry (allegedly “connected” to the proposed rail line) is not part of a single federal project or plan, but is rather a private project not dependent on the rail line and wholly outside the authority or control of the STB.

The Ninth Circuit in *Wetlands Action Network v. Corps of Engineers*, 222 F.3d 1105, 1117 (9th Cir. 2000) (“*WAN*”), rejected an argument that a private action was a “connected action” where the federal agency, like here, did not have independent jurisdiction over the non-federal action. In that case, the court found that the non-federal action “certainly could proceed without the [federal action] and . . . is currently proceeding without the [federal action].” *Id.* The non-federal action at issue in *WAN*, as here, was not financed by federal funding, and federal regulations did not control the design of the non-federal action. *Id.* Moreover, the fact that the federal action would not occur without the non-federal project was not sufficient to place the non-federal action within the federal agency’s jurisdiction. *Id.* at 1116-1117.

Similarly, in the present case, the “connected action” requirements are not applicable because the quarry is (1) not dependent on the relevant federal action and (2) an independent private project, over which the STB has no jurisdiction. *See also Save the Bay v. U.S. Army Corps of Eng’rs*, 610 F.2d 322, 327 (5th Cir. 1980) (NEPA review of entire plant not necessary in consideration of a permit for just one outfall pipeline); *Border Power Plant Working Group v. Dep’t of Energy*, 260 F. Supp. 2d 997, 1015-16 & n.10 (S.D. Cal. 2003) (where agency does not have jurisdiction over related private project, NEPA’s connected action requirement is inapplicable). Indeed, it is axiomatic that rail transportation projects are planned based on the existing or planned development in the area and the associated transportation needs. This does mean, however, that assessing the impacts of the rail project requires a complete NEPA assessment of the various private facilities to be served by the rail line.<sup>7</sup>

MCEAA incorrectly argues that *Sylvester v. U.S. Army Corps of Eng’rs*, 884 F.2d 394 (9th Cir. 1989), supports the inclusion of both the quarry and rail line within the EIS. Rather, *Sylvester*’s holding suggests that SGR’s EIS should solely address the rail line. In *Sylvester*, the Ninth Circuit ruled that the Corps’ EIS for a planned golf course properly excluded a separate, nearby planned resort because while the resort was not entirely independent from the golf course, the resort could exist without the course. *Id.* at 398-401 The court noted that while the resort “would benefit from the [golf course’s] presence,” its existence was not dependent on the golf course. *Id.* at 400. Likewise, while the quarry will benefit

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<sup>7</sup> As discussed further below, the Board has not made a practice of assessing the direct environmental impacts of such rail-served facilities.

from the rail line, the quarry could exist without the rail line, and the quarry and rail line are not “connected actions” under the CEQ regulations.

Similarly, the “independent utility” cases cited by MCEAA at pages 10-11 of its February 19 letter do not support assessing the direct impacts of the quarry in the EIS. These cases are fundamentally no different than the other connected action cases discussed above. In fact, a case cited by MCEAA acknowledges that the “independent utility” test is “merely an application of subsection (iii)” of the CEQ regulations, the test that focuses on whether the activities in question are “interdependent parts of a larger action and depend on the larger action for their justification.” *See Blue Ocean Preservation Society v. Watkins*, 754 F. Supp. 1450, 1459, n 8 (D. Haw 1991) (citing two other cases relied on by MCEAA, *Town of Huntington v. Marsh*, 859 F.2d 1134, 1141-42 (2d Cir. 1988) and *Hudson River Sloop Clearwater v. Dep’t of the Navy*, 836 F.2d 760, 764 (2d Cir. 1988)). Further, in *Fritiofson v. Alexander*, 772 F.2d 1225, 1242 (5<sup>th</sup> Cir. 1985), the Fifth Circuit recognized that the independent utility analysis is the same as the CEQ connected action analysis. As explained above, the rail line and the quarry are not connected actions under the CEQ regulations; therefore, the independent utility test does not yield a different result.

By contrast to the present situation, all of the independent utility cases relied upon by MCEAA involve two allegedly interdependent projects, each subject to some form of NEPA review due to agency permitting or funding. Here, the quarry is not subject to NEPA review by any federal agency, and has independent utility wholly apart from the rail line. There is no foreclosure of alternatives nor irretrievable commitment of federal funds that would result from the quarry not being considered part of the NEPA project because there will never be a NEPA analysis for the quarry. Therefore the independent utility test is not applicable. *See Save Barton Creek*, 950 F. 2d at 1139-1140 (citing FHWA’s NEPA implementation regulations stating that the criteria including independent utility only are applicable where the FHWA exercises sufficient control over the project approval and are not applicable to projects that do not require Federal approvals). While outside the EIS’s direct impacts analysis, the quarry is not exempt from discussion in the EIS. As a non-federal foreseeable action development of the quarry should be included in the cumulative impacts analysis for the EIS.

MCEAA’s reliance on the cost benefit analysis in *Sierra Club v. Sigler*, 695 F. 2d 957 (5th Cir. 1983), also is misplaced. In *Sigler* the Corps developed an EIS in connection with the granting of certain permits for a deepwater port and oil terminal. The EIS did not consider the environmental impacts of certain bulk commodity activities expected to develop as a result of the port construction, although it included the economic benefits of the bulk activities in the analysis of the port. *Id.* The Fifth Circuit held that although the Corps could have excluded the bulk commodity activities from the EIS, the Corps’ decision to attribute to the port substantial economic benefit from the bulk commodity activities meant that the Corps could not ignore the costs. *Id.* at 979. The court stated that the agency cannot cite possible benefits to promote a project, while failing to look at the costs. *Id.* Here, however, SGR has never claimed that the rail line is dependent on the revenues of the quarry. While the rail line will clearly serve the quarry, the Board has not, nor is it required to, look to the potential economics of the quarry in order to approve the rail line. Nor is there any indication that the Board intends to engage

in the lopsided analysis that the Fifth Circuit rejected in *Sigler*. Rather the Board's scoping notice clearly states that it will look, in the context of a cumulative impacts analysis, at the impacts of the quarry on the environment.

In its February 24 Scoping Comments, MCEAA argues that the no action alternative in the EIS should assume that neither the rail line nor the quarry are built. Scoping Comments p. 14-17. MCEAA alleges that because the rail line and the quarry are "connected actions," the no action alternative "cannot include any part of the action." *Id.* at 15. Thus, MCEAA's argument regarding the no action alternative is merely a variation on a theme, and rests on their assertion that the quarry and the rail line are inextricably linked to one another. As discussed above, that assertion is unfounded -- a quarry could be operated even if there were no rail line. As stated above, the proper no action alternative to be assessed in the EIS is not "no rail line, no quarry," but rather "no rail line, truck-served quarry."

The cases cited by MCEAA fully support a Board decision to include the quarry in the no action alternative. For example, in *Nashvillians Against I-440 v. Lewis*, 524 F. Supp. 962 (M.D. Tenn. 1981), the agency included in the no action alternative to a proposed federal highway an assumption that the existing city streets would need to be improved. The plaintiffs argued that the no action alternative should have been an action where literally nothing occurred. The court upheld the agency's decision, noting that CEQ has recognized that the no action alternative should include "predictable actions by others" and should be "reasonable." The court relied on the following language from CEQ's guidance document, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*:

Where a choice of 'no action' by the agency would result in predictable actions by others, this consequence of the 'no action' alternative should be included in the analysis. For example, if denial of permission to build a railroad to a facility would lead to construction of a road and increased truck traffic, the EIS should analyze this consequence of the 'no action' alternative.

46 Fed. Reg. 18026 (1981). The *Nashvillians* court found that the necessary improvements to city streets were a logical, predictable outcome if the highway were not built, and that omitting that outcome in the no action alternative would not be "reasonable." *Id.* at 988 and n. 67. Similarly in this case, because Vulcan has stated the quarry will be developed regardless of the rail line, the no action alternative properly includes the quarry and the associated truck traffic. *See also Piedmont Heights v. Moreland*, 637 F.2d 430, 437 (5<sup>th</sup> Cir. 1981) (subway system properly deemed part of no build alternative to proposed highway where subway system would be built regardless of highway project).

In its February 20 letter filed on the "merits" side of this proceeding, MCEAA points to several STB and Interstate Commerce Commission ("ICC") rail construction cases, and alleges that in several of those cases the STB and its predecessor misapplied NEPA by failing to assess the direct environmental impacts of facilities to be served by the new rail line. Despite MCEAA's contentions, the STB and its

predecessor have consistently acted correctly in determining the scope of prior environmental reviews with respect to rail lines proposed to serve new manufacturing, mining or other facilities. To SGR's knowledge, in no prior case has the ICC or the STB analyzed -- other than with respect to cumulative impacts -- the environmental impacts of a new facility or other source of rail traffic where that facility would exist regardless of whether the proposed rail line is built. The precedents underscore that the STB is not in the business of assessing, other than with respect to cumulative impacts, the environmental impacts of new mines, steel plants, ports, industrial parks or quarries that would be served by a proposed rail line in the absence of a setting where the facility would not exist "but for" the rail line. *Compare Riverview Trenton Railroad Company -- Petition for An Exemption from 49 U.S.C. § 10901 to Acquire and Operate a Rail Line in Wayne County Michigan*, STB Finance Docket No. 34040 (EA served Oct. 15, 2001) at 1-2 (addressing environmental impacts of proposed intermodal terminal to be served by proposed rail line because the "traffic and related impacts of that [intermodal] facility would not occur 'but for' the proposed rail acquisition and operation activities that are subject to the Board's regulatory control").

The STB and ICC cases cited by MCEAA at pages 9-14 of its February 20 letter do not support the result MCEAA seeks. For example, in *Alamo North*, a rail line was proposed to serve an existing, commonly-owned quarry already being truck-served. The Board properly did not assess the impacts of the quarry (or a new quarry being developed in the area), despite MCEAA's contention that the Board might have been challenged in that case. In *San Jacinto Rail Ltd. -- Construction Exemption, Build-in to the Bayport Loop*, STB Finance Docket 34079 (May 9, 2003) at 13, the Board properly concluded that the rail line and a proposed port -- which was the subject of a separate EIS undertaken by another federal agency and which would not be served by the rail line -- were not connected actions. MCEAA's convoluted criticism of the Board's decision in that case, which is off the mark in any event, does not suggest a different result here, particularly given that SEA intends to assess the cumulative impacts of the quarry and rail line.

The outcome of these and the other cases cited by MCEAA is consistent with the EIS scope that the Board has proposed in the SGR case.<sup>8</sup> The fact that Vulcan's quarry could exist independent of the

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<sup>8</sup> See *Tongue River Railroad Co. -- Rail Construction and Operation -- Ashland to Decker, MT*, STB Finance Docket No. 30186 (Sub No. 2) (Nov. 8, 1996) (Board properly did not assess the environmental impacts associated with the mines that the proposed line would serve since the mines' transportation needs would be served regardless of the new line); *East Cooper & Berkeley Railroad -- Construction and Operation of a Rail Line -- Berkeley, SC*, STB Docket No. 32704 (Dec. 5, 1995) (Board properly did not assess direct impacts of a steel mill project to be served by new rail line; no evidence that the mill would not be built unless the rail line were constructed); *Northern Nevada R.R. Corp. -- Construction and Operation -- White Pine County, NV*, STB Finance Docket No. 32476 (Feb. 24, 1995) (EA prepared by Board with respect to rail line designed to serve a mine; EIS prepared by BLM by virtue of use of public lands assessed impacts of mine and rail operations on public lands); *Vaughan RR Co. -- Construction Exemption -- Nicholas and Fayette Counties, WV*, ICC Finance Docket (Continued...)

rail line places this case squarely within the ambit of those cases where the ICC or Board did not analyze the direct impacts of the facility proposed to be served by the line. *See Vaughan*, ICC Finance Docket No. 32322 (direct impacts of new coal mine facilities not assessed where absence of rail line, i.e., “no action alternative” was truck service to mines); *Northern Nevada*, ICC Finance Docket No. 32476 (similar, “no action alternative” assessed was truck service to reopened mines).

## II. STB Is Not Required To Order a Biological Assessment for the Quarry

MCEAA’s request that STB require a biological assessment of “all phases of the quarry “ is inconsistent with the STB’s jurisdiction and the requirements of the ESA. Section 7(2) of the ESA requires federal agencies to consult with the U.S. Fish and Wildlife Service<sup>9</sup> (the Service) to ensure that they are not undertaking, funding, permitting, or authorizing actions likely to jeopardize the continued existence of a threatened or endangered species or destroy or adversely modify designated critical habitat. 16 U.S.C. § 1536 (2000). Here, the quarry is not subject to the authorization, funding or permitting of the STB. Moreover, as explained above, the quarry is not a connected action of the permitted project -- the rail line. Courts have held that where the federal agency has not authorized, funded or carried out a project, there is no federal agency action to support an ESA claim. *See Proffitt v. Dep’t of Interior*, 825 F. Supp. 159 (W.D. Ky. 1993) (where EPA voluntarily assisted the county with its sewage system but did not authorize funds or carry out the project here was no ESA claim). Therefore, there is no basis for the STB to take any action regarding the biological assessment of the quarry.

It is appropriate to note that Section 9 of the ESA prohibits the “taking” of any endangered species, except with permission from the Service and applies to any person subject to the jurisdiction of the US. The Service, not the STB, has the authority to enforce the ESA at quarry. The quarry owner has been in consultation with Service, as noted in Mr. Barton’s letter, and it is the providence of the Service as the agency designate by Congress to administer the ESA to determine the adequacy of that consultation, not the STB.

The Board must consider Section 7 of the ESA in its approval of the rail project, and the January 28 Draft Scoping Notice specifically states that the EIS will:

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No. 32322 (Nov. 4, 1993) (ICC properly did not assess direct impacts of a coal facility which would be served by a new rail line where the coal would be transported by truck in absence of rail line); *Jackson County Port Authority -- Construction Exemption -- Pascagoula, MS*, ICC Finance Docket No. 31536 (Aug. 6, 1990) (port and rail line were connected actions, Corps of Engineers had previously assessed port).

<sup>9</sup> In some cases the federal agency also must consult with NOAA Fisheries, but that is not an issue in this project due to its geographic location.

- a. Describe the existing biological resources within the project area, including vegetative communities, wildlife and fisheries, and Federal and state threatened or endangered species and the potential impacts to these resources resulting from the proposed new rail line construction and operation.
- b. Propose mitigative measures to minimize or eliminate potential project impacts to biological resources, as appropriate.

It is clear from the Draft Scoping Notice that Board intends to comply with the ESA as it pertains to that project over which the Board has jurisdiction -- the rail line. Moreover, MCEAA's argument that the Fifth Circuit's decision in *Nat'l Wildlife Fed'n v. Coleman* requires the Board to conduct a biological assessment for the quarry is misplaced. 529 F.2d 359, 373 (5th Cir. 1976). *Coleman* stated that in considering the impact to endangered species, the agency must take into account more than the mere number of acres of the project. *Id.* In fact, the agency must consider indirect effects such as borrow pits and residential and commercial development "that can be expected to result from the construction of the highway." *Id.* The quarry is not a development resulting from the rail line because the quarry can go forward regardless of the rail line. As explained above, there are numerous quarries that are served exclusively by trucks. Moreover, unlike the commercial development at a highway interchange in *Coleman* that would not have developed without the interchange, the quarry could be built regardless of the construction of the rail line.

MCEAA also assumes that the Board can only comply with the ESA by conducting the biological assessment that MCEAA wants. However, the first step in the process is to determine in accordance with the Service's criteria, if there is potential endangered species habitat in the area of the action. There is no potential endangered species habitat along the proposed rail line, other than at the loading loop and a thorough biological assessment has been conducted for the loading loop area in accordance with the Service's requirements.

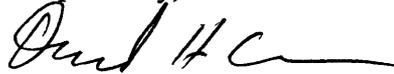
#### Conclusion

In summary, the rail line and the quarry are not interdependent actions and the quarry should not be included as part of the project assessed in the EIS. The Board has stated that it will describe the impact to endangered species in connection with the construction and operation of the rail line, which is consistent with the ESA. The Board should consider the quarry as part of the "cumulative impacts" and it has specifically indicated in the Draft Scoping Notice that it will do so. No more is required.

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Finally, MCEAA's motivations for seeking an expanded EIS should be clear. That avowedly anti-quarry group hopes to slow down and complexify the Board's EIS process, perhaps in the hope that they will delay the quarry. SEA should not allow its processes to be abused in this manner.

Respectfully,



David H. Coburn  
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cc: Rini Ghosh, SEA  
Jaya Zyman-Ponebshek, URS