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April 19, 2004

FD 34284

Received 4/19/04

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
ATTN: STB Finance Docket No. 34284
1925 K Street, NW
Washington, DC 20423-0001**VIA TELEFAX: (202) 565-9000**
& CM-RRR #7001 2510 0002 0226 6000**RE:** Analysis under the National Environmental Policy Act and Endangered
Species Act of:

- (1) Vulcan Materials Company's planned Medina County stone quarry; and
- (2) Vulcan Materials Company subsidiary Southwest Gulf Railroad Company's proposed rail line to serve Medina County stone quarry.

Dear Ms. Rutson:

This letter is a further response to the letter dated March 10, 2003 (March 10 letter) (Document EI-733) from David Coburn, counsel for the applicant, regarding the scope of environmental analysis. It has some repetition of earlier submissions, but is reasonably inclusive of prior arguments with the addition of issues you requested for further discussion following our conference.

Although the legal argument regarding the connectedness issue is a straight-forward one, the applicants arguments seem to have become so convoluted that the MCEAA feels it necessary to present its legal and factual arguments in a step-by-step analysis in order to lead the agency to the logical conclusion presented herein. Thus, we request your indulgence in working through these issues in this document. We are confident the dividends will warrant the investment.

This letter also addresses an argument raised by a memorandum submitted in *Finance Docket 34314—Bexar County Rural Transportation District—Construction and Operation in Bexar County, Texas (Toyota)*, a completely separate and unrelated proceeding from this one. In that

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memo (*Toyota* memo) (Document EI-222), counsel in *Finance Docket 34314* addressed a similar, but ultimately distinguishable question regarding the appropriate scope of environmental analysis. Because the STB's concerns expressed to the applicant in *Toyota* go to the heart of defining exactly which circumstances the STB must treat as "connected actions" under the National Environmental Policy Act (NEPA), discussion of the *Toyota* memo's response is appropriate here.

Also appropriate is a discussion of the reality of the major industrial rail build-in today, and how the clear law governing connected actions in an environmental impact statement (EIS) under NEPA affects those projects. Our position, incorporating by reference our 3 previous letters and our scoping comments, is a limited one, and most importantly, is grounded in clear rule of law that provides settled expectations for applicants and citizens alike, but only if the agencies have the courage to deem actions connected when they truly are.

In this proceeding, the applicant's position is without merit and reflects extreme disregard for the consensus policies underlying agency analysis under the National Environmental Policy Act and Endangered Species Act (ESA), as well as their existing regulations and case law. Nowhere in the March 10 letter does the applicant advance an argument that the statutes and regulations are invalid or that the case law requires reversal. Rather, the applicant's misuse and misclassification of legal standards and case law fails to support its position.

I. THE SOURCE OF THE APPLICANT'S FLAWED INTERPRETATION

A. *The March 10 Letter Fails to Apply the Connected Action Regulation to the Rail Line*

The fatal misinterpretation appears in the third paragraph of the March 10 letter. There, the applicant asserts that "the quarry, which is a non-federal action, could be operated at the Medina County site even if there were no rail line."

The third paragraph of the March 10 letter presumes that the quarry is a non-federal action that will not, and cannot through some operation of law, be included in the EIS. The applicant fails to test this assumption by *properly* applying the relevant connected action regulation, 40 C.F.R. § 1508.25(a)(1)(iii) (defining scope for actions that lack independent utility as those that

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“are interdependent parts of a larger action and depend on the larger action for their justification”), anywhere in the letter.

Instead of applying 40 C.F.R. § 1508.25(a)(1)(iii) to the quarry and the rail line, the applicant applies it only to the quarry. Everything in the applicant’s March 10 letter centers on whether the unproposed action (the quarry) has independent utility. This ignores the fact that it is the rail line in this proceeding that lacks independent utility when 40 C.F.R. § 1508.25(a)(1)(iii) is applied, and therefore draws the action it is interdependent with (the quarry) into the scope of NEPA analysis. The March 10 letter after paragraph 3 never tests the assumption that the federalized rail line action is independent of, and therefore not connected to the “non-federal quarry,” and the remainder of the “analysis” serves solely to obfuscate this deliberate omission.

From this, all other misrepresentations by the applicant flow, including:

- *Improper No Action Alternative*: The statement in the remainder of paragraph 3 that the proper “no action” alternative is a truck served quarry, rather than no quarry and no rail line.
- *Improper Scope of Endangered Species Act Analysis*: The page 3 statement that “STB has no ESA responsibilities for the quarry.”
- *Improper Scope of EIS (denying that the rail line and quarry are “connected actions” under NEPA)*: The first denial, without explanation, on page 3 that the quarry and rail line are interdependent parts of a larger action (the third connected action factor of “independent utility” at 40 C.F.R. § 1508.25(a)(1)(iii)).
- *Improper Scope of EIS (denying that the rail line and quarry are “connected actions” under NEPA)*: The attempt, on page 6, to apply the multifactor federalization test for relatedness (a broader test used to determine whether a non-federal action is sufficiently “related” to require analysis in an environmental assessment, that includes “independent utility” as one of several factors), instead of 40 C.F.R. § 1508.25(a)(1), which strictly defines the scope of “connected action” in an EIS, and to equate the two.

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- *Improper Scope of EIS (denying that the rail line and quarry are "connected actions" under NEPA):* The quick retreat from the pretense of applying the inapplicable environmental assessment test and equating it with 40 C.F.R. § 1508.25(a)(1), in the same paragraph, asserting instead that "as stated above, the rail line and the quarry are not connected actions under the CEQ regulations."
- *Improper Scope of EIS (denying that the rail line and quarry are "connected actions" under NEPA):* The second application, on pages 3–4, of the connected action regulation's "independent utility" factor, 40 C.F.R. § 1508.25(a)(1)(iii), in one direction, to the quarry, without applying it to the action that lacks "independent utility"—the rail line.
- *Improper No Action Alternative:* The restatement on page 7 that the proper "no action" alternative is a truck served quarry, rather than no quarry and no rail line.
- *Improper Scope of Endangered Species Act Analysis:* The argument on pages 8–9 that no biological assessment is necessary for the quarry.

The applicant's analysis for the no action alternative and Endangered Species Act cannot even be understood, and in many of the cases cited does not even apply, unless one assumes that the rail line and quarry are not connected actions under 40 C.F.R. § 1508.25(a)(1)(iii). See e.g., March 10 letter at 7 (applying "no action" alternative cases that would only apply if the rail line were an unconnected action) and 10 (arguing to limit the scope of *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), in the cumulative impact context, where it would apply regardless of whether the actions were deemed connected; this presumes that the quarry would be analyzed as an unconnected action with cumulative impacts rather than as a connected action with direct impacts).

B. Federalization of the Quarry—or the "non-Federal" Project Generally—is Not the Issue

The issue in this case is whether either the rail line or the quarry lack independent utility such that they are "interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1)(iii) (2003). Here, the rail line is a wholly-owned subsidiary of the quarry's owner/operator that is "an interdependent part" of the quarry, lacks any other potential customers, and "depend[s] on" the quarry for its justification.

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Both the applicant's March 10 letter and the *Toyota* memo rely exclusively on the "non-federal" nature of the non-rail actions potentially connected to their projects to claim that a connected action is not present. March 10 letter at ¶ 3; *Toyota* memo at 3.

Both the applicant's March 10 letter and the *Toyota* memo cite environmental assessment, rather than EIS, cases to support this position. March 10 letter at 6; *Toyota* memo at 3. Another name for these cases is Finding of No Significant Impact (FONSI) cases. Following the preparation of an environmental assessment, an agency will reach one of two possible outcomes. If an agency finds a significant impact, it must prepare an EIS. If it does not, and if the action does not significantly affect the quality of the human environment independently, the agency must prepare a Finding of No Significant Impact (FONSI) and finalize the decision. 40 C.F.R. §§ 1501.4(c),(e) (2003).

As we have stated previously, and now review, these FONSI cases do not apply in this case, where an EIS will be prepared. Letter from David F. Barton, The Gardner Law Firm, to Victoria J. Rutson, STB-SEA 3-8 (February 19, 2004) (Document EI-601).

1. *Review of the inapplicable FONSI case law and why it does not apply*

An agency may reasonably limit relatedness at the environmental assessment stage precisely because the NEPA statute is silent on the scope of an environmental assessment, and because 40 C.F.R. § 1508.25 applies only to the EIS. *California Trout v. Schaefer*, 58 F.3d 469, 472 (9th Cir. 1989) ("When the federal action is merely a component of a larger nonfederal project, the process becomes more complicated, because NEPA does not specify the scope of an agency's environmental assessment analysis."¹).

The analyses for *whether to prepare* an EIS (EIS-threshold) and the *scope* of an EIS (EIS-scoping) differ completely. It is important to understand the cases that correctly and incorrectly apply these principles, in order to limit them to their proper context.

¹ *California Trout's* citation to *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 398 (9th Cir. 1989), for this principle is somewhat misleading and unnecessary, because *Sylvester*, another environmental assessment case, said correctly that "[the statute] NEPA does not specify the scope of analysis that federal agencies must conduct," but ignored the fact that regulations at 40 C.F.R. § 1508.25 define the scope for an EIS.

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When deciding whether to prepare an EIS, an agency considers potentially related actions along with the proposed action. These potentially related actions may be proposed, planned, or speculative.

The regulation does not limit the inquiry to the cumulative impacts that can be expected from proposed projects; rather, the inquiry extends to the effects that can be anticipated from '[past, present, and] reasonably foreseeable future actions.' . . . The regulations clearly mandate consideration of the impacts from actions that are not yet proposals and from actions—past, present, or future—that are not themselves subject to the requirements of NEPA.

Fritiofson v. Alexander, 772 F.2d 1225, 1241 n.10 (5th Cir. 1985). This distinction arises from the difference between the definitions of "cumulative impact" and "cumulative action." Cf. 40 C.F.R. § 1508.7 (defining "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (*Federal or non-Federal*) or person undertakes such other actions.") (emphasis added) and *Id.* §§ 1508.25, 1508.25(a)(2) (defining "scope" as "the range of actions, alternatives, and impacts to be considered in an [EIS]," and defining "cumulative action" as "actions, which when viewed with other *proposed* actions have cumulatively significant impacts and should therefore be discussed in the same [EIS]" (emphasis added).

While an agency must consider the cumulative impacts from "related" actions in its EIS-threshold significance determination, *Id.* § 1508.27(b)(7), and prepare an EIS if the impacts may be cumulatively significant, *Fritiofson*, 772 F.2d at 1238-39 n.7, it need not consider unrelated actions at all.

A multi-factor test (the multifactor federalization test for relatedness) has evolved to determine whether actions must be considered in a proposed federal action's environmental assessment because they are sufficiently "related". These factors, which "federalize" otherwise non-jurisdictional segments of a project at the environmental assessment stage, include, but are not limited to:

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- (1) whether the regulated activity comprises "merely" a link" in a corridor type project (e.g., a transportation or utility transmission project);
- (2) whether there are aspects of the nonjurisdictional activity in the immediate vicinity of the regulated activity which uniquely determine the location and configuration of the regulated activity;
- (3) the extent to which the entire project will be within the agency's jurisdiction; and
- (4) the extent of cumulative federal control and responsibility.

See Sylvester v. Army Corps of Engineers, 884 F.2d 394, 398-99 (9th Cir. 1989) (quoting similar Corps of Engineers regulations at 33 C.F.R. Part 325 Appx. B, §7(b)(2)).

Sylvester involved the alleged segmentation of a proposed golf course from other portions of a proposed resort at Squaw Valley, California, including a village and additional ski runs. The state completed an environmental impact report on all segments of the proposal, pursuant to state law. *Id.* at 396. The Corps of Engineers, however, issued a FONSI for the federal wetland fill permit after completing an EA describing only the golf course, which was the only segment of the proposal that it had jurisdiction over. The Corps applied the federalization test in its regulations, 33 C.F.R. Part 325 Appx. B, §7(b)(2), and concluded that the other segments of the resort were not related to the golf course for the purposes of NEPA. The court held that NEPA was unclear as to the proper scope of analysis of NEPA review for nonjurisdictional actions, and that the Corps' interpretation was not an impermissible reading of the statute. *Sylvester*, 884 F.2d at 397. In the wake of *Sylvester*, numerous other federal agencies promulgated EIS-threshold regulations similar to the Corps. *See e.g.*, 23 C.F.R. § 771.111(f) (2003) (Federal Highway Administration), 18 C.F.R. § 380.12(c)(2)(ii) (2003) (Federal Energy Regulatory Commission).

Still, courts confronted with challenges to agency FONSI's have often misapplied or collapsed the analysis of relatedness and the analysis of potential significance that comprise the two step EIS-threshold analysis. This typically occurs when the court substitutes the EIS-scoping test, in the Council on Environmental Quality (CEQ) regulations implementing NEPA, for the multi-factor relatedness test. *Cf.* 40 C.F.R. § 1508.25 (2003) (defining EIS scope for connected and cumulative actions). The former cannot apply exclusively until an EIS is

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required. The terms of the EIS-scoping test may be used as factors in the relatedness test, but they cannot be the only test of whether an EIS is required.

To surpass the EIS-threshold, the court must deem the agency's "decision to forgo preparation of an EIS . . . unreasonable for at least [one of the] two reasons" outlined in *Fritiofson*:

(1) the evidence before the court demonstrates that, contrary to the FONSI, the project may have a significant impact on the environment, or (2) the agency's review was flawed in such a manner that it cannot yet be said whether the project may have a significant impact.

Fritiofson, 772 F.2d at 1238. That requires applying both a federalization test for relatedness and a significance test.

By far the best example of an improperly collapsed analysis is *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985). In *Thomas*, the district court upheld the Forest Service's decision to analyze a proposed Forest Service road and several proposed timber sales along the proposed road in separate environmental assessments. Without even consulting the record for a significance determination, the Ninth Circuit reversed the district court and, applying the EIS-scoping test for connected actions at 40 C.F.R. § 1508.25(a)(1)(i)-(iii), deemed the proposals connected and ordered them consolidated in a single EIS.²

Thomas' reliance on the EIS-scoping factors at 40 C.F.R. § 1508.25 as inputs to a federalization test for relatedness at the EA stage is perfectly reasonable, but *Sylvester* shows that they are not the only reasonable inputs. *Thomas*' bypass of the significance test is completely impermissible; *Fritiofson* instructs that the court must at least consult the record before making its own determination.

² Later courts have noted that *Thomas* relied most heavily on 40 C.F.R. § 1508.25(a)(1)(iii), the so-called "independent utility" factor in the EIS-scoping test. See *Thomas*, 753 F.2d at 759-60 (discussing Ninth Circuit independent utility precedent); *Blue Ocean Preservation Society v. Watkins*, 754 F. Supp. 1450, 1459 n.8 (D. Haw. 1991) (politely suggesting that the Second Circuit, in *Hudson River Sloop Clearwater v. Department of the Navy*, 836 F.2d 760 (2d Cir. 1988), was incorrect to categorize *Thomas* as an application of 40 C.F.R. § 1508.25(a)(1)(ii), the "but for" factor in the EIS-scoping test).

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The second factor cited in *Sylvester* is an independent utility-type factor, and some agencies have explicitly codified it as such in their regulations. *See, e.g.*, 23 C.F.R. § 771.111(f) (2003) (Federal Highway Administration). But it should be clear that the federalization test for relatedness in an environmental assessment case differs from the relatedness tests for connected and cumulative actions once an EIS has been triggered.

Early FONSI cases set out slightly different sets of relatedness factors but reached results consistent with *Sylvester*. *See Friends of the Earth v. Coleman*, 518 F.2d 323 (9th Cir.1975) (agency did not have to prepare an EIS for state funded projects in a partially federally funded airport development); *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980) (because federal jurisdiction extended only to river crossing of interstate power line, Corps of Engineers was not required to consider impacts beyond that area); *Friends of the Earth v. Hintz*, 800 F.2d 822, 832 (9th Cir. 1986) (agency not required to consider the impacts of shoreside facilities, such as berthing areas, terminals, roadways, and utility improvements).

In *Save the Bay, Inc. v. U.S. Army Corps of Engineers*, 610 F.2d 322 (5th Cir. 1980), the Corps of Engineers was required to analyze only the environmental consequences of a discharge pipeline's construction and maintenance instead of considering an entire chemical plant in its decision on whether or not to prepare an EIS. *Id.* at 327. The record before the court in that case did not contain facts or circumstances to compel an alternate conclusion. *See also Hoosier Environmental Council, Inc. v. U.S. Army Corps of Engineers*, 105 F. Supp. 2d 953, n.13 (S.D. Ind. 2000) (plaintiffs did not present factual evidence of significance contrary to Corps' conclusion under its regulations that EA did not require cumulative effects analysis of riverboat casinos greater than 100 miles away from the proposed action). However, the Fifth Circuit explicitly stated "We express no opinion as to the proper scope and extent of coverage of an EIS should one have been necessary." *Id.* at 327 n.3.

There are limits to an agency's ability to avoid invoking its jurisdiction under the multifactor federalization test for relatedness. In *Stewart v. Potts*, 996 F. Supp. 668 (S.D. Tex. 1998), an environmental group alleged that the Corps violated NEPA and the Clean Water Act by issuance of a permit to a city to build a golf course. To build the golf course, 200 acres of forest land containing approximately two acres of wetlands had to be cleared. The Corps prepared an EA for the wetlands but declined to perform an assessment of the environmental impact of the rest of the area on which the golf course would be built.

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Stewart held that the tasks necessary to construct the proposed golf course—filling of the wetlands and clearing of the forest located on the wetlands—were so interrelated and functionally interdependent as to bring the entire project within the jurisdiction of the Corps and NEPA. The court arrived at this conclusion because the two acres of wetlands were not in a “neat square of land” but were scattered throughout the 200 acre site. The court stated that “[t]o suggest that the Corps has no jurisdiction to consider the environmental impacts of the fragmentation of the forest, even though it has jurisdiction to consider the impacts of the wetlands which coexist underneath those very trees is . . . an impermissible abdication of a federal agency's duties under NEPA.” *Id.* at 683-84.

Sometimes, if the agencies lack clear EIS-threshold regulations, the courts simply ignore the multifactor case law and apply their own test. See *Airport Neighbors Alliance, Inc. v. United States*, 90 F.3d 426 (10th Cir. 1995) (test for whether particular parts of airport master plan could be considered cumulative impacts of the proposed action was whether they were “so interdependent that it would be unwise or irrational to complete one without the others”).

This has happened frequently for the “independent utility” factor in the federalization test for relatedness, which many circuits have carried over to the third connection action factor in the EIS-scoping analysis, 40 C.F.R. § 1508.25(a)(1)(iii). See *Utahns for Better Transportation v. U.S. Department of Transportation*, 305 F.3d 1152, 1173 (10th Cir. 2002) (expressing the novel theory that the Tenth Circuit test for whether an action can be considered a cumulative impact—a term with its own definition at 40 C.F.R. § 1508.7—and define the scope of an EIS is the *Airport Neighbors* test); *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1118 (9th Cir. 2000) (ignoring *Sylvester* to say that “We use an ‘independent utility’ test to determine whether an agency is required to consider multiple actions in a single NEPA review pursuant to the CEQ regulations,” as the federalization test for relatedness, before an EIS has even been triggered). Again, analogous to the use of the EIS-scoping test factors in *Thomas*, there is nothing wrong with defining independent utility as a factor in the federalization test for relatedness, or even using it as the primary factor, *Association Concerned About Tomorrow, Inc. v. Dole*, 610 F. Supp. 1101, 1108 (N.D. Tex. 1985) (“Nevertheless, the illogic of a terminus is at best a secondary inquiry . . . shadowed by the independent utility inquiry”).

However, when applying the EIS-scoping test, it is important to understand first that while carryover of the independent utility concept from the FONSI cases is permissible, those cases often use independent utility as a proxy for a multifactor relatedness test. Second, EIS-scoping

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cases that have carried over the concept, instead of applying 40 C.F.R. § 1508.25(a)(1)(iii) directly, may do so thinking that they may apply other factors in the FONSI cases as well, when in fact the EIS-scoping test is restricted to the terms of the CEQ regulations. While one factor in the EIS-threshold analysis—the “independent utility” factor—may happen to match one of the terms in the EIS-scoping analysis, other reasonable factors in a test for relatedness do not carry over, unless they happen to match the prongs of § 1508.25(a)(1).

For a complete classification of FONSI and EIS cases, please consult the list in the page (s) attached to this letter.

- 2. The multifactor federalization test for relatedness has already been applied, and the applicant has lost—the quarry has been deemed related*

It is telling that the applicant is attempting to take a second bite at the apple by applying the inapplicable case law-based multifactor relatedness test for the scope of an environmental assessment in lieu of the clear connected action regulation for the scope an EIS. For if simply federalizing the non-federal project is the issue, rather than establishing the dependence of the federal proposal on an additional project that must be considered part of the “action” and directly analyzed in the EIS, the applicant has already lost. It concedes that “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” and that “the rail line and quarry are related to the extent that the rail line will serve the quarry.” March 10 letter at 3. The only test left to apply is the connected action regulation for the scope an EIS.

Yet the applicant would deny the effect of the EIS connected action regulation by substituting the inapplicable relatedness analysis from the environmental assessment stage, with its multiple potential factors, including independent utility. This is why it is essential to classify and separate the case law on environmental assessments and EISs. The applicant’s use of environmental assessment cases applying a relatedness test in various forms, including *Save the Bay, Inc. v. U.S. Army Corps of Engineers*, 610 F.2d 322 (5th Cir. 1980), *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1118 (9th Cir. 2000), and *Border Power Plant Working Group v. U.S. Department of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003) is disingenuous and disrespectful of clear rules of law represented by the EIS connected action regulation.

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The use of *Wetlands Action Network* by the both applicant's March 10 letter and the *Toyota* memo, and the use of *California Trout* by the *Toyota* Memo, is particularly offensive. *Wetlands Action Network's* statement that "We use an 'independent utility' test to determine whether an agency is required to consider multiple actions in a single NEPA review pursuant to the CEQ regulations" is an example of sloppy, overbroad language leading to unclear law. *Wetlands Action Network*, 222 F.3d at 1118. The CEQ regulations defining scope, at 40 C.F.R. § 1508.25, apply only to an EIS, not to an environmental assessment, even though they may be used as factors in a relatedness test in a FONSI case. Ironically, it is *California Trout* that points this out. *California Trout*, 58 F.3d at 472.

More disturbing is the fact that both the applicant's March 10 letter and the *Toyota* memo use the *Wetlands Action Network* and *California Trout* FONSI cases to stand for the categorical principle that projects "not financed by federal funding" and not controlled by "federal regulation," March 10 letter at 5, "not [but-for] dependent on the federal action . . . and an independent private project over which the [agency] has no jurisdiction," *id.*, or where "only one of them falls under agency jurisdiction," *Toyota* memo at 3, cannot be connected actions in an EIS. *Wetlands Action Network* and *California Trout*, (which again, like *Save the Bay* and *Border Power Plant Working Group*, are FONSI, not EIS cases), do not even stand for this principle in an environmental assessment, much less in an EIS where they cannot apply. The factors these cases list are just that—factors—meant to be applied by agencies in environmental assessments on a case by case basis, and not as categorical rules.

3. *To resurrect the federalization test from the environmental assessment stage, the applicant seeks to define "action" in the CEQ regulations to mean only "federal action," which it clearly does not.*

Now that an EIS will be required, and the only test left to apply is the connected action regulation, the applicant's only argument is to replace the explicit EIS regulation at 40 C.F.R. § 1508.25(a)(1)(iii) (the independent utility test) with a multifactor, jurisdictional federalization test for relatedness. The applicant posits on page 6 of their March 10 letter, that "all of the independent utility cases relied upon by MCEAA involve two allegedly interdependent projects, each subject to some form of agency review due to agency permitting or funding." That is merely a restated federalization test. Unfortunately for the applicant, 40 C.F.R. § 1508.25(a)(1) contains no requirement that the connected action be subject to agency permitting or funding, be otherwise federal, or even be proposed as opposed to planned. *Compare* 40 C.F.R.

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§ 1508.25(a)(2) (2003) (requiring analysis in the same EIS only for “proposals” that are cumulative actions) *with id.* § 1508.25(a)(1) (lacking that requirement for connected actions).

Assume for a moment that the applicant’s implicit assertion—that “action” as used in the Council on Environmental Quality regulations means only federal actions—is even arguable:

Federalization of a project not otherwise subject to federal agency review occurs during the environmental assessment stage, when an agency’s decision to prepare an EIS turns on whether the action and any related segment does so “significantly.” 40 C.F.R. § 1502.3 (2003). In that determination, significance may arise directly from the proposed action, or cumulatively. If “the action is related to other actions with individually insignificant but cumulatively significant impacts . . . [then] [s]ignificance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.” *Id.* § 1508.27(b)(7) (2003). As *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985) and hundreds of environmental assessment cases before and since have recognized, the “other actions” that may be considered in the determination of cumulative significance may be non-federal. A multifactor federalization test for relatedness, which includes independent utility and other potential factors, governs whether these non-federal actions are related enough to the proposed federal project to be included in that significance determination. *Id.*; *Sylvester v. Army Corps of Engineers*, 884 F.2d 394, 398-99 (9th Cir. 1989).

Then, when these other actions are considered in an EIS, if they are not otherwise connected actions (§ 1508.25(a)(1)) or cumulative actions (§ 1508.25(a)(2)), they are considered as merely cumulative impacts (§ 1508.7). A “cumulative impact” is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” *Id.*

Having established that even the most remote “actions” considered in an EIS are both federal and non-federal, we turn to the applicant’s assertion that those “actions” most directly tied to the federal action—indeed, connected to it—need not be considered if they are non-federal. The result can be no different. The applicant’s only justification could be that multiple environmental documents are preferable to one, per the two hypotheticals discussed above. If this were true, STB would consider the quarry solely as a cumulative impact in the rail line EIS, as the applicant desperately wishes at this late date. But it is not. The connected action

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regulation exists apart from the cumulative impact regulation for a reason, and the applicant's argument must fail.

C. Consequences of the Applicant's Position

The applicant's flawed view of connected actions in an EIS under NEPA can be distilled into two hypothetical principles:

First, if an applicant desires to construct what would otherwise be a connected action under 40 C.F.R. § 1508.25(a)(1)(iii), such as a quarry and a rail line, they can avoid analyzing them together in an EIS by proposing the one that lacks independent utility (the rail line) first, or, arguably, the quarry.

Second, if an applicant desires to construct what would otherwise be a connected action under 40 C.F.R. § 1508.25(a)(1)(iii), such as a quarry and a rail line, they can also avoid analyzing them together in an EIS by proposing the federal action (the rail line) first, and then waiting until after that process to see if the nonfederal action requires an EIS.

Both of these hypotheticals are flatly inconsistent with NEPA and the connected action regulation. Underlying this inconsistency is the theoretical argument that two EISs are just as good as one, because the cumulative impact section in the second one will account for the effects of the first (probably after it is built). That ignores the basis for the connected action regulation for EISs, 40 C.F.R. § 1508.25(a)(1) (requiring analysis in the "*same EIS*") (emphasis added), and its three tests, in favor of treating all unproposed actions as connected cumulative impacts. The purpose of 40 C.F.R. § 1508.25(a)(1) is precisely to require the direct effects analysis of both projects at the same time.

II. NATURAL MONOPOLY GOODS AND THE APPLICATION OF THE CONNECTED ACTION REGULATION

We have stated that the application of the connected action regulation need not encompass all actions that come before the agency. Letter from David F. Barton, The Gardner Law Firm, to Vernon Williams, STB 14 (February 20, 2004) (Document 210174). We are not unsympathetic

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to the agency's concern about how the connected action regulation may impact similar projects that come before it. Therefore, we will state clearly how limited the application of the connected action regulation should be.

A. Why Natural Monopoly Goods Are Different and More Susceptible to the Connected Action Regulation

Natural monopoly goods include pipelines, power lines, and rail lines. Federal agencies that build or license projects where these goods are often connected to a larger action, or that build or license the larger action, include the Federal Energy Regulatory Commission (FERC) (pipelines and power lines); Army Corps of Engineers, Tennessee Valley Authority (TVA), Bureau of Reclamation, and Bonneville Power Agency (BPA) (dams); Nuclear Regulatory Commission (NRC) (nuclear power plants); Western Area Power Administration, the US Section of the International Boundary and Water Commission (IBWC), and the Bonneville, Southwestern, and Southeast Power Administrations (power lines), and the STB (rail lines).

In many of these cases, the larger action is already a federal action, and its impact dwarfs that of the natural monopoly good. Rarely are pipelines and power lines to nowhere proposed.

Today, however, it is common to see rail lines to nowhere proposed, mainly for the reasons seen in the *Toyota* case. In *Toyota*, the closest line haul carrier, Union Pacific, initially refused to permit its competitor, Burlington Northern Santa Fe (BNSF), to serve a proposed Toyota factory south of San Antonio. BNSF had trackage rights over a nearby line but not over the line from which the new spur to the facility would be built. Union Pacific could have relied (and eventually did rely) on 49 U.S.C. § 10906 to exempt the new rail line from environmental review, since it was short enough to qualify as a spur, if it built the new line itself.

Toyota, however, refused to build the factory if it was not competitively served by rail, that is, by both Union Pacific and BNSF, to avoid a captive pricing situation. This situation does not arise nearly as often in the more monopolistic power line and pipeline goods, often because open access policies have been instituted. However, it is being replicated over and over nationwide with new rail construction. See *Finance Docket 34079—San Jacinto Rail Limited—Build-Out to the Bayport Loop, Texas* (2003) (consortium of chemical shippers seeking build out to end captive pricing); *Finance Docket 34002—Alamo North Texas Railroad—Construction and*

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Operation, Wise County, Texas (2002) (prospective quarry and rail line operator seeking build out to avoid captive pricing). It is also the situation with the quarry and rail line operator here.

But if Toyota or another entity paid for another line, to connect to where BNSF could operate, that line, due to its length, would have to undergo environmental review under NEPA. In response, the state of Texas did in fact form and fund the Bexar County Rural Transportation District to build a seven mile connecting rail line that would allow both Union Pacific and its competitor, Burlington Northern Santa Fe, to access the new Toyota factory.

Prior the commencement of the environmental analysis of the rail line, STB consulted the *Toyota* applicant's counsel regarding whether the rail line and the Toyota factory were connected actions. The *Toyota* applicant's counsel gave the responses discussed above, which, to the extent that they did not purport to apply to an EIS, were applicable to any environmental assessment that the STB would have prepared.

However, Union Pacific backed down and offered BNSF trackage rights and built the spur to the factory before an environmental assessment was prepared in *Toyota*. The decision came less than two months after BNSF had gained access to a massive concentration of chemical shippers near Houston, in *Finance Docket 34079—San Jacinto Rail Limited*. But what factors Union Pacific used in its calculation, and whether a "redivision of the map" occurred between the giant line haul carriers and the captive pricing policies they rely on to profit, we will never know.

The *Toyota* case illustrates that the pressure for shippers to step out and build "rail lines to nowhere" before their projects, to avoid captive pricing, has real impacts on the scope of environmental review, even in an environmental assessment. For the shipper to assume the risk that their entire project, which almost certainly has the potential for significant cumulative, if not direct-from-rail environmental impacts thus triggering an EIS, will be reviewed in detail is a major financial decision weighed against the cost of captive service.

Nevertheless, whether the shipper applies to construct the line or whether the line haul carrier that would provide competitive service does, the agency can consider at least two factors at the environmental assessment stage to deem the larger project "unrelated" and thus not part of the determination of whether an EIS will be prepared. This avoids applying the connected action regulation for an EIS, though the agency may still wish to apply its tests among the other factors. Those factors are:

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the extent to which the entire project will be within the agency's jurisdiction; and
the extent of cumulative federal control and responsibility;

Sylvester v. Army Corps of Engineers, 884 F.2d 394, 398-99 (9th Cir. 1989). *Sylvester* found these factors to be reasonable agency interpretations of NEPA. As discussed above, the agency has wide discretion to consider the relatedness of other actions at the environmental assessment stage. It can even promulgate its own regulations, as the Federal Energy Regulatory Commission (FERC) has. *See* 18 C.F.R. § 380.12(c)(2)(ii) (2003) (listing factors for relatedness of other actions in an environmental assessment).

As discussed below, the agency may also be able to consider a general, as opposed to project specific, independent utility, if the context is proper.

The larger actions potentially related to power line and pipeline projects are almost invariably excluded at the environmental assessment stage by these factors. *See Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980) (because federal jurisdiction extended only to river crossing of interstate power line, Corps of Engineers was not required to consider impacts beyond that area in environmental assessment). Only rail lines are not, and it is easy to see why. Unlike power lines and pipelines, the frequency and nature of operation on rail lines leads to widely varying environmental impacts. Power lines and pipelines, once they are built, have few impacts, and those impacts are consistent. There is not much ongoing responsibility past the construction stage, and what operational impacts do exist are not added to by the larger project. But for heavily used rail lines, or rail lines carrying hazardous cargo, environmental impacts (such as noise, traffic, and in particular for this case, flooding, cultural resource impacts, and air pollution) exist that will likely be added to, significantly, by related projects with similar impacts that therefore must be considered in determining whether an EIS will be prepared.

Examples of related projects where a sufficient amount of the entire project would be within the agency's jurisdiction are limited for natural monopoly goods. *See Tennessee Gas Pipeline Co., Order Granting, in Part, and Denying, in Part, Rehearing and Request for Reconsideration*, 95 FERC ¶ 61,169, 2001 WL 469985 (applying *Sylvester*-type multifactor test in FERC regulations to find that environmental assessment was not required to analyze a proposed nonjurisdictional lateral off of proposed pipeline, or the proposed nonjurisdictional power plant that the lateral would serve, due to insufficient federal control and responsibility over them). In such cases, state environmental review covers the non-federal project.

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On the other hand, related projects at the environmental assessment stage may exist in what would properly be termed "cumulative actions" at the EIS stage. Proposals with overlapping rail traffic impacts, such as a rail-served port and a new rail line, would have sufficient relatedness with respect to the agency's jurisdiction despite the lack of any physical connection. Relatedness will also exist when the non-federal action becomes federalized by another agency, because federal jurisdiction will then extend over the entire project. If the rail line will physically connect solely to a federalized action, the actions should be deemed connected if the independent utility test at 40 C.F.R. § 1508.25(a)(1)(iii) is satisfied.

But the biggest problem for STB is using independent utility as one of many factors at the environmental assessment stage. Invariably, because the proposed rail lines will connect directly to the proposed shippers, the rail line will lack independent utility unless (maybe) it is planned to serve a clearly industrial area where a speculative construction project might be justified. This is true even in cases like *Toyota* where the shipper claims that it has alternate means of transportation. Indeed, the courts would likely require a more detailed showing by the applicant, setting aside any confidentiality protection, if such massive projects that will almost certainly require rail service in order to be cost-effective at some date were regularly deemed independent.

The question for STB is if applying the independent utility factor in a relatedness test at the environmental assessment stage always points to an EIS, can it apply a jurisdictional factor at that stage as the sole counterbalance to avoid an EIS? Perhaps it cannot. And perhaps the line haul carriers and shippers have been dreading this day for some time for that reason. The shippers will choose a site that avoids federal environmental permitting requirements. But they cannot avoid the federal requirements that come with rail. Their entire project may thus reach the EIS stage, and be subjected to a detailed review that, while not as rigorous as individual permitting processes, is still more detailed than they would like.³

NEPA calls for this analysis for a reason, and that reason is providing a single, comprehensive set of facts for the community and for decision makers. NEPA addresses the tension of divided communities that will experience the entire action, not parts of it. When the state process has not begun, and the applicant is coyly waiting for its rail line before it builds the

³ One upside to the law for applicable parties may be the incentive for increased reuse of industrial sites in already industrialized areas, rather than "greenfield" development in rural areas.

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non-federal project that the line will connect to, the NEPA analysis is not duplicative, but rather complementary. In *Sylvester*, on the other hand, the state had already analyzed the resort surrounding the golf course. The complementary nature of NEPA analysis, when it is unclear whether the project served by the rail is truly non-federal as the applicants claim, prevents the applicant from short-circuiting the process based on the order in which their projects are proposed. Whether the "non-federal" project has in fact commenced the permitting process is itself another factor that the agency could and should use at the environmental assessment stage to determine relatedness.

B. Why the Relatedness Test and the Connected Action Test Will Not Produce Different Results

Once the EIS stage is reached, as in this case, the non-rail part of the action will usually have been deemed related during the environmental assessment stage, as it was in this case. However, "significance" requiring preparation of an EIS can arise independently of impacts from the related actions, *see* 40 C.F.R. § 1508.27(b) (listing significance factors), including "the degree to which the effects on the quality of the human environment are likely to be highly controversial." *Id.* § 1508.27(b)(4). The question then arises, is there a case where a public controversy is present, an EIS is required, but the actions would be "unrelated" for a relatedness test in the environmental assessment, yet "connected" under the EIS connected action regulation?

The answer is no, but even if it happened, it would not be a problem. First, the "independent utility" test of the EIS connected action regulation is likely dispositive enough when used as a factor in the relatedness test during the environmental assessment. Here, the rail line clearly lacks independent utility, as it would in nearly all rail construction cases like this one, where the applicant will both build the rail line and construct the project it serves. However, even if jurisdictional factors outweighed "independent utility" in the relatedness test during the environmental assessment, the connected action regulation does not permit the consideration of jurisdictional concerns at the EIS stage. An agency may blame CEQ for not providing better guidance at the environmental assessment stage, but it cannot reasonably challenge CEQ's connected action regulation for an EIS, which, like all agency regulations, is entitled to the highest deference, on those grounds. The EIS connected action regulation properly excludes jurisdictional concerns because the significance determination whether to prepare an EIS, where jurisdictional concerns may play a role, has already been made. Any further exercise of

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jurisdictional limits after that point may lead to an EIS that is practically an environmental assessment.

C. A General "Independent Utility" of Economic Benefit Does Not Apply Here

Road construction projects may enable future development on surrounding lands, and are used by and accessible to the public, and therefore may be said to have a general public independent utility if they are not being built solely to access a piece of land that is not a traffic generator. *See Association Concerned About Tomorrow, Inc. v. Dole*, 610 F. Supp. 1101, 1108-09 (N.D. Tex. 1985). Unlike road projects, rail lines are for private use, and generally connect to private shippers on private land.

Nevertheless, the *Toyota* memo suggests that a general "independent utility" of a rail line as "needed infrastructure to enhance the economic development of the region generally" can meet the "independent utility" test. *Toyota* memo at 8. We express no opinion as to the truth of that statement, for an environmental assessment under the multifactor federalization test for relatedness or under the EIS connected action regulation. But the two FONSI cases that the *Toyota* memo cites, *Wetland Action Network*, 222 F.3d at 1118, and *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 580 (9th Cir. 1998), do not support this position.

Even if such a general "independent utility" were possible, it is not present in this wholly private action. Such a test is contextual. Unlike *Toyota*, where an economic development area had been defined, commercial property was for sale, and the state was actively and formally pursuing activities on the land surrounding the proposed rail line through its economic development agencies and for the purpose of attracting new businesses, none of that is occurring in Medina County.

It is plausible to find independent utility from general economic benefit where a proposed rail line with no customers will serve a publicly-defined industrial or economic development area, even if that area is in the process of attracting tenants. Such general "independent utility" swallows the regulation, however, when it is applied to a rail line like the one in this proceeding, which crosses private land outside of *any* industrial or economic development area; where, as the applicant concedes, no tenants intend to locate; where the rail line's only customer is a private

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entity or consortium that has not yet built their project; and where the rail line is proposed by the same or effectively the same entity that it will serve.

III. THE PROPER ANALYSIS

Notably, we have not discussed the scope of the required Endangered Species Act analysis or the proper no action alternative up to this point. The March 10 letter's circular analysis intermingles these issues to distract from its failure to apply the connected action regulation to the rail line. The ESA issue can be determined independently from, and the no action issues cannot be determined until after, the scope of the EIS.

A logical, orderly analysis would contain three steps:

1. Apply the Endangered Species Act to both the quarry and the rail line, even if the quarry is only considered as a cumulative impact, because the relevant consideration for ESA purposes is the "total impact." *National Wildlife Federation v. Coleman*, 529 F.2d 359, 373 (5th Cir. 1976).
2. Explicitly apply 40 C.F.R. § 1508.25(a)(1)(iii) – the "independent utility factor" to the federal action (the rail line)
3. Determine the "no action" alternative with reference to the scope of the action determined in step 2.

MCEAA has already provided the analysis necessary to complete these simple steps. The additional background that we have provided attempted to preempt and elucidate the fallacies in the applicant's arguments. Unfortunately, because the applicant deliberately did not apply the connected action test to the rail line in their March 10 letter, they proceeded through numerous misrepresentations of the regulations and case law, most of which (such as the *Save the Bay*, *Border Power Plant Working Group*, *Wetlands Action Network*, *Thomas v. Peterson*, and *Save Barton Creek* environmental assessment cases) would not even apply even if the applicant were correct. In other instances, the applicant deliberately misrepresented MCEAA's explicit segregation of the inapplicable *Sylvester* environmental assessment case as though it applied, and likewise applied clearly inapplicable precedents in discussing the no action alternative.

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But the consequences of failing to consider a 1760-acre quarry—the largest in the San Antonio area, to serve the nation's ninth and fourth (Houston) largest cities—on flooding, on property, on air quality, on the transportation system, and on the natural surroundings, will be significant. The applicant has no argument, only its misrepresentations to offer, and having spent five years backing itself into an irrevocable moral corner through its initial dishonesty towards the community, it has now made an irresponsible request of the agencies to violate the law through its indefensible March 10 letter. To preclude that, we now restate portions of our prior analysis on the three steps above, with additions to respond to the March 10 letter.

IV. THE PROPER ANALYSIS APPLIED

A. *Endangered Species Act*

In *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), the Fifth Circuit held that “the relevant consideration,” in whether an agency has “adequately considered” the effects of an action under § 7(a)(2), “is the total impact.” *Id.* at 373. In *Coleman*, the FWS had found that a segment of Interstate 10 in coastal Mississippi would not “jeopardize the continued existence” of the endangered sandhill crane. However, the FWS had neglected to consider the “residential and commercial development that [could] be expected to result” adjacent to the highway” *Id.* The court found that regardless of the non-federal nature of the development, the agency still had a duty under § 7 and “control[led] the development . . . to the extent that they control[led] the placement.” *Id.* at 374.

“Irrespective of the past actions of others,” the court wrote, the agencies “have a duty to ensure that the highway and the development generated by it do not further threaten the crane.” *Id.* Absent that analysis, it would be “questionable whether the crane could survive . . . the indirect effects of the highway.” *Id.* at 373.

By implicating “indirect effects,” the Fifth Circuit calls for the same level of consultation inquiry used for direct effects to apply to what may fairly be called “cumulative effects” as the term is understood in the CEQ regulations implementing NEPA. See 40 C.F.R. § 1508.7 (2003) (defining “cumulative impact” as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable

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future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”). The level, or depth, of inquiry must be the same in order to produce the result compelled by the ESA. As applied in *Coleman*, that was “whether the crane could survive.” *Coleman*, 529 F.2d at 373.

As MCEAA discusses in its incorporated February 15, 2004 letter on the scope of the quarry and rail line as connected and cumulative actions under NEPA, a cumulative impact analysis will be required in the EIS regardless of whether the rail line and quarry are otherwise analyzed together as connected or cumulative actions. See MCEAA Connected Action Letter, Part III (Feb. 15, 2004).

Coleman holds without ambiguity that any BA placed in the EIS must consider all phases of the quarry and rail line. In addition, such a BA must consider the effects now, before operation begins. *Coleman* did not allow the U.S. Department of Transportation to wait around and see what the effects of Interstate 10 and the foreseeable private development around it would have on the crane. In the same way, the applicant and FWS cannot wait and see what indirect effects blasting and other quarry operations would have on the golden-cheeked warbler or the black-capped vireo. Vulcan concedes that it will have to monitor over the life of the project anyhow—but it is the agencies’ duty to analyze today that is at issue.

To date, however, only one phase of the quarry has been studied consistent with FWS protocols. Significantly, the rail loading yard, where the rail line will enter and connect with the quarry, has not been fully surveyed for the golden-cheeked warbler or the black-capped vireo. In an April 22, 2003 letter, from the FWS to Vulcan’s environmental analysis contractor, the FWS noted:

We are particularly concerned about the area noted by STB as the ‘straight track loading option’. It appears that the vegetation in this area has not been cleared and may support habitat for one or both of these species.

Letter from Robert T. Pine, FWS Supervisor, to Jana Zyman-Ponebshek, URS ¶ 3 (Document EI-56). Further, several landowners in the area report seeing the birds on their property, which will be crossed by the rail line alternatives.

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A procedural requirement of the ESA is a substantive violation for which an injunction may issue. *Thomas v. Peterson*, 753 F.2d 754, 764-65 (9th Cir. 1985). The STB cannot simply ignore *Coleman* and adopt the existing BA for Phase I of the quarry. It must require Vulcan to conduct the additional three years of focused study on Phases 2-5 of the quarry and the rail line alternatives necessary to produce an adequate BA under FWS protocols. Any such BA must be included for comment with the DEIS if it is not used in lieu of a section discussing impacts on threatened and endangered species.

The applicant's March 10 letter makes no serious argument against *Coleman*'s mandate to consider indirect effects. Page 9 of the letter contains a completely irrelevant jurisdictional argument that would not even apply if the actions were unconnected. Page 10 most directly addresses *Coleman*, but misapplies the "control[led] the development . . . to the extent that they control[led] the placement" language, *id.* at 374, to imply that *Coleman* only addresses "but for" cause. Such a scenario would apply much like one factor of the connected action test, 40 C.F.R. § 1508.25(a)(1)(ii) (the "cannot or will not proceed unless. . ." factor). But not only would it be irrational not to apply the ESA requirements to other types of connected actions, but "indirect effects" that "[could] be expected to result," encompass far more than directly connected actions. *Coleman* at 373.

An agency could not, for example, choose to subject some reasonably foreseeable future actions to ESA analysis but not others. Does the applicant seriously argue that wide areas of land adjacent to the rail line, where it anticipates induced development that the STB would "control the development" of "to the extent that they control[led] the placement," requires ESA analysis under *Coleman*, but that the quarry, which is far less speculative—indeed, certain in the applicant's eyes—does not? The applicant, having spent 5 years desperately trying to convince the agencies that the as-yet-unpermitted and unproposed quarry will proceed independently from the rail line cannot receive the benefit of this sort of sophistry. The "indirect effects" in *Coleman* were just as speculative as the private induced development is here, only over a slightly smaller area. Therefore, *Coleman* indicates that the speculative nature of reasonably foreseeable private development does not distinguish the quarry.

Further, what would be the purpose of considering "indirect effects" from only those future actions that tied to the federal action through "but for" causation? Those same actions, if truly "but for," would already be part of the connected action under 40 C.F.R. § 1508.25(a)(1)(ii) (the

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"cannot or will not proceed unless. . ." factor). But the Fifth Circuit in *Coleman* said "indirect" not "direct," and said "[could] be expected" not "cannot or will not proceed."

The Tenth Circuit has spoken clearly on the issue, in *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985):

Plaintiffs argue that, even if the Corps can consider effects of changes in water quantity, it can do so only when the change is a direct effect of the discharge. In the present case, the depletion of water is an indirect effect of the discharge, in that it results from the increased consumptive use of water facilitated by the discharge. However, the Corps is required, under both the Clean Water Act and the Endangered Species Act, to consider the environmental impact of the discharge that it is authorizing. To require it to ignore the indirect effects that result from its actions would be to require it to wear blinders that Congress has not chosen to impose. The fact that the reduction in water does not result "from direct federal action does not lessen the appellee's duty under § 7 [of the Endangered Species Act]." *National Wildlife Federation v. Coleman*, 529 F.2d 359, 374 (5th Cir. 1976). The relevant consideration is the total impact of the discharge on the crane. *Id.* at 373. In *National Wildlife Federation*, the Fifth Circuit held that the federal agency was required to consider both the direct and the indirect impacts of proposed highway construction, including the residential and commercial development that would develop around the highway interchanges. Similarly, in this case, the Corps was required to consider all effects, direct and indirect, of the discharge for which authorization was sought.

Riverside Irrigation District, 758 F.2d at 512-13.

In *Riverside Irrigation District*, the District's argument to avoid ESA applicability was a jurisdictional one similar to the one that appears on pages 3 and 10 of the applicant's March 10 letter. The District, subject only to the Clean Water Act in this case, styled its dam proposal as an otherwise non-federal action, attempting to restrict *Coleman* to the direct effects of major federal actions under NEPA. The applicant seeks to style its quarry in the same fashion and similarly attempt to restrict *Coleman* to the direct effects of its federal action (the rail line).

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Here again the applicant desires a result like one of the hypotheticals above, where the order of proposal between the federal and non-federal project would be outcome determinative and would undercut the cumulative analysis called for by the statute. The Tenth Circuit soundly rejected this approach and no circuit has challenged its affirmation, or the Fifth Circuit's original interpretation which leads ineluctably to the same result. So long as some federal action is involved, all direct and indirect impacts of the federal action must be considered.

Operation of the quarry is at least a reasonably foreseeable indirect effect of the rail line, in that, like reduced flows from a dam to facilitate consumptive use in *Riverside Irrigation District*, once the rail line is in place it will be utilized. The dam enabled water transfers with the indirect effect of reduced flows that impacted endangered species. The rail line will enable quarry operation and output with the indirect effect of degraded and destroyed habitat for endangered species from those operations. Simply because the quarry has another option besides the proposed federal action that it could use to enable quarry operation and output does not excuse the indirect effects that the rail option will generate once it is constructed.

Finally, the applicant states on page 10 that "there is no potential endangered species habitat along the proposed rail line." This is unsupported by the documentation provided to the STB to date. No biological assessment has been conducted for the rail line alternatives. To date Vulcan has completed a biological assessment on phase 1 of the quarry, which did not include the rail line. Nor have three years of focused counting per U.S. Fish & Wildlife requirements been completed for the rail loading area and loop, which, as page 6 of the August 2003 Biological Assessment states, are part of Phase 2 of the quarry. A complete Biological Assessment, including three years of focused counting, has only been completed for Phase 1. Even so, because the rail line will at least enable indirect effects from the quarry once it is constructed, a full analysis of the quarry site is merited, given that the agency "control[s] the development . . . to the extent that they control the placement." *Coleman* at 529 F.2d at 374.

Of course, because the rail line and quarry are connected actions under NEPA, the above simply illustrates that the scope of the ESA analysis will encompass the entire quarry site regardless of whether it is treated as part of the direct effects of a connected action, or the indirect effects of a cumulative impact.

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B. Connected Actions Under the National Environmental Policy Act

40 C.F.R. 1508.25(a)(1)(iii)—Are interdependent parts of a larger action and depend on the larger action for their justification.

The proposed rail line and all phases of the planned quarry (including the construction and operation of the rail line into the site) fall within this factor as connected actions. The proposed rail line is an interdependent part of the larger quarry action, and depends on it for its justification. Therefore, the quarry is a connected action whose direct and cumulative impacts, as well as alternatives, must be analyzed alongside those of the rail line in the same EIS.

Connected actions are defined in a manner consistent with the criteria recognized in the independent-utility cases. *Fritiofson*, 772 F.2d at 1242; *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 439 (5th Cir.1981). The Second Circuit has affirmatively acknowledged that "The proper test to determine relatedness under 40 CFR § 1508.25(a)(1)(iii) is whether the project has independent utility." *Town of Huntington v. Marsh*, 859 F.2d 1134, 1141-42 (2d Cir.1988); *Hudson River Sloop Clearwater v. Department of the Navy*, 836 F.2d 760, 764 (2d Cir.1988).

The independent utility test requires that "[i]f proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the projects should be evaluated together." *Fritiofson*, 772 at 1241 n. 10; *Stewart v. Potts*, 996 F. Supp. 668, 683 (S.D. Tex. 1998).

On the facts in this case, the rail line does not possess any real independent utility. Most significantly, the rail line originates at the quarry site. There is no "independent utility" to building an aggregate loading yard at the start of the line, in phase 2 of the quarry site, without the construction of the quarry that Vulcan intends to supply it at that exact site. Construction of the rail line "forecloses options" as to the quarry's location. If the quarry were not a possibility, it would clearly be "irrational, or at least unwise," *Trout Unlimited v. Morton*, 509 F.2d 1276, 1285 (9th Cir. 1974), to proceed with the rail line. That action is "irrational" absent imminent construction of the quarry through phase 2, and "functional[ly] dependent" on the quarry. Vulcan could not "reasonably consider" going ahead with the rail line construction if there were no other development to utilize it. *Blue Ocean Preservation Society v. Watkins*, 754 F. Supp. 1450, 1459 (D. Haw. 1991).

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At every turn in this proceeding, Vulcan and SGR have stated that the rail line's sole purpose is to serve the quarry. SGR's counsel has represented that "The SGR line would be used to transport aggregate between the quarry and a point near Dunlay, Texas, where the SGR line would connect with a Union Pacific Railroad line." Letter from David H. Coburn, Steptoe & Johnson LLP, to Victoria J. Rutson, STB-SEA 1 (January 5, 2004) (Document EI-423). Even so, Vulcan and its wholly-owned subsidiary continue to insist that their fictional division justifies the evasion of the legally required combined analysis of their two projects' direct effects under NEPA. SGR's counsel insists that "the appropriate no action alternative is the alternative of a truck served quarry." *Id.* at 2.

SGR and Vulcan also claim that other shippers "may locate in the area in the future" and plans to hold itself out as a common carrier. *Finance Docket 34284*, Petition of Southwest Gulf Railroad Company for Exemption 3, 5 (February 27, 2003). Rather than allow the NEPA process to account for the changes in land use such development might bring, SGR and Vulcan want it both ways. Fortunately, SGR counsel's own words show that the rail line has no independent utility of its own.

In response to a criticism that the rail line would cause a significant increase in industrial and commercial development along its length, Mr. Coburn responded:

SGR at this point is not aware of any specific shippers that may locate on the line, other than Vulcan. While the line will be operated as a common carrier line and thus open to use by other shippers, SGR has no information at this time about other shippers that may locate in the area. *Accordingly, any assessment of the level of commercial and industrial development that could develop along the line is speculative.*

Letter from David H. Coburn, Steptoe & Johnson LLP, to Victoria J. Rutson, STB-SEA 1 (January 5, 2004) (Document EI-423) (emphasis added). Clearly, it would be "irrational" to assume that the rail line can proceed independently on the basis of speculation.

The applicant's March 10 letter fails to alter this analysis. Rather than apply the connected action regulation to the federal action, the rail line, the applicant applied it only to the non-federal quarry. The regulation must be applied to all potentially connected actions,

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including the federal action, to avoid making the order or timing of proposal outcome determinative.

This case is rare because it is the federal action itself that lacks independent utility. The applicant's March 10 statements do nothing to disprove its earlier statements to this effect. Page 6 of the letter states remarkably that "SGR has never claimed that the rail line is dependent on the revenues of the quarry." Given that the applicant's counsel has stated on the record that future development is "speculative" and that the Vulcan Materials quarry is the only possible customer for the Vulcan Materials subsidiary rail line, this statement cannot be taken seriously.

Logically, the same side by side analysis of direct effects and alternatives that occurs for single actions is required for connected actions and their effects, once the agency deems them "connected". As the CEQ regulations themselves provide, an action need not be "proposed" to be connected so long as it satisfies one of the three tests of 40 C.F.R. § 1508.25(a)(1). Yet the command of the CEQ regulations for full analysis in the same EIS remains the same between § 1508.25(a)(1) and (a)(2). It is simply impossible to argue that *Kleppe's* statement for what the CEQ regulations later termed cumulative actions under § 1508.25(a)(2) should be ignored in favor of a different result under § 1508.25(a)(1).

It makes no sense to argue that the cumulative impacts of the rail line and the quarry must be described in the same EIS, but that consideration of alternatives and direct impacts for the connected action (quarry) may be deferred until the connected action (quarry) is ripe for proposal. The actions must be analyzed from the same baseline of no action side by side. Only then can their cumulative impacts be determined, also in the same document.

The Fifth Circuit has already decided this issue contrary to any attempt by the applicant to segment the EIS' analysis of the quarry as a connected action. In *Sierra Club v. Sigler*, the Fifth Circuit held that related actions that are not "proposals" must be discussed alongside the proposed action in the direct effects and alternatives analyses of the EIS, not simply in the cumulative impact section. 695 F.2d 957, 978-79 (5th Cir. 1983). While the Supreme Court in *Kleppe* addressed (yet, unambiguously resolved) the issue of combined EIS breadth only in dicta, the Fifth Circuit also spoke clearly and on point:

If an agency were permitted to cite possible benefits in order to promote a project, as the Corps has done here, yet avoid citation of accompanying costs by hiding

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behind *Kleppe*, the cost-benefit analysis in the EIS would be reduced to a sham: such a "cost-benefit analysis" would always be tipped in favor of benefits. *Kleppe* cannot be used to defend a skewed cost-benefit analysis; it was concerned solely with determining when an EIS with its informal cost-benefit analysis must be prepared. Once that threshold is crossed, the analysis must be objective. This case is beyond the threshold at issue in *Kleppe*, since the Corps had to prepare an EIS on the superport project. The issue here is one not discussed in *Kleppe*: once an EIS is required, can the costs of any claimed benefits be ignored? This issue was correctly resolved in [*Chelsea Neighborhood Association v. U.S. Postal Service*, 516 F.2d 378 (2d Cir.1975)], and as NEPA required it must, *Chelsea* answered it negatively.

Sigler, 695 F.2d at 979.

Sigler stands for the principle that Vulcan cannot have it both ways. The bulk cargo activities in *Sigler* were beneficiaries of the proposed action that, while speculative and not yet proposed, required analysis of direct effects ("costs and benefits") in the same EIS. Likewise, Vulcan chose to have the quarry phases all benefit from the proposed rail line, and while some of the latter phases may be speculative and not yet proposed, *Sigler* will not permit Vulcan's quarry to hide behind the speculative possibility of "implementation based on market demands." See Biological Assessment, Phase I Medina Project 3 (Aug. 2003) (describing implementation in terms of that phrase). It must analyze the direct impacts and alternatives for all phases of the quarry in the same EIS as the rail line, because it has not represented to the STB that it will use the line only for certain phases or stop using the line after a given time.

Sigler rested its holding on the duty to discuss direct effects advanced by the plaintiffs, and not simply cumulative, secondary, or indirect effects. The plaintiffs "first argue[d] that since the FEIS relied on the benefits of the bulk cargo activities, the FEIS must also evaluate the adverse effects of those activities. Second, the FEIS should have assessed those adverse effects as cumulative effects of related proposals. Third, the adverse effects should have been examined as secondary or indirect effects of the multipurpose deepwater port." *Id.* at 975. The Fifth Circuit did not reach the latter two arguments, because it did not need to. It had already decided them by establishing that, at minimum, a direct effect analysis of the connected action was necessary. *Id.* at 979 n.21. It follows that once the direct effect analysis is complete for all of the phases of the

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quarry, those effects will be added to other effects of the proposal to generate the cumulative impact analysis. 40 C.F.R. § 1508.7 (2003).

Sigler makes it clear that the proposed rail line does not exist independently of any phase of the quarry. The phases of development will overlap. These phases will not locate elsewhere, away from the rail line or rest of the quarry; nor will they use exclusively trucks. While not the rule for all phased connected actions, once this quarry is deemed a connected action, every phase of it will be connected to the proposed rail line, because none of the quarry phases have independent utility with respect to one another. They will all rely on common equipment, a shared crushing unit, and shared personnel and resources. They cannot exist apart from one another or the rail line that will transport at least some of their joint output.

C. The No Action Alternative

The no action alternative to the connected action neither builds a rail line nor builds any quarry facilities. For a connected action, no action is something that is *not the connected action* (i.e., something that has independent utility apart from the connected action) that would occur anyhow. It is illogical to define no action as part of the action itself.

However, Vulcan's incorrect argument is predicated on a line of NEPA case law that does not deal with connected actions. In every single case that could justify Vulcan's position, the either/or proposition to reasonably define no action applies as follows:

either the action / or something that is *not the action* that would occur anyhow.

No action is obviously the latter "or" result. These cases all proceed from the assumption that no action can be defined "reasonably" as something that is *not the action* that would occur regardless of whether the action did. We cannot disagree with that general principle. Here, however, the action is a *connected action* with two constituent and interdependent parts. If actions are so bound up and closely related that they cannot be separated, and require side-by-side consideration in the same EIS, then they obviously cannot be juxtaposed against one another in an either/or analysis. The proper analysis to determine the no action alternative is:

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either the connected action /

or something that is not the connected action (i.e., something that has independent utility apart from the connected action) that would occur anyhow

not what Vulcan wants, which is:

either one part of the connected action /

or the other part of the connected action with a substitute for the first part that would occur anyhow

As the definition of “scope” in the CEQ regulations states, scope consists of the ranges of actions, alternatives, and impacts to be considered in an EIS. Actions, alternatives, and impacts—each term is set out and defined separately by the regulation; each term follows from the other. Defining alternatives to an action, including the alternative of *no action*, necessarily requires defining the *action* in a previous step of the scoping process. The agency cannot “undefine” or “redefine” the scope of the action—be it connected, cumulative, similar, or single and unconnected—in a subsequent step if these codified words, which are entitled to the highest deference, mean anything at all.

The general principle that something that is *not the action*, but that would occur regardless of whether the *action* did or did not, can reasonably constitute a no action alternative differs by orders of magnitude from redefining the scope of the action after it has already been defined. The de facto result of independent utility if the quarry is assumed as part of *no action* is no illusion—it is the outright reversal of the connected action determination made one step earlier.

Interstate highway hypothetical

Returning to the earlier federal interstate highway and quarry example, assume a proposed interstate with independent utility that would cross a planned quarry site. Assume that the planned quarry is not a federal action and does not trigger NEPA. Because it has independent utility, the federal highway would occur regardless of whether the quarry ever began operations, and the quarry would begin operations regardless of whether the highway was ever built. The highway and quarry are not connected actions and do not need to be analyzed in the same EIS.

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However, assume also that it is reasonably foreseeable that the quarry will begin operations. The Federal Highway Administration, justifiably concerned about the impacts from fine particulate air pollution, decides to assume the operation of the quarry in the no action alternative. The Highway Administration uses the quarry operations to establish a more accurate baseline for its analysis of the interstate routing alternatives. This is perfectly reasonable.

Channel deepening hypothetical

Now, in a different example, assume a proposed channel deepening project in a bay. The proposed channel deepening project requires an EIS. A planned, but not yet proposed, container port is found to be connected to it under the regulations. The channel deepening project claims all of the benefits of the container port to justify itself. The container port, however, could live with the existing channel if it had to. Nevertheless, the channel deepening depends on the larger container port action for its justification, and that is why it is deemed a connected action with the container port under the regulations.

The no action alternative to the connected action neither deepens the channel nor builds any port facilities on the bayshore and uplands. Action alternatives to the connected action involve various reasonable and feasible combinations and locations of channel deepening (including none) and port facilities (including none). Clearly, the agency can eliminate the deeper channel-but-no container port alternative early on, if the facts support that decision. But deeper channels, combined with container ports of varying extent and location, certainly merit further analysis. So does not deepening the channel but still building the port—just not as the no action alternative.

What was a single, unconnected federal action with a scope limited to aquatic environment impacts from dredging and dredge disposal becomes a connected action with a scope encompassing bayshore and upland impacts as well. This is as it should be, because the channel deepening lacks independent utility of its own. Without encompassing these bayshore and upland impacts that it depends on for its justification, the scope of the EIS would be artificially restricted to a level that does not reflect the action that is actually proposed. The case of *Sierra Club v. Sigler* in the Fifth Circuit holds exactly that.

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It makes no sense, then, to redefine the scope of the action back to the aquatic environment, and assume the bayshore and upland impacts as a given in the alternatives analysis. The scope of the action has already been decided. The action is the connected action of aquatic environment plus bayshore plus upland, not simply aquatic environment. Stated differently, the action is the connected action of channel deepening and the container port development it depends on for its justification, not simply channel deepening.

To proceed otherwise requires reading the connected action test out of the CEQ regulations. That argument assumes that the differences here are solely semantic, and that the process of defining action, alternatives, and impacts with reference to one another has no meaning so long as a reasonable-looking outcome is achieved. If that were true, then the bayshore and upland impacts could just as easily be added into the cumulative impacts section, rather than considered as part of the no action alternative, *just as they would be in an unconnected single action*. That may be what Vulcan and some in the Federal government want. It is not what they are going to get.

Application to Vulcan's facts

The facts of Vulcan's proposed rail line and planned quarry match the channel deepening hypothetical exactly. We repeat the analysis below.

Now, assume a proposed rail line in a rural area. The proposed line requires an EIS. A planned, but not yet proposed, quarry is found to be connected to it under the regulations. The rail line claims all of the benefits of the quarry to justify itself. The quarry, however, could live with the existing transportation network, namely roads, if it had to. Nevertheless, the rail line depends on the larger quarry action for its justification, Vulcan concedes as much, and that is why it is deemed a connected action with the quarry under the regulations.

The no action alternative to the connected action neither builds a rail line nor builds any quarry facilities. Action alternatives to the connected action involve various reasonable and feasible combinations and locations of rail lines (including none) and quarries (including none). Clearly, the agency can eliminate the rail line-but-no quarry alternative early on, if the facts support that decision. But rail lines, combined with quarries of varying extent and location, certainly merit further analysis. So does not building a rail line but still building the quarry—just not as the no action alternative.

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What was a single, unconnected federal action with a scope limited to track-proximate impacts from rail construction and operation becomes a connected action with a scope encompassing quarry site impacts as well. This is as it should be, because the rail line lacks independent utility of its own. Without encompassing these quarry site impacts that it depends on for its justification, the scope of the EIS would be artificially restricted to a level that does not reflect the action that is actually proposed. The case of *Sierra Club v. Sigler* in the Fifth Circuit holds exactly that.

It makes no sense, then, to redefine the scope of the action back to the proximity of the track, and assume the quarry site impacts as a given in the alternatives analysis. The scope of the action has already been decided. The action is the connected action of trackside impact plus quarry site impact, not simply trackside impact. Stated differently, the action is the connected action of building the rail line and the quarry site development it depends on for its justification, not simply building the rail line. No action is something that is *not the action*, whether the action encompasses one or many constituent actions. It defies logic to define no action as part of the action itself.

MCEAA recognizes that a large amount of potentially confusing guidance and case law exists on this point, since the principle that the no action alternative can include something that is *not the action* that would occur anyhow has been accepted in a number of single, unconnected action cases. To assist the agency, we discuss these cases and guidance.

CEQ's Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (Mar. 23, 1981), presents an example in question 3 that seems at first to fit this situation exactly. It reads:

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.

Id. at 18027. Again, we cannot disagree. But the question clearly assumes that the facility already exists. The only action assumed in the question is that of constructing the rail line. No

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connected or cumulative actions intervene. This example provides no guidance beyond implicitly setting out the "either/or" proposition.

The cases that have applied the CEQ guidance stand only for applying the either/or proposition to unconnected actions with independent utility. They provide no support for the proposition that an action can be redefined into one of its dependent parts when connected actions are involved.

In *Young v. General Services Administration*, 99 F. Supp. 2d 59 (D.D.C. 2000), the General Services Administration (GSA) planned to build two buildings for the U.S. Patent and Trademark Office in Alexandria, VA. No connected actions were involved in the construction. The GSA found that it was reasonably foreseeable that the land, owned by a private developer, would be developed privately if the government did not build on it. Therefore, the no action alternative assumed private development. This was perfectly reasonable.

Young borrowed most of its analysis from two earlier cases. In *Nashvillians Against I-440 v. Lewis*, 524 F. Supp. 962 (M.D. Tenn. 1981), the no action alternative to a major interstate project assumed the resurfacing of city streets that would need to occur if the interstate were not built. The interstate was not connected in any way to the resurfacing. Both projects would have independent utility, but only one would occur, as the interstate necessarily foreclosed any need to resurface city streets. Here, the quarry does not foreclose any need for the rail line; in fact, it creates the justification.

Nashvillians makes clear that a "do nothing" alternative was discussed. *Id.* at 988. "The FEIS examined in detail a 'no build' alternative which involved not building I-440. . . ." *Id.* This alternative was a sufficient no action alternative because it reasonably included something that was *not the action* (i.e., resurfacing city streets) that would occur anyhow, but did not include any part of the action (building I-440) itself.

The plaintiffs in *Nashvillians* wanted a reasonable no action alternative to be defined as one where nothing occurred. We are not saying that no action means this. We are only saying that no action cannot include any part of the action, and that the no action alternative to the connected action neither builds a rail line nor builds any quarry facilities. No action can mean doing something else that is not part of the action if the facts justify it.

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Young also relied on a second case, *Communities, Inc. v. Busey*, 956 F.2d 619 (6th Cir. 1992). In that case, the FAA evaluated a proposal of a regional airport authority to proceed with an airport expansion. The city of Louisville had urban renewal plans that involved both condemnation and purchasing from willing sellers in three neighborhoods near the airport. The court found that these actions were not connected to the airport expansion, and that the city's plans to condemn the neighborhoods had independent utility. *Id.* at 626-27. Consequently, it was proper for the FAA to assume that the neighborhoods would no longer exist in the no action alternative.

The independent utility of the city of Louisville's plans make them the complete opposite of the proposed rail line in this proceeding, which depends on the quarry for its justification. The authority of the city to act independently in this manner is completely distinct from whether a private entity such as Vulcan may assume part of its own connected action as the no action alternative.

Most of the remaining basis for Vulcan's position comes out of *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430 (5th Cir. Unit B 1981). Like the three cases above, it stands only for the general principle that a no action alternative can reasonably include something that is not the action but which will occur anyhow.

Piedmont involved three segments of the Atlanta freeway system with independent utility. These three segments were part of a regional transportation plan that was previously determined, in *Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission*, 599 F.2d 1333 (5th Cir. 1979), to not require a comprehensive EIS within the holding of *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), because the elements of the plan had not ripened into concrete proposals for major federal action. *Piedmont*, 637 F.2d at 438. This sort of programmatic ripeness analysis is what we recognize today as the holding of *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726 (1998).

It is important to note that none of these cases displace the connected or cumulative action tests in the CEQ regulations. Had certain elements of the regional transportation plan been concurrently proposed, they may have been cumulative actions. Had the segments not had independent utility, they may have been connected actions. But they were neither of these things.

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The plaintiffs in *Piedmont* argued that the EIS should have considered the MARTA transit system as an alternative to the highway segments. But the court found that MARTA would occur anyhow, was part of the baseline analysis, and “amounted to a ‘no-build’ alternative.” *Piedmont*, 637 F.2d at 437. The highway segments would be needed with or without MARTA, and “complemented the system,” clearly indicating that the segments and MARTA each had their own independent utility. *Id.* at 438. A similar finding of independent utility for a transit system and highway was made in *Movement Against Destruction v. Volpe*, 361 F. Supp 1360 (D. Md. 1971).

At no time in *Piedmont* does the court ever say that a connected action can be redefined into constituent parts, where one part serves as the no action alternative.

Vulcan likely relies most heavily on this statement:

However, NEPA does not require an agency to restate all of the environmental effects of other projects presently under consideration. Where the underlying database includes approved projects and pending proposals, the “statutory minima” of NEPA has been met.

Piedmont, 637 F.2d at 441. By “approved projects,” the court means MARTA. By “pending proposals” the court means other highway projects in the regional transportation plan. *Id.* at 442. All of these actions have independent utility. The court’s statement simply cannot support Vulcan’s desired result for a connected action.

Even the dissent in *Piedmont* does not reach the result desired by Vulcan. The dissent would have considered the highway segments as connected actions, but not MARTA. *Piedmont*, 637 F.2d at 443-45. The dissent disagrees with whether MARTA was actually considered as an alternative, no action or otherwise. However, it does not contest the majority’s finding that MARTA could have been used as the no action baseline because it had independent utility, even though the dissent notes that MARTA might have been affected by the highway segments. *Id.* at 444.

Additional cases still do not support the proposition that Vulcan urges, because none of them apply to connected actions or stand for the principle of defining the no action alternative as part of the action itself. *City of Olmstead Falls, Ohio v. FAA*, 292 F.3d 261, 271 (D.C. Cir.

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2002) (21 projects with independent utility were properly considered part of the baseline "no action/no-build" alternative); *Grand Canyon Trust v. FAA*, 290 F.3d 339, 343, 347 (D.C. Cir. 2002) (FAA's failure to establish a natural, airport-free baseline noise level in the EA was a failure to evaluate past, present, and future reasonably foreseeable impacts for the EIS-threshold cumulative significance determination; no related actions were involved); *Custer County Action Association v. Garvey*, 256 F.3d 1024, 1037, 1040 (10th Cir. 2001) (Air National Guard's existing flight patterns could be considered the no action alternative for the new flight plan, where the new plan had independent utility and was not a connected action).

MCEAA also notes that in *Dakota, Minnesota, and Eastern Railway Co.—Construction into the Powder River Basin—Finance Docket No. 33407*, STB considered what was clearly a two part connected action: reconstruction of part of an existing track that would only occur if new construction also occurred. In the EIS for that proposal, the no action alternative neither reconstructed the existing track nor added new construction.

Vulcan's attempt to avoid alternatives and direct effect analysis for the quarry cannot be justified by the fact that the STB lacks direct jurisdiction over the quarry site. By defining a truck-served quarry as no action, Vulcan seeks to avoid discussion of any other quarry site alternatives that may arise during the environmental review, including alternative configurations and phasing at the current site. STB must consider the effects of such alternatives. In *NRDC v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972) the government's contention that "the only 'alternatives' required for discussion under NEPA are those which can be adopted and put into effect by the official or agency issuing the statement" was expressly rejected. While other holdings of *Morton* have been called into question, this one endures. *City of Alexandria v. Slater*, 198 F.3d 862, 868 (D.C. Cir. 1999).

V. SELECTED SITE SPECIFIC CONCERNS DESERVING FURTHER MENTION

Without assessing the relative importance of the issues raised by MCEAA that must be addressed in the EIS that were previously raised, we address a selection of issues which deserve further mention.

This project is an attempt by a corporate entity to assume the position of a sovereign to enable it to condemn property to further its corporate purposes to the detriment of people and culture who would not otherwise give their property at any price to this unwelcome neighbor.

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Following being rebuffed by a legitimate rail line to provide rail service to an encroachment by a noisy, dusty, thirsty and unsightly quarry on the serenity of the Texas Hill Country, Vulcan/SGR now seeks to create havoc by its avarice. Vulcan/SGR has likely procured all the property it can by purchase or lease. Most of the remaining residents who could be affected by the quarry and railroad have placed deed restrictions on their property to thwart further purchase of their property. Vulcan/SGR knows this and they know they have to have condemnation power in order to impose their project on this quiet community.

Quarrying in Texas is currently undergoing close scrutiny, as evidenced by the recently appointed Governor's committee to address quarry operations throughout the state, especially permitting requirements for new operations, such as the one at issue here. See <http://www.senate.state.tx.us/75r/senate/members/dist24/pr04/p030104a.htm> It must be noted regarding the permitting concern that the San Antonio region, which tentatively includes Medina County, the proposed quarry's location, is currently subject to being placed in non-attainment for air quality. This issue must be studied through the EIS process.

The current publicly announced proposal of Vulcan to employ trestle crossings of flood prone areas is totally unacceptable. They state these will not pose impediments to the free flow of water for the "legendary" flash floods of this region without benefit of any engineering or geologic evaluation, which is absurd. The recent regional flooding which has resulted in over 20 deaths lends credence to the arguments presented by the MCEAA and must be studied as part of the EIS.

Quarry operations typically have a severe impact on water tables in affected areas surrounding quarries. No mention or study of this impact has been addressed by Vulcan/SGR to date and it must be. The rural areas surrounding the proposed quarry are dependent upon the sole source aquifer which is under a significant area of the quarry. This water is the lifeline and drinking source for the people of the area and the entire Edwards Aquifer dependent area, which includes San Antonio, Texas. Numerous endangered species are identified as dependent upon the Edwards Aquifer. All of these issues must be addressed by the EIS.

The cultural significance of the region is an emotional issue for those possibly affected by the quarry. This issue has not been adequately addressed and must be evaluated through the EIS. Remember the comment in Dr. Hester's letter presented in our previous mailings in which he

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stated something to the effect that Vulcan could not have picked a worse place in Texas to build a railroad. That was only from the historical and archeological aspect.

As a final issue in this section, truck transport for the quarry's product is a practical impossibility. Based upon the facts presented by Vulcan/SGR in their submissions to the STB, 850 trucks a day will be required to handle the intended work load. The approximate impact of that would require a truck to leave the quarry about every 80-90 seconds during a 20 hour day. That would be a continuous circle of trucks approximately one mile apart, if they went 40 miles per hour average. If there is even a small traffic problem, the traffic could be backed up for miles. Half of this circle of truck traffic would traverse State Hwy FM 2676. At present it is a very nice road, but built for only 58,000 lbs of vehicle weight. A loaded gondola truck of limestone weighs 78,000 lbs.

In addition to the physical damage to the roads the 850 trucks per day will totally destroy the aesthetics of the Quihi Historical Area. It must be noted the truck route cuts through the heart of the village of Quihi. The 125 trucks per day coming through Quihi that Vulcan says will run even with a railroad, will destroy the aesthetics of this historical settlement. At least part of CR 4516 is likely the last remaining remnant of the historic General Wolls road of the 1800's that starts in Mexico and comes through the western part of Texas, and ends in San Antonio. This road was frequently traveled in that era, and also was significant in some of the battles. But it gets worse.

The terrain on most of the other half of the road circle is a narrow gravel road (part of CR 365) that has a stream of water going across it - Quihi creek, no bridge. Few cars use this part of CR 365 due to the rough terrain. It is generally limited to pickup traffic. This part of CR 365 has been like this practically forever. Medina County Commissioner Hartman says the county has no solution regarding the creek crossing, yet Vulcan thinks it will be able to use this road for 78,000 pound trucks. It does get worse.

The part of the 'circle' that would be shared by two-way traffic with Vulcan's gravel trucks - CR 4516 to Castroville - is narrow. It is difficult for cars to pass each other going in opposite directions. There is no shoulder - it is constantly crumbling. Cherry Creek crosses that section of CR 4516 three times. In a two inch rain on March 14, 2004, this creek flooded, as is a frequent occurrence.

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The EIS must address this issue in the context of the connected actions. It is not unthinkable that Vulcan/SGR made up this ridiculous alternative to scare people, in hopes of making the rail look good. Vulcan/SGR must show how they intend to make the trucking alternative work with the connected action quarry.

This movement of consciousness leads one to only one conclusion - they did not open the quarry first because the quarry is dependent upon the railroad to make a profit. The quarry alone would not make money. Moreover, Tom Ransdell, Vulcan's local representative, told MCEAA in January, 2000, that they would not open the quarry without a railroad. This is further proof that the quarry and railroad are connected actions.

The ill-conceived and legally and factually incorrect assertions of the Coburn, March 10, 2004, letter fail to address or even acknowledge much of the foregoing. MCEAA is disgruntled with the often misleading information and arguments presented by the applicant. STB/SEA is the stopgap for ferreting out the truth. It is incumbent that the EIS address all these issues.

VI. CONCLUSION

This letter, although prepared prior to Mr. Coburn's April 5, 2004, to your office offers argument that will respond to much of what he stated in that letter. Although Mr. Coburn's April 5, 2004, addresses numerous issues from the perspective of the applicant, his letters are nothing more than his argument of the, quite likely, skewed findings of the applicant, without benefit of the independent analysis an EIS will provide. MCEAA obviously has different facts and opinions which would apply to most everything he stated in that letter, but it will forego further argument in this document, which is already extensive. MCEAA's and similarly aligned entities previous, and I would expect future, offerings addressing their concerns have touched on most, if not all, of what Mr. Coburn addressed in his April 5, 2004, letter.

At stake in the scoping decision in this proceeding is the full disclosure of the impacts of a major industrial project on a growing community. The applicant has spent five years attempting to segment and foreclose the analysis through various means to avoid disclosing the impacts of the rail line and the quarry that it will solely serve. Having backed itself into a corner, it has run out of arguments to stop what NEPA clearly intends—the production of information for decision-makers and a community divided and questioning the merits of this connected action. NEPA was passed to address this tension by providing what people wanted most—facts about all

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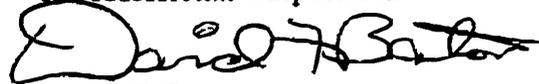
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of the impacts—and avoiding piecemeal process where the information would be lost and the full impacts unknown.

The case law and connected action regulation are clear. While Vulcan is quick to blame project opponents for delay, it is time that the weak arguments and foundational flaws of the applicant's submissions along with the March 10 letter be retired after five years of overuse, and that the agencies get on with providing the citizens of Medina County the full, direct effect analysis of the rail line and quarry to which they are entitled.

Very truly yours,

THE GARDNER LAW FIRM
A Professional Corporation



David F. Barton

DFB:cf

Enc.

dfb1/8675.001/NEPA/Second response to March 10 Coburn-4904-Revised

cc: Rini Ghosh, STB-SEA (same)
Surface Transportation Board
ATTN: STB Finance Docket No. 34284
1925 K Street, NW
Washington, DC 20423-0001

Finance Docket 34282
 Medina County Environmental Action Association
 Attachment to Letter

EIS cases – Applying connected action regulation or test

<i>Piedmont Heights Civic Club, Inc. v. Moreland</i>	637 F.2d 430 (5th Cir.1981)
<i>Sierra Club v. Sigler</i>	695 F.2d 957 (5th Cir. 1983)
<i>Chelsea Neighborhood Association v. U.S. Postal Service</i>	516 F.2d 378 (2d Cir.1975)
<i>Town of Huntington v. Marsh</i>	859 F.2d 1134 (2d Cir.1988)
<i>Hudson River Sloop Clearwater v. Department of the Navy</i>	836 F.2d 760 (2d Cir.1988)
<i>Texas Committee on Natural Resources v. Van Winkle</i>	197 F. Supp. 2d 586 (N.D. Tex. 2002)
<i>Welch v. U.S. Air Force</i>	249 F. Supp. 2d 797, 820-25 (N.D. Tex. 2003)
<i>Blue Ocean Preservation Society v. Watkins</i>	754 F. Supp. 1450 (D. Haw. 1991)
<i>City of Williams v. Dombeck</i>	151 F. Supp. 2d 9 (D.D.C. 2001)
<i>Sierra Club v. Dombeck</i>	161 F. Supp. 2d 1052 (D. Ariz. 2001)
<i>Shoshone-Paiute Tribe v. U.S.</i>	889 F. Supp. 1297 (D. Idaho 1994)
<i>Citizens Committee to Save Our Canyons v. U.S. Forest Service</i>	297 F.3d 1012 (10th Cir. 2002)

Environmental Assessment cases – Applying relatedness test that is inapplicable here

<i>Fritiofson v. Alexander</i>	772 F.2d 1225 (5th Cir. 1985)
<i>Stewart v. Potts</i>	996 F. Supp. 668 (S.D. Tex. 1998)
<i>Sylvester v. Army Corps of Engineers</i>	884 F.2d 394 (9th Cir. 1989)
<i>Thomas v. Peterson</i>	753 F.2d 754 (9th Cir. 1985)
<i>Friends of the Earth v. Coleman</i>	518 F.2d 323 (9th Cir.1975)
<i>Winnebago Tribe of Nebraska v. Ray</i>	621 F.2d 269 (8th Cir. 1980)
<i>Save the Bay, Inc. v. U.S. Army Corps of Engineers</i>	610 F.2d 322 (5th Cir. 1980)
<i>Friends of the Earth v. Hintz</i>	800 F.2d 822 (9th Cir. 1986)
<i>Save the Yaak Committee v. Block</i>	840 F.2d 714 (9th Cir. 1988)
<i>California Trout v. Schaefer</i>	58 F.3d 469, 472 (9th Cir. 1989)
<i>Northwest Resource Information Center v. National Marine Fisheries Service</i>	56 F.3d 1060 (9th Cir. 1996)
<i>Morongo Band of Mission Indians v. Federal Aviation Administration</i>	161 F.3d 569 (9th Cir. 1998)

<i>Wetlands Action Network v. U.S. Army Corps of Engineers</i>	222 F.3d 1105 (9th Cir. 2000)
<i>Airport Neighbors Alliance, Inc. v. United States</i>	90 F.3d 426 (10th Cir. 1995)
<i>Utahns for Better Transportation v. U.S. Department of Transportation</i>	305 F.3d 1152 (10th Cir. 2002)
<i>Vieux Carre Property Owners, Residents, and Associates, Inc. v. Pierce</i>	719 F.2d 1272, 1278 (5th Cir. 1983)
<i>Save Barton Creek Assn. v. FHWA</i>	950 F.2d 1129 (5th Cir. 1992)
<i>Citizen Advocates for Responsible Expansion, Inc. v. Dole</i>	586 F. Supp. 1094 (N.D. Tex. 1984)
<i>Association Concerned About Tomorrow, Inc. v. Dole</i>	610 F. Supp. 1101 (N.D. Tex. 1985)
<i>Sierra Club v. U.S. Department of Energy</i>	255 F. Supp. 2d 1117 (D. Colo. 2002)
<i>Border Power Plant Working Group v. U.S. Department of Energy</i>	260 F. Supp. 2d 997 (S.D. Cal. 2003)
<i>Hoosier Environmental Council, Inc. v. U.S. Army Corps of Engineers</i>	105 F. Supp. 2d 953 (S.D. Ind. 2000)
<i>Tennessee Gas Pipeline Co.</i>	95 FERC ¶ 61,169, 2001 WL 469985
<i>Coalition for a Livable Westside v. HUD</i>	1997 U.S. Dist. LEXIS 8860