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February 19, 2004

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 5676

Re: Analysis under the National Environmental Policy Act of:

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

Dear Ms. Rutson:

Medina County Environmental Action Association, Inc. (MCEAA) requests that two actions described in this letter—the planned stone quarry of Vulcan Materials Company (Vulcan) in Medina County, Texas, and the proposed rail line of Vulcan's wholly owned subsidiary that will serve it—be deemed “connected actions” requiring “discuss[ion] in the same impact statement.” 40 C.F.R. § 1508.25(a)(1) (2003).

In the event that Vulcan's planned stone quarry has ripened or ripens into a proposal for major federal action, MCEAA requests that it and the rail line be deemed “cumulative actions” which may “have cumulatively significant impacts” requiring “discuss[ion] in the same impact statement.” 40 C.F.R. § 1508.25(a)(2) (2003).

FACTS

Southwest Gulf Railroad Company (SGR), a wholly owned subsidiary of Vulcan, plans to construct and operate a rail line to connect a planned Vulcan stone quarry to the Union Pacific Railroad Company (UP) main line in Medina County, Texas, about 30 miles west of San Antonio.

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -2-

Vulcan plans to locate its new quarry in the north central part of Medina County. The quarry would produce crushed stone aggregate for highway and other construction purposes. Vulcan plans to proceed with the quarry in phases. Phase 1 consists of excavation, in accordance with a site plan, on a portion of the 1,760 acres that Vulcan currently leases, as well as construction and operation of a crushing unit. Trucks and trains would haul materials from the site in Phase 1. Later Phases 2 to 5 would expand excavation from Phase 1 to other portions of the 1,760 acres. It is clear Vulcan's purpose in proposing its quarry be addressed in phases is to avoid various regulatory requirements which, if addressed to the entire 1,760 acres and the railroad at one time, would jeopardize the entire project.

During Phase 1, Vulcan will construct a rail service facility to allow material generated from the mining operation to be delivered to remote markets by rail directly connected to the plant area. As stated in an August 2003 Biological Assessment for the quarry prepared for Vulcan, the rail facility would require approximately seven miles of new rail track directly connecting the quarry operation to the main line rail intercept near Dunlay, Texas.

On February 27, 2003, Vulcan's wholly owned subsidiary, SGR, filed a petition with the U.S. Surface Transportation Board (STB) seeking an exemption under 49 U.S.C. 10502(b) for authority to construct and operate approximately 7 miles of single track railroad directly connecting the quarry operation to the main line rail intercept near Dunlay, Texas. Although the primary purpose of the proposed construction is to provide rail service to the quarry site, SGR desires to hold itself out as a common carrier and provide service to other industries that might locate in the area in the future. Private citizens own a majority of the land in and adjacent to the easement that SGR will require, as well as lands potentially impacted by the quarry. Many of these private citizens and their neighbors oppose the quarry and its rail line and are members of MCEAA.

It is clear Vulcan's purpose in seeking common carrier status for SGR is to thwart the will of the landowner's in Medina County, who, after preliminary inquiry by Vulcan, made it clear they do not approve of the quarry or rail projects, and would not give up their land for the rail line. Additionally, it is clear that Vulcan is attempting to dupe STB by cloaking its private rail project in common carrier garb. It is not the intent of Congress to promote such private endeavors through common carrier legislation. Even more importantly, it is totally anathema to legislative intent that such private endeavors be allowed to take advantage of common carrier legislation. STB should not be a part of a greater scheme of SGR, which is to be granted condemnation authority through common carrier status. That is the only true goal of SGR in this process.

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -3-

On January 22, 2004, the STB determined that the effects of the proposed rail line on the quality of the human environment are likely to be highly controversial, and therefore ordered the preparation of an environmental impact statement (EIS). The current draft scope of study includes direct effects only from the rail line, not from the quarry.

I. THE QUARRY AND THE RAIL LINE ARE CONNECTED ACTIONS

The applicant's apparent belief that the STB's EIS analysis of the rail line need not account for the direct, as well as the cumulative environmental impacts of the proposed quarry rests on a fundamental misunderstanding of the National Environmental Policy Act (NEPA) and its case law. The analyses for *whether to prepare* an EIS and the *scope* of an EIS differ completely in their treatment of potentially related actions. Failure to appreciate this distinction has led the applicant to advocate an extension of the EIS-threshold analysis to the EIS-scoping analysis. This effort is mistaken on the facts at hand and contrary to law. As Part I.B. shows, the proposed rail line and planned quarry must be considered together, in their entirety, in a single EIS. First, however, a review of certain elements of the EIS-threshold case law is in order.

A. The EIS-threshold ("Whether to Prepare") Analysis

1. The Difference Between Cumulative Impacts and Cumulative Actions

Following the preparation of an environmental assessment (EA), 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. *Id.* §§ 1501.4(c),(e) (2003).

Assuming that the agency is reviewing a proposal for legislation or other major federal action that affects the quality of the human environment, the agency's decision to prepare an EIS will turn on whether the action and any related segment does so "significantly." 40 C.F.R. § 1502.3 (2003). 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).

In the context of reviewing an agency's significance determination

[i]t is also clear that a decision to forgo preparation of an EIS may be unreasonable for at least two reasons: (1) the evidence before the court

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -4-

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 v. Alexander, 772 F.2d 1225, 1238 (5th Cir. 1985). In the former, "the test is whether there is a possibility, not a certainty, of significant impacts." *Id.* at 1239 n.7. Contrary to the conclusion of the district court in *Hoosier Environmental Council, Inc. v. U.S. Army Corps of Engineers*, 105 F. Supp. 2d 953, 981 n.13 (S.D. Ind. 2000), whether the old "reasonableness" standard of review is applied or whether the "arbitrary and capricious" standard that has prevailed since *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375 (1989), is applied has no bearing on this conclusion of *Fritiofson*. If *Hoosier* were correct about *Fritiofson*, a court could never "make a reasoned decision based on its evaluation of the significance—or lack of significance—of the . . . information." *Marsh*, 490 U.S. at 378.

When making the EIS-threshold decision, 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, 772 F.2d at 1241 n.10. 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.") 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]").

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

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -5-

be cumulatively significant, *Fritiofson*, 772 F.2d at 1238-39 n.7, it need not consider unrelated actions at all.

2. The Multi-factor Federalization Test for Relatedness

A multi-factor test has evolved to determine relatedness for the purpose of the EIS-threshold significance determination. These factors, which "federalize" otherwise non-jurisdictional segments of a project by subjecting them to NEPA, include, but are not limited to:

- (a) whether the regulated activity comprises "merely" a link" in a corridor type project (e.g., a transportation or utility transmission project);
- (b) 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;
- (c) the extent to which the entire project will be within the agency's jurisdiction; and
- (d) 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).

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -6-

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 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*, 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 EAs. 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. 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).

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 EA case differs from the relatedness tests for connected and cumulative actions once an EIS has been triggered. *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.

An agency may reasonably limit relatedness at the EA stage precisely because the statute is silent and because 40 C.F.R. § 1508.25 applies only to the EIS. Nevertheless, it is important to

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -7-

understand the FONSI cases that correctly and incorrectly apply these principles, in order to limit them to their proper context.

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. 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.

More recent FONSI cases have applied *Sylvester*-type multifactor tests. 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 EA 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); *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).

There are limits to an agency's ability to reasonably invoke 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.

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -8-

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 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

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -9-

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).

A. The EIS-Scoping Analysis

Unlike the situation in Part I.A, an EIS will be prepared in this case. Even if the STB had not determined that a public controversy exists, an EIS for both the rail line and the quarry would likely have been required under the analysis in Part I.A.

Because an EIS will be prepared, the federalization test for relatedness is no longer the starting point of the analysis. Rather, the three factor test of 40 C.F.R. § 1508.25(a)(1) determines whether actions are “closely related” and therefore “connected actions”, and the definition at 40 C.F.R. § 1508.25(a)(2) determines whether “cumulative actions” are present. Actions deemed connected or cumulative should therefore be discussed in the same EIS. *Id.* § 1508.25(a)(1)-(2). The connected action definition, unlike the cumulative action definition, is not limited to actual “proposals.” See *Fritiofson*, 772 F.2d at 1243 n.13. Contemplated actions which have not reach the proposal stage may certainly play a critical role in assessing the impacts of current proposals, and CEQ regulations require that they be considered. *Id.*

1. The Proposed Rail Line and Planned Quarry Are Connected Actions Because the Rail Line Depends On the Quarry For Its Justification
 - (a) Discussion in the same impact statement is required.

One of the primary reasons for requiring an agency to evaluate “connected actions” in a single EIS is to prevent agencies from minimizing the potential environmental consequences of a proposed action (and thus short-circuiting NEPA review) by segmenting or isolating an individual action that, by itself, may not have a significant environmental impact. *Citizens Committee to Save Our Canyons v. U.S. Forest Service*, 297 F.3d 1012, 1028 n.13 (10th Cir. 2002).

In analyzing the quarry and the rail line under the connected action definition, we note that satisfying any one of the three factors will trigger an agency duty to consider the actions together in the same EIS. *Shoshone-Paiute Tribe v. U.S.*, 889 F. Supp. 1297, 1308 (D. Idaho 1994) (“the three subsections of the regulation [40 C.F.R. § 1508.25(a)(1)] are to be read in the disjunctive, not the conjunctive”); *Town of Huntington v. Marsh*, 859 F.2d 1134, 1142 (2d Cir. 1988) (finding actions to be connected based solely on the satisfaction of subdivision (iii)).

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -10-

We analyze each connected action factor in turn. *Texas Committee on Natural Resources v. Van Winkle*, 197 F. Supp. 2d 586, 613-14 (N.D. Tex. 2002).

1508.25(a)(1)(i)—Automatically trigger other actions which may require EIS.

As the rail line is the only currently proposed action, the test under this prong is whether the rail line will automatically trigger the quarry, which may require an EIS if it requires any federal permits. Though these projects are related, mere construction of a rail line does not trigger the quarry. This factor typically encompasses actions necessary for the proposal to exist in any circumstance, not just when the proposal happens to depend on the segmented action. See *City of Williams v. Dombeck*, 151 F. Supp. 2d 9, 19-20 (D.D.C. 2001) (water delivery system must be analyzed at the same time as the development where the land exchange “automatically triggers” the need to develop a system which will deliver water).

1508.25(a)(1)(ii)—Cannot or will not proceed unless other actions are taken previously or simultaneously.

A typical example of the “but for” test would be a road that was the sole means of accessing a mine. See *Sierra Club v. U.S. Department of Energy*, 255 F. Supp. 2d 1117 (D. Colo. 2002) (applying this factor in a relatedness test in a FONSI case to the above facts). There, the easement and the mine were connected actions because they were inextricably linked. *Id.* at 1184-85. But for the road, the mining company could not access the mine site; absent the mine, the road had no independent utility. Therefore, DOE was required to consider and evaluate the mine’s impacts on the environment.

In “but for” test for this case, one test is whether the quarry cannot or will not proceed unless the proposed rail line is approved and constructed. Evidence may exist to support the conclusion that Vulcan will not proceed with all or part of the project unless the rail line is built. To date, however, Vulcan has represented that the quarry will be built regardless of whether the rail line is, and states that it operates numerous quarries not served by rail.

The other test under this factor is whether the rail line cannot or will not proceed unless the quarry is in operation. This inquiry is better reserved for the independent utility factor.

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

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -11-

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).

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 analysis of their two projects under NEPA. SGR's counsel insists that "the appropriate no action alternative is the alternative of a truck served quarry." *Id.* at 2.

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -12-

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 analysis from this point is simple. Either the two projects are connected actions under the EIS-scoping analysis, or the STB’s grant of an exemption does not comport with its statutory mandate, the Rail Transportation Policy of the United States, 49 U.S.C. § 10101. In particular, if the STB concludes that the proposed rail line has “independent utility” from the quarry, even though it has only “speculative,” and in the eyes of many, “imaginary” future customers besides the quarry, then regulation will be necessary “to carry out the transportation policy of section 10101.” *See id.* § 10502(a) (outlining grounds for exemption from prior approval procedures of 49 U.S.C. § 10901). Vulcan’s duty to show that SGR will “foster sound economic conditions in transportation” will go unfulfilled in the absence of such regulation, *Id.* § 10101(5). Vulcan has made no such showing to date, and indeed has expressly indicated that no such showing can be made. Approval of Vulcan’s petition will be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), under those circumstances. MCEAA will discuss this topic further in a subsequent filing with the STB.

It is also noteworthy that courts have regularly found that other types of natural monopoly goods besides rail, such as pipelines and power lines, lack independent utility under NEPA when they exist only to serve a single proposal. *City of Williams v. Dombeck*, 151 F. Supp. 2d 9, 19-20 (D.D.C. 2001) (review of final EIS) (the “potential for a pipe line, whether

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -13-

connected to a railroad siding or not, is most certainly an “interdependent part [] of [the] larger action” that is Alternative H and “depend[s] on [that] larger action for [its] justification”); *Sierra Club v. Dombeck*, 161 F. Supp. 2d 1052, 1067 (D. Ariz. 2001) (review of final EIS) (“without a water delivery system the development cannot be constructed and without the contemplated construction, a water delivery system would not be needed. It is illogical to maintain that the development and the water delivery system are not connected actions”); *Border Power Plant Working Group v. U.S. Department of Energy*, 260 F. Supp. 2d 997, 1017 (S.D. Cal. 2003) (review of FONSI) (finding, after some confusion as to how to apply the multifactor federalization test for relatedness, that proposed transmission line and planned power plant turbine were “links in the same chain” and therefore “effects” of turbine required analysis in the EA).

Other independent utility cases in the Fifth Circuit are not on point for this issue, and several review a FONSI, rather than an EIS. *Vieux Carre Property Owners, Residents, and Associates, Inc. v. Pierce*, 719 F.2d 1272, 1278 (5th Cir. 1983) (review of FONSI) (office tower phase of planned urban development project that was uncertain and speculative, and might not involve federal funding, had independent utility from other phases, including proposed federally funded common infrastructure and proposed privately funded hotel, retail, and parking complex); *Sierra Club v. Sigler*, 532 F. Supp. 1222, 1234-35 (S.D. Tex. 1982), *aff'd in part, rev'd in part on other grounds*, 695 F.2d 957 (5th Cir. 1983) (review of final EIS) (crude oil terminal, underwater pipeline system, and channel deepening in Galveston had independent utility and did not commit the federal government to other planned and studied navigation projects in the area that had not received Congressional authorization and had not been proposed); *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 586 F. Supp. 1094, 1102 (N.D. Tex. 1984), *rev'd on other grounds*, 770 F.2d 423 (5th Cir. 1985) (review of one EIS and one EA) (two parts of transportation plan each designed to relieve congestion have independent utility, despite common terminus); *Welch v. U.S. Air Force*, 249 F. Supp. 2d 797, 820-25 (N.D. Tex. 2003) (review of FEIS) (Past relocations and ongoing development of fighter aircraft training programs within the same region have independent utility).

Numerous other independent utility cases are easily distinguishable. In *Texas Committee on Natural Resources v. Van Winkle*, 197 F. Supp. 2d 586, 613-14 (N.D. Tex. 2002), the court found applied each factor in the connected action definition under the CEQ regulations. It concluded that the record contained no evidence of interdependence between a proposed flood control project and other planned actions in the same area. In *Citizens Committee to Save Our Canyons v. U.S. Forest Service*, 297 F.3d 1012, 1028-29 (10th Cir. 2002), even though the Tenth Circuit improperly restricted the definition of connected actions to actual proposals, it was still able to conclude that a proposed ski resort expansion would proceed regardless of whether the resort participated in the proposed land exchange for several small mineral parcels. Similarly, in

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -14-

Hudson River Sloop Clearwater v. Department of the Navy, 836 F.2d 760, 764 (2d Cir.1988), the Second Circuit found that the Navy would construct its proposed dock regardless of whether it was able to construct upland housing.

Unlike the parties in those three cases, Vulcan has made no showing of independence for the proposed rail line; rather, it has expressed only dependence. The SGR rail line is not part of a larger system like an airport or a transportation network that can function independently, either as a segment or as part of a whole. This rail line will not function without Vulcan's quarry.

- (b) The breadth of environmental impact analysis required includes an analysis of alternatives and direct and cumulative effects of both the quarry and the rail line.

Neither tiering, phasing, nor notions of state-federal efficiency can serve as a legal basis to shield the Vulcan quarry from an EIS that evaluates its alternatives and direct effects.

First, tiered environmental impact statements are both impossible and impermissible under these circumstances. Under the CEQ regulations, "tiering" refers to the coverage of general matters in broader environmental impact statements . . . with subsequent narrower statements or environmental analyses . . . incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. 40 C.F.R. § 1508.28. By contrast here, shifting from the proposed rail line to its connected action, the quarry, opens a much broader scope of environmental impacts that require discussion. Indeed, the rail line is a phase of the quarry. This case is the opposite of those that qualify for tiering.

Second, the phasing of the quarry by no means bars the analysis of every phase in the combined EIS. SGR may 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 may be deferred until the connected action is ripe for proposal.

The Fifth Circuit has already decided this issue contrary to any attempt by SGR 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) (*Sigler* refers to the EIS repeatedly as a type of "cost-benefit analysis" but clarifies that it uses this term informally to refer to the EIS analysis of direct impacts in n.15).

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -15-

The proposed action in *Sigler* was a Corps of Engineers permit for a channel deepening, crude oil terminal, and oil pipeline distribution system project in Galveston Bay. The channel deepening, which would extend beyond the proposed crude oil terminal, would generate benefits connected to the proposed action, in the form of additional bulk cargo activities at the Port of Galveston. The relevant portion of the opinion is excerpted below:

In order for an agency to carry out this broad systematic cost-benefit analysis, it is vitally important that the FEIS relied on by the agency fully and accurately disclose the environmental, economic, and technical costs associated with the project. The extent of that disclosure is the issue in this case.

Cost-Benefit Analysis in this Case.

The Second Circuit in [*Chelsea Neighborhood Association v. U.S. Postal Service*, 516 F.2d 378 (2d Cir.1975)] confronted an issue very similar to the one we face here. In *Chelsea*, the Post Office had acquired land in New York City for use in building a new facility. Airspace rights above the facility were granted to the City for use in building public housing. 516 F.2d at 381. The FEIS prepared by the Post Office was challenged, *inter alia*, on the grounds that the Post Office used the benefits of the housing project as a "selling point" and a principal reason to go forward with the facility while ignoring many of the disadvantages that would flow from it. *Id.* at 387. The court held the FEIS deficient on this basis. *Id.* at 388. The skewed cost-benefit analysis in *Chelsea* is remarkably similar to the skewed analysis found here by the trial judge, 532 F. Supp. at 1235, and substantiated by the record.

The trial court in the instant case found the FEIS deficient due to its skewed cost-benefit analysis, and agreed with the holding of *Chelsea* as a "general proposition," 532 F. Supp. at 1236, but held the legal rule of *Chelsea* had been limited to "actual proposals" due to the Supreme Court's ruling in *Kleppe*. *Id.* Therefore, the court held that *Chelsea* did not compel disclosure of the costs associated with these bulk commodities activities because these activities were speculative possibilities, not actual proposals. It is this legal holding of the district court that the Sierra Club challenges on appeal. It being a legal holding, we make our own determination of its validity. . . .

Kleppe addressed the question of whether the Department of the Interior had to prepare an EIS for a broad program to lease federal coal reserves in a four-state area in the western United States. The Court held that the program did not invoke

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -16-

NEPA as it was not a "proposal." Only the program's parts (issuing a lease, granting a permit) were proposals subject to NEPA. In so holding, the Court interpreted NEPA in the following way:

The statute [NEPA], however, speaks solely in terms of *proposed* actions; it does not require an agency to consider the possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions. Should contemplated actions later reach the state of actual proposals, impact statements on them will take into account the effect of their approval upon the existing environment; and the condition of that environment presumably will reflect earlier proposed actions and their effects. 427 U.S. at 410 n. 20, 96 S. Ct. at 2730 n. 20; *See Environmental Defense Fund v. Marsh*, 651 F.2d 983, 999 (5th Cir.1981).

The Corps' and the trial court's reliance on *Kleppe* is misplaced. In *Kleppe*, the Court was concerned with the point at which NEPA's requirements are triggered by a definitive proposal. In analyzing that issue the Court held that environmental impacts need not be evaluated for actions that are not imminent. Under *Kleppe* then, the Corps need not have prepared an EIS on the bulk commodities terminals if they were not imminent. However, once the Corps *chose* to trumpet the benefits of bulk cargo activities in the EIS as a "selling point" for the oil project, it rendered a decision that these activities were imminent. NEPA therefore requires full disclosure and analysis of their costs. *See Chelsea, supra*. The Corps cannot tip the scales of an EIS by promoting possible benefits while ignoring their costs. Simple logic, fairness, and the premises of cost-benefit analysis, let alone NEPA, demand that a cost-benefit analysis be carried out objectively. There can be no "hard look" at costs and benefits unless all costs are disclosed.

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 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

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -17-

correctly resolved in *Chelsea*, and as NEPA required it must, *Chelsea* answered it negatively.

We therefore hold that the district court reached an erroneous legal conclusion in failing to apply the principle of *Chelsea* to this skewed cost- benefit analysis. We follow *Chelsea*, apply it to the trial court's well- substantiated factual conclusion that the FEIS is skewed, and hold the FEIS deficient under NEPA.

Sigler, 695 F.2d at 978-79.

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. Additionally, it is illogical that Vulcan and SGR would build the railroad based upon any less than development of all 1,760 acres. To do so would likely violate the company's fiduciary duty to its shareholders.

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 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

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -18-

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.

Third, as described at length in the preceding sections, the types of state-federal efficiency factors that may enter into the multifactor federalization test for relatedness do not carry over into the EIS-scoping analysis. While the court stated in *Sylvester* that "ordinary notions of efficiency suggest a federal environmental review should not duplicate competently performed state environmental analysis," 884 F.2d at 401, that factor plays no role in the EIS-scoping analysis, and certainly not after relatedness has been established. Any SGR arguments to that effect should be dismissed out of hand.

II. THE PROPOSED RAIL LINE AND PLANNED QUARRY ARE ALSO CUMULATIVE ACTIONS

It is important to remember that issues of economic and functional dependence are distinct from questions of environmental synergy, and that concerns in both areas may trigger the need for a comprehensive EIS. *Fritiofson*, 772 F.2d at 1241 n.10.

In the event that Vulcan's quarry ripens into a proposal for major federal action, two proposals with potential cumulatively significant impacts will affect the same geography. The severity and type of impact may lead to a determination of this geography as local or regional, but the record will reflect that it must be at least one or the other. The agencies will not be able to retreat arbitrarily to a property line analysis, because the rail line enters and traverses a large portion of the quarry property.

One can easily reframe the EIS-threshold analysis in *Fritiofson* to a combined EIS-threshold analysis that, like the original test, remains consistent with the arbitrary and capricious review standard:

[i]t is also clear that a decision to forgo preparation of [a combined] EIS may be unreasonable for at least two reasons: (1) the evidence before the court demonstrates that, contrary to the [decision to proceed separately], the [proposals] may have a [cumulatively] 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 [cumulatively] significant impact.

See *Fritiofson v. Alexander*, 772 F.2d 1225, 1238 (5th Cir. 1985) (outlining analysis).

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -19-

Once major federal actions reach the stage of actual proposals, impact statements on them will take into account the effect of their approval on the existing environment; and the condition of that environment presumably will reflect earlier proposed actions and their effects. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.20 (1976). This statement of *Kleppe* requires both direct and cumulative impact analysis in a single EIS, for both proposals, if cumulatively significant impacts may exist. No ambiguity exists in the Supreme Court's command. No delay is permitted until after one proposal proceeds through the EIS process, unless the CEQ's tiering regulation applies, 40 C.F.R. § 1508.28, which it does not. No regional activities are involved; rather, the quarry and the rail line are both site specific.

Significant cumulative impacts resulting from the rail line and the quarry that may trigger the analysis of both proposals in a single EIS may occur in several categories. Both proposals would impact the local rail and highway transportation network, as well as various historic sites. Both proposals might also have a significant direct effect on endangered species and a safe and sustainable water supply attributable to the sole source aquifer for the south central Texas region in the vicinity of their proposed and preferred alternatives. The potential for significant incremental increases in localized particulate matter and fine particulate matter concentrations, regardless of whether they exceed the National Ambient Air Quality Standard, would also merit analysis for each proposal. Among other impacts, noise, vibration, and land use changes, particularly in light of the applicant's statements to the latter effect, may generate the type of cumulatively significant impacts that trigger a combined EIS on that basis.

III. CONSIDERATION OF THE QUARRY ABSENT CONNECTED OR CUMULATIVE ACTIONS

Even in the event that a single EIS for the rail line and quarry are not required, the cumulative impacts of the quarry must be considered as a reasonably foreseeable future action. *Texas Committee on Natural Resources v. Van Winkle*, 197 F. Supp. 2d 586, 614-20 (N.D. Tex. 2002). This holding recognizes and gives effect to the distinction between cumulative impacts and cumulative actions discussed in Part I.A. of this letter. *Id.* at 614-16.

IV. CONCLUSION

In their petition, the applicants string-cited numerous STB cases where the STB had not considered a planned project served by the proposed rail line in its analysis under 49 U.S.C. § 10901. Applicant's counsel referenced these cases in replying to MCEAA's petition, dismissing

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Ms. Victoria J. Rutson
Chief of Section of Environmental Analysis
Surface Transportation Board
February 19, 2004
Page -20-

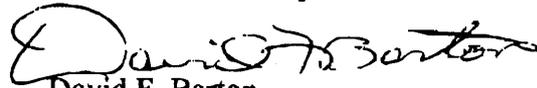
MCEAA's concerns as irrelevant. In fact, because NEPA informs the STB's final decision to grant or deny the exemption under 49 U.S.C. § 10502 and § 10901, a concerned party can never be wrong in simply bringing this point to the STB's attention. But more importantly, in the context of NEPA, now that STB will prepare an EIS, it is now the applicant that is mistaken and whose argument is irrelevant.

MCEAA respectfully requests that you and your agency take action consistent with the principles discussed in this letter, and join the entire analysis of the quarry and the rail line in a single EIS.

Please place a copy of this document in the administrative record for this proceeding.

Very truly yours,

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