

ORIGINAL

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION
745 EAST MULBERRY AVENUE, SUITE 100
SAN ANTONIO, TEXAS 78212-3149

DAVID F. BARTON
WM. RICHARD DAVIS
JAY K. FARWELL
GREGORY M. HUBER
R. WES JOHNSON[†]
BRAD L. SKLENCAR[‡]
WILLIAM W. SOMMERS
THOMAS J. WALTHALL, JR.
KEVIN M. WARBURTON

[†]Board Certified-Consumer & Commercial Law
[‡]Board Certified-Labor & Employment Law
Texas Board of Legal Specialization



210174
ENTERED
Office of Proceedings

FEB 26 2004

Part of
Public Record

TELEPHONE
(210) 733-8191

TELECOPIER
(210) 733-5538

E-MAIL ADDRESS
gardner@glf.com

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34284

**SOUTHWEST GULF RAILROAD COMPANY
CONSTRUCTION AND OPERATION—MEDINA COUNTY, TX**

MEDINA COUNTY ENVIRONMENTAL ACTION ASSOCIATION

Letter for Placement in the Record

David F. Barton
THE GARDNER LAW FIRM
745 E. Mulberry Ave.
San Antonio, TX 78212-3167
(210) 733-8191

Attorney for Medina County
Environmental Action Association

February 20, 2004

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION
745 EAST MULBERRY AVENUE, SUITE 100
SAN ANTONIO, TEXAS 78212-3149

DAVID F. BARTON
WM. RICHARD DAVIS
JAY K. FARWELL
GREGORY M. HUBER
R. WES JOHNSON¹
BRAD L. SKLENCAR²
WILLIAM W. SOMMERS
THOMAS J. WALTHALL, JR.
KEVIN M. WARBURTON

¹Board Certified-Consumer & Commercial Law

²Board Certified-Labor & Employment Law
Texas Board of Legal Specialization



TELEPHONE
(210) 733-8191

TELECOPIER
(210) 733-5538

E-MAIL ADDRESS
gardner@stlf.com

February 20, 2004

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
Case Control Unit
Attn: STB Finance Docket No. 34284
1925 K Street, NW
Washington, DC 20423-0001

VIA TELEFAX: (202) 565-9004
& CM-RRR #7002 0510 0003 0883 8373

Re:

STB Finance Docket No. 34284
SOUTHWEST GULF RAILROAD COMPANY
CONSTRUCTION AND OPERATION—MEDINA COUNTY, TX
MEDINA COUNTY ENVIRONMENTAL ACTION ASSOCIATION
Letter for Placement in the Record

Dear Mr. Williams:

The Medina County Environmental Action Association (MCEAA) files this letter to provide new information relevant to the final decision in this proceeding, and to focus the STB's attention on a question of law that will impact that decision.¹ As stated in MCEAA's February

¹ The proposal was conditionally exempted on May 19, 2003. STB precedents are clear that a party may raise merits, environmental, or joint merits and environmental issues up until the final decision. *Finance Docket No.*

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
February 20, 2004
Page -2-

19, 2004 letter to Victoria J. Rutson of STB's Section of Environmental Analysis, Vulcan Materials Corporation's (Vulcan) planned quarry and proposed rail line of its wholly-owned subsidiary Southwest Gulf Railroad (SGR) are "connected actions" that by law must each be fully analyzed in the same environmental impact statement (EIS).

As Part I of this letter discusses, the STB's decision whether to act in accordance with the law on this issue will impact final merits determinations under the STB's statutory mandate, the Rail Transportation Policy of the United States. 49 U.S.C. § 10101 (2000). First, the § 10101(8) duty "to operate transportation facilities and equipment without detriment to the public health and safety" could possibly be satisfied in isolation, except when other connected or cumulative actions that affect those operations are considered, all proposals/actions must be considered together. Second, SGR's proposed action to seek common carrier status,² when the evidence shows that its proposal's viability is solely connected to the plans of their parent Vulcan, implicates its § 10101(5) duty to "foster sound economic conditions in transportation" by making a showing of financial viability. In the STB's analysis of this requirement for the conditional exemption grant, SGR received the benefit of the common carrier assumption. Yet SGR's own

33388, *CSX Corp. et al - Control & Operating Leases/Agreements - Consolidated Rail Corp. ("CSX Corp.")* (May 27, 1998) at 2-3.

² MCEAA acknowledges that any eminent domain issues associated with the failure of SGR's proposal to constitute a "public use" will be resolved at the state level, not by the STB.

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
February 20, 2004
Page -3-

statements undermine this assumption.³ If SGR is to receive the benefit of any showing of financial viability, it is solely that associated with the quarry.⁴ The precise nature of that financial relationship remains undisclosed. And if SGR is to claim the benefit of the quarry at all, the quarry must be analyzed in the EIS, for the reasons discussed in our letter to Ms. Rutson.

It is the applicant's burden to respond to these bases for exemption denial.⁵ Consequently MCEAA has filed and served this letter to place the matter at issue in the record and to allow SGR to reply.

In Part II of this letter, we review several past exemption cases that illustrate a need for STB to more closely evaluate how it considers connected actions in rail construction proceedings. MCEAA is concerned with the manner in which some past STB rail construction cases have considered (or not considered) connected actions. Because the STB commonly grants a conditional exemption in rail construction proceedings pending the outcome of the

³ Letter from David H. Coburn, Steptoe & Johnson LLP, to Victoria J. Rutson, STB-SEA 1 (Jan. 5, 2004) (Document EI-423) ("Accordingly, any assessment of the level of commercial and industrial development that could develop along the line is speculative"); SGR Reply to MCEAA Petition to Revoke 5 (Jun. 9, 2003) (Document 208015) ("Clearly SGR is not proposing to build a railroad . . . for no good reason. [Vulcan], the parent of SGR, is planning a quarry. . .").

⁴ Profitability is an issue of concern as stated by Vulcan's Southwest Division President, "Vulcan wants to have the quarry become profitable before it has to make the investment," when referring to possible road projects. "Vulcan Presents Its Side of Quarry Dispute," Hondo Anvil Herald Online, February 19, 2004.

⁵ *Dakota, Minnesota, & Eastern R.R. Corp.—Construction Into the Powder River Basin—Finance Docket No. 33407* (Dec. 9, 1998), 3 S.T.B. 847, 864-65 (1998) (opponents can overcome presumption of a statutory standard by coming forward with credible evidence that requires a response).

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
February 20, 2004
Page -4-

environmental review, improperly scoping that review may affect the final decision without STB realizing it.

I. THE SCOPE OF THE ACTION WILL IMPACT THE MERITS

A. Defining Scope

The results of the environmental review under the National Environmental Policy Act (NEPA) in this proceeding are universally recognized as a component of the final decision to grant or deny an exemption based on the statutory criteria of § 10101.⁶ While the proposal in this proceeding has been conditionally exempted from further regulation under 49 U.S.C. § 10901, the applicant still bears the burden of satisfying § 10101 pending the environmental review and any new information that may arise.

In this proceeding, the decision to prepare an EIS, rather than an Environmental Assessment (EA), triggers a heightened and broader level of scrutiny during the environmental review. The test for whether and to what extent other actions besides the proposed action must be considered and analyzed in an EIS differs from that of an EA.

In an EA, the STB would proceed through a two step analysis to determine whether to prepare an EIS or whether to prepare a Finding of No Significant Impact (FONSI) and finalize

⁶ See *The Indiana & Ohio Railway Co.—Construction and Operation, Butler, Warren and Hamilton Counties, Ohio—Finance Docket No. 31320* (July 23, 1993), 9 I.C.C.2d 783, 786 (“This is the first time we have denied a construction application based on evidence and analysis set out in an Environmental Impact Statement”); *Calvert Cliffs Coordinating Committee, Inc. v. U.S. Atomic Energy Agency*, 449 F.2d 1109, 1112-14 (D.C. Cir. 1971).

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
February 20, 2004
Page -5-

the decision. The first step, relatedness, involves a multifactor analysis not explicitly defined by CEQ regulations and measured for reasonableness against the NEPA statute.⁷ The second step, significance, analyzes cumulative impacts of related actions as reasonably foreseeable future actions along with past and present actions.⁸ If these impacts are cumulatively significant, an EIS will be required, regardless of whether the direct impacts of the proposal are significant. However, in an EA, the direct impacts and alternatives to related actions other than the proposal need not be discussed.

In the EIS for the SGR rail project, STB must apply the tests defined in the CEQ regulations for connected and cumulative actions.⁹ As explained in MCEAA's February 19th letter to Ms. Rutson (and summarized here), one of the legal consequences under the Council on Environmental Quality (CEQ) regulations implementing NEPA is that the proposed rail line and planned quarry "are connected actions . . . and therefore should be discussed in the same impact statement."¹⁰ The three factor connected action test,¹¹ any one of which may trigger a combined EIS, deems actions connected if they:

⁷ Certain factors, such as the EIS-scoping factors at 40 C.F.R. § 1508.25(a)(1)-(2), and agency regulations deemed reasonable interpretations of the statute worthy of deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), are essentially *per se* reasonable factors, but no one factor defines the test.

⁸ See 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.")

⁹ 40 C.F.R. § 1508.25(a)(1) (2003) (connected action) and § 1508.25(a)(2) (2003) (cumulative action).

¹⁰ 40 C.F.R. § 1508.25(a)(1) (2003). Like the same command for "cumulative actions" in 40 C.F.R. § 1508.25(a)(2) (2003), this is not a discretionary determination. See *Kleppe v. Sierra Club*, 427 U.S. 390, 413 (1976) ("Cumulative

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
February 20, 2004
Page -6-

- (i) Automatically trigger other actions which may require environmental impact statements.
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
- (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.¹²

When actions are deemed connected actions, the EIS must analyze the indirect or cumulative effects of the other action(s), plus the proposed action. That is, the EIS must evaluate alternatives and direct impacts for the other action(s) just as for the proposed action.¹³

B. Operation of transportation facilities and equipment without detriment to the public health and safety

If the location of a proposed action would create a threat to public safety that cannot be adequately mitigated, an exemption can be denied under § 10101(8), regardless of the level of scrutiny (§ 10901 or § 10502(b)) used in reviewing the petition for exemption. For connected and cumulative actions, this standard may be satisfied by the proposal in isolation, but might not be when other actions that affect those operations are considered.

impacts are indeed, what require a comprehensive impact statement"). This interpretation of § 102(c) of NEPA by the Supreme Court in *Kleppe* was translated by CEQ into the test and requirements of 40 C.F.R. § 1508.25 to prepare comprehensive EIS for cumulative and connected actions.

¹¹ 40 C.F.R. § 1508.25(a)(1) (2003).

¹² This last factor is known as the "independent utility" test.

¹³ See e.g., *Sierra Club v. Sigler*, 695 F.2d 957, 978-79 (5th Cir. 1983).

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
February 20, 2004
Page -7-

In the case of a cumulative action, one can envision an overburdened rail system in a major city where two exemption actions proceeding in isolation would create an unacceptable cumulative risk of derailment or accident that would justify the denial of one or both under § 10101(8). Alternatively, a single proposal acting as a common carrier may not create a detriment to public health and safety with its own traffic, but when reasonably foreseeable common carrier traffic is considered, the detriment may rise to a level that justifies a mitigation condition or denial under § 10101(8).

For a connected action, the impact on public health and safety from transportation facilities and equipment arises from the full scope of the action that is connected, not just a single phase. The relevant analysis is the full build-out level of rail traffic from the action that will not proceed without, or which is interdependent with, the rail line.

For the SGR proposal, which is a connected action, the full build-out level of rail traffic has not been disclosed. Rather, an estimate from the first phase of the Vulcan quarry is being used, because the other phases of the quarry, even though obviously interdependent with and connected to the rail line, are being treated as speculative.

We are not saying that the § 10101 analysis includes the entire quarry, even though the NEPA analysis must because it is a connected action. We are saying that the full extent of the

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
February 20, 2004
Page -8-

quarry must be considered in the final evaluation of the rail proposal on its merits, and that the STB needs to take particular care that the decision is made correctly.

C. Fostering Sound Economic Conditions in Transportation

To date, SGR has received the benefit of assumed common carrier status. Yet SGR's own statements undermine this assumption. If SGR is to receive the benefit of any showing of financial viability, it is solely that associated with the quarry. The precise nature of that financial relationship remains undisclosed.

The STB cannot simply take the applicant's word that an abstract benefit, in the form of Vulcan's quarry, exists to satisfy § 10101(5), without also analyzing that benefit's connection to the rail line in the EIS. The alternative is to pretend that this is a rail line to nowhere,¹⁴ which not only runs afoul of NEPA, but is difficult to justify under § 10101(5).

II. CLOSER STB OVERSIGHT OF CONNECTED ACTIONS TO NEW RAIL CONSTRUCTION IS NEEDED

Several past STB rail construction cases have defined the scope of their respective environmental impact analyses with varying degrees of legality. Some of these cases applied the relatedness test (for EA/FONSI cases) or the connected and/or cumulative action designation (for EIS cases) correctly. But others left STB exposed to potential judicial reversals on those issues.

¹⁴ Cf. SGR Reply to MCEAA Petition to Revoke 5 (Jun. 9, 2003) (Document 208015) ("Clearly SGR is not proposing to build a railroad . . . for no good reason. [Vulcan], the parent of SGR, is planning a quarry. . .").

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
February 20, 2004
Page -9-

MCEAA urges the STB to study and re-evaluate its positions in these cases, and focus particular oversight to prevent disparate results from occurring in this proceeding.

Alamo North

In a recent case with a connected action somewhat similar to the one in this proceeding, the STB applied the relatedness test legally *in the context of an EA*. In *Alamo North*,¹⁵ the proposed rail line would serve an existing quarry and a new quarry. The owner of the new quarry assured STB that it was not related to a new rail line.¹⁶ As in this case, the owner of both the new and existing quarries, Martin Marietta, was the owner and developer of the rail line. STB found no cumulative impact between the rail line and either the existing or planned quarry sites. Both the relatedness finding and the cumulative impact finding could have been challenged on the facts, but as a matter of law STB likely properly applied the relatedness test in the absence of contrary evidence.

San Jacinto Rail

In *San Jacinto Rail*,¹⁷ however, contrary evidence was submitted to show that a proposed 13.2-mile chemical rail line and an adjacent, unconnected proposed Port Authority container port

¹⁵ *Alamo North Texas R.R. Corp.—Construction and Operation, Wise County, TX—Finance Docket No. 34002* (Sept. 3, 2002).

¹⁶ *Id.*, Environmental Assessment at ES-4 (Apr. 10, 2002).

¹⁷ *San Jacinto Rail Ltd.—Construction Exemption, Build-in to the Bayport Loop—Finance Docket No. 34079* (May 9, 2003).

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
February 20, 2004
Page -10-

that would be served by a separate rail, were “cumulative actions.” Both actions were at the proposal stage and undergoing an EIS. Parties submitted un rebutted evidence that the two proposals might have numerous cumulatively significant impacts over a wide area, justifying their analysis in a single EIS. The STB and the Corps of Engineers (the lead agency reviewing the container port) ignored this evidence and made only separate, conclusory statements concerning the cumulative impacts of each project on the other, rather than of both projects together on the environment.¹⁸ In the eyes of opponents, the STB improperly applied a relatedness test, rather than 40 C.F.R. § 1508.25(a)(2), to cut off analysis of overlapping rail traffic impacts from the container port and San Jacinto Rail within the city of Houston. Even without this particularly severe additive impact, numerous other potentially cumulatively significant impacts, such as noise and impact on the road transportation system adjacent to the container port, were not jointly analyzed.

Tongue River

¹⁸ *Id.*, Final Environmental Impact Statement (May 2, 2003) at 4-141, 142 (incorporating cumulative impact analysis of Draft Environmental Impact Statement served Dec. 6, 2002); *see also* U.S. Army Corps of Engineers, Galveston District, Draft and Final Environmental Impact Statements for the Port of Houston Authority’s Bayport Container Terminal, at <http://www.swg.usace.army.mil/pe/reg/pha/>

THE GARDNER LAW FIRM

A PROFESSIONAL CORPORATION

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
February 20, 2004
Page -11-

In *Tongue River*,¹⁹ another EIS case, the proposed actions of a consortium formed to serve existing and new area coal mines were properly limited to exclude a new mine along one of the proposed lines. The STB found that the consortium would build the new rail line regardless of whether another mine began operations.

East Cooper

In *East Cooper*,²⁰ a state run railroad proposed to connect to a proposed steel mill as an incentive for the steel mill project. The EA for the rail line indicated that the Corps of Engineers had granted a permit on August 3, 1995, after the petition for exemption was filed for the rail line on June 29, 1995, but before the EA was completed.²¹ Clearly, the Corps exposed itself to reversal here by not including the obviously connected rail line action in its own analysis before granting a permit. Instead, the Corps foreclosed alternatives and STB evidently did not or could not object. The one paragraph cumulative impacts discussion in STB's EA speaks solely of reasonably foreseeable future rail traffic, and does not reference environmental impacts that would be caused by the steel mill connected action. The analyses of the rail line and the steel mill could not have been tiered within the meaning of 40 C.F.R. § 1508.28 precisely because the

¹⁹ *Tongue River Railroad Co.—Construction and Operation, Ashland to Decker, MT—Finance Docket No. 30186* (Sub-No. 2) (Nov. 8, 1996).

²⁰ *East Cooper and Berkeley R.R.—Construction and Operation, Berkeley County, SC—Finance Docket No. 32704* (Dec. 13, 1995), 1995 WL 734007.

²¹ *Id.*, Environmental Assessment (Sept. 12, 1995), 1995 WL 684898 at 5.

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
February 20, 2004
Page -12-

Corps analysis of the steel mill contained no general discussion of or reference to any specific categories of impacts from the proposed rail line alternatives.

Northern Nevada Railroad

In *Northern Nevada Railroad*,²² the STB produced an EA²³ lacking a cumulative impact section entirely for a proposed rail line spur to serve a reactivated mine. The mine and the new rail line were clearly related in that the mine was interdependent on the rail line and required it to operate. Nevertheless, the U.S. Bureau of Land Management (BLM) produced a separate EIS for the mine that analyzed rail operations much more comprehensively:

The FEIS addressed potential environmental impacts of rail freight operations over the proposed new rail line and the two existing line segments, as they relate to BLM's approval of RMLP's mining operation. In addition, on October 20, 1993, BLM issued an EA on construction and operation of the proposed new rail line in the areas where the line would be located on BLM property (approximately half the proposed rail ROW).²⁴

Since the actions were obviously related, and connected for the purposes of BLM's EIS, there was no reason for STB to wait for BLM to analyze them separately and then incorporate BLM's analysis into its own. Analyzed together, the mine and rail line would have generated at least one less environmental document with the same result.

²² *Northern Nevada R.R. Corp.—Construction and Operation, White Pine County, NV—Finance Docket No. 32476* (Feb. 24, 1995), 1995 WL 73355.

²³ *Id.*, Environmental Assessment (Sept. 12, 1995), 1995 WL 141753.

²⁴ *Id.* at 3.

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
February 20, 2004
Page -13-

Vaughan

In *Vaughan*,²⁵ the STB failed to properly apply the relatedness test in an EA to a proposed coal loadout facility and preparation plant to be owned by Fola Coal Company. That plant was interdependent on the construction of Vaughan's line and likely would have been deemed related had an appropriate relatedness test been applied. The loadout facility and preparation plant should have been analyzed in the EA cumulative impacts section to determine whether its cumulative impacts might have been significant enough to trigger an EIS.

Vaughan raises difficult questions for the STB, since the resource shortages at the agency encourage resistance to federalizing large industrial rail-dependent projects during environmental review. STB certainly does not want to have to consider the environmental consequences of every rail-dependent development project in the nation. However, at the EA stage, the multi-factor federalization test for relatedness does offer some flexibility for "small federal handles." As discussed in our letter to Ms. Rutson, however, the CEQ regulations do not afford this same flexibility when the threshold of significance or public controversy is sufficient to require the more detailed EIS.

²⁵ *Vaughn R.R. Co.—Construction Exemption, Nicholas and Fayette Counties, WV—Finance Docket No. 32322* (Nov. 4, 1993), 1993 WL 451259

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
February 20, 2004
Page -14-

To the extent that STB must consider cumulative impacts in an EA, it is asking to be sued on the adequacy of the EA when it fails to explicitly apply a defensible relatedness test. If the lead agency on the other, potentially connected action undertakes an EIS or concludes without an EIS before STB even starts, both agencies are subject to be sued under the CEQ regulations. But in many cases, if STB and the other agencies with jurisdiction over the non-rail potentially connected action would cooperate, STB could avoid unnecessarily duplicated analysis or segmenting the rail proposal and still comply with NEPA.

Pascagoula

In *Pascagoula*,²⁶ a Port Authority sought to connect its proposed rail line from its proposed intermodal terminal to a mainline common carrier. Though it did not represent as much at the time, the Port Authority later also received operating authority on the line.²⁷ The port terminal and the rail line were clearly related for the purposes of the EA analysis. Nevertheless, the Corps of Engineers (lead agency on the port terminal) and STB proceeded separately,²⁸ despite STB's explicit finding, in Section 1.2.3 of the EA, that the port terminal and rail line were related actions. A finding of relatedness necessarily entails a finding of cumulative significance or insignificance as to the impacts of the related actions, yet the STB's EA contained no cumulative

²⁶ *Jackson County Port Auth.—Construction Exemption, Pascagoula, MS—Finance Docket No. 31536* (Aug. 6, 1990), 1990 WL 287815.

²⁷ *Jackson County Port Auth.—Operating Authority, Pascagoula, MS—Finance Docket No. 34134* (Dec. 5, 2001), 2001 WL 1544905.

²⁸ *Id.*, *Finance Docket No. 31536*, Environmental Assessment (Jul. 25, 1991), 1991 WL 163508.

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
February 20, 2004
Page -15-

impact discussion whatsoever. This exposed both STB and the Corps to potential judicial reversal.

CONCLUSION

In this case, the proposed SGR rail line and planned Vulcan quarry are interdependent. The rail line depends on the quarry for its justification, and each phase of the quarry connects to the others to fulfill this purpose of the rail line. The economic viability of both is potentially dependent on the other. Because an EIS will be prepared, and because the rail line lacks independent utility without the quarry that will benefit from it, the direct impacts and alternatives to the quarry must also be analyzed. The case law is clear on these points, even where STB's past rail construction proceedings have not been. MCEAA urges the STB to closely examine how it accounts for cumulative impacts in all potential project situations and levels of environmental analysis, to determine where clearer policies or interagency cooperation may aid in compliance with NEPA and with § 10101.

Very truly yours,

THE GARDNER LAW FIRM
A Professional Corporation


David F. Barton

THE GARDNER LAW FIRM
A PROFESSIONAL CORPORATION

Mr. Vernon Williams, Secretary
U.S. Surface Transportation Board
February 20, 2004
Page -16-

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served on all Parties of Record in *Finance Docket Number 34284*, by first class mail or more expeditious means, on this 20th day of February, 2004, including:

David Coburn
Steptoe & Johnson LLP
1330 Connecticut Avenue NW
Washington, DC 20036-1795



DAVID F. BARTON
Attorney for Party of Record
MEDINA COUNTY ENVIRONMENTAL
ACTION ASSOCIATION, INC.