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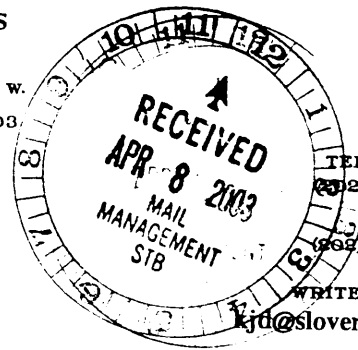
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April 4, 2003

VIA HAND DELIVERY

Ms. Victoria J. Rutson
Chief, Section of Environmental Analysis
Surface Transportation Board
1925 K Street, N.W.
Suite 500
Washington, D.C. 20423

Re: Finance Docket No. 34314, Bexar County Rural
Rail Transportation District -- Construction and
Operation -- In Bexar County, Texas

Dear Ms. Rutson:

The subject of the referenced proceeding is a request to be made by the Bexar County Rural Rail Transportation District ("BCRD") for approval (under 49 U.S.C. §10901) or exemption (under 49 U.S.C. §10502) of the construction and operation of an approximately seven-mile line of railroad to serve an industrial development site south of the city limits of San Antonio, Texas known as the Applewhite Site. The proposed rail line will be connected to the Union Pacific Railroad ("UP") Elmendorf Subdivision, over which the Burlington Northern & Santa Fe Railway ("BNSF") has trackage rights. The line also will connect with UP's Corpus Christi Subdivision, which is adjacent to the Applewhite Site. BNSF does not have trackage rights over this line.

The purpose of the BCRD project is to provide efficient and competitive rail service access to shippers that locate at or near the Applewhite Site and along the new rail right-of-way. Among the first users of the new rail service is expected to be Toyota

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Motor Corporation, which recently announced plans to construct a truck manufacturing and assembly facility at the Applewhite Site.

On February 19, 2003, the Board approved BCRD's retention of Jo Carole Dawkins and Dawkins Environmental Consulting as independent third party contractor for the preparation of the required environmental impact documentation for the project (EA or EIS), under the Board's NEPA regulations (49 C.F.R. Part 1105, *et seq.*). Subsequently, we were asked by Mr. Troy Brady of your staff to comment on behalf of BCRD on the proper scope of environmental review under regulations promulgated by the Council on Environmental Quality (CEQ) at 40 C.F.R. Part 1500, *et seq.* The specific issue raised was whether the EA (or EIS) should examine the BCRD rail line project independently, or whether the impact of the rail line had to be evaluated together with the prospective impact of the Toyota facility or facilities of other potential rail service users as "connected" or "cumulative" actions under the CEQ rules.

BCRD respectfully submits that the weight of governing authority supports the conclusion that the scope of the EA (or EIS) in this case should be limited to the proposed rail line itself and to reasonable alternatives to BCRD's selected route, and should not extend to the facilities of shippers that may be served by the line. The line and the shippers' facilities (including Toyota's) each will have independent utility, with the rail line in particular representing an infrastructure improvement that will enhance general economic development in the region, and would be justified regardless of the siting decision of any individual shipper.

In support of this conclusion, we submit the following:

1. The CEQ Rules

The governing rules for determining the scope of an environmental impact analysis (whether an EA or an EIS) are set out in the CEQ guidelines at 40 C.F.R. Part 1508.25. As defined therein, "scope" refers to the "range of actions, alternatives, and impacts to be considered" in an environmental document. To properly evaluate scope issues, agencies are directed to consider three types of actions: connected, cumulative and similar. Two of these are relevant to the question of the proper scope of an environmental review of the BCRD rail project. The first category describes:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(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.

40 C.F.R. Part 1508.25(a)(1). The second category that agencies are instructed to consider is “[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement”. 40 C.F.R. Part 1508.25(a)(2).

As a threshold matter, it should be noted that the federal courts have held that separate projects cannot and should not be evaluated as “connected actions” if only one of them falls under federal agency jurisdiction. See Wetlands Action Network v. U.S. Army Corps of Engineers, 222 F. 3d 1105, 1117 (9th Cir. 2000). The BCRD rail line is subject to the Board’s jurisdiction by virtue of 49 U.S.C. §10901 and its intended status as a “line of railroad.” At this stage, however, we are not aware that the construction or operation of the planned Toyota facility or any other prospective new shipper facility would be subject to prior federal approval authority. This fact alone would be dispositive on the question of the status of the rail line and a shipper’s new facility as “connected actions” under the CEQ rules. See California Trout v. Schaefer, 58 F.3d 469, 474 (9th Cir. 1995).

While federal and non-federal projects cannot be grouped together for environmental review as “connected actions,” the law is equally clear that such projects *can* be considered together if they meet the criterion applicable to *cumulative* impacts under 40 C.F.R. Part 1508.25(a)(2). See Resources Limited, Inc. v. Robertson, 35 F.3d 1300, 1305-06 (9th Cir. 1993). We have doubts whether, as a factual matter, a rail line and the separate facilities of unrelated rail service customers should be considered “cumulative actions,” given their very different operational natures, physical

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characteristics, ownership, and construction timetables, among other factors. Given that the interpretive case law tends to apply the same principles in evaluating claims of connected and cumulative actions (which often are raised in the alternative), however, the discussion which follows assumes that a rail line and customer facility could be considered cumulative in terms of their environmental impacts.

2. Relevant Case Law

A leading court decision in the area of interpreting CEQ's connected and cumulative actions rules is Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985). There, the U.S. Forest Service was evaluating a timber harvesting plan (and accompanying EIS) for a portion of the Nezperce National Forest. In a related but separate proceeding, the Forest Service solicited public comment on a proposed gravel haul road, to be used to access the harvest area. An EA prepared in connection with the road discussed the environmental impact of the road itself, but not the timber sales. When the EA resulted in a finding of no significant environmental impact with respect to the road, adversely affected parties appealed. As framed by the court:

The central question that plaintiffs' NEPA claim presents is whether the road and the timber sales are sufficiently related so as to require combined treatment in a single EIS that covers the cumulative effects of the road and the sales. If so, the Forest Service proceeded improperly.

753 F.2d at 757.

The court ruled that the road and the timber sales were "connected actions" under the CEQ regulations, based on a finding that at least two (and possibly all three) of the criteria set out in 40 C.F.R. Part 1508.25 (a) (1) were met:

It is clear that the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales. This much is revealed by the Forest Service's characterization of the road as a "logging road," and by the first page of the environmental assessment for the road, which states that "[t]he need for a transportation route in the assessment area is to access the timber lands to be developed over the next twenty years." Moreover, the [EA] rejected a

“no action” alternative because that alternative would not provide the needed timber access.

753 F.2d at 758. Significantly, the court relied on the total interdependence between the road and the timber harvest: the road made no sense absent the timber sales (it literally would have been a road to nowhere), and timber sales would have been impossible absent the road. As the court noted, “it would be irrational to build the road and then not sell the timber to which the road was built to provide access.” 753 F.2d at 759.

Save the Yaak Committee v. Block, 840 F.2d 714 (9th Cir. 1988), also examined the claimed nexus between a wilderness road project and a planned timber harvest and sale program. In that case, the Ninth Circuit identified six factors that it said guided the finding that the road and the sales were “connected actions”:

1. The road was characterized by the Forest Service only as a “logging road.”
2. The EA tied the purpose of the road to the timber sales.
3. “No action” on the road would have precluded timber sales.
4. The cost-benefit analysis conducted by the Forest Service considered the timber sales to be the benefit obtained from road construction.
5. No claim was made that anything else justified building the road.
6. The record showed that future timber sales were dependent on the road’s completion.

As in Thomas, the court found an “inextricable nexus between the road construction and the logging operations,” which required both to be analyzed in the same environmental document. 840 F.2d at 719-21.

In clear contrast to the road-and-timber cases, however, are decisions in other factual contexts far more analogous to the BCRD project, in which the courts have held that two separate actions are not sufficiently intertwined to be treated together for environmental review purposes. In Sylvester v. U.S. Army Corps of Engineers, 884 F.2d 394, 400 (9th Cir. 1989), the court approved the Corps’ separate analyses of the impact of

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a proposed golf course and a resort to which it would be attached. While each project would benefit from the presence of the other, "each could exist without the other," and thus were not sufficiently interdependent to trigger a "connected actions" finding under the CEQ rules. Similarly, in Northwest Resource Information Center, Inc. v. National Marine Fisheries Service, 56 F.3d 1060, 1068-69 (9th Cir. 1996), the court held that a plan to manage river flow and a salmon transportation program each had "independent utility," and therefore should be reviewed separately even though they both served a common purpose; *i.e.*, the protection of juvenile salmon.

The Tenth Circuit's decision in Airport Neighbors Alliance, Inc. v. United States, 90 F.3d 426 (10th Cir. 1996), also is instructive. Foreseeing growth in air traffic and an accompanying need to expand its airport infrastructure to accommodate it, the City of Albuquerque devised a master plan to upgrade one runway, reconstruct another, and construct new terminal, parking and ground access facilities. The Federal Aviation Administration drafted an EIS for the runway upgrade only, characterizing its purpose as both accommodating air traffic growth and handling existing traffic while the second runway was being reconstructed. When a neighborhood group appealed, claiming that the FAA should have evaluated both runway projects, the terminal expansion and the additional parking facilities at the same time in the same EA, the court rejected the challenge:

Here, no "inextricable nexus" exists between the Runway 3-21 upgrade and other components of the Master Plan.

Although the Runway 3-21 upgrade and the other components currently might be linked, the city clearly could sever this link by deciding to abandon the Master Plan without destroying the proposed action's functionality; ...[T]he remaining components of the Master Plan are not so interdependent that it would be unwise or irrational to complete the Runway 3-21 upgrade without them.

90 F. 3d at 431.

The differences between the road-and-timber cases and the decisions discussed immediately above were distilled in Morongo Band of Mission Indians v. Federal Aviation Administration, 161 F.3d 569 (9th Cir. 1998). There, the environmental impact associated with an arrival gate expansion project was examined separately from a larger expansion project for Los Angeles International Airport. In response to claims that

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all should have been considered together as “connected actions,” the court juxtaposed the rulings in Thomas and Northwest Resource Information Center as follows:

In Thomas... we concluded that the construction of a road in a forest and the sale of timber were connected actions....

Because the timber sale could not proceed without the road, and the road could not have been built but for the timber sales, the two were “inextricably intertwined....”

By contrast, we rejected a claim that actions were “connected” when each of two projects would have taken place with or without the other and thus had “independent utility.”... In NRIC, both an ongoing salmon transportation program and proposed river flow improvement measures “could exist without the other, although each would benefit from the other’s presence.”

161 F.3d at 579-80.

The upshot of the decisions reviewed is that where one project could not proceed or would not make sense but for the second project, and the second project essentially depends upon the first for its own rationality or viability, environmental impacts of the two can be considered together under 40 C.F.R. Part 1508.25. However, where it is shown that the two projects have independent utility and could exist individually, though they still may be designed primarily to complement each other and each benefits from the other’s presence, separate environmental review and documentation is appropriate.

3. The BCRD Rail Project

Applying the principles and precedents summarized above to the essential facts of the BCRD rail project, we believe it is clear that the environmental impacts of the rail line can and should be evaluated separately from those of the facilities of individual shippers that might use the line, including Toyota.

As noted above, the purpose of the new line is to bring efficient, competitive rail service to shippers that come to locate at the Applewhite Site and along the right-of-way, to promote regional economic development, growth, and employment. These shippers certainly will benefit from the rail line and the transportation alternatives

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that it is intended to provide. However, BCRD's rail line is not *necessary* to provide Toyota or other shippers at the Applewhite Site with transportation alternatives. Commercial negotiations with UP could produce dual rail carrier service – or its equivalent – over UP's existing Corpus Christi line via a short, private rail spur that could be built without federal approval (see 49 U.S.C. §10906), or through a transload operation. Additionally, truck transportation is available to satisfy a significant portion of the shippers' needs. This is not a case where the Toyota facility or facilities of other shippers could not be developed “but for” construction of the BCRD line. Cf. Thomas, 753 F.2d at 758. Nor will successful completion and operation of a shipper facility depend on completion of the rail line; indeed, it is expected that some initial shipments to and from the Toyota plant will be handled over the Corpus Christi line. Compare Save the Yaak, 840 F.2d at 719.

While Toyota is expected to be a principal initial user of the new rail line, the line also will have “independent utility” as needed infrastructure to enhance the economic development of the region generally. Wetlands Action Network, 222 F.3d at 1118; Morongo, 161 F.3d at 580. Analogous to the “anchor store” in a shopping mall, the Toyota plant is expected to attract other businesses to the region that will increase traffic over the new rail line. Even if Toyota were to make alternate transportation arrangements (e.g., contract with UP for service over the Corpus Christi line), it would be rational for BCRD to proceed with construction to make service available to other prospective shippers and otherwise enhance the attractiveness of the region for further development. On these facts, a finding of “independent utility” clearly is justified. See Sylvester, 884 F.2d at 400. In this respect, the BCRD project is analogous to the line construction proposed by the Ellis County Rural Rail District and approved by the STB in 2000. There, the Midlothian Riverport had been sited and planned, but was not yet constructed when the rail line project was brought before the Board. Though a primary purpose of the new line was to provide competitive transportation service to the Riverport, the Board properly limited the scope of its EA to the rail line itself. See F.D. No. 33731, Ellis County Rural Rail Transportation District – Construction and Operation Exemption – Ellis County, TX, Decision served November 27, 2000.

Finally, as was the case in Northwest Resource Information Center, the rail line and the shipper-customers' facilities each can “exist without the other,” even though each would benefit from the other's presence. Id., 161 F.3d at 580. Toyota, for example, already has made its siting decision, although BCRD has yet to apply to the Board for construction approval, and there are no agreements or other formal commitments reflecting a quid pro quo between Toyota and BCRD. While the attraction of new

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manufacturing facilities and economic development obviously form a part of the justification for the new rail line, it is not so "inextricably intertwined" with the Toyota plant or any other prospective new facility that neither would be possible or rational without the other. Compare Thomas, 753 F.2d at 759.

* * *

In sum, based upon the relevant facts and applicable precedents, SEA should conclude that the proper scope of its environmental review in connection with the referenced proceeding should be limited to BCRD's federally-sanctioned rail project, and should not include construction or operation of separate, non-federal new shipper facilities. On behalf of BCRD, we appreciate the opportunity to present our views and conclusions, and invite you or members of your staff to contact the undersigned if there are any questions or a desire for further discussion of this matter.

Respectfully submitted,



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KJD:cef

cc: Mr. Troy Brady (SEA)
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