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Via E-filing

July 15, 2008

Hon Ann K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: STB Finance Docket No. 35106
*United States Department Of Energy – Rail
Construction And Operation – Caliente Line In
Lincoln, Nye, And Esmeralda Counties, Nevada*

Dear Acting Secretary Quinlan.

Enclosed for filing on behalf of the State of Nevada in the above-captioned docket
is the **State Of Nevada's Comments In Opposition To The Application Filed March
17, 2008 By The United States Department Of Energy Under 49 U.S.C. 10901**

The Comments are presented in both original and PDF version in WORD format
for IMac

The Certificate of Service reflects the correct document and service dates. Parties
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Yours truly,
/s/
Paul H Lamboley

PHL/nd
Enc.

222941

UNITED STATES OF AMERICA

BEFORE THE SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35106

**UNITED STATES DEPARTMENT OF ENERGY – RAIL
CONSTRUCTION AND OPERATION – CALIENTE RAIL LINE
IN LINCOLN, NYE, AND ESMERALDA COUNTIES, NEVADA**

**STATE OF NEVADA'S COMMENTS IN OPPOSITION TO THE
APPLICATION FILED MARCH 17, 2008 BY THE UNITED STATES
DEPARTMENT OF ENERGY UNDER 49 U.S.C. 10901**

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JULY 15, 2008

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I. INTRODUCTION.

In accordance with the Board's Decision, served April 11, 2008, establishing a "Procedural Schedule on the Merits" in this case, the State of Nevada ("Nevada") files its initial comments in opposition to the application of the United States Department of Energy ("DOE") filed March 17, 2008 seeking prior approval from the Board under provisions of 49 U.S.C. §10901 for the proposed construction and operation of a 300-mile rail line, commonly known as the Caliente route, in Lincoln, Nye, and Esmeralda counties, in the State of Nevada.

DOE has asked the Board to evaluate an extraordinary plan. DOE proposes to extend the national rail system into Nevada for the purposes of transporting more than 70,000 metric tons of spent nuclear fuel and high level radioactive waste. It would transport waste past the homes and businesses of scores of millions of Americans, over a period of 50 years. The waste will come from various origins throughout the United States to a proposed geologic nuclear waste repository at Yucca Mountain, NV, that is, itself, the first of its kind in the world. This decision is one of, if not the, most far-reaching that the Board or any administrative agency can be asked to reach

Nevada's comments here address the public convenience and necessity ("PCN") issues raised by DOE's application under Section 10901.

Previously, by allowed Amended Motion dated April 30, 2008, Nevada moved the Board to reject DOE's Application for several reasons. (1) the Application failed to establish a basis upon which the Board may exercise jurisdiction; (2) the Application failed to comply with certain requirements of the Board's Regulations; and (3) the Application was devoid of meaningful consideration of potential terrorism attacks on the

proposed transportation activity and infrastructure, and related security and first-response concerns. To ensure meaningful consideration of terrorism and security risks, Nevada moved to include the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), Transportation Security Administration ("TSA"), and Federal Railroad Administration ("FRA") as a "cooperating agencies" with "lead agency" status for FRA on safety and security matters in any further proceedings.

By decision served June 27, 2008, the Board denied Nevada's Amended Motion.

Nevada believes those issues were wrongly decided and does not wish to waive or forfeit its challenge to Board's jurisdiction and the Application's compliance with regulations. Thus, as a part of these comments and by this reference, Nevada incorporates herein, as if restated in full, the reasons contained in its Amended Motion, and the supporting authorities cited therein, as additional grounds for its opposition to DOE's Application and the PCN issues raised therein.

II. COMMENTS.

A. Nevada's Interest

The State of Nevada, acting through the Nevada Attorney General and the Agency for Nuclear Projects, is responsible to protect the public health, safety and environment of its citizens from the potential adverse consequences or effects of nuclear projects within the State, and specifically the waste repository project proposed for Yucca Mountain ("YMP") and related transportation activities.

Nevada is responsible as trustee to protect the groundwater resources held for the public in trust from any adverse consequences resulting from a project such as YMP. Nevada is also responsible for the public health and safety of Nevada employees, and

also other workers within the state, especially those that may be adversely affected by YMP-related activity.

For the purposes of proceedings on the DOE application, Nevada is a stakeholder and an interested party, and acknowledges service of the application by DOE

Nevada's standing cannot be seriously disputed regarding YMP-related proceedings. Nevada has previously participated, and continues to participate, as a party in proceedings before the Environmental Protection Agency ("EPA"), the Nuclear Regulatory Commission ("NRC"), and DOE. Nevada has also participated as a party in judicial review proceedings before United States Courts of Appeals on YMP-related issues

B. JURISDICTION.

DOE's application justifies its demand for an extraordinary determination by coupling it with an equally extraordinary theory of jurisdiction. DOE does not come the Board with a common carrier application. The purpose of this rail line is not to afford service on a common basis to shippers. It is for DOE to ship nuclear waste to a one-in-a-kind location. To bring this matter before the Board, DOE demands that the Board assume jurisdiction over this action based on the possibility that at some point, DOE might decide to opt for what DOE calls its common carrier "Shared Use Option."

DOE's argument – that the Board should consume its resources with this application because of the possibility that it might someday decide to share the line – appears to be nothing more than an exercise in forum shopping. DOE does not wish to demonstrate to state regulators that its transportation route meets their requirements, and

believes that having a proceeding before the Board will preempt them from considering this issue.

Nevada recognizes that the Board's June 27 decision allowed DOE to proceed on this basis. However, Nevada respectfully believes that this ruling is mistaken and does not waive its challenge to the absence of Board jurisdiction.

DOE invokes the Board's jurisdiction by filing an Application under provisions of 49 U.S.C. §10901 and applicable regulations. By so doing, DOE's Application seeks the benefit of Federal preemption under the Interstate Commerce Act, as amended, 49 U.S.C. §§10101 *et seq.*, and the exclusive jurisdiction of the Surface Transportation Board ("STB").

DOE relies solely on the filing of its Application under 49 U.S.C. §10901 as the basis for the Board's jurisdiction in this case asserting "the plain language of 49 U.S.C. §10901 indisputably vested the Board with jurisdiction over DOE's Application when filed." DOE *Reply* p. 6 (April 22, 2008). However, filing under Section 10901, a procedural statute, does not confer the requisite jurisdiction, that must be established under 49 U.S.C. §10501. DOE's Application fails to establish affirmatively that the proposed transportation transaction falls within STB jurisdiction under Section 10501.

To satisfy Section 10501, DOE must demonstrate its proposed transaction will in fact implement a common carrier activity, which DOE identifies as a "Shared-Use Option" ("SUO"), and result in the construction and operation of a line of "railroad" in interstate commerce, which will involve "transportation by rail carrier" conducted over any "part of the interstate rail network". "Rail carrier" is defined in Section 10102(5) as "a person providing *common carrier* railroad transportation for compensation"

To come within the Board's jurisdiction under Section 10501, DOE's Application must affirmatively show that, as a matter of material fact, common carrier activities or obligations, as those terms are defined in Sections 10102 and 11101, will *in fact* exist on the proposed line

DOE's Application and supporting submissions are at best equivocal on implementation of the SUO, being more a contingency than a commitment. DOE describes the SUO everywhere with "could/would" potential or as a "preferred alternative", but nowhere in its Application does DOE commit or state unequivocally that SUO will in fact be implemented or that common carrier activities or obligations will occur on the proposed new line.

Significantly, DOE's Application *expressly reserves* decision not only whether to implement the SUO, but also whether to even construct and operate the line for which prior approval is being sought, stating:

"The DOE anticipates that the Final Rail Alignment EIS will be issued in June 2008. The Final Rail Alignment EIS will assist DOE in deciding whether to construct and operate a railroad, and if so, within which corridor and alignment. The Final Rail Alignment EIS will also assist DOE in deciding whether to implement the Share-Use Option. These decisions will not be made until DOE issues the Final Rail Alignment EIS and a record of decision."
DOE *Application*, p. 10.

DOE, a non-carrier, fails to identify the operator that will provide or perform common carrier service on the line for purposes of 49 U.S.C. §11101, clearly stating: "An operator has not been selected at the time of this application." Thus commenters are left to speculate how, if at all, and by whom, will the SUO be implemented. If determinative common carrier decisions are yet to be made by DOE, this Application is premature and does not fall within STB jurisdiction under Section 10501

DOE does not claim jurisdiction under Section 10501. Nor has DOE stated that a decision to provide common carrier activity on the line has been made, over 20 years after the 1987 Nuclear Waste Policy Act Amendments. Indeed, DOE's Application appears to be a placeholder-filing intended to be later amended or supplemented as and when DOE makes further decisions detailing its actual SUO plans. This approach ensures that additional opportunity for public comments will be necessary and this proceeding will be conducted in piecemeal fashion.

DOE is a non-carrier that owns the commodities (spent nuclear fuel and high level radioactive waste) to be transported over the proposed DOE-owned rail line to the DOE-owned Yucca Mountain Repository. Without affirmatively committing and holding out that common carriage activity or obligation to the public will in fact exist over the proposed new rail line, the proposed construction and operation transaction for which DOE seeks prior approval is merely private carriage that, even if accomplished by a carrier, is not within the Board's jurisdiction for purposes of Section 10901. *B Willis, C.P.A., Inc.-Petition for Declaratory Order*, STB Finance Docket No. 34013, 2001 WL 1168090, (served Oct. 3, 2001)(*B Willis*)("if a shipper does not hold out to provide common carrier railroad service over a line it constructs and maintains to serve its own facility, and no other shippers are served by the line, then neither that construction, nor a railroad's operation over that track to reach the shipper's facility requires Board authorization or approval."), aff'd sub nom. *B. Willis, C P A , Inc v. STB*, 51 Fed.Appx. 321 (D C Cir. 2002) and *Hanson Natural Resources Company – Non-Common Carrier Status – Petition for Declaratory Order*, ICC Finance Docket No 32248 (served Dec 5, 1994).

B. Willis is consistent with the legislative history of the ICC Termination Act of 1995 (ICCTA), which Conference Report specifically stated that “non-railroad companies who construct rail lines to serve their own facilities. .are not required to obtain agency approval to engage in such construction.” H.R. Conf. Rep. No 422, 104th Cong. 1st Sess. 179 (1995).

Without question, the STB’s statutory jurisdiction under Section 10501 is singularly premised on *common carrier* activity. The 1995 ICCTA Conference Report on Section 10501, in relevant part, states:

“This provision integrates changes common to both House and Senate provisions to reflect reductions in regulatory jurisdiction. . .To clarify that only providers of rail transportation for compensation are within the scope of the statute, the definition of “rail carrier” is limited to persons providing *common carrier* rail transportation ” H R. Conf Rep. No 422, 104th Cong 1st Sess. 166 (1995)(Italics in original).

DOE now, as in the past, refuses to commit that this proposed rail line will in fact be used to provide common carrier service to the general public. When appearing before the DC Circuit in 2005, DOE resisted Nevada’s YMP-related claim that STB jurisdiction and review should apply to the proposed transportation activity and infrastructure based on DOE’s repetitious references to an SUO See *State of Nevada v Department of Energy*, 457 F.3d 78 (DC Cir. 2006). In that case, Nevada’s claim was deemed “unripe because it is speculative.” The Court found that “STB jurisdiction comes into play only if DOE decides to operate the branch rail line as a common carrier,” and accepted DOE’s indecision, stating: “[t]hat decision, however, has not been made ” DOE’s decision to come the Board without having decided to operate the branch rail line as a common carrier is a bait and switch.

In its June 27 decision, the Board's concedes that its authority over DOE's Application is based on Section 10501, but nonetheless concludes:

"Because DOE has applied to construct and operate a common carrier line of railroad, it is seeking to provide transportation by railroad, and therefore engage in an activity under our jurisdiction at 49 U.S.C. 10501."
STB Decision, p. 3

Presumably, the Board's conclusion is based on the Application's stated purpose "is to request a certificate of authority for the DOE to construct and operate a common carrier rail line along the Caliente Corridor " DOE Application, p. 3. In the context of this case, this is just not true. In the same paragraph, attempting to mask what is the sole purpose of the proposal, DOE states "[t]he line would permit the DOE to transport construction materials, spent nuclear fuel and high-level radioactive waste to a repository at Yucca Mountain " *Id* at 3. This latter statement in context is the true purpose of the proposal and the former reflects only a possible secondary purpose yet to be decided. DOE's singular purpose and proposal is to construct and operate a railroad to YMP in order implement its "mostly rail" transportation scenario to transport spent nuclear fuel and high level waste from sites around the nation to YMP, a site that does not have rail service. To conclude otherwise ignores the obvious.

The Board also overlooks the material facts that DOE's Application expressly states that decisions whether to construct and operate a railroad, within which corridor or alignment or to implement a shared-use option (common carrier service) *have not been made and will not be made until June 2008*, or later in the "summer of 2008" See DOE Application p. 10 and DOE Reply p. 5.

The Board correctly acknowledges the absence of any common carrier decision by DOE, when the Board characterizes it as an "uncertainty " STB Decision, p. 3. The

Board, however, errs, when it says that this “uncertainty” “does not deprive this agency of jurisdiction over the project.” *Id* Neither NV, nor DOE, nor the Board has located *any* case in the Board’s history in which a Section 10901 application, by a carrier or non-carrier, did not affirmatively propose and definitely identify the common carrier service on the proposed line for which permission to construct and operate was requested. The Board’s June 27 decision is the first decision *ever* to suggest that

“at this point, *only if* DOE would definitely decide that it *does not* wish to have common carrier service on the Caliente Line would we lack jurisdiction over the proposed line construction.” (Emphasis added) *Id*.

This cannot be the rule. To assume that there is jurisdiction until an applicant disclaims it stands on its head Section 10501’s requirement that applicants demonstrate jurisdiction. Board regulations in Part 1150 contemplate that an application details such planned operations to provide opportunity for meaningful public comment on PCN issues. If applicant could invoke the Board’s jurisdiction by saying “maybe I might someday provide a common carrier service,” there would be nothing to stop any applicant from consuming the Board’s resources regardless of its actual plan.

To require that Section 10501 jurisdiction be the antecedent of Section 10901 permission would not transform a “permissive” grant under §10901, into a mandate. Simply put, without jurisdiction there can be no permission.

Nor is jurisdiction established for DOE by saying that “it is seriously considering using the line to provide common carrier service”, and that “it would prefer to use the line for common carrier service. Neither “consideration” nor “preference” affirmatively establishes common carrier service. To the contrary, under established law, it is evident that DOE’s Application has not “sufficiently crystallized” regarding common carrier

activity within the jurisdictional requirements of Section 10501 jurisdiction to warrant Board evaluation at this time. See *State of Nevada v Department of Energy*, 457 F.3d at 84-85 discussion and conclusion that DOE's "uncertainty" of its traffic plan makes review "plainly premature "

The Board's assertion of jurisdiction in this case has significant adverse consequences for Nevada. The Board's announced basis for jurisdiction effectively delegates to the applicant, DOE, the unfettered discretion to preempt State action under Section 10501, and to do so for a duration solely dependent on the "unless and until" event when DOE decides *not* to have common carriage on the line.

Placing no obligation on DOE to decide on common carriage prior to a final decision on the merits, STB's approach also ensures the prospect of piecemeal commentary and litigation in both the PCN and NEPA issue tracks. It forces interested parties to assume common carrier service and details of construction and operation necessary to support that service.

That is not efficient. It is not logical. And it is not fair.

Rather than reject a meritorious Section 10501 jurisdictional challenge based on lack of common carriage, the Board should stay further proceedings on DOE's Application unless and until DOE makes an affirmative decision to have common carrier activity on the proposed line, and supplements its application accordingly. Mistakenly, for now, the Board has decided to accept DOE's placeholder application.

C. DOE's Application.

Nevada's comments address the public convenience and necessity ("PCN") issues raised by DOE's Application under Section 10901.

For Section 10901 purposes, the STB recognizes there is no statutory definition for PCN, rather the criteria can be found in the application of the Board's governing statutes, 49 USC 10101 *et seq.*, and regulations, 49 CFR Part 1150. See *Alaska Railroad Corporation*, STB F.D. No. 34658, served April 3, 2008, *Tongue River Railroad Company Inc.*, STB F.D. No. 30186 (Sub-nos. 1, 2, and 3) (*Tongue River I, II, and III*), last served March 13, 2008, and *Dakota Minnesota & Eastern Railroad Corporation* STB F.D. No. 33047, (*DM&E I, II and III*), *I* served Dec. 10, 1998, *II* served Jan. 30, 2002, *aff'd* in part sub nom. *Mayo Foundation et al. v. STB*, 472 F.3d 545 (8th Cir. 2006), and *III* served Feb. 15, 2006.

Because DOE's application does not even declare whether (much less explain what) common carrier services is going to be provided, it is not possible to apply the standards as these cases articulate them. PCN relates to public activity not the private activity that DOE contemplates; and Section 10901 requires and proposed *common carrier* activity, not shipping DOE's own nuclear waste.

Precedent suggests there is a four-factor analysis for public convenience and necessity (PCN):

1. Whether the applicant is financially fit to undertake construction and provide proposed service;
2. Whether there is public demand or need for the proposed service;
3. Whether the construction project is in the public interest and will not unduly harm existing services; and
4. For purposes of PCN is the proposed transaction consistent with applicable elements of the national rail transportation policy (RTP) set out in 49 USC 10101(1)-(15)¹

¹ These may be related to (1) fostering competition and demand to establish reasonable rates, (2) minimizing need for Federal regulatory control over the rail transportation system, (3) promoting safe and efficient rail transportation by allowing adequate revenues, (4) fostering sound economic conditions in transportation to ensure effective competition and coordination between rail carriers and other modes, (5) ensuring development of and continuation of a sound rail transportation system with effective competition among rail carriers and other modes to meet the needs of the public and the national defense, (6)

See *Dakota Minnesota & Eastern Railroad Corporation* STB F.D. No. 33047, (DM&E I) served Dec. 10, 1998, pp. 15-16, citing *Tongue River*, *supra* p 13

The Board has held that the "interests of shippers are matters of substantial importance in determining the question of public convenience and necessity in railroad construction applications". *Id.* at 16.

The broad PCN criteria is incorporated in the details supporting the application required by 49 CFR Part 1150, specifically *Subpart A – Applications under 49 U.S.C. 10901*. Sections 1150.1 to 1150.8.

Applying the RTP, STB regulations and precedent to DOE's application as filed provide an opportunity to review a broad range of topics and permit consideration of the expansive scope of the proposed action/alternatives, including its impact on the national transportation system. Because there is *no* definite or specific local or regional *common carrier* activity in NV to address since DOE admittedly has not made that decision, many comments addressing PCN factors will require a degree of speculation unless and until DOE makes a common carrier decision.

Nevada's comments will focus on specific portions of DOE's Application.

1. Overview, Brief Narrative of Proposal, 49 C.F.R. §1150.2(a)

DOE's Application suggests a proposed rail transaction limited to the State of Nevada and its local concerns. To the contrary, the proposal truly implicates the entire national rail transportation system, service and infrastructure.

maintaining reasonable rates in the absence of effective competition, (8) operating without detriment to public health and safety, and (14) encouraging energy conservation

The 1981 case between DOL/DOD and the rail carriers over common carrier obligation, premium rates and services for transport of SNF and HLW remains on-going with the continuation of STB-encouraged negotiations, except for the UP agreement Docket No 3802S and 38376S. The Board recently opened Ex Parte No. 677(Sub-No. 1) on the common carrier obligation on HAZMAT, including radioactive materials.

Virtually the entire nation would be affected by the DOE proposal to construct and operate a new rail line in Nevada. The new rail line would be only one component of a massive and unprecedented national spent nuclear fuel and high-level radioactive waste transportation system designed to operate for at least 50 years. The material is highly radioactive (with some isotopes having a half-life measured in millions of years), and so hot that it will take an estimated 1,000 years for the waste containers to cool to boiling point of water. If the DOE proposal proceeds, one or more shipping casks of SNF or HLW would be moving on a train somewhere in America virtually every day for five decades or longer. The radiological characteristics of these shipments would pose a unique combination of impacts and risks from routine operations, transportation accidents, and acts of terrorism and sabotage. The STB must weigh the DOE claims of public convenience and necessity against these risks and effects.

DOE has chosen not to address the national effects of the proposed Nevada rail line in its Application to the Board and in its Rail Corridor and Rail Alignment EISs (Exhibit 11). The DOE Supplemental EIS for Yucca Mountain has identified representative routes for rail shipments to Yucca Mountain if DOE selected the Caliente rail option. [p. 6-14] These routes would traverse 44 states and the District of Columbia, and 33 Indian nations. The DOE Supplemental EIS also includes state-by-state maps of the routes DOE would use for rail shipments to Caliente, and estimates of the number of rail shipments through each state for the Caliente rail option. Nevada believes that the Board must consider this information in evaluating DOE's application for a certificate of public convenience and necessity ("CPCN").

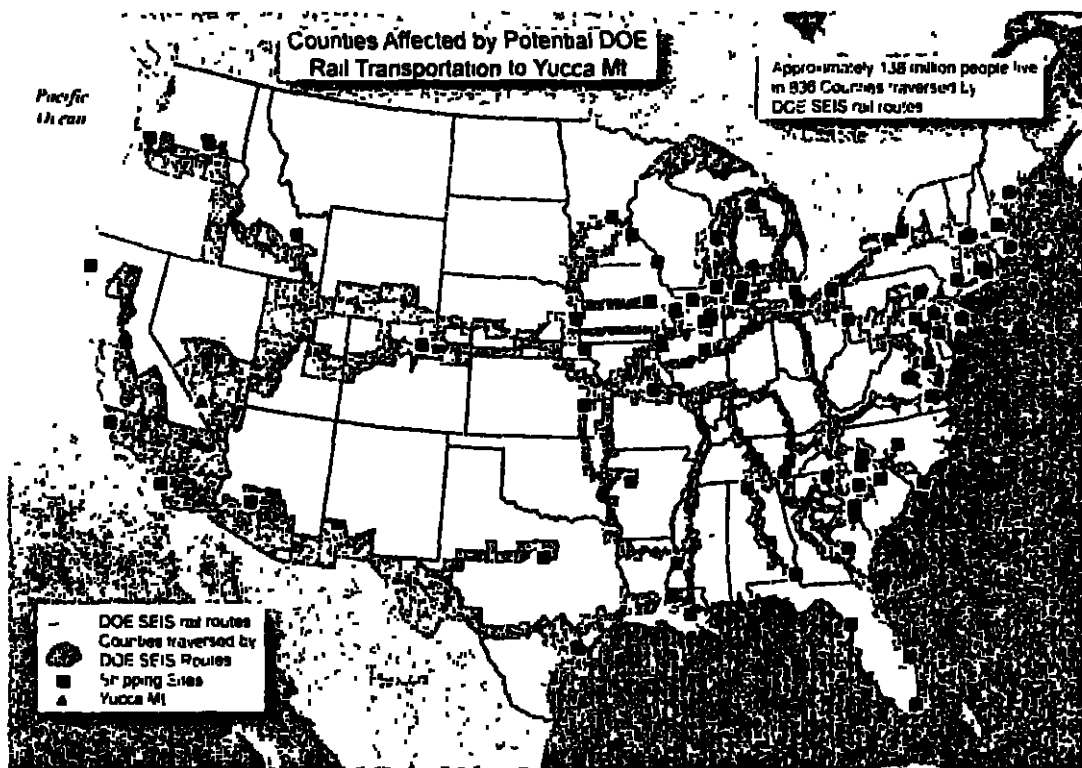


Figure 1. Counties Affected by DOE Rail Routes to Proposed Caliente Rail Line

Nevada's analysis of the representative rail routes shows that DOE's selection of the Caliente rail option would affect about 836 counties with a total estimated 2005 Census population of about 138 million. Figure 1 shows the counties affected by DOE rail routes to Caliente. Identification of counties is essential because of the important role played by county officials and personnel in hazardous materials transportation security and emergency response.

See <http://www.state.nv.us/nucwastencws2008/pdf/bmr080626counties.pdf>

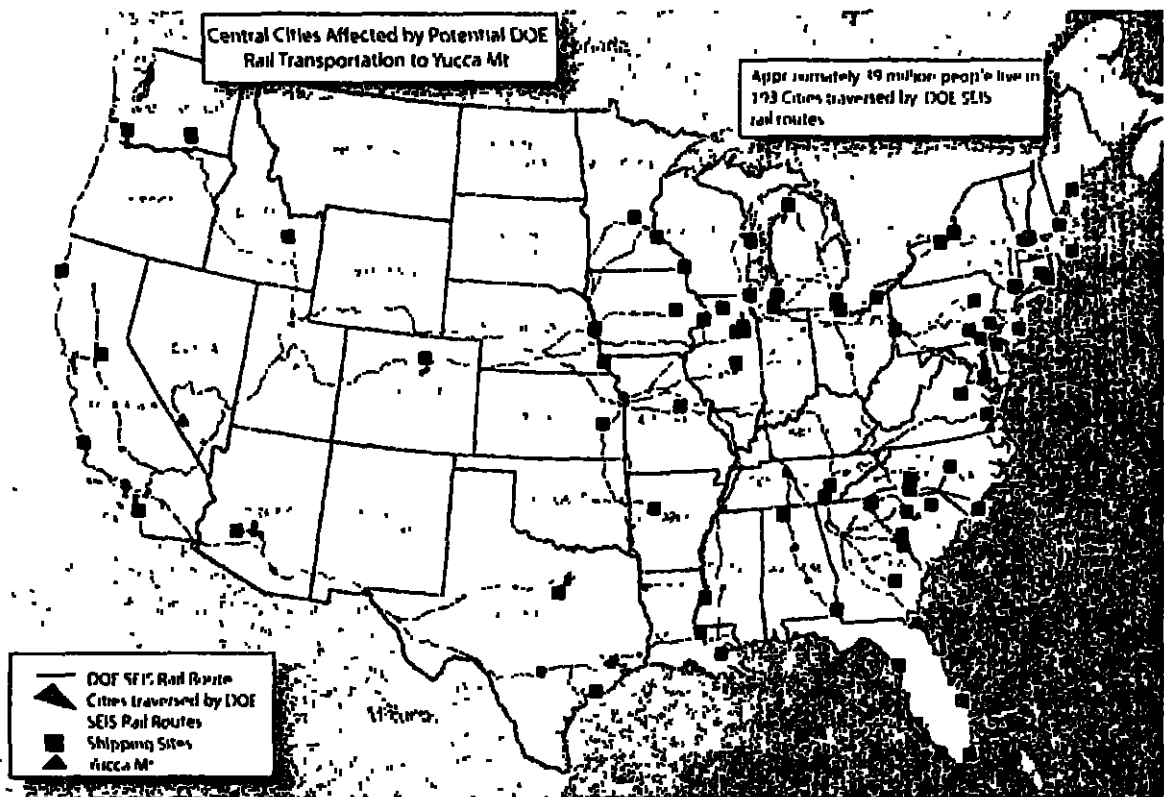


Figure 2. Cities Affected by DOE Rail Routes to Proposed Caliente Rail Line

Nevada's analysis of the representative rail routes also shows that selection of the Caliente rail option would affect about 193 central cities with a total estimated 2005 Census population of about 39 million. Figure 2 shows the cities affected by DOE rail routes to Caliente. Identification of cities is essential because population exposure from routine operations must be minimized and because of the new post-911 concerns about the security implications of hazardous material shipments through highly populated areas, especially those with iconic significance.

The Board might also want to consider the political geography of DOE's rail routes to the Caliente rail line, since the "Nuclear Waste Fund will be used to fund the construction of the rail line, subject to yearly Congressional appropriations." [Application, p.36] Nevada has identified the Congressional districts that would be

traversed by DOE's rail routes from 70 shipping sites to Yucca Mountain by way of the Caliente rail line, and the highway routes DOE would use for direct truck shipments from 6 reactors. See <http://www.state.nv.us/nucwaste/news2008.pdf/bmr080626.pdf> DOE's rail and truck routes to Yucca Mountain would affect 3 of every 4 U.S. Congressional districts, traversing 170 districts currently represented by Republicans, and 160 districts currently represented by Democrats. To our knowledge, DOE has made no effort to inform the affected Members of Congress about impacts of DOE's proposed transportation system on their districts.

In its consideration of DOE's Application, the STB must consider the unique characteristics of spent nuclear fuel and high level waste. This cargo is so high temperature and so highly radioactive that it will create a one-half mile radiological region of influence around the proposed new 300-mile rail line in Nevada, and around the 22,000 miles of railroads that will transport spent nuclear fuel and high-level waste to Caliente through 44 States and the District of Columbia. Previous studies by DOE and Nevada found that 10 to 12 million Americans currently live within the one-half (0.5) mile radiological region of influence around the rail routes DOE proposes to use for shipments to Caliente.

In the Draft Rail Alignment EIS (Exhibit H), DOE defines the radiological region of influence (ROI) for incident-free transport as the area 0.8 km (0.5 mi) on either side of the rail alignment centerline. DOE defines the radiological ROI for accidents and sabotage as the area 80 km (50 mi) on either side of the rail alignment centerline. The Draft RA EIS defines the affected environment for public radiological effects as: (1) residents within the region of influence, "including persons who live within 0.8 kilometer

(0.5 mile) of either side of the centerline of the rail alignment;" (2) individuals at locations "such as residences or businesses near the rail alignment;" and (3) for effects related to accidents or sabotage, individuals within the area "80 kilometers (50 miles) on either side of the centerline of the rail line." [Pp. 3-4 to 3-5, 3-350 to 3-351]

Nevada believes that DOE's definition of the radiological region of influence reflects how uniquely hazardous this material is. The fission products in SNF and HLW, especially the radioactive cesium, create the potential for widespread contamination in the event of a severe accident or act of terrorism. The same fission products contained within the shipping cask create an intense field of gamma radiation that results in continuous radiation from the outside surface of the cask during routine operations. NRC regulations allow shipping casks to emit 1,000 mrem/hr at the cask surface and 10 mrem/hr 2 meters from the cask surface. The hourly dose at two meters is about the equivalent of a chest X-ray.

Before accepting DOE's claim of public convenience and necessity, the STB must consider the interests of millions of Americans who live and work within the nationwide radiological ROIs that will be created by the proposed Caliente rail line. DOE has not adequately assessed radiation doses to workers and the public from routine operations, and the creation of elevated exposure zones at near-route locations; accident prevention, security, and emergency response planning requirements and costs are not adequately addressed; doses to workers, responders, and the public from severe accidents and successful terrorist attack or sabotage are not adequately addressed; economic losses from severe accidents and/or successful terrorist attack or sabotage, and cleanup and

recovery costs resulting from release of radioactive materials or the effects of stigma or perceived risks.

In Nevada, Clark County and the City of Las Vegas provide an example of how counties and cities would be affected by the creation of radiological ROIs along DOE's rail routes to Caliente. The lowest estimate of shipments, assuming DOE uses dedicated trains with 3 casks per train, would result in 5-13 trains per year through Las Vegas, for 50 years. . The mid-range for Las Vegas could be 23-62 trains per year. The maximum impact on Las Vegas could be 46-118 trains per year through the city.

In northern and southern Nevada, many tens of thousands of people live within the 0.5-mile regions of influence, and more than two million live within the 50-mile region of influence for accidents and sabotage. Because DOE has selected Caliente as the preferred rail access option, the State of Nevada has focused its analysis on the radiological ROIs in Las Vegas and Clark County. If DOE should reconsider the Mina option, or any of the other rail access options from Northern Nevada, further evaluation of impacts on Reno-Sparks, Elko, and other urban areas along the Union Pacific mainline would be required

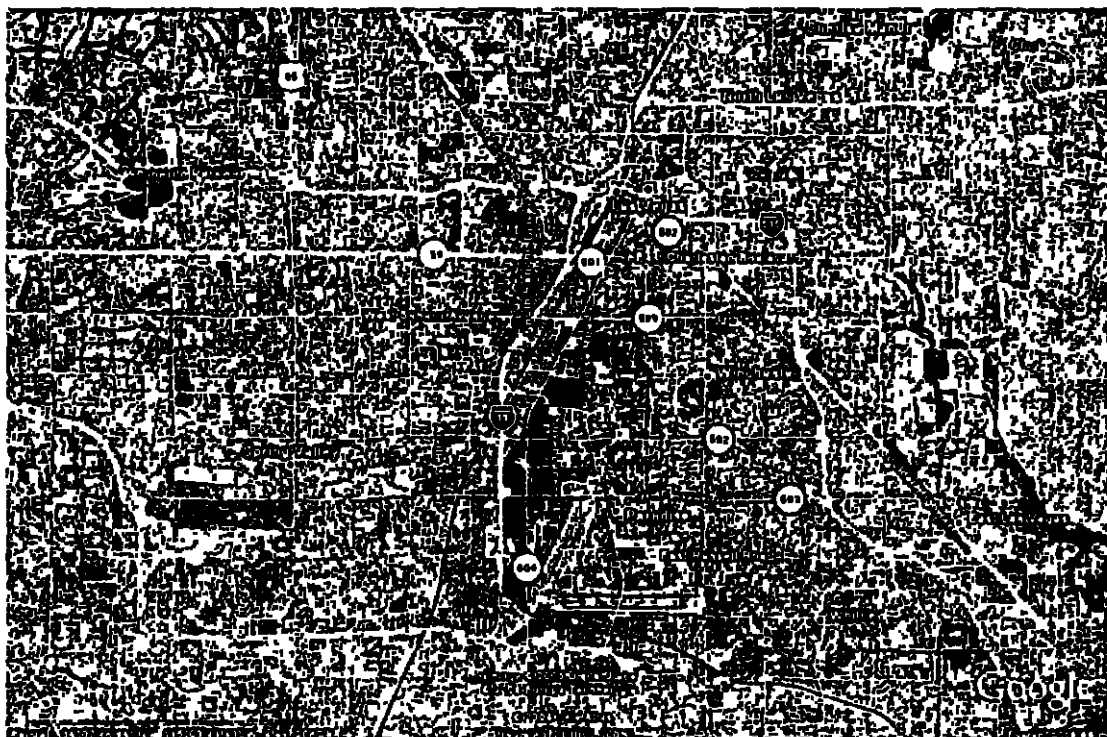


Fig. 3. Radiological Region of Influence, Routine Rail Shipments, Las Vegas.

The State of Nevada estimates at least 95,000 residents of Clark County live within one-half mile of the Union Pacific route for shipments to Yucca Mountain via Caliente. Nevada consultants developed these estimates by applying the radiological ROIs to the potential DOE shipping routes, based on a half-mile buffer around the UPRR mainline, using the Clark County GIS Management Office "streetcenterline" file, and the Bureau of the Census 2005 census tract estimates.

See <http://www.state.nv.us/nucwaste/news2008/pdfwm2008perspective.pdf>.

Figure 3 shows the radiological region of influence (ROI) for routine rail shipments to Caliente via Las Vegas. A large portion of the world-famous Las Vegas "Strip" is located within the ROI. Using the same GIS methodology, Nevada consultants estimate that 34 Las Vegas hotels (shown in blue on Figure 3) and about 49,000 hotel rooms are located within the ROI. Based on previous studies, Nevada estimates at least

40,000 nonresident visitors and workers in Clark County would likely be located within one-half mile of the highway and rail routes for shipments to Yucca Mountain at any hour of the day. State of Nevada estimates virtually all of Clark County's 1.8 million residents live within the 50-mile radiological region of influence for transportation accidents and sabotage.

Neither the Draft SEIS nor the Draft RA DEIS (Exhibit H) specifically assess the how selecting Caliente as the preferred rail access option effects Las Vegas, or how, if DOE reconsiders, and chooses the Mina option, DOE's new choice will effect Reno-Sparks. According to the DOE, these effects "are not included in the estimates of impacts for the Caliente and Mina rail corridors but are included in the national impacts" presented in the DSEIS. [p. 6-41] But the discussion of national impacts in the Draft SEIS excludes the unique local conditions that exist in downtown Las Vegas and Reno-Sparks. In one of the few instances where the DSEIS does respond to Nevada studies, the DOE estimates of routine exposures in Las Vegas [p 6-42] are hundreds of times too low because DOE underestimates shipment numbers and ignores repeated stop times at specific locations. Throughout the Draft SEIS, DOE ignores, misinterprets, or dismisses Nevada's contention that unique local conditions should be factored into impacts of routine shipments, impacts of accidents, impacts of sabotage, and perceived risk impacts.

2. Information About the Applicant, 49 C.F.R. §1150.3

a. Facts Showing Common Carrier Status, 49 C.F.R. §1150.3(b) and (c).

As noted in discussing the absence of jurisdiction under Section 10501 in Paragraph B, *infra*, DOE's Application fails to establish that the proposed transportation

transaction will implement a shared-use option ("SUO"), i.e., common carrier service on the proposed line.

DOE's Application and supporting submissions are at best equivocal on implementation of an SUO – which remains more a contingency than a commitment. See *Application*, pp 5-6, 9-10, 15-16, 28-30 (SUO identified as a "preferred alternative"); *Exhibit H*, Draft Rail Corridor SEIS (RC-DSEIS) and Draft Rail Alignment EIS (RA-DEIS), p. S-40 (designs in implementing alternatives "could allow"/"would accommodate" SUO), p. 2-7, §2.2.2 (construction/operation "could provide" for SUO), pp. 2-108-113, §2.2.6 (each implementing alternative "would allow" SUO) and, p. 6-3 §6.2 ("If DOE selected [SUO] as part of the *Proposed Action*" then STB jurisdiction would attach.) (Italics added), see also *Exhibits K and M*

While DOE describes SUO everywhere with "could/would" potential, nowhere in its Application does DOE commit or state unequivocally that SUO will in fact be implemented or that common carrier activities or obligations will occur on the proposed new line.

Both DOE's March 17 Application and the Board's June 27 Decision concede that DOE's Application is not premised on a DOE decision to implement a shared-use option (SOU), i.e., common carrier service to the public. See DOE *Application*, p.10 and STB *Decision*, served June 27, 2008, p. 3.

As a result DOE's Application cannot and does not offer required facts showing common carrier status. For purposes of Section 10901, DOE is a non-carrier applicant neither asserting that it is a carrier nor that it has been organized to implement the proposal for which approval is sought

Additionally, DOE neither asserts that it will be operating the line nor that it has selected an operator that joins in the application, or state who is being considered, if DOE does not operate the line.

Thus, as discussed later in Paragraph C.8., *supra*, DOE's Application admittedly fails to properly include operating data and operating plan, *Exhibit D*, as required by 49 C.F.R. §1150.5. See *Application*, p. 34.

In its Application, DOE attempts to excuse this failure away by offering that "an operator for the rail line has not been selected at the time of this Application" but "once an operator has been selected, an operating plan would be developed". *Id*

For Application *Exhibit D*, Operating Plan, DOE merely states.

"Not Applicable at this time"

b. Applicable State Statutes, 49 C.F.R. §1150.3(e).

Because DOE has not selected a carrier, its Application does not and cannot identify State statutes applicable to the carrier, or regulations that could apply regardless whether shared-use is or is not determined.

3. Information About the Proposal, 49 C.F.R. §1150.4

a. Description of the Proposal, 49 C.F.R. §1150.4(a)

Before accepting DOE's claims of public convenience and necessity, STB should review the history of DOE's evaluation of various rail access options to Yucca Mountain, and DOE's selection of Caliente as its preferred rail corridor. Nevada believes DOE has not shown that Caliente is the safest or most desirable rail option. Nevada urges the STB to re-evaluate all of the rail access options previously identified by DOE, before making any final decision on DOE's Application for a CPCN

The difficulty of constructing rail access to Yucca Mountain has challenged DOE for more than 20 years. In 1986, DOE assumed for purposes of its Environmental Assessment that it would use a relatively short rail access route, from Valley Siding, through the Las Vegas Valley. Even so, DOE for the five candidate sites under consideration for the first repository, found that Yucca Mountain had the least favorable transportation access of any of the five candidate sites studied for the first repository. Then, DOE's Environmental Assessments estimated that rail access to Yucca Mountain would require construction of about 100 miles of new track, at a cost of about \$151 million (1985 dollars).

Shortly after Congress directed the study of Yucca Mountain as the only repository candidate site, DOE began a new assessment of rail alternatives. Figure 4 shows the potential rail routes that DOE identified in 1990. Two of these routes became the Caliente and Mina corridors evaluated in the Draft RA EIS.

The DOE 1990 rail access study identified two Mina route options, Option 6 across the Walker River Paiute Tribe (WRPT) Reservation, and Option 6A which bypassed the reservation. DOE estimated the cost of Option 6 at \$394 million (1990 dollars) assuming 209 miles of new construction, and 84 miles of rehabilitation of existing track. DOE estimated the cost of Option 6A at \$669 million (1990 dollars) assuming 368 miles of new construction (159 miles for bypass of the reservation), and 5 miles of rehabilitation of existing track. By comparison, DOE estimated the cost of the Caliente route at \$579-735 million (1990 dollars), depending upon route variations.

DOE dropped the Mina options from active consideration after opposition in late 1991 from WRP Tribe, whose reservation would have been traversed by the existing rail line to Schurz, Nevada. About the same time, local officials in the City of Caliente and surrounding Lincoln County urged DOE to prioritize study of the Caliente route. DOE selected Caliente for its first rail alignment conceptual design study, completed in 1992.

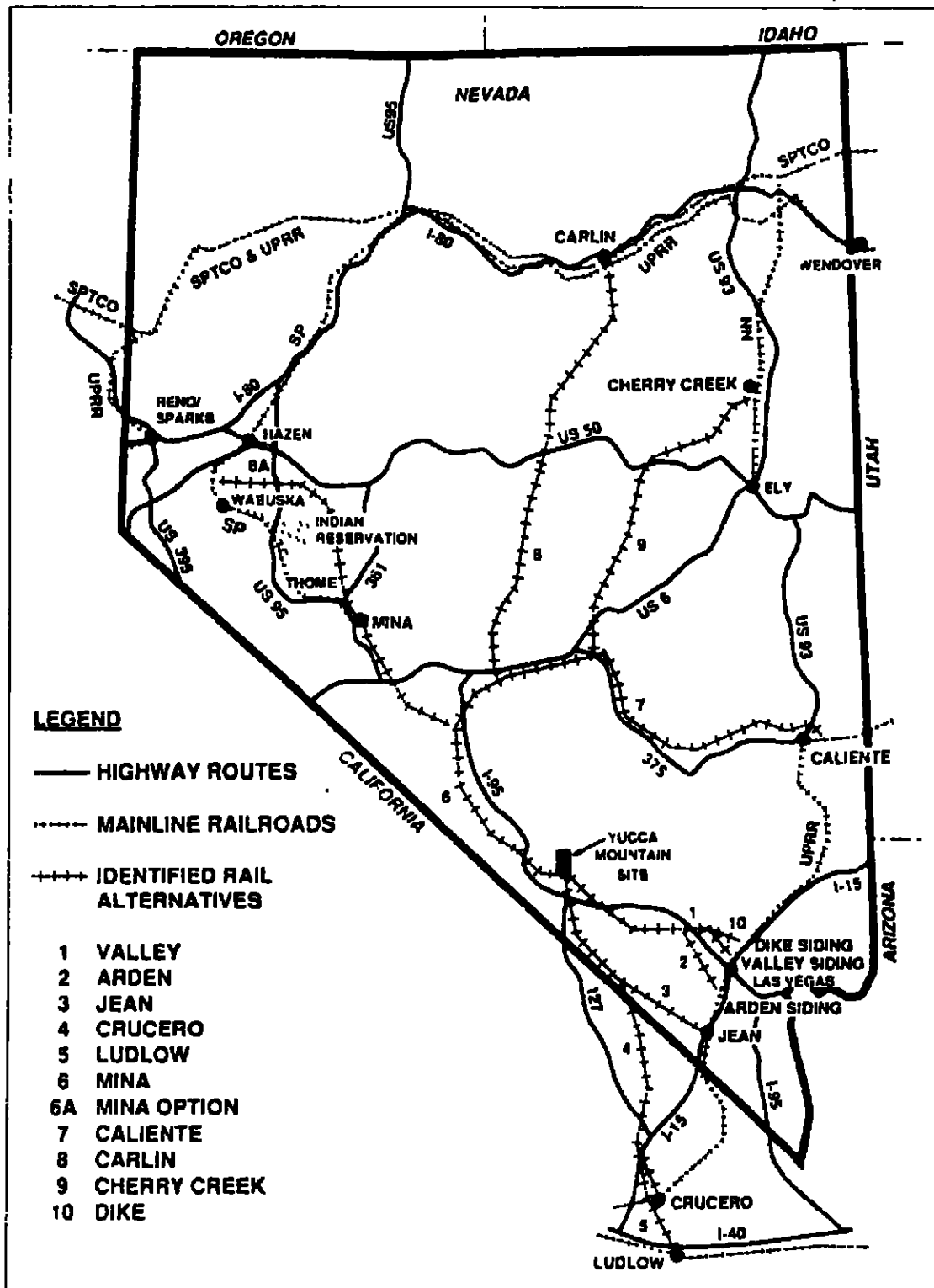


Figure 4. DOE Potential Rail Routes to Yucca Mountain, 1990

Since 1991, the State of Nevada has opposed DOE's selection of the Caliente corridor on three grounds. conditions along the proposed corridor for the new rail line, conditions along the existing Union Pacific (UP) mainline to Caliente, and the potential for large-scale rail shipments through Las Vegas.

Nevada has also challenged the feasibility and cost of the Caliente corridor, noting that Caliente would be considerably longer than the 113-mile Orin Line constructed by the Burlington Northern to access the Wyoming Powder River Basin coalfields in the 1970s. At the time, Orin was the longest new track construction effort in the United States since the 1930s. The Caliente route would be longer than the distance from Washington to New York (204 miles); St Louis to Chicago (259 miles); or London to Paris (213 miles).

Before accepting DOE's claims of public convenience and necessity, STB should closely examine the safety, cost, and environmental implications of the difficult terrain along the proposed Caliente rail line. DOE has ignored Nevada's concerns that difficult terrain along the Caliente rail corridor would cause safety concerns during operations (particularly runaway trains and derailments on steep down grades), and exacerbate worker safety concerns and environmental impacts during construction

Since 1992, Nevada has repeatedly advised DOE about the number of mountain crossings along the Caliente corridor and the difficulty of constructing a workable railroad grade. Black Mountain Research (BRM), under contract with NANP, has developed a geographic information system (GIS) for use in assessing natural and technological hazards along the proposed Caliente Rail Corridor and the existing Union

Pacific mainline through Caliente, Nevada. The BRM GIS elevation profile of the Caliente corridor is shown in Figure 5.

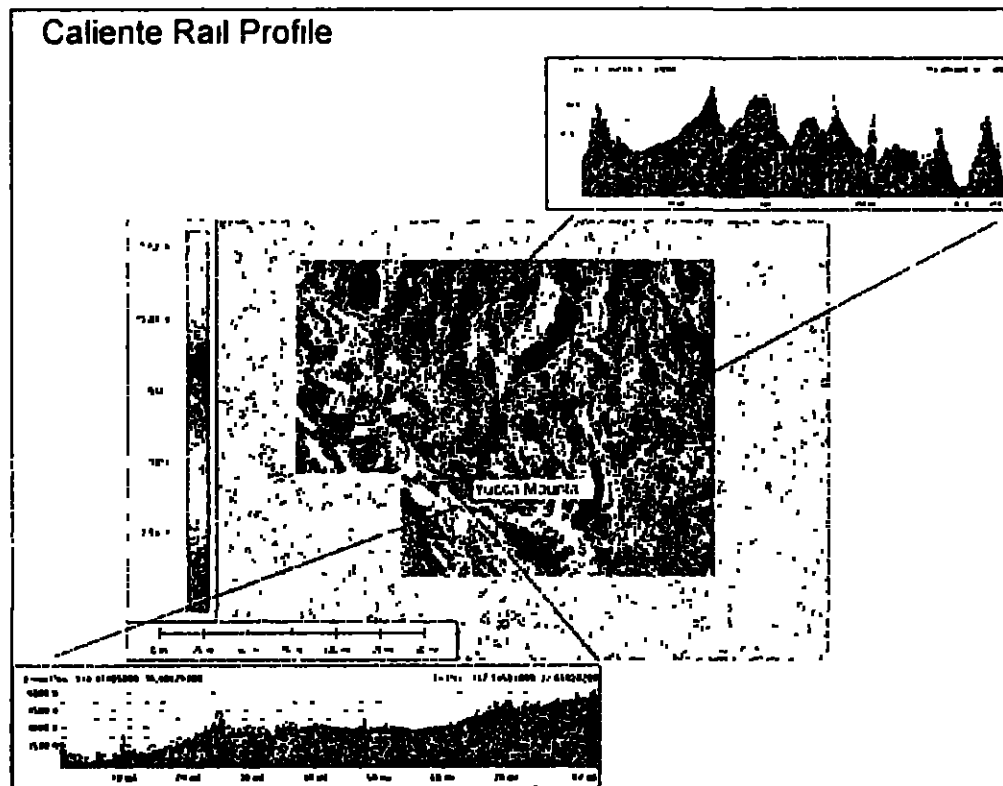


Fig.5. Elevation Profile of Proposed Caliente Corridor.

The Caliente corridor is located primarily within the Basin and Range Region of Nevada, which is divided by more than 150 North-South mountain ranges. These North-South mountain ranges pose a considerable challenge to East-West railroad building. The original DOE Caliente rail route, which followed existing highways U.S. 93 and S.R. 375. But DOE moved the route 40 miles north in 1992, in large part to avoid the need to construct tunnels at Hancock Summit through the Pahrangat Range and at Coyote Summit through the Timpahute Range.

The first hundred miles of the current DOE Caliente corridor must cross, skirt, or dodge the Delamar Mountains, the Chief Range, the Highland Range, the North Pahroc

Range, the Seaman Range, the Golden Gate Range, and the Worthington Mountains. Figure 6 shows Timber Mountain Pass, the highest summit crossed in the first 100 miles. The second hundred miles of the corridor must cross the Quinn Canyon Range, slip between the Groom and Belted Ranges to the South and the Reville Range to the North, traverse Warm Springs Summit (elevation 6,293 feet) between the Kawich and Hot Creek Ranges, and turn south to avoid Sugarloaf Mountain and the Monitor Hills. In its final 119 miles, the primary corridor must snake along the boundary of the Nellis Air Force Ranges to avoid mountains and hills near Goldfield, Stonewall Mountain, Pahute Mesa, Oasis Mountain and Bare Mountain before arriving at the southern extent of Yucca Mountain.

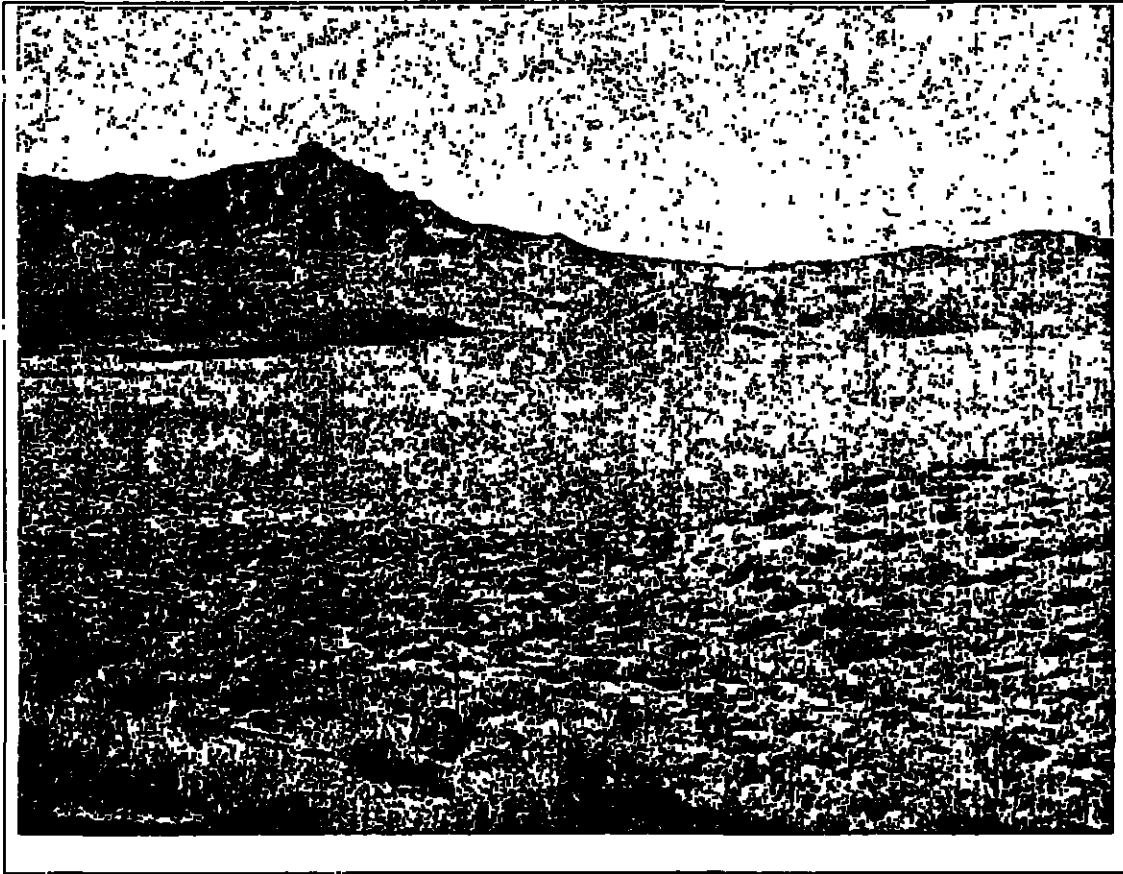


Fig. 6. Timber Mountain Pass.

DOE has not yet presented a detailed plan with vertical profile for a specific rail alignment within the current Caliente corridor. Without a detailed plan and vertical profile it is not possible to conduct meaningful evaluation of construction feasibility, cost, and impact on the environment. Nevada has prepared a preliminary analysis of the first 100 miles, based on previous DOE and Nevada studies. The first four mountain crossing segments, ranging in length from 7 miles to more than 20 miles, would involve ascending and descending from valley elevations of 4,600 to 5,200 feet, to summit elevations of 5,400 to 6,100 feet. Almost any alignment within the proposed corridor will require grades of 1.3 percent to 2.4 percent for 75 of the first 100 miles, even after extensive cut-

and-fill activity. DOE would encounter similar conditions at other locations along the remaining 219 miles.

Nevada also urges that before accepting DOE's claims of public convenience and necessity, the STB study the safety and reliability of the existing mainline rail connection to the proposed Caliente rail line. Based on extensive study and recent experience, Nevada believes that the UP mainline through Caliente is a poor choice for originating a rail line for transportation of nuclear fuel and waste to Yucca Mountain.

In 1991, a Nevada-sponsored infrastructure study by the University of Nevada, Reno, evaluated the Union Pacific (UP) mainline through Caliente. "The 118-mile study corridor traverses very rugged terrain. The route is confined within the canyon walls of Clover Creek and Meadow Valley Wash. The route exhibits a high degree of curvature as it descends 4,300 ft. from the high plateau at the Utah border to the desert floor beyond the southern end of the study area [Moapa]." The steep grades and tight curves require speed restrictions for trains from the East on the downgrade from the Utah border to Caliente. The study identified 15 tunnels, 107 bridges, 66 culverts, and numerous falling rock and flood hazard areas, along the route. Service disruptions due to track and bridge washouts began soon after the route opened in 1905, and continue to the present time, most recently in January 2005. A 1907 washout at Eccles, east of Caliente, is shown in Figure 7. The 2005 washout west of Caliente is shown in Figure 8. The 2005 washout occurred at a location identified as having a high-probability of flood damage in the 1991 UNR report.



Figure 7. Track Washout at Eccles, east of Caliente, 1907.

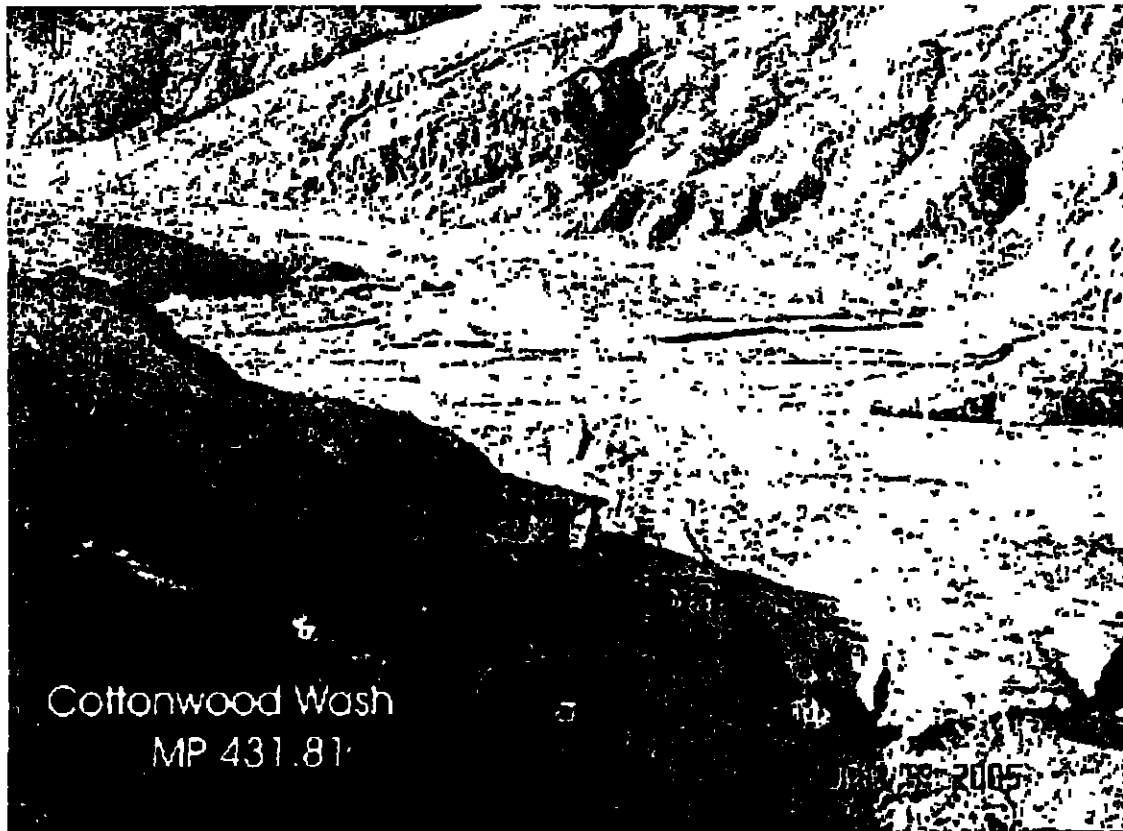


Figure 8. Track and Bridge Washout at Cottonwood Wash, west of Caliente, 2005.

Although endorsing no rail corridor or rail alignment, Nevada points to several flaws in DOE's selection process. Selection of the Caliente corridor is flawed because there has been no adequate comparative evaluation of reasonable alternative corridors. The only detailed comparison is flawed because the Mina route is not a viable alternative because the Walker River Tribe owns the rail line through the reservation. Thus any suggestion that a north-south route across the reservation could be developed is fatally flawed.

b. Details About Traffic and Commodities, 49 C.F.R. §1150.4(b)

The DOE Application fails to provide full and accurate details about the amount of traffic from the 70 sites in 34 states which would ship spent nuclear fuel (SNF) and high-level radioactive waste (HLW) to the proposed Caliente rail line. The amount of

expected traffic on the proposed Caliente rail cannot be clearly determined from the information in the application. DOE has chosen not to reveal the radiological characteristics of the "commodities" for which DOE says the rail line is needed. The discussion of expected non-DOE traffic on the proposed rail line is speculative regarding potential use by industries in the area, and silent regarding the much larger potential induced traffic from future users. These cannot be determined at this time.

The number of DOE SNF and HLW shipments to the proposed Caliente rail line could likely be two-and-one-half times greater than the amount stated in the application DOE would likely ship 24,100 rail casks of SNF, HLW, and other radioactive wastes to Yucca Mountain over 50 years. This would require about 7,100 to 8,000 trains, or an average of 2.7 to 3.1 trains per week for 50 years. DOE calls this the Inventory Module 2 scenario, and describes this scenario in the Draft SEIS (pages 8-31 to 8-33) DOE has chosen not to provide this information in the Application or in the Draft RA EIS (Exhibit II).

The rail shipment numbers in the Application - 9,500 rail casks in about 2,800 trains - represent about 68,000 MTHM (metric tons of heavy metal) of spent nuclear fuel and high level radioactive waste, less than half the 143,000 MTHM of fuel and waste, and 2,200 canisters of Greater-Than-Class C radioactive wastes, that DOE would ship to Yucca Mountain under Inventory Module 2. Because DOE currently has no plan to develop a second repository, the maximum amount of traffic should be based on Inventory Module 2.

Additionally, Inventory Module 2 does not include any nuclear fuel or waste shipped from newly constructed nuclear power plants. The amount of spent fuel shipped

to Yucca Mountain would increase dramatically if 20-100 new commercial power reactors were constructed in the United States during the next 50-60 years. The STB should direct DOE to amend its Application to reflect accurately how much spent nuclear fuel and high level nuclear waste it actually expects to ship on the proposed Caliente rail line over 50 years of operation, with and without a second repository, and with and without construction of new nuclear power plants. The Board's NEPA review of DOE's Application should assume the corresponding range of fuel and waste traffic estimates.

The Application states that DOE expects a peak average of 8 one-way cask trains per week on the proposed new rail line from Caliente to Yucca Mountain. (p.15) Neither the Application nor the Draft RA EIS (Exhibit H) explain how DOE arrived at this traffic estimate. The Board should direct DOE to explain how it calculated this traffic estimate. The Board should also direct DOE amend its application to explain how the peak average cask trains per week estimate would change under the Inventory Module 2 scenario, with and without construction of new nuclear power plants.

In its Application, DOE has chosen to provide little meaningful information about the radiological characteristics of the primary commodities for which DOE says the rail line is needed, spent nuclear fuel and high-level radioactive waste. Nevada believes that DOE's failure to provide this information is not only intentional, but also intended to divert the discussion of necessity and public convenience away from the fact DOE proposes to ship very dangerous materials to and on the proposed Caliente rail line.

Spent nuclear fuel from commercial nuclear power plants would account for 90 percent of the radioactive wastes that DOE proposes to ship to and on the Caliente rail line. The most basic facts about spent nuclear fuel are that it is lethal to human beings,

and that it remains lethal for many millennia. Nevada has evaluated the DOE design basis SNF for the new rail shipping casks (PWR spent fuel, 4.2% initial enrichment, burn up 50,000 MWDt/MTHM, 10 years cooling time, contact dose rate in excess of 35,000 rem/hour) The SNF that DOE plans to ship is so radioactive that even after 10 years of cooling, unshielded exposure to a single fuel assembly could deliver a dose of 600 rem of radiation (600 rem) in a little more than one minute. The Nuclear Regulatory Commission ("NRC") considers 450 rem received over a very short period to be a "lethal dose" it is "[t]he dose of radiation expected to cause death to 50 percent of an exposed population within 30 days.. ." See <http://www.nrc.gov/reading-rm/basic-ref/glossary/lethal-dose-ld.html>.

Each DOE rail cask would contain an enormous amount of dangerous radioactive material Fission products, especially Strontium-90 (half-life 28 years) and Cesium-137 (half-life 30 years), account for most of the radioactivity in SNF for the first hundred years after removal from reactors. Each DOE rail cask of commercial SNF would contain more than 1.5 million curies of radioactive cesium and strontium, more than 100 times the amount of those fission products released by the Hiroshima bomb. Each DOE dedicated train hauling three or four rail casks would contain more Cesium-137 than the total amount (2.4-2.9 million curies) released during the Chernobyl reactor accident in the Soviet Union.

The new DOE rail shipping casks will not be tested to determine compliance with safety regulations or accident failure thresholds The NRC does not currently require full-scale physical testing of shipping casks (None of the spent nuclear fuel shipping casks currently used in the United States have ever been tested full-scale to determine their

crash-worthiness.) NRC has developed a plan for demonstration testing of the new DOE rail casks for Transportation Aging and Disposal (so-called TAD) canisters, but the tests are designed to promote public confidence, and will not actually determine if the casks can withstand the severe accident conditions assumed in NRC regulations. The State of Nevada, the Western Governors Association, and the Association of American Railroads have all endorsed more rigorous, full-scale testing. DOE and the nuclear industry have opposed that.

Nevada's analyses conclude that severe rail transportation accidents could be much more severe than the DOE estimates in Exhibit H. In the Draft SEIS analyses upon which Exhibit H is based, DOE chose not to evaluate "worst case" accidents, in which "all factors combine in the most disadvantageous way," because such events are "not reasonably foreseeable." (DSEIS, p. G-54) Moreover, the DOE accident analysis did not include consideration of human error in the design, fabrication, and loading of shipping casks. DOE also chose not to consider unique local conditions that could result in more severe accidents or consequences. Still, DOE acknowledges that cleanup costs following a transportation accident resulting in release of radioactive materials could range from \$300,000 to \$10 billion. (DSEIS, Pp. G-52 to 54)

Nevada's analyses conclude that the consequences of a successful terrorist attack on a rail cask could be much more severe than the DOE estimates in Exhibit H. In the Draft SEIS analyses upon which Exhibit H is based, DOE acknowledges that both truck and rail casks are vulnerable to terrorist attacks or sabotage involving certain types of military and commercial explosive devices. However, DOE has chosen not to consider attack scenarios including multiple weapons or combinations of weapons that could result

in radioactive releases, human health effects, and cleanup costs, that could be tens to hundreds of times greater than the estimates in Exhibit H. Nevada-sponsored studies have concluded that a credible attack scenario in an urban area could release enough radioactive material to cause thousands of latent cancer fatalities, requiring cleanup and recovery costs exceeding \$10 billion.

DOE SNF and HLW shipments to and on the Caliente rail line will create radiological impacts even if there are no accidents or terrorist incidents. The fission products in SNF and HLW create intense gamma radiation emissions. NRC regulations allow shipping casks to emit a small amount of radiation during routine operations (1,000 mrem/hr at the cask surface and 10 mrem/hr 2 meters from the cask surface). The dose rate allowed under NRC regulations results in near-cask exposures of about 2.5 mrem per hour at 5 meters (16 feet), in measurable exposures (less than 0.2 mrem per hour) at 30 meters (98 feet), and calculated exposures (less than 0.0002 mrem per hour) at 800 meters (one-half mile) from the cask surface.

In Exhibit H, DOE acknowledges that cumulative routine radiation from shipping casks could pose a health threat to certain transportation workers. DOE proposes to control these risks by restricting work hours and doses for certain jobs. DOE concludes that members of the general public would not receive significant doses from passing trains. DOE concludes that even the maximally exposed members of the public – a service station attendant, a resident near a rail yard, or a motorist stuck next to a truck cask in a traffic jam – would not suffer significant adverse health effects.

Nevada's analyses conclude that the consequences of radiation from routine rail shipments could be more significant than the DOE estimates in Exhibit H. and in the

Draft SEIS analyses upon which Exhibit H is based. Nevada analyses have found that routine transportation radiation exposures could result in higher doses, both to workers and to members of the public, and in more significant health effects, than estimated by DOE. Moreover, the very fact that these exposures would occur may adversely affect the public even though the dose levels are well below the established thresholds for cancer and other health effects

Nevada-sponsored studies have found that radiation possesses some unique characteristics as a hazard. One Nevada researcher has grouped these characteristics into the categories of dread, exposure, and familiarity. This paradigm of "riskiness," now widely adopted in the hazards research field, argues that radiation may be riskier than other hazards because people perceive the risk to be involuntary and uncontrollable (dread). It is reasonable to expect that the public will believe that a large number of people will be exposed to the radiation and that it is a hazard with which they are unfamiliar. Unique local conditions along some potential routes to Yucca Mountain could create elevated radiation exposure zones on private properties, and could constitute at least a 'nuisance' or even an actual 'taking' of property rights, both in terms of lost value and involuntary assignment of risk of radiological exposure.

See <http://www.sate.nv.us/nucwasteneews2008/pdf/nv080109seis.pdf>.

**c. Purposes of Proposal Public Convenience and Necessity (PCN)
Factors, 49 C.F.R. §1150.4(c)**

DOE alleges the construction and operation of the proposed rail line is necessary and in the public interest for "four compelling purposes" Nevada addresses each below

"1. The need to address the national interests created by the nation's spent nuclear fuel and high-level radioactive waste" (p.19)

This entire section of DOE's Application is heavy on symbolism and rhetoric, but short on facts. The single most important fact is that the proposed Yucca Mountain repository, scheduled for operation about 2020, and is now more than 20 years behind schedule, and DOE can present no evidence that the absence of a federal repository has adversely affected the nation's energy security or harmed the future prospects of civilian nuclear power in the United States. Just the opposite appears to be true. According to the Nuclear Energy Institute, as of July 2008, some 17 companies are currently pursuing licenses for more than 30 new nuclear power plants in the United States. DOE presents no evidence that existing plants have shut down because there is no federal repository. Just the opposite appears to be true. The operators of virtually every nuclear power plant in the country have either received, applied for, or plan to apply for NRC license extensions for up to 20 years of additional power production. The absence of a federal repository has in fact resulted in the robust growth of a related industry that provides safe, long-term storage at more than 50 reactor sites for civilian SNF.

DOE has already developed a safe, long-term, dual-purpose cask storage system for the spent nuclear fuel produced by the U.S. Navy's fleet of nuclear-powered ships. DOE has demonstrated no compelling national security need for a repository in this regard. Indeed the amount of naval reactor spent nuclear fuel requiring storage is quite small, estimated by DOE to fill 300-600 transportable storage casks over the next fifty years.

DOE's assertion that "a repository is important to homeland security" is exaggerated. According to the Nuclear Energy Institute, spent fuel storage installations are as secure as the operating reactors. NEI boasts: "Proven. Prepared. Protected. Security

at America's Nuclear Power Plants." DOE's claim that Yucca Mountain would solve the security problem ignores the fact that many operating reactors will still have fuel in storage for many decades after the repository begins operation. The primary reason for the reactor site-specific fuel storage is because spent fuel **MUST** cool for a few years at the site before it can be packaged and transported. Thus, there will always be a quantity of spent fuel at **EVERY** single reactor site and the "one safe location" is simply not true. Instead of less security, more security will be needed after Yucca Mountain opens (if it ever opens). for the reactors, for the repository, and for tens of thousands of cask shipments of SNF from reactors to the repository.

Instead of less security, more security would be needed after Yucca Mountain opens (if it ever opens) for the reactors, for the repository, and for tens of thousands of cask shipments of SNF from reactors to the repository. And the fact the DOE has *failed* to consider the terrorist risk in its plan belies the authority of its claim to be bolstering homeland security.

DOE offers no evidence that a repository is needed for non-proliferation objectives.

DOE's closing assertion, that a repository "is important to the nation's efforts to protect the environment, " cannot be demonstrated until the EPA issues a final radiation protection standard for the repository, and the NRC certifies that the repository can meet that standard.

"2. The rail line would enable DOE to safely and securely transport the nation's spent nuclear fuel and high-level radioactive waste to the proposed repository at Yucca Mountain" (p.25)

Without endorsing any specific transportation scenario or mode, Nevada points out that DOE's "mostly rail" scenario necessarily includes barge and truck in the transportation modal mix. And pending completion of the construction and the operation of the proposed rail line, DOE's "interim transportation plan" is not a "mostly rail" scenario.

DOE has failed to demonstrate that a rail line to the repository is needed, and DOE's assertion that rail transport is preferable to truck transport is both questionable and out of date. DOE's evaluation of the mostly legal-weight truck (LWT) scenario in the 2002 FEIS demonstrated that rail access is not necessary; all 76 sites that would ship SNF and/or HLW to the repository could ship by LWT, with the exception of INL, where 300-600 dual-purpose casks of naval SNF could be shipped from INL by rail and delivered to the repository by heavy-haul truck, and the DOE FEIS concluded that truck transport was feasible, and that the environmental impacts would be acceptable. In the Draft SEIS (Exhibit H) DOE proposes to ship LWT casks by overweight truck, but DOE offers no argument that OWT shipments are not feasible.

DOE's stated reasons in the Application (Pp.25-26) for the selection of the mostly rail scenario nationally and in Nevada in the ROD are not convincing.

- (1) Regarding "impacts to human health" DOE states "... there would be fewer non-radiological traffic fatalities under the mostly rail scenario (3 fatalities), compared to the mostly legal-weight truck scenario (five fatalities) there would be fewer worker and general public latent cancer fatalities under the mostly rail scenario (3 worker fatalities, 1 general public fatality) than the mostly legal-weight truck scenario (12 worker fatalities, 3 general public fatalities)."

(p.26) Here DOE is simply wrong. When the human health impacts of constructing and operating the proposed rail line under the shared use option are considered, the mostly rail scenario would actually result in more human fatalities (18) than the FEIS mostly legal-weight truck scenario (15). In the Draft RAEIS (Exhibit H) DOE estimates 6 vehicle-related fatalities during railroad construction, 8 vehicle-related fatalities during rail operations, and 4 rail-related fatalities from rail operations under the shared-use option [Table 4-134, Draft SEIS, p. 4-327]

(2) Regarding "...impacts to the environment," (p 25) DOE provides no analysis in the FEIS or the ROD in support of the notion that the combined impacts of the mostly rail scenario, including rail construction and operation, would be less than the impacts of the mostly legal-weight truck scenario

(3) Regarding "... number of rail and highway shipments needed," (p 26) the purported advantage for rail is simply not compelling. While the larger payload capacity of a rail cask is equal to about five legal-weight truck casks, reducing the number of cask shipments required, this does not necessarily reduce overall transportation risk. As DOE admits in a footnote, the potential health effects of a severe transportation accident would be "greater for the mostly rail scenario (5 latent cancer fatalities) than the mostly legal-weight truck scenario (1 latent cancer fatality) due to the greater amounts of radioactive materials that could be released from a rail cask in such an accident " [fn. 2, p 26] The DOE explanation that such accidents are rare, about 3 chances in 10 million per year, applies to both the truck and rail accidents studied by DOE. Moreover, the number of

shipments may be less important for safety than other indicators, such as accident rates. In both the FEIS and the Draft SEIS, DOE failed to consider historical data on the accident rates for past shipments of spent nuclear fuel by truck and by rail, which show higher accident rates for rail shipments, measured in both accidents per million miles and in accidents per million ton-miles, than for truck shipments of SNF. [OCRWM, Nevada Commercial Spent Nuclear Fuel Transportation Experience, YMP/91-17, September 1991, p. 12]

(4) Regarding “. .the proximity of commercial facilities to railheads,” (p.26) DOE seems to have forgotten that only 44 of the 72 commercial sites identified by DOE in the Draft SEIS can ship directly to Yucca Mountain by rail. DOE assumes six sites would ship directly by truck, and 22 sites would ship rail casks to the nearest railhead by heavy haul truck or barge. The 22 sites requiring intermodal transfer would account for 29% of the civilian SNF inventory (18,290 MTHM,) and 31% of the civilian SNF rail casks (about 2,100 casks), shipped under the Proposed Action. These sites could pose a significant logistical challenge, since 14 of the 22 sites could ship during first 3 years of repository operations, and 16 during the first 5 years, under the annual acceptance allocations established by the current standard contracts between DOE and the nuclear utilities.

(5) Regarding “. the State of Nevada’s preferences expressed in comments to the DOE,” (p.26) DOE has misrepresented the State of Nevada’s comments on selection of a preferred mode for repository shipments. Since 1997, Nevada has consistently recommended that DOE adopt a package of transportation safety

measures emphasizing a comprehensive approach to risk assessment, risk management, and risk communication. Nevada has communicated these same recommendations to the U.S. Nuclear Regulatory Commission (NRC), the U.S. Nuclear Waste Technical Review Board, and the National Academy of Sciences (NAS) Study Committee on Transportation of Radioactive Waste. Nevada's endorsement of mostly rail as the preferred modal choice has always been conditional upon adoption of other measures, including shipment of the oldest fuel first, or at least older fuel first, to reduce radiological hazards 65-85 percent; use of dual-purpose (transportable storage) casks of a standardized design, with a range of capacities; a full-scale cask testing program, with regulatory tests on each cask design and a combination of extra-regulatory, full-scale testing (fire), scale model testing, component testing, and computer simulations to determine cask failure thresholds; and implementation of the accident prevention and emergency response training program, required under Section 180 (c) of the NWPA, through formal rulemaking.

(6) Regarding “. the irreversible and irretrievable commitments of resources,” (p 26)

DOE provides no analysis in the FEIS or the ROD in support of the statement that the combined commitments of resources for the mostly rail scenario, including rail construction and operation, would be less than the commitments of resources for the mostly legal-weight truck scenario. Moreover, DOE has not provided a comparative cost assessment of the proposed mostly rail construction and operations scenario, and the mostly legal-weight truck scenarios.

(7) Regarding “ cumulative impacts from transportation activities.” (p.26) DOE provides no analysis in the FEIS or the ROD in support of the statement that the combined cumulative impacts of rail construction and operation, would be less than the cumulative impacts of the mostly legal-weight truck scenario. DOE’s own analysis of the cumulative human health impacts, often considered the most important measure of cumulative impact, show just the opposite.

“3. The rail line would enable DOE to ship construction materials for the construction of the repository to the Yucca Mountain site” (p.26)

DOE fails to demonstrate that the Caliente rail line is necessary for the transportation of repository construction materials. The concrete, steel, and copper that DOE would use in repository construction are divisible loads, regularly transported by legal-weight trucks. DOE provides no estimate of the cost and impacts of transporting these goods to the proposed repository site by truck, compared to the cost of transporting these goods by rail. Even if rail transportation of construction materials would be economically advantageous to DOE, this would not in and of itself constitute public convenience and necessity, nor outweigh the adverse environmental impacts of rail line construction and operation.

Moreover, delay in construction of the rail line could eliminate most or all of the purported benefit of shipping repository construction materials. DOE acknowledges (p.31) that congressional appropriations might not be “sufficient to complete construction in 4 years” and that complete construction might require 10 years. Under the 10-year schedule, “construction of the rail roadbed would occur sequentially, starting at the beginning of the rail alignment and moving toward Yucca Mountain.” DOE must explain

how the 10-year schedule and sequential construction would impact transportation of repository construction materials.

“4. Common carriage rail service would promote economic development and services to rural areas of the State of Nevada” (p.28)

The purported economic benefits to existing businesses are speculative, especially since DOE has provided no operations plan for the proposed shared-use rail operation, and there can at this time be no basis for calculating comparative rail and truck shipping costs for the affected area businesses. The benefit of an influx of 1,800 construction workers would be offset by the expected “boom and bust” social and economic costs. DOE has not provided a comparative assessment of the potential local economic impacts of the repository absent the proposed rail line, operating under the mostly legal-weight truck scenario. Absent the railroad, there could be significant local opportunities for transportation of goods by legal-weight truck, and the potential for improvements to existing highway infrastructure.

None of DOE’s PCN reasons satisfy even the strongly presumptive character of Section 10901 for the issuance of a certificate, which in this case would be inconsistent with the public interest.

d. Time Schedule, 49 C.F.R. §1150.4(f)

The DOE Application provides no basis for the statement that a minimum of four years would be required for construction, nor for the selection of ten years as a maximum time requirement.

Nevada estimates that it would likely take 7 to 10 years to construct the rail line, because of delays in acquiring the right-of-way, delays in obtaining permits, unexpected disruptions due to natural hazards (especially flooding and fires), and because of the

likelihood of one or more archaeological or cultural resource discoveries that would require rerouting, and perhaps additional BLM land withdrawal proceedings Nevada believes a 10-year construction period may be required even if Congressional appropriations are sufficient

DOE's acknowledgement (p.31) that congressional appropriations might not be "sufficient to complete construction in 4 years," would appear to be a reasonable expectation given recent congressional appropriations for the repository project. Moreover, now that the DOE transportation program has become more visible, with the issuance of the Final SEIS and the Final RA EIS, and the filing of DOE's Application with the STB, it is reasonable to assume that the transportation program itself will become more politically controversial, and thus DOE transportation program budget requests will be even more likely to be reduced by Congress

Therefore, DOE's 10-year construction schedule may be overly optimistic.

4. Operational Data, 49 C.F.R. §1150.5

On its face, DOE's Application admittedly fails to properly include operating data and operating plan, *Exhibit D*, as required by 49 C.F.R. §1150.5. See *Application*, p. 34.

In its Application, DOE attempts to excuse this failure away by offering that "an operator for the rail line has not been selected at the time of this Application" but "once an operator has been selected, an operating plan would be developed". *Id*

For Application *Exhibit D*, Operating Plan, DOE merely states: "Not Applicable at this time".

DOE has neither sought a waiver under §1150.10 nor provided justification in its Application for the failure to provide an operating plan.

DOE has had almost 20 years since the 1987 Nuclear Waste Policy Act Amendments (NWPAA), to anticipate the need for operating data and plan requirements to support this Application. But rather, in a rush to meet its self-imposed timetable to file this Application with the Board coincident with a license application with the NRC in June 2008, DOE failed to develop an operating plan in time to include in this Application.

The failure to include an operating plan compromises full disclosure of essential information which has been the continuing bane of stakeholders regarding DOE's proposed rail transportation activity and infrastructure in Nevada. Previously, DOE has refused to commit to implementing the "Shared-Use Option" Even now, DOE's refusal to clearly do so in its Application is evidenced by not submitting an operating plan to the Board. That failure is fatal and should have resulted in rejection of the Application.

5. Financial Information, 49 C.F.R. §1150.6

The cost information provided in the DOE Application, page 37, appears to be derived from the same estimate provided in the Draft RA EIS (Exhibit H), issued in October, 2007, based on a July, 2007 source [DIRS 182777, Nevada Rail Partners, Comparative Cost Estimates, Caliente Rail Corridor, Summary Report, July 3, 2007, Prepared for BSC] This source was apparently not included in the RA DEIS References DVD distributed by DOE, after the RA DEIS references were deleted from the DOE EIS website. [<http://www.state.nv.us/nucwaste/news2008/pdf/nrp070603cost.pdf>]

In DOE's Application, the total construction phase estimated cost in 2008 dollars, \$2.566 billion, is about 17 percent higher than the Draft RA EIS estimated cost in 2005 dollars. DOE offers no explanation in the Application for the 18 percent escalation in

total estimated alignment cost, and the 11 percent escalation in total estimated facility cost, compared to the Draft RA EIS. The estimate does not include the “costs associated with mitigation,” which should be a major concern to STB for this proposed project

The Draft Rail Alignment EIS, and the sources cited therein, fail to provide detailed information on the cost of constructing the Caliente and Mina preferred rail alignments. The cost estimates provided (Vol. 1, page 2-5), \$2.2 billion (2005 dollars) for Caliente and \$1.7 billion (2005 dollars) for Mina, differ from the cost estimates in the July 2007 Draft of the DOE National Transportation Plan (NTP). The Draft NTP states: “A range of estimated costs have been developed to describe the financial commitments necessary to execute the Nevada Rail Infrastructure Project through March 2017.” The cost estimates, in constant 2006 dollars, range from a “Low Point” of \$1.7 billion, a “Mid Point” of \$2.4 billion, to a “High Point” of \$3.2 billion. The NTP cost estimates “are based on the Caliente Corridor.”[Draft NTP, page 52]

The Draft Rail Alignment EIS provides no explanation for the rapid escalation in the estimated cost of constructing a railroad along the Caliente corridor since publication of the Yucca Mountain FEIS in 2002. The FEIS estimated the Caliente construction cost at about \$800 million.

The Draft Rail Alignment EIS provides no information updating the construction costs for the Carlin, Jean, and Valley corridors. DOE claims to have updated other relevant data for the other corridors

The two references cited in the Draft Rail Alignment EIS, DIRS 182777 and 182778, provide almost no meaningful information on the methodology and data used to develop the Caliente and Mina construction cost estimates. The cited references do not

allow the Board to verify estimated construction costs independently. The references provide absolutely no information on the unit prices assumed for right-of-way acquisition, earthwork, ballast, concrete ties, rails, bridges, culverts, etc. The references do explain that the construction cost estimates do not include any costs "to mitigate impacts." [DIRS 182777, page 13]

The Draft Rail Alignment EIS should have provided an alternative cost estimate for the 10-year construction schedule. The references concede that under the extended construction schedule "additional costs would be incurred." The additional costs would include: "escalation, extended overhead costs, maintenance of constructed facilities not in use, and security." [DIRS 182777, page 13]

The Draft Rail Alignment EIS should have provided an alternative cost estimate for construction of the Caliente and Mina alignments using ballast shipped in from existing quarries in Utah, Wyoming, and other states. Elimination of the need for construction of new quarries along the proposed alignments could significantly reduce adverse environmental impacts.

The Draft Rail Alignment EIS fails to explain the implications of rail line construction costs for route selection decisions. Appendix C provides cost information on alternative segments that DOE dropped from further consideration. It appears that primarily to reduce construction costs DOE passed over segments that would have significantly reduced adverse impacts. This particularly appears to be the case regarding alternative segments in Meadow Valley, Coal Valley, Garden Valley, the Goldfield mining district, and Beatty Wash.

The Draft Rail Alignment EIS fails to discuss the overall implications of rail construction costs for program decisions, such as the selection of the preferred corridor or the preferred shipment mode. The estimated construction cost of the Caliente rail line increased from \$800 million in 2002, to \$2 billion in 2005, to more than \$2 billion in 2007. Additional cost increases could occur when the Final EIS is published. The STB should inquire. (a) is there some cost threshold where construction cost would become the major factor in selecting the preferred rail corridor? And (b) is there some cost threshold for rail access that would trigger a reconsideration of the preferred transportation mode?

6. Environmental Information and Data, Exhibit H, 49 C.F.R. §1150.7

Despite assertions by Nevada and other stakeholders that shared-use, common carrier service over the proposed line to be constructed in Nevada is necessary to trigger STB jurisdiction over the proposed transportation transaction for all purposes, especially the environmental documentation required under the National Environmental Policy Act, 42 U.S.C. §§4321 *et seq* ("NEPA"), DOE has consistently refused to commit to "shared-use, common carrier service" over the line.

Faced with Nevada's continuing assertions of STB jurisdiction and special expertise, and especially that it be the "lead agency" for common carrier transportation-related environmental documentation under NEPA, DOE finally included the STB as a "cooperating agency" in DOE's own undertaking of required but incomplete NEPA environmental documentation. Notably, DOE did not similarly include the Federal Railroad Administration ("FRA") as a "cooperating agency", which likewise has jurisdictional interests and special expertise for rail safety

Board regulations require sufficiently complete environmental information and data, Exhibit H, under 49 C.F.R. §§1150.7 and 1105.1 et seq. In its Application, DOE includes its own Draft Nevada Rail Corridor Supplementary Environmental Impact Statement ("RC-DSEIS") and Draft Rail Alignment Environmental Impact Statement ("RA-DEIS") as environmental analysis and documentation, *Exhibit H*. The Application proposes that the RC-DSEIS and RA-DEIS be adopted by the Board to support STB's "fulfillment of its responsibilities under the National Environmental Policy Act, (NEPA), as well as under the Board's regulations (49 C.F.R. Parts 1105 and 1150)." DOE *Application*, p. 3.

Notwithstanding the STB's prior participation as a "cooperating agency" in DOE's undertaking of required RC-DSEIS and RA-DEIS environmental analysis and documentation, that NEPA process is nonetheless incomplete and, assuming properly established STB jurisdiction, does not now satisfy the STB's own *non-delegable* NEPA responsibilities as the "lead agency" evaluating a proposed transportation transaction. See *Idaho v. ICC*, 35 F.3d 585, 596-97 (D.C. Cir. 1994).

The STB may consider the DOE submissions for reference material but is not obligated to accept let alone adopt the RC-DSEIS or RA-DEIS. To avoid duplication, the Board may utilize DOE documents in combination with its own environmental analysis and documentation in order to fulfill its NEPA requirements. See 10 C.F.R. §§1506.3 and .4, and 49 C.F.R. Part 1105.

As previously noted in this motion, the RC-DSEIS and RA-DEIS are, by DOE's own admission, incomplete and indefinite, both in terms of content and decisions. *Supra*,

pp. 6-7. So much so, these submissions cannot satisfy the requirements of 49 C F R §1150.7 and Part 1105 for this application.

For example, Part 1105 regulations that address additional NEPA environmental documentation in line construction cases require a detailed operating plan, which is here omitted. 49 C.F.R. §1105.7(11)(iii) Those plan requirements are similar to those contained in §1150.5, *Exhibit D*, for applications under 49 U.S.C. §10901

Apart from the incompleteness, indefiniteness, omissions and non-acceptability of the RC-DSEIS and RA-DEIS, relative to the criteria normally applied by the STB in environmental analysis and documentation for the transportation transaction such as DOE here proposes for §10901 evaluation, the real question now is: how does the STB intend to proceed to fulfill its own NEPA responsibilities under Part 1105?

The Board must decide and declare what Part 1105 NEPA procedures will apply going forward, and specifically what will be the status of the RC-DSEIS and RA-DEIS in those procedures.² After commenting on "cooperating agency" status as making the NEPA process more efficient, and that STB's Section of Environmental Analysis (SEA) had been participatory in public hearings held on Draft EISs in November and December 2007, the Board's April 11 Order did state that "[t]he EISs (including the public comments) will serve as the basis for SEA's recommendations to the Board regarding

² Comments on the RC-DSEIS and RA-DEIS by the many interested parties, and specifically those of Nevada, filed with DOE evidence numerous, serious omissions and deficiencies. At the very least, DOE should have included the same as a part of *Exhibit H* in order to make full disclosure and provide more complete record of environmental information. All of which bears directly on STB's future determination whether, and if so to what extent, to adopt or DOE's documentation under 40 C F R §1506.3 as it proceeds to satisfy and create the record for its own environmental analysis and documentation under Part 1105

whether, from an environmental perspective, DOE's construction and operation application should be granted, denied, or granted with environmental conditions "

Herein lies a cautionary note. The foregoing suggests that STB proceedings under Section 10901 on the DOE application may not contemplate a parallel schedule for true public comment on and critical analysis of, the DOE's EIS documentation. But in the June 27 decision rejecting NV's concerns over the status of DOE's EISs, the Board acknowledged its independent NEPA/NHPA responsibilities, and stated *"[a]ll parties, including the State, will be able to participate in the environmental review process as provided in our regulations at 49 CFR Part 1105."*

In mid-June, 2008, DOE issued its Final EIS documentation for the Rail Corridor and Rail Alignment, but has not chosen to supplement Exhibit H of its Application or otherwise make those documents part of the record in the case. Thus to date, there has been no public comment on NEPA issues scheduled by the STB. These July 15 comments only address transportation issues, i.e., the public convenience and need (PCN) issues raised by DOE's application under Section 10901.

7. Failure to Provide Safety Integration Plan (SIP), 49 C.F.R. §1106

The transportation transaction proposed by DOE for the transport of SNF and HLW will result in a 300-mile extension of the national rail system and necessarily involve the operations of several other carriers, both within and without Nevada. Review and approval of the proposed transaction requires an adequate and coordinated consideration by the Board and the Federal Railroad Administration ("FRA") for integration of operating safety procedures among the national rail carriers and a presently unidentified rail carrier operative for DOE over the Nevada line

DOE's application is silent on the issue and fails to provide a SIP for a transportation proposal that qualifies as a "transaction" as that term is defined in 49 C.F.R. §1106.2 for which an SIP can and should be deemed necessary by the Board for a proper consideration of the application for authority to construct and operate the line in question

Although Part 1106 generally applies to consolidations under 49 U.S.C. §11323 not construction under §10901, 49 C.F.R. §1106.2 makes clear the requirement is not so limited, but in appropriate cases, such as here, may be applied to other requests for transaction authority, such as here where interoperation issues among various entities and modes are necessarily contemplated

8. Failure to Address Terrorism Related to Proposed Rail Transportation

Following September 11, 2001, Congress enacted measures that address national concerns for terrorism attacks on transportation activity and infrastructure. One of significance is the *"Implementing Recommendations of the 9/11 Commission Act of 2007"*, P.L. 110-53, 121 Stat. 266 (August 3, 2007), Titles XII, XIII and XV Subtitles A, B and D. These concerns also prompted responsible administrations within DOT and DHS to undertake rulemakings proposing new security regulations for rail shipments of hazardous materials, including spent nuclear fuel.

DOT's Pipeline and Hazardous Materials Safety Administration ("PHMSA"), in consultation with the FRA, and DHS's Transportation Security Administration ("TSA"), in coordinated, companion proceedings, proposed new security regulations for rail shipments of hazardous materials, including spent nuclear fuel, for 49 C.F.R. Parts 172 and 174, and 49 C.F.R. Parts 1520 and 1580, respectively. The notices of proposed

rulemakings (NPRMs) are at 71 FR 76834 and 76852 (December 21, 2006), respectively. [The proposed rules are currently under review at OMB and are expected to become effective within the next 45 - 180 days.]

As recent as June 27, 2008, in a memorandum to NRC's Office of Federal and State Materials and Environmental Management Programs ("FSME"), NRC's Office of Nuclear Security and Incident Response ("NSIR") requested rulemaking to incorporate updated requirements for the secure transport of spent nuclear fuel (SNF) for the stated reason that *"the existing requirements for the secure transport of SNF were developed under a different threat environment."*

The memorandum notes that *"as a result of new insights, the existing security requirements that apply during the transportation of SNF need to be updated to further minimize the possibility for radiological sabotage of spent fuel shipments and to further facilitate the location, recovery, and response to spent fuel shipments that may have come under the control of an adversary"*, and finally that *"the updated security requirements align with our mission to protect public health and safety, and the environment, promote the security of our nation, and, provide for regulatory actions that are open, effective, efficient, realistic and timely"*

The memorandum points out that the requested rulemaking will be concurrent with a planned separate rulemaking to update the in-transit requirements for Radioactive Materials in Quantities of Concern (RAMQC) and that third rulemaking to update the in-transit special nuclear material is planned in the future

Unquestionably, Congress, NRC, DOT and DHS have very genuine and specific concerns about the security of rail shipments of hazardous materials, especially spent

nuclear fuel, through major urban areas. Currently proposed rulemakings are designed to address these concerns, among others, through route selection decisions based on security risk assessments, that have been exacerbated by rail capacity constraints within and without Nevada

DOE's application fails to address the full implications of the revised rail transportation safety and security regulations proposed by PHMSA and TSA. DOE's *Exhibit II* identifies potential rail and barge-to-rail routes to YMP through more than 30 of the nation's 50 largest metropolitan areas, including New York, Philadelphia, Washington, DC, Atlanta, Detroit, Chicago, Houston and Los Angeles, not to overlook the proximity of YMP activity to Las Vegas.

DOE repeatedly underestimates the transportation terrorism risks that others have chosen to evaluate, and ignores more severe transportation terrorism risks identified by the State of Nevada and other parties. Nevada has addressed these issues in detail in the written comments on the RC-DSEIS and RA-DEIS submitted to DOE on January 10, 2008.

An act of terrorism or sabotage that perforates the shipping cask containment, or deployment of a combination of weapons specifically designed to breach, damage, and disperse the cask contents, could result in consequences many times more severe than those evaluated by DOE, with radiation exposure to thousands and clean-up costs in the billions

The circumstances in this case surely heighten terrorism concerns because the proposed transportation activity and infrastructure involves the relatively exposed rail

transport of substantial amounts of spent nuclear fuel and high level radioactive waste not only in Nevada but also from origins nationwide to Nevada.

DOE's *Exhibit I*, at page 30, offers comment on anti-terrorism as a reason for the repository, but does not address terrorism as it relates to national or Nevada transportation activity or infrastructure. Nor does it do so by its efforts at debunking transportation myths. *Id.* at 38 Other references in DOE's submissions do not present a meaningful analysis or consideration of terrorism.

The Ninth Circuit recently rejected NRC's 4-factor rationale for excluding meaningful consideration of terrorism from its NEPA environmental analysis and documentation. *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1035 (9th Cir. 2006), *cert denied* 127 S.Ct. 1124 (2007)(concluding "[i]n sum, none of the four factors upon which the NRC relies to eschew consideration of the environmental effects of a terrorist attack satisfies the standard of reasonableness. We must therefore grant the petition in part and remand in part for the agency to fulfill its responsibilities under NEPA. Our identification of the inadequacies in the agency's NEPA analysis should not be construed as constraining the NRC's consideration of the merits on remand, or circumscribing the procedures that the NRC must employ in conducting its analysis.")

DOE's application does not give meaningful consideration of these concerns, but should have. It is necessary supportive information under 49 C.F.R. §1150.8 required for Board consideration of this application. The failure to critically address terrorism as it relates to transportation activity and infrastructure, and related security, exposure and first response concerns should be considered fatal to the acceptance of DOE's application as presently filed

In a post-9/11 world, meaningful consideration requires recognition of the jurisdictional responsibility and expertise of other Federal agencies for rail safety and security risk assessments. The Interim Final Rule, effective June 1, 2008, issued by PHMSA in coordination with FRA and TSA, on April 16, 2008 at 73 F.R. 20752, and consideration of the 27 risk analysis factors included therein, warrant the inclusion those agencies as "cooperating agencies" with "lead agency" status for FRA on safety and security risk assessment matters, as a part of the Board's deliberations for purposes of NEPA and determination of the public convenience and necessity for purposes of prior approval under Section 10901.

It is unclear whether and to what extent transportation safety and security risk assessments will be subject to critical review by the NRC in processing DOE's License Application. Thus, because the STB may be the only Federal agency to review the national and Nevada impacts of DOE's transportation plans for approval purposes and given the presumptive nature of Section 10901, the Board must act to ensure an open and fair opportunity for public participation in these proceedings, as well as appropriately adding other Federal agencies as "cooperating agencies".

Relying on "compliance with applicable law" results in neither an evaluation nor a plan addressing safety and security issues resulting from rail transport of SNF and HLW throughout the nation and in Nevada.

III. Conclusions and Requests for Relief

The geologic repository for spent nuclear fuel and high level radioactive waste proposed for Yucca Mountain, NV is a unique, first-ever in the world project. For the

Board, DOE's application involving local and national transport of such hazardous materials is likewise unique.

DOE's application seeks prior approval from the Board for the construction and operation of a 300-mile rail line in Nevada as an extension of the national rail system for the transportation of SNF and HLW from origins throughout the United States to the repository. While the application focuses on construction and operation of rail infrastructure in Nevada, it necessarily implicates rail transportation and infrastructure nationwide.

This case represents the first invitation and opportunity for the STB to review and evaluate the local and national impacts of proposed transportation activity and infrastructure related to the proposed repository. For that reason, the Board should require that DOE's initial Application comply fully with applicable rules and regulations.

With respect to the Section 10901 public convenience and necessity (PCN) issues raised by DOE's Application filed March 17, 2008 Nevada finds the Application deficient, and for the reasons urged, requests the Board to reject the Application for lack of jurisdiction or as incomplete requiring supplement, and that the Board require responsive PCN comments be filed *only after* DOE's application has been fully completed with proper supplementary content and that PHMSA, TSA and FRA be included as "cooperating agencies" with FRA the "lead agency" on safety issues in any further proceedings.

Nevada reserves the right to request discovery and/or oral argument following DOE's responses to these and other comments due July 15, 2008.

Dated this 15th day of July, 2008, by _____/s/_____
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Certificate of Service

I HEREBY CERTIFY that true and correct copies of the foregoing document were served on Parties or Counsel of Record identified below by (1) first-class U.S. mail, postage prepaid, (2) e-mail as shown, or (3) other expeditious method, this 15th day of July, 2008

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