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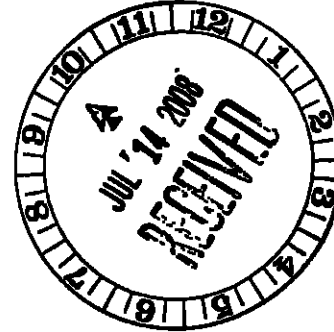
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DEPARTMENT OF JUSTICE



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July 11, 2008



Hon Ann K Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S W
Washington, D C 20423-0001

RE: *United States Department of Energy -- Rail Construction and Operation
-- Caliente Rail Line in Lincoln, Nye, and Esmeralda Counties, Nevada
STB Finance Docket No 35106*

ENTERED
Office of Proceedings
JUL 14 2008
Part of
Public Record

Dear Acting Secretary Quinlan

Enclosed for filing on behalf of the State of California in the above-captioned docket is the *State of California's Opposition to DOE Application*. Enclosed is an original and 10 copies. We have also enclosed two extra copies. Please file the original and return the extra two endorsed copies in the enclosed self-addressed, stamped envelope. Thank you for your assistance in this matter.

Sincerely,

SUSAN L. DURBIN
Deputy Attorney General

For EDMUND G. BROWN JR.
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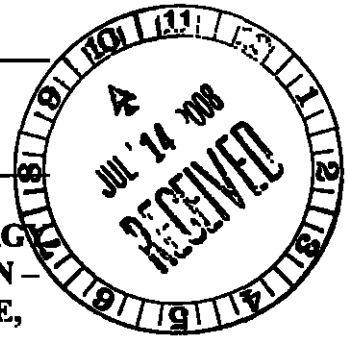
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Enclosures

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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 CALIFORNIA'S
OPPOSITION TO THE
DOE APPLICATION**

**ENTERED
Office of Proceedings**

JUL 14 2008

**Part of
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July 11, 2008

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I

MOTION

The State of California, by and through the California Energy Commission and the Edmund G Brown Jr, California Attorney General (California) moves the Board to reject the application by the U S Department of Energy (DOE) to build a rail line to serve the proposed Yucca Mountain high-level nuclear waste repository, insofar as DOE's application implies that the Mina route is an alternative to the Caliente route for which DOE explicitly seeks authorization DOE has not met the Board's requirements for an application to construct and operate a rail operation using the Mina route corridor, and the Board thus lacks regulatory authority, as well as substantial supporting evidence in the record, on which to base a grant of permission to DOE to build the Mina route

DOE has not explicitly applied for approval by the Board of construction or operation of a rail line on the Mina route, but its Application is internally inconsistent and may be read to implicitly request such approval. DOE's Draft Environmental Impact Statements for the Nevada Rail Corridor and the Rail Alignment, DEISs Numbers DOE/EIS 0250F-S2 and DOE/EIS 0369¹, included in the Application in Exhibit H, present the Mina route as an alternative to the Caliente route The Application explicitly seeks permission to build and operate the Caliente line, but because it incorporates information about the Mina route, could be subject to an interpretation that DOE is also requesting authorization from the Board, on an

¹ California presumes that DOE will update its Application by submitting the Final Environmental Impact Statements for both the rail corridor and rail alignment to this Board, but our argument is not affected by issuance of the final EISs

alternative basis, to build the Mina route ² Because the Application could be interpreted this way, and to the extent that the Board reads the Application as asking for authorization to build the Mina route, California moves the Board explicitly to reject the Application as incomplete and lacking in justification and evidentiary support insofar as it requests permission to construct or operate a rail line servicing the Yucca Mountain Project on the proposed Mina route

II

DISCUSSION SUPPORTING MOTION

A. California's Interest

DOE has applied for permission to build a rail line that will be located solely in Nevada, but the choice of corridors for that line is of vital importance to California. Although it is difficult to discern the fact from the DEISs that comprise Exhibit H, the choice between the Caliente and the Mina routes leads to a huge difference in both the number of shipments and the quantity of the waste that DOE expects will be shipped through California. The State of California is responsible for protecting the health, safety, and welfare of its residents from any possible harm due to these shipments, and bases its participation in this proceeding on its need and right to protect those residents.

As shown in Figure 1-7 of the Rail Corridor DEIS (DOE/EIS 0250F-S2D), the Mina route would connect with existing rail lines in the northwest corner of Nevada, at Hazen, Nevada. We attach excerpted pages from Appendix G to DOE's 2002 Final Repository SEIS, an SEIS that DOE has not chosen to attach to its Application, showing the rail routes DOE expects

² We note that Esmeralda County, Nye County, and Lander County filed comments supporting the use by DOE of the Mina route, with a view to establishing a through-going rail route connecting Reno and Las Vegas.

would be used to transport high-level nuclear waste if the Caliente route were used (Figure G-1, page G-7) and if the Mina route were used (Figure G-2, page G-8) We also attach an excerpted table from Appendix G of the 2002 Final Repository EIS, listing the numbers of casks of high-level nuclear waste DOE expects will be shipped through California if the Caliente route is used and if the Mina route is used (Table G-25, page G-67)

These figures and table show that the choice of rail routing between the Caliente route and the Mina route is of serious concern to California. If the Mina route is used, DOE expects that over 1200 more casks of high-level nuclear waste will be transported through California than if the Caliente route is used Further, if the Mina route is used, DOE expects that these shipments will travel hundreds of miles through the heart of California's Central Valley, passing through the cities of Bakersfield (population 323,000), Fresno (population 481,000), Modesto (population 209,000), Stockton (population 290,000), and Sacramento, the state capital (population 467,000) These population numbers reflect current populations, California is expected to grow by several million people during the time period that DOE expects waste will be shipped to Yucca Mountain, and each of the cities through which the waste would travel is expected to grow significantly Compared with the Caliente route, which would pass through more sparsely populated parts of the State, including largely undeveloped parts of the Mojave desert, the Mina route would expose a significantly higher number of people in California to the consequences of transport, including any possible accidents

DOE estimates that, if the Caliente route is used, 755 casks will be transported through California, while if the Mina route is used, 1,963 casks -- about one a half times as many -- will be transported by rail through the State (Page G-67 of the 2002 Repository FSEIS,

attached hereto) Nor would the only difference be the numbers of casks transported As Figure G-2 at page G-8 of the 2002 Repository FSEIS shows, DOE expects that use of the Mina rail route would result in the waste from the Hanford site, containing DOE weapons high-level radioactive waste, being shipped south into and through California That waste, and waste, shipped up through California's Central Valley, would then be transported over the Sierra Nevada Mountains, through the Donner Pass, to connect to the Mina route at Hazen, Nevada (see Figures G-6 and G-8 from the 2002 Repository FSEIS, attached hereto). The choice of rail route to Yucca Mountain will have a significant impact on California, and underlies the State's interest in this proceeding

B. DOE Has Not Presented a Complete or Adequate Application for the Mina Route, and the Board Should Explicitly Refuse to Approve Construction or Operation of any Rail Line on the Mina Route.

Because the DEISs submitted by DOE in Exhibit H to the Application show the Mina route as an alternative to the Caliente route, this Board may view the Mina route as within the authorization DOE is seeking from this Board, per 49 C F R section 1150.4(c), which requires that any "alternative routes" proposed for construction be included in the application Should this Board not view the Application as implicitly seeking permission to build the Mina route, we ask the Board to say so clearly, and to state clearly that it is not granting permission or authorization to DOE to build a rail line on the Mina route However, if the Board does view the Application as implicitly proposing the Mina route as an alternative to the Caliente route, we submit that the Application does not support any grant by the Board of permission to DOE to build a rail line on the Mina route

1. The Application Does Not Address the Mina Line or Provide the Information Required by the Board's Regulations.

The Board requires a carefully delineated set of information in an application to construct and operate a rail line, pursuant to 49 C.F.R. section 1150.4.³ DOE's Application fails to provide the following required information for the Mina route:

- 1150.4(b) while the Application does present data about the number of casks, frequency and number of trains, and so forth, that the DOE expects on the Caliente route, there are no such data for the Mina route, nor any justification for assuming that the data presented for the Caliente route would apply equally to the Mina route. As set out above, the 2002 Repository FSEIS supports an inference that the number and time distribution of casks coming on the Mina route might be different from the those for the Caliente route. No information on the Mina route is given in the Application except what can be gleaned from the DEISs, and that is insufficient to meet the precise and detailed requirements of section 1150.4. Nor is there information on commercial use that might be made of any rail line built on the Mina route. The Application notes that DOE and Nye County performed market surveys for companies or communities that might use a common carrier rail line built on the Caliente route, but no such surveys or studies are cited for a Mina line. Nor is there any assertion of commercial or economic benefit to any Nevada communities along a Mina route.

³ In view of the Board's June 26, 2008 Decision, we do not discuss the Application's failure to designate an operator or submit an operations plan for the Mina route.

- 1150 4(d) Exhibit C contains no map for the Mina route at all, let alone one that meets the regulatory requirement that the area to be served be clearly delineated. The Application's Exhibit C contains no information about origins, termini, stations, cities and counties, principal highways, rail routes, or other interchange points with other railroads for the Mina route, all of which are required by the regulation.
- 1150 4(e) The Application contains no list of cities or counties to be served by a Mina route, or a discussion of current rail service for such cities or counties.
- 1150 4(f) The Application contains no time schedule for construction of a line on the Mina route.
- 1150.4(g). The Application does not provide the specific information for construction of a new rail line that is required by this regulation. There is no description or depiction of the approximate service area, no discussion or listing of the types of industry in the area and how such industry might use a rail line, and no discussion of other existing railroads and whether a Mina line would cross them.

California believes that the Application's failure to provide the information required by the Board's regulations makes it impossible for the Board to grant any permission or authority to DOE to build a rail line on the Mina route, or to regard it as an alternative route to the Caliente route. Before DOE could seek authority to build any rail line on the Mina route, it would have to return to the Board with a new or amended application that does address the Mina route and does provide the required information. As of this point, neither the Board nor the

public has had the opportunity to evaluate the merits of any rail line on the Mina route, and the records lacks any evidence to support a grant of authority to build such a rail line

2. The Application Does Not Make an Adequate Showing of Public Necessity and Convenience for a Rail Line on the Mina Route.

The bedrock finding that the Board must make to authorize construction and operation of a new rail line is that the line serves the public necessity and convenience *Mid-States Coalition for Progress v Surface Transp Bd*, 345 F 3d 520, 533 (8th Cir 2003) Here, because DOE has not provided the specific and detailed information the Board's regulations require as a basis for making that finding, the Board lacks the evidence needed to make any such finding Under 49 C.F.R. section 1150.8, the Board may require DOE to submit any additional information it requires California believes that, in the event DOE seeks authorization to build a rail line on the Mina route, the Board should demand adequate information upon which to base any finding, and that a new or continued proceeding be convened to consider that information At this point, there simply is not adequate information before the Board to support a finding of public necessity and convenience

III

CONCLUSION

Whatever the merits of its Application for the Caliente route, DOE has failed to provide the information to the Board and the public to support a grant of authority by the Board to construct a rail line on the Mina route. California asks the Board to explicitly find and hold

that DOE is not authorized to build a rail line on the Mina route based on its current Application, and that the Board hold an amended or new proceeding should DOE ever explicitly ask for permission to build on the Mina route.

Dated July 11, 2008

Respectfully submitted,

EDMUND G BROWN JR
Attorney General

A handwritten signature in black ink, appearing to read "Susan L. Durbin", written over a horizontal line.

Susan L. Durbin
Deputy Attorney General
for the State of California

DECLARATION

I, Susan L. Durbin, declare, under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this pleading.

Executed on July 11, 2008

A handwritten signature in black ink, appearing to read "Susan L. Durbin", written in a cursive style.

Susan L. Durbin
Deputy Attorney General
Attorney for the State of California



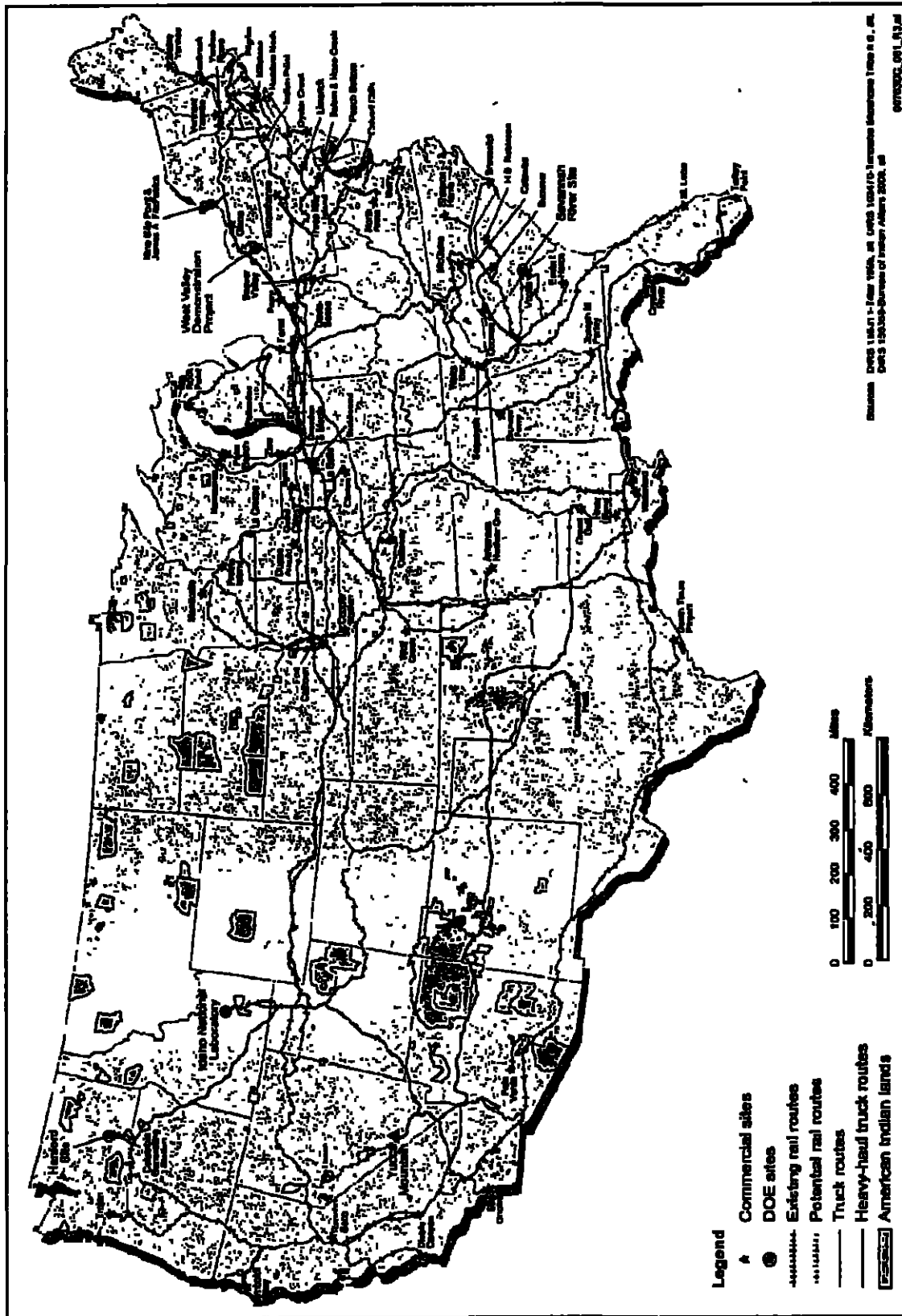


Figure G-2. Representative rail and truck transportation routes if DOE selected the Mina rail corridor in Nevada.

Table G-25. Estimated transportation impacts for the State of California

Rail alignment	No of Casks	Members of the public		Involved workers		Members of the public		Involved workers		Vehicle emission fatalities		Radiological accident dose risk (person-rem)		Radiological accident risk (latent cancer fatalities)		Traffic fatalities		Total fatalities	
		radiation dose (person-rem)		radiation dose (person-rem)		radiation dose (person-rem)		radiation dose (person-rem)		fatalities		fatalities		fatalities		fatalities		fatalities	
Caliente																			
Rail	755	35		82		0 021		0 049		0 042		0 16		9.9×10^{-5}		0 032		0 14	
Truck	857	7 6		24		0 0045		0 015		0 0010		3.1×10^{-4}		1.9×10^{-7}		0 015		0 036	
Total	1,612	43		110		0 026		0 064		0 043		0 16		9.9×10^{-5}		0 047		0 18	
Mina																			
Rail	1,963	99		160		0 059		0 098		0 12		0 35		2.1×10^{-4}		0 087		0 36	
Truck	857	7 6		24		0 0045		0 015		0 0010		3.1×10^{-4}		1.9×10^{-7}		0 015		0 036	
Total	2,820	110		190		0 064		0 11		0 12		0 35		2.1×10^{-4}		0 10		0 40	

a Totals might differ from sums of values due to rounding.

CERTIFICATE OF SERVICE

Case Name **United States Department of Energy – Rail Construction and Operation
– Caliente Rail Line in Lincoln, Nye, and Esmeralda Counties, Nevada**

No **FD 35106**

I declare

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On July 11, 2008, I served the attached **STATE OF CALIFORNIA'S OPPOSITION TO THE DOE APPLICATION** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P O Box 944255, Sacramento, CA 94244-2550, addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 11, 2008, at Sacramento, California.

Bessie Wong

Declarant

Bessie Wong
Signature

FINAL - 1 Tables - CA opposition3 (Yucca) .wpd

SURFACE TRANSPORTATION BOARD

Case Title **UNITED STATES DEPARTMENT OF ENERGY--RAIL
CONSTRUCTION AND OPERATION--CALIENTE RAIL
LINE I N LINCOLN, NYE, AND ESMERALDA COUNTIES, NV**

Docket No **FD 35106**

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