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Department of Energy
Washington, DC 20585

November 10, 2008

Via E-filing

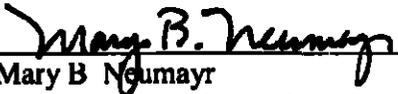
The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

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

Dear Acting Secretary Quinlan:

Enclosed for filing in the above referenced proceeding is the United States Department of Energy's Reply to Caliente Hot Springs Resort LLC's Motion for Leave to File Response.

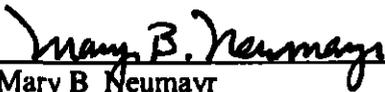
Sincerely,


Mary B. Neumayr
Deputy General Counsel
for Environment & Nuclear Programs



CERTIFICATE OF SERVICE

I, Mary B Neumayr, hereby certify that I caused to be served a true and correct copy of the United States Department of Energy's Reply to Caliente Hot Springs Resort LLC's Motion for Leave to File Response on each party of record on the attached list by first-class mail or more expedient service on this 10th day of November 2008



Mary B Neumayr
Deputy General Counsel
for Environment & Nuclear Programs

November 10, 2008

UNITED STATES OF AMERICA
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 ESMEFALDA COUNTIES, NEVADA

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UNITED STATES OF AMERICA

**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 ESMEERALDA COUNTIES, NEVADA**

**UNITED STATES DEPARTMENT OF ENERGY'S REPLY TO
CALIENTE HOT SPRINGS RESORT LLC'S
MOTION FOR LEAVE TO FILE RESPONSE**

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For the reasons stated below, the United States Department of Energy ("DOE") respectfully requests that the Surface Transportation Board ("Board" or "STB") deny Caliente Hot Springs Resort L.L.C.'s ("CHS") Motion for Leave to File Response, served October 23, 2008 ("Motion for Leave") Accompanying the Motion for Leave is CHS's proposed Response to Reply of the United States Department of Energy ("Proposed Response")

BACKGROUND

On March 17, 2008, DOE filed its Application for a Certificate of Public Convenience and Necessity ("Application") to construct and operate an approximately 300-mile rail line in Nevada to be known as the Caliente Rail Line On April 16, 2008, the Board published a notice in the *Federal Register* (73 Fed. Reg. 20748) announcing DOE's Application In the notice, the Board adopted a procedural schedule that provided a comment period more expansive than that prescribed in the Board's regulations The Board allowed a 120-day period for interested parties to submit comments in support of or in opposition to the Application, instead of the 35-day period set forth in the Board's regulations

Various parties submitted comments on the Application, and DOE filed its reply to those comments ("Reply to Comments") on August 29, 2008 In its Reply to Comments, DOE stated its intent to implement a wetlands compensatory mitigation plan that would meet the recommendation of the United States Environmental Protection Agency ("EPA") for mitigating losses to aquatic resources This plan will "include one of the following options to compensate for the loss of wetlands: (1) restore or create three acres of wetlands of equivalent function within the watershed for every acre of wetlands

filled to construct the railroad, (2) restore or create one acre of wetlands of equivalent function within the watershed, and remove non-native plants in five acres within the watershed for every acre of wetlands filled, or (3) restore or create one acre of wetlands of equivalent function in the watershed, and enhance five acres of riparian wetlands habitat in upper Meadow Valley, including Rainbow Canyon, for every acre of wetlands filled” Reply to Comments at 34, citing August 11, 2008 letter from the EPA to Dr Jane Summerson (attached as Appendix D to Reply to Comments) ¹

CSX Transportation, Inc (“CSXT”) thereafter filed on September 18, 2008 a motion for leave to reply to DOE’s Reply to Comments (“CSXT’s Motion for Leave”). CSXT’s filing did not concern any wetlands issue Rather, CSXT’s Motion for Leave concerned exclusively the use of dedicated trains to transport spent nuclear fuel and high-level radioactive waste. DOE replied to CSXT’s Motion for Leave on October 8, 2008.

CHS served its Motion for Leave on October 23, 2008 Though styled as a response to DOE’s reply to CSXT’s Motion for Leave, CHS’s Proposed Response contains a single sentence regarding the dedicated train issue That sentence merely adopts the argument of Norfolk Southern Corporation and adds no additional information and makes no new argument on that topic The substance of CHS’s Proposed Response is directed instead to the compensatory mitigation options recommended in EPA’s August 11, 2008 letter and discussed in DOE’s Reply to Comments

¹ On October 10, 2008, DOE published in the *Federal Register* a Record of Decision and Floodplain Statement of Findings-Nevada Rail Alignment for the Disposal of Spent Nuclear Fuel and High-level Radioactive Waste at Yucca Mountain, Nye County, NV that commits DOE to implement a wetlands compensatory mitigation plan that will meet EPA requirements for mitigating losses to aquatic resources and that will include one of the three options identified in EPA’s August 11, 2008 letter to compensate for the loss of wetlands 73 Fed Reg 60247, 60258

ARGUMENT

CHS's Motion for Leave is procedurally improper. The Board's regulations expressly provide that a "reply to a reply is not permitted." 49 C.F.R. § 1104.13(c). Yet, CHS seeks leave to reply to DOE's Reply to CSXT's Motion for Leave. CHS's Motion for Leave seeks permission to file a pleading that is entirely outside those allowed by the Board's regulations.

CHS's Motion for Leave is also untimely. CHS seeks to reply to two matters discussed in DOE's Reply to Comments and not at all in the CSXT Motion for Leave: namely, EPA's August 11, 2008 letter and DOE's intent to include in its wetlands compensatory mitigation plan one of the three options recommended in the letter. The Board's regulations, 49 C.F.R. § 1104.13(a), provide that a motion must be filed within 20 days of the matter to which it is addressed. CHS was thus required to file its Motion for Leave within 20 days of DOE's Reply to Comments. That twenty-day period expired on September 18, 2008. CHS, however, did not file its Motion for Leave until October 23, 2008, more than a month after that deadline.

Further, the premise underlying CHS's motion is erroneous. CHS argues that its reply is warranted because DOE's Reply to Comments allegedly "adopts a new position with regard to impacts to wetlands." CHS Motion for Leave at 1. "By fundamentally altering its position in its last evidentiary filing," CHS asserts, "DOE effectively precluded other parties from addressing DOE's position on wetlands impacts, specifically with regard to the Cahente and Eccles Alternative Segments." CHS Motion for Leave at 4. CHS's Motion for Leave, however, does not identify any new position that DOE supposedly adopted in its Reply to Comments.

CHS also complains that the August 11, 2008 EPA letter, which is included as Attachment D to DOE's Reply to Comments, discloses an allegedly improper "deal" between DOE and EPA regarding compensatory mitigation. This allegation is not correct. The August 11, 2008 letter provided EPA's comments on the final Nevada Rail Corridor SEIS² and final Rail Alignment EIS³ which, as the letter itself states, EPA provided in accordance with its responsibilities under the Clean Air Act and the National Environmental Policy Act. August 11, 2008 letter at 1. What CHS characterizes as a "deal" is DOE's agreement to adopt EPA's recommendations included in its comments concerning compensatory mitigation options. It is entirely appropriate for EPA to make recommendations for compensatory mitigation options for lost wetlands acreage and functions and for DOE to agree to those recommendations.

CONCLUSION

For the reasons stated above, DOE respectfully requests that the Board (1) deny CHS's Motion for Leave, (2) not accept CHS's Proposed Response, and (3) decide the Application on the existing record. In the event that the Board grants CHS leave to file its Proposed Response, DOE respectfully requests an opportunity to reply on the merits to

² *Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada - Nevada Rail Transportation Corridor*, DOE/EIS-0250F-SD

³ *Final Environmental Impact Statement for a Rail Alignment for the Construction and Operation of a Railroad in Nevada to a Geologic Repository at Yucca Mountain, Nye County, Nevada*, DOE/EIS-0369.

that pleading DOE also respectfully requests that DOE's reply time run from the date of notification of any such decision granting leave

Respectfully submitted,



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