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SUPPLEMENTAL TESTIMONY OF SUSAN BRAGER, CLARK COUNTY COMMISSIONER,

BEFORE

THE SURFACE TRANSPORTATION BOARD

PUBLIC HEARING 12/04/2008

STB FINANCE DOCKET NO 35106

The following summarizes and elaborates upon the numerous deficiencies contained in the application for a Certificate of Public Convenience and Necessity to Construct and Operate a Rail Line in Lincoln, Nye and Esmeralda Counties, Nevada ("Application")

In brief, Clark County objects to the DOE's application and subsequent Reply to Comments in the following areas 1) The Department of Energy's misapplication of *Department of Transportation v Public Citizen*, 541 U S 752 (2004), and correlating misidentification of the proper standard of causation; 2) Consideration of Reasonable Alternatives per the National Environmental Policy Act (NEPA); 3) Consideration of the Impacts of Highway Trucking as a Reasonable Foreseeable Impact, 4) The absence of specific plans and management schemes addressing emergency management, training and necessary facility usage. 5) The absolute non-responsiveness of the Department of Energy (DOE) Reply Brief filed on August 29, 2008, 6) The improper reliance upon Regulation 180(c) as a substitute for a NEPA mandated needs assessment of Clark County public safety systems Finally, Clark County incorporates and reasserts its initial

comments submitted on July 15, 2008 by reference for purposes of the Surface Transportation Board ("the Board") review

1.1 The DOE Improperly Relies Upon *Public Citizen* and Misleads the STB

In its Reply to Comments submitted to the STB regarding the application for a Certificate of Public Convenience and Necessity, the DOE attempts to circumvent review by this Board by misstating the current status of governing law The DOE argues that *Department of Transportation v Public Citizen*, 541 U S. 752 (2004), is controlling as to whether a NEPA challenge is appropriately before the STB. In *Public Citizen*, the United States Supreme Court asserted that NEPA requires analysis of an effect "only where there is a reasonably close causal relationship between the environmental effect and the alleged cause "[1] The Court held that a causal connection akin to proximate cause must exist to require a NEPA analysis. A "reasonably close relationship" was held to not exist in *Public Citizen*: "pollution from Mexican motor carriers was not an 'effect' that the Department of Transportation (DOT) had to consider because no 'action' by the DOT would 'cause' Mexican motor carriers to enter the United States."[2] Under *Public Citizen*, the following two inquiries had to be answered in the affirmative to necessitate a NEPA-based evaluation process by the reviewing agency. First, can the STB decision regarding the Certificate of Public Convenience and Necessity be said to cause environmental impacts beyond the actual construction of the Caliente rail line? Second, does the STB have the authority to prevent the related actions from taking place?

The DOE attempts to draw a parallel between the instant matter and the Mexican motor carriers' situation in *Public Citizen* The DOE argues that the requisite causal link

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[1] *Public Citizen* 541 U. S 752, 767, 124 S Ct 2204 (2004)
[2] *Id* at 764-766

between transportation of spent nuclear fuel and potential environmental impacts outside of the Caliente Corridor is unsatisfied.[1] Furthermore, the DOE posits that the STB's "actions in this proceeding cannot proximately cause an environmental impact associated with transporting spent nuclear fuel and high-level radioactive waste nationwide."[2]

The DOE errs in employing *Public Citizen* as its guide. Multiple cases addressing the requisite causality to necessitate a NEPA analysis have been decided that refine the applicable inquiry developed in *Public Citizen* in 2004.[3] The proper inquiry states that "indirect impacts, when dealing with NEPA, need only be reasonably foreseeable to require assessment of environmental impacts."[4] Regulations promulgated by the Council on Environmental Quality (CEQ) define 'indirect impacts' in the following form:

> Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.
> Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.[5]

While the DOE attempts to confine the Board's review in the narrowest fashion possible, CEQ guidelines and NEPA policy mandate that the Board consider both the direct and indirect impacts of the proposed construction. Application of this principal

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[1] August 29, 2008 Reply of the United States Dept. of Energy at 26-27.
[2] *Id.*
[3] *See generally e.g. Wyoming Outdoor Council/Powder River Basin Resources Council v. U.S. Army Corps of Eng.*, 351 F. Supp. 2d 1232 (2005), *Sierra Club v. Marcella*, 459 F. Supp. 2d 76 (2006), *Humane Society v. Johanns*, 520 F. Supp. 2d 8 (2007).
[4] *Humane Society v. Johanns*, 520 Supp. 2d 8, 24 (D.D.C. 2007) (*citing Friends of the Earth, Inc. v. U.S. Army Corps of Engrs.*, 109 F. Supp. 2d 30, 41 (D.D.C. 2000).
[5] *Id.* (*citing* 40 C.F.R. § 1508.8(b).

means that the Board must consider environmental impacts of national transportation, increased highway trucking, the inevitable utilization of overweight highway trucking, impacts on emergency management, specified best management practices, mitigation and emergency readiness, response evaluation, etc

The following material demonstrates the deficiencies of the Application, and leaves little doubt as to why the DOE attempts to constrict the lens through which the Board may review the DOE's Application and included environmental impact statements.

1.2 The DOE Fails to Consider All Reasonable Alternatives

As recently noted by the District Court of Wyoming,

> [T]he alternatives requirement is the linchpin of NEPA, mandating that an agency study, develop, and describe alternatives to proposed agency action, and the alternatives section is the heart of the environmental impact statement [8]

The definition of a "reasonable alternative," as used by NEPA, is one that is "non-speculative and bounded by some notion of feasibility."[9] An environmental impact statement is inadequate for purposes of NEPA if it "fails to address the existence of a viable but unexamined alternative [10] An agency is prohibited from defining the objectives of its action so narrowly as to render consideration of alternatives a "mere formality "[11] The DOE must examine every reasonable alternative to the instant proposed action under NEPA, with the range of reasonableness defined by the "nature and scope of the

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[8] *Wyoming v U S Dept of Agriculture* 570 F Supp 2d 1309 (*citing* National Environmental Policy Act of 1969 § 102(C)(iii) (E) 42 U S C A § 4332(C)(iii)(E)) 40 C F R §§ 1501 2(c), 1502 14(a)

[9] *Id*

[10] *Sierra Nevada Forest Protection Campaign v Rey* 573 F Supp 2d 1316 (E D Cal 2008)

[11] *Anglers of the Au Sable v U S Forest Service* 565 F Supp 2d 812 (E D Mich S Div , 2008)

proposed action "[12] Finally, the DOE must explain its reasoning for excluding analysis or eliminating an alternative.[13]

In Volume IV, Chapter 5 of the Rail Alignment EIS, the DOE discusses the preferred alternative Caliente Corridor for rail construction, the non-preferred alternative Mina Rail Corridor, and the No Action alternative Consideration of the Caliente and Mina rail corridors is the full extent of the DOE's consideration of alternatives Yet, as many as ten alternatives were worthy of consideration as recently as 1990 in the Preliminary Rail Access Study complied on behalf of the Yucca Mountain Project Office, Nevada Operations Office and the DOE In this study, of the ten potential rail sites that were evaluated,[14] five were deemed to have minimal land use conflicts Those five corridors include Jean, Caliente, Cherry Creek, Mina and Carlin. Of those five, the DOE only provides examination of two (Caliente and Mina) in its Application [15] Furthermore, an alternative Mina rail route that bypasses tribal lands was neither discussed nor was an explanation provided as to why such discussion was absent. In fact, the DOE fails to provide its bases for eliminating all but the Caliente and Mina routes from the Rail EIS

1.4 Transportation Disposal Canisters and Highway Transport

The DOE responds to the Clark County's criticism regarding the DOE's failure to address impacts of overweight highway transport of spent nuclear fuel in two ways First, the DOE relies on the tiered review process obfuscate their shortcomings in this area [16] Second, the DOE posits that any highway trucking analysis would only be necessary

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[12] *Quechan Indian Tribe of the Fort Yuma Indian Reservation v U S Dept of Interior*, 547 F Supp 2d 1033 (D Ariz 2008)
[13] *Wilderness Soc Center for Native Ecosystems v Wisely* 524 F Supp 2d 1285, (D Colo 2007)
[14] Arden Jena, Crucero Ludlow Mina, Mina alternative, Caliente Carlin Cherry Creek and Dike
[15] *See generally* Preliminary Rail Access Study, United States Dept of Energy and Nevada Operations Office (1991)
[16] August 29 Reply to the Reply of the United States Dept of Energy at 28

under the no-action alternative, and as such, the level of such trucking would remain the status quo.[17] These arguments are facially invalid.

Tiered review is intended to avoid duplication and simplify analysis [18] It is not, however, intended to circumvent obligations of the Applicant agency Regardless, the DOE attempts to utilize tiered review to circumvent substantive discussion regarding Transportation and Disposal Canisters (TADS) and to evade engaging the issue of overweight highway trucking.

The Yucca Mountain FEIS fails to provide any analysis of the impacts that will result from the use of Transportation and Disposal Canisters (TADS). Despite the lack of analysis, the DOE states that the "DOE would seek NRC certification of the TAD canister design for surface storage at commercial sites and for transportation."[19] The DOE essentially committed to storing and transporting the spent nuclear fuel in a canister that has yet to be approved for either storage or transport. Furthermore, inadequate, if any, discussion addresses the overall impact of uniform TAD usage.

In its Reply, the DOE refers to its analysis of truck transportation modes in the Yucca Mountain FEIS, and asserts that such analysis is sufficient under NEPA. Yet, the relevant EIS's fail to discuss highway impacts that will result from the overweight trucks [20] The DOE concedes that most recent update on the transportation impacts associated with the use of trucks under the mostly rail scenario focused on the "mostly legal weight truck alternative " The DOE, however, concedes that it "has determined that trucks carrying casks would be more likely to have gross vehicle weights

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[17] *Id*

[18] 40 CFR § 1502 20

[19] Supplemental Environmental Impact Statement, S 2 2 P 8

[20] [A]s much as 90 percent of the commercial spent nuclear fuel would be placed in transportation aging and disposal (TAD) canisters at the commercial sites prior to shipment Dept of Energy Supplemental Yucca Mountain FEIS, P 4-6 June, 2008

in the range of 36,000 to 52,000 kilograms (80,000 to 115,000 pounds) "[21] The legal threshold for "legal-weight" trucks is 36,000 kilograms. Thereby each and every truck over the said threshold would have to be subject to overweight permit requirements By the DOE's own concession, most of the trucks would be overweight. Thus, a "mostly legal weight" analysis is totally inapplicable and inadequate. The Application lacks any substantive discussion of the nature, scope and duration of environmental impacts of mostly overweight loads and is, therefore, incomplete The DOE's attempt to utilize the concept of tiered review as a basis for not including the aforementioned necessary data should not be permitted

1.5 Emergency Management Deficiencies

Clark County's original comments concerning the emergency management and public safety component of the Application are contained in Section 3 of the July 15, 2008 Comments of Clark County The DOE responded to Clark County by curbing discussion of emergency response under the subject of mitigation in Appendix B of its August 29, 2008 reply [22] Yet, Appendix B provides no more than a list of Clark County's comments That is, the DOE is entirely silent regarding emergency management impact commentary as provided in Section 3 of the July 15, 2008 Clark County comments [23] The DOE's non-responsiveness is likely the result of its failure to actually examine potential impacts on the Clark County Emergency Management and Public Safety system Thus,

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[21] Draft Supplemental EIS, P 6-5

[22] August 29 2008 Department of Energy Reply, P 31-32

[23] The DOE grouped Clark County's public safety and emergency management comments in its mitigation discussion From the vantage of a federal agency, the impacts may be a matter of mitigation, but to Clark County, insufficient understanding of the demands emergency management and preparedness endangers public safety

the DOE is incapable of disputing fiscal and other impacts documented in the reports provided [24]

In its Reply, the DOE states that Table 7-1 within Chapter 7 of the Rail EIS provides information pertaining to technical support in the context of emergency management and preparedness [25] Review of Table 7-1 reveals that the DOE is actually asserting that necessary discussion of best management practices is satisfied by the DOE implementation of Section 180(c) of the Nuclear Waste Policy Act (NWPA) [26] This section says that the DOE must provide technical and financial assistance to states and tribes.[27]

Clark County believes that it is a fundamental error to try to segment or separate emergency management and public safety systems from the environmental impact statements for the repository or the rail corridor That the Repository and related transportation will impact emergency management and public safety sectors of Clark County can no longer be disputed These impacts should have been examined in the environmental impact statements, but were not Rather, the DOE decided to assert that all such impacts can be mitigated through Section 180(c)

The fragmented analysis, and misguided grouping of emergency management issues in the Application, results in several flaws Given the scope of impacts likely to result, a needs assessment is appropriate, and yet is not provided In addition, the DOE

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[24] Impacts to Clark County, NV Public Safety Agencies Resulting from the Yucca Mountain Project – 2001 Impacts to Clark County, NV in Local Governmental Public Safety Agencies Resulting from the Transportation of High-Level Nuclear Waste to Yucca Mountain 2005 Impacts to Clark County, NV Non-Public Safety Governmental Agencies Resulting from the Yucca Mountain Repository – 2001

[25] August 29, 2008 Department of Energy Reply, P 31-32

[26] Federal Register, Vol 73 No 212, October 31, 2008 69433

[27] Nuclear Waste Policy Act of 1982, Section 180(c) The policy as stated in 1 4 of the Section states

[T]here will be no shipments under the NWPA through the jurisdiction of any state or Indian tribe unless Section 180(c) assistance under this part has been made available to such state or tribe in a time sufficient to affect plans under Section 1 7 to implement procedures for safe routine transportation and for dealing with emergency response situations '

does not identify a training standard based upon current capabilities Also, the extensive impacts upon public safety and emergency management that will result from the proposed means of transport exceeds the type of assistance that the DOE considers in Section 180(c). The absence of such an assessment, matched with the DOE's attempt to eschew Clark County comments regarding this issue, renders the Application void of substance and examination in these areas.

In sum, if the DOE is permitted to disregard the aforementioned subject matter and continue to separate public safety and emergency management in its analyses, an accurate estimate of the current capacity of Clark County's public safety system will remain both absent and inaccurate. The DOE's separation of emergency management and public safety from other systems under examination provides a muddled, inchoate and unacceptable examination Substitution of Section 180(c) for substantive analysis and examination in the Application is unacceptable and not in accordance with the licensing process.

2.0 Conclusion

Clark County, as an affected unit of local government, respectfully recommends that the aforementioned problems in the DOE's application not be ignored Rather, Clark County asks that the Board hold the DOE to the standards provided and mandated by federal legislation The Application, as it currently stands, fails to meet this standard As such, the Certificate of Public Convenience and Necessity should not be granted