

PAUL H. LAMBOLEY
BANK OF AMERICA PLAZA
SUITE 645
50 W. LIBERTY STREET
RENO, NV 89501

TEL 775.786.8333
FAX 775.786.8334

E-MAIL
phlamboley@aol.com

Via E-filing

April 7, 2009

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*
State of Nevada's Motion to Suspend Further Proceedings, or in the alternative,
to Reopen the Procedural Schedule and Record on PCN Issues

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 Motion to Suspend Further Proceedings, or in the alternative, to Reopen the Procedural Schedule and Record Previously Established for Public Comment on Public Convenience and Necessity (PCN) Issues Related To The Application Filed by the United States Department Of Energy Under 49 U.S.C.10901.*

The Motion is presented in both original and PDF version in WORD format for IMac. Exhibits A, B, C, and D are in PDF format.

The Motion reflects the correct document and service dates. Counsel has been served by U.S. Mail and/or by e-mail as agreed.

Expedited consideration of this motion is requested

Please acknowledge receipt. Thank you.

Yours truly,
/s/
Paul H. Lamboley

PHL/nd
Enc.

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 MOTION TO SUSPEND FURTHER PROCEEDINGS,
OR IN THE ALTERNATIVE, TO REOPEN THE PROCEDURAL SCHEDULE
AND RECORD PREVIOUSLY ESTABLISHED FOR PUBLIC COMMENT ON
PUBLIC CONVENIENCE AND NECESSITY (PCN) ISSUES RELATED TO THE
APPLICATION FILED BY THE UNITED STATES DEPARTMENT OF
ENERGY UNDER 49 U.S.C. 10901**

**Martin G. Malsch
Charles J. Fitzpatrick
EGAN FITZPATRICK & MALSCH
12500 San Pedro Avenue, Suite 555
San Antonio, TX 78216
Tel. 210.496.5001
Fax 210.496.5011**

**Catherine Cortez Masto
Attorney General
Marta A. Adams
Chief Deputy Attorney General
Office of the Attorney General
of the State of Nevada
100 North Carson Street
Carson City, NV
Tel. 775.684.1100
Fax 775.684.1108**

**Paul H. Lamboley
Law Offices of Paul H. Lamboley
Bank of America Plaza, Ste. 645
50 W. Liberty Street
Reno, NV 89501
Tel. 775.786.8333
Fax 775.786.8334**

Attorneys for State of Nevada

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**STATE OF NEVADA’S MOTION TO SUSPEND FURTHER PROCEEDINGS,
OR IN THE ALTERNATIVE, TO REOPEN THE PROCEDURAL SCHEDULE
AND RECORD PREVIOUSLY ESTABLISHED FOR PUBLIC COMMENT ON
PUBLIC CONVENIENCE AND NECESSITY (PCN) ISSUES RELATED TO THE
APPLICATION FILED BY THE UNITED STATES DEPARTMENT OF
ENERGY UNDER 49 U.S.C. 10901 and SUPPORTING DISCUSSION**

I

Motion

On March 17, 2008 the United States Department of Energy (“DOE”) filed an Application under provisions of 49 U.S.C. §10901 seeking a certificate of public convenience and necessity (“CPCN”) from the Board to construct and operate a proposed 300-plus miles of branch line or spur, commonly known as the Caliente Line, in Lincoln, Nye, and Esmeralda counties, in the State of Nevada (“Section 10901 Application” or “Application”).

The *sole purpose* of DOE’s proposed project is to facilitate the interstate transportation not less than 70,000 metric tons heavy metal (“MTHM”) of spent nuclear fuel (“SNF”) and high-level radioactive waste (“HLRW”) over at least a 50-year period *from* shipping sites that presently generate and/or store such waste throughout the United States *to* a geologic repository for such nuclear waste that DOE proposes to construct and operate at Yucca Mountain, Nevada (“Yucca Mountain Project” or “YMP”).

By decision dated April 11, 2008 the Board adopted a procedural schedule calling for public comments “in support of or opposition to” DOE’S Application by July 15, 2008 and DOE to reply by August 29, 2008. Based on prior Board decisions, this initial schedule was presumed to invite comment focused *solely* on public convenience and necessity (“PCN”) issues under Section 10901 and 49 CFR 1150 raised by the Application, and *not* on environmental issues that require investigation by the Board

under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-43 and 49 CFR Part 1105 to be invited later before issuance of a CPCN.¹

For reasons offered herein the State of Nevada (“Nevada”) moves the Board to *suspend* further proceedings on DOE’s Application, or *in the alternative*, if suspension is denied, Nevada moves the Board to *reopen* the procedural schedule and record developed as a result of the Board’s April 11 decision previously adopted for public comment on public convenience and necessity (“PCN”) issues raised by DOE’s Application.

A. Suspend Proceedings on Application.

Nevada contends that Board should *suspend* proceedings on DOE’s Application *because* (a) the Application’s stated predicate of public convenience and necessity for the Caliente Line is solely derived from and singularly dependent upon the construction and operation of the proposed repository at Yucca Mountain, and (b) as evidenced by the appropriations history for YMP and the unequivocal opposition to YMP by the Obama Administration and its FY2010 budget for YMP, necessary support for the future construction and operation of the proposed YMP repository, and related activities such as the Caliente Line, has all but vanished.

The past reductions in Congressional appropriations and the present opposition and budget of the Obama Administration, represent *materially changed circumstances* in public demand, need or interest for YMP. As a consequence, further proceedings by the

¹ See *Alaska Railroad Corporation - Construction and Operation Exemption - Rail Line Between Eielson Air Force Base (North Pole) and Fort Greeley (Delta Junction)*, AK, STB Finance Docket No 34658 (served Oct. 4, 2007), and *United States Department Of Energy - Rail Construction and Operation - Caliente Rail Line In Lincoln, Nye, And Esmeralda Counties, Nevada*, STB Finance Docket No. 35106 (served June 27, 2008), p.5.

Board on DOE's Application to construct and operate a railroad for the sole purpose of transporting spent nuclear fuel and high-level radioactive waste to YMP are no longer warranted and would serve no purpose. In short, because of its integral dependence on a now-questionable YMP, DOE's Application proposes and seeks permission to construct and operate what could ultimately be *a rail line to nowhere*.

Suspension of proceedings would conserve the resources of the Board, DOE, Nevada and other PORs. Proceedings could be resumed later if circumstances warrant.

B. Alternatively, Reopen PCN Schedule and Record.

In the alternative, if the Board declines to suspend proceedings, Nevada moves the Board to *reopen* proceedings for development of the record on PCN issues raised by DOE's Application for several *purposes*: *first*, to allow, if not compel, DOE to supplement its March 17 Application in light of the *materially changed circumstances* as evidenced by appropriations history for YMP and the Obama's Administration's opposition to YMP and its proposed FY2010 budget for YMP; *second*, to afford Nevada and other Parties of Record ("PORs") the opportunity to undertake limited discovery related to DOE's supplement on PCN issues in light of the changed circumstances; *third*, to afford Nevada and other PORs the opportunity file supplemental comments related to PCN issues raised by DOE's Application and supplemental filing; and *fourth*, for the Board to hold a post-supplement public hearing focused on PCN issues.

In addition to the *materially changed circumstances*, Nevada contends DOE's "*cumulative filings to date*"² provide further *reasons* for the Board to reopen its previously adopted PCN procedural schedule and record developed to date:

first, DOE's cumulative filings continue to omit essential, material facts detailing the rail construction proposed as well as the management, operation and maintenance of the rail operations and service proposed, and the costs thereof, all of which renew and raise significant issues concerning (a) the propriety of DOE as an applicant under Section 10901, (b) the essential need and basic purpose of the information requirements of 49 C.F.R. Part 1150, and (c) the recognized CPCN criteria that require reopening.

second, for purposes of development of the record, the absence of essential, material facts has, in the past, irreparably compromised the opportunity of Nevada and other PORs to fairly evaluate and adequately comment on PCN issues raised by the Application previously invited and filed under the Board's April 11 decision;

third, DOE's cumulative filings to date contain additional, new information and assumptions, as well as inconsistent and changed positions, regarding material elements essential to support and evaluate issuance of a CPCN that, in the absence of an

² As used herein "*cumulative filings to date*" include DOE's initial *Application*, filed March 17, 2008, DOE's *Reply* comments filed August 29, 2008, DOE's final NEPA documents ("*Rail Alignment FEIS or RA-FEIS*", "*Rail Corridor FSEIS or RC-FSEIS*" and "*Repository FSEIS or R-FSEIS*") filed August 14, 2008, supplementing *Application Exhibit H*, DOE's *Opposition* to Timbisha Shoshone Tribe, CSX, NS and CHS motions, respectively filed October 8, October 29, and November 10, 2008, DOE's *Statement* and testimony provided in the Board's December 4, 2008 hearing in Las Vegas, NV; as well as DOE's *Analysis of the Total System Life Cycle Cost of the Civilian Radioactive Waste Management Program* ("*TSLCC*"), published July 2008, DOE's *Record of Decision* ("*ROD*") filed October 6, 2008, DOE's *Project Decision Schedule for YMP* ("*PDS*"), draft published January 2009, and DOE's *National Transportation Plan* ("*NTP*"), draft published January 2009 (copies of the last four are attached as Exhibits A, B, C, and D).

opportunity to discover and more critically examine, will, in the future, continue to compromise the ability of the Nevada and other PORs to fairly evaluate and adequately address the PCN issues raised by the Application under Part 1150; and

fourth, DOE's previously omitted information, as well as that newly proffered, involve facts material to environmental issues raised by the Application that, without supplementation, adequate explanation or discovery, will in the future, compromise the ability of Nevada and other PORs to fairly evaluate and adequately comment on NEPA issues that the Board must consider under 49 C.F.R. Part 1105.

In sum, Nevada's request to reopen rests on two recognized Board *criteria*:

one, even after several decades of planning and expenditure of millions of dollars, DOE's cumulative filings continue to omit material facts essential to evaluate both PCN and NEPA issues raised by its Application under Section 10901, and

two, DOE's cumulative filings contain additional, new evidentiary information and assumptions, material and essential to the evaluation of both PCN and NEPA issues raised by its Application.

DOE's October 6, 2008 Record of Decision ("ROD") and its January 2009 National Transportation Plan ("NTP"), both issued months after DOE's March 2008 Application, confirm the extensive lack of definite, factual information concerning DOE's plans for the transportation proposed and provide sufficient justification to reopen since the ROD and NTP demonstrate that DOE's Application is little more than an outline of a work-in-progress representing a snapshot of concepts at the time of its filing.

Finally, it is evident that DOE's Application and cumulative filings generally precede the new, final safety and security rules promulgated by DOT's Pipeline and

Hazardous Materials Safety Administration (“PHMSA”) in conjunction with the Federal Railroad Administration (“FRA”) and DHS’s Transportation Security Administration (“TSA”) that became effective December 26, 2008 and establish new standards for rail route selection and risk analysis that directly affect DOE’s options and PCN issues, as well as impacts on Nevada and other stakeholders. Reopening on PCN issues is warranted to assess the impact of the new regulatory regime that now governs the safety and security risk analysis for transportation of spent nuclear fuel and high-level radioactive waste.

If the Board decides not to suspend proceedings, *reopening* for purposes of supplementation, limited discovery, additional public comment and hearing on PCN issues will not impair or prejudice the rights of DOE or unnecessarily delay the proceedings. Rather, it will protect the rights of stakeholders and PORs to fully evaluate DOE’s Application and supporting information, and file additional responsive comments on PCN issues, and at the appropriate time, on NEPA issues as well. It will prove to be efficient in developing a complete evidentiary record on PCN issues and avoid the need for serial filing of supplementary pleadings by responding commentators as well as supplementary replies by DOE, now evident in these proceedings.

Requiring more adequate compliance by DOE with information regulations in Part 1150 to support its Section 10901 Application will promote the fair, effective and efficient review of PCN issues and related NEPA issues in this unique proposed rail transportation transaction, the effects of which are not limited to Nevada but affect the entire national rail system, its infrastructure and service operations.

II

Discussion Supporting Motion

A. Nevada's Interest

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

Nevada is responsible for the public health and safety of Nevada employees, and also other workers within the state, especially those that may be adversely impacted by YMP-related activity. Most importantly, Nevada is responsible as trustee to protect the groundwater resources held by the state in trust from any adverse consequences resulting from a project such as YMP.

For the purposes of proceedings on DOE's application, the core purpose of which is to evaluate the feasibility of DOE's "mostly rail" scenario for the interstate transportation of spent nuclear fuel and high level radioactive waste to YMP from locations throughout the U.S., Nevada is a stakeholder and a Party of Record ("POR").

B. Scope of Proposed Transaction at Issue.

The scope of DOE's proposed interstate transportation transactions is essential to evaluating both DOE's Application and this motion.

DOE's Application under Section 10901 seeks Board approval to construct and operate in Nevada a single-line branch line or spur of some 300-plus miles off the national rail system via interchange facilities at Caliente, NV to DOE's proposed

geologic nuclear waste repository project at Yucca Mountain, NV (“YMP”), the first of its kind in the world.

DOE’s Application is project-specific to YMP. It is designed for the *sole purpose* of transporting more than 70,000 metric tons heavy metal (“MTHM”) of spent nuclear fuel (“SNF”) and high-level radioactive waste (“HLRW”) over a period of 50 years from shipping sites throughout the United States to the Yucca Mountain facility. The waste to be transported presently consists of 63,000 MTHM of commercial SNF generated by 104 operating reactors and 14 reactors that have ceased operations, as well as 2333 MTHM of DOE and Naval Propulsion Program SNF and 4667 MTHM of DOE HLRW stored at 4 sites. Shipping sites are located in 39 states outside Nevada and will require nationwide, interstate transportation and routing under DOE’s proposed “mostly rail scenario”.³

It is important to note that the Nuclear Regulatory Commission (“NRC”) has determined that commercial spent nuclear fuel presently stored at or near the reactor sites can be retained safely at those on-site locations for 100 years, and is currently considering extending that waste confidence policy to 120 years.⁴ DOE’s proposed national transportation plan to YMP will require long-haul movements through high-threat urban areas (“HTUAs”) and many other large, heavily populated or significant communities, from reactor or storage locations where, according to NRC, there is otherwise ample on-site storage in which that waste can be stored for 100-120 years. Need for the interstate waste transportation to YMP is questionable as an initial premise.

³ *NTP*, pp. 3-4.

⁴ 10 CFR Part 51, *NRC Waste Confidence Decision*, 1984, 1990 review, Oct. 9, 2008 reopening, 73 FR 59551 (proposal to raise waste confidence rule by 60 yrs. post-licensed life (original+renewal=60yrs) for total of 120 yrs from current 100 yrs. total).

Under its “mostly rail” scenario, DOE variously estimates its sustained campaign to transport waste to YMP will require 9500-9600 rail shipments (3-5 casks per train, 190-317 trains per year) and 1100-2700 truck shipments (one cask per truck, 53-90 trucks per year). In addition, DOE estimates there would be 29,000 rail shipments of construction materials, diesel fuel and supplies for YMP.⁵ For the “mostly rail scenario”, the number of waste rail shipments varies because further investigation revealed that 22 of the commercial shipping sites able to handle rail casks do not have rail service and will require intermodal shipments via heavy haul truck or barge to railheads (16 being on or near navigable waterways).⁶ Of shipping sites with rail access, 23 are on lines of shortline carriers.⁷

The breadth and impact of DOE’s proposal is evident by contrast with pre-YMP shipments of SNF/HLRW. Numbers for pre-YMP shipments, taken from September 2008 Congressional testimony vary widely: 3000 since early 1960s (DOE est.), 1500+ over past 50 years (DOT est.), 1500 since 1979 (NRC est.), 540 between 1964-2004 (NAS est.), 317 in 2003-2007 (AAR); and only 14 in 2007 (AAR).⁸ This testimony suggests that, without more detail, Government statistics tend to overstate the levels of pre-YMP SNF/HLRW traffic and safety.

For YMP traffic, DOE initially proposed *new, additional* 9600 rail shipments and 1100 truck shipments of SNF/HLRW, assuming a 90% “mostly-rail” availability, that has

⁵ *Application*, p. 14, *R-FSEIS*, p.21, *RC-FSEIS/RA-FEIS*, p.43, PDS, p. 8, *Cf. ROD*, p. 14, (“3000 rail shipments of spent nuclear fuel and high-level radioactive waste to the repository”).

⁶ *NTP*, p. 5.

⁷ *See Section II.F.2(b)(1), Short Lines, infra*, pp.52-56

⁸ *Written Statements* of the parties before the Senate Committee on Commerce, Science, and Transportation, September 24, 2008.

been altered to 9500 rail and 2700 truck because of less than “90% mostly-rail” availability at shipping sites.⁹ It is significant to note that rail/truck shipment levels obviously depend on the facilities and capabilities available at the various shipping sites. Thus, in the event rail shipments via DOE’s proposed “mostly rail scenario” are not available or diminish in number, truck shipments would necessarily increase such that routing, impacts and areas affected could all change dramatically.

DOE’s proposed new, additional shipments on *exposed* rail or highway systems dramatically increase safety and security risks in a post-9/11 world that are the subjects of concern for several Federal agencies engaged in related joint rulemaking addressing those issues.¹⁰ Almost any serious event on either system, accidental or otherwise, could compromise the system, in whole or in part, for a substantial period.

While both systems are physically exposed, only the national rail network is a *closed-system*, which means a rail shipment’s *access to* and *egress from* the national rail system is both controlled and limited through complex protocols that govern loading, unloading, switching, transportation, trackage agreements and interchange arrangements. In addition, the nature of the radioactive commodities shipped will require compliance with *new* shipment-specific safety and security regulations for coordination, inspection, route analysis/selection, chain of custody and control, interchange, storage and delays in transit.¹¹

⁹ *Application*, p. 14; *R-FSEIS*, p. S-21.

¹⁰ See final rules adopted by the Department of Transportation’s Pipeline and Hazardous Materials Safety (“PHMSA”) in coordination with the Federal Railroad Administration (“FRA”) in 49 C.F.R. Parts 172, 179, and 209, 73 FR 72182, and the Department of Homeland Security’s Transportation Security Administration (“TSA”) in 49 C.F.R. Parts 1520 and 1580, , 73 FR 72130, all effective December 26, 2008.

¹¹ *Id.*; 49 C.F.R. Parts 172,174,209, 1520 and 1580.

By contrast, shipments in legal weight truckloads generally enjoy more open, flexible access to and egress from any part of the national highway system. But restricted heavy-weight and over-size truckloads, including HAZMAT loads, do have more limited route options available.

Given the physical and operational complexities of the nation's rail network, DOE's "mostly rail scenario" proposes large numbers of new YMP rail shipments nationwide over a sustained period that will require extensive, closely coordinated planning by many interests and authorities regarding service, safety and security, as well as costly system and infrastructure improvements and maintenance.

The legal capacity of the proposed repository is 70,000 MTHM.¹² Reactors presently generate 2000 tons of waste per year.¹³ In December 2008, DOE reported that, because waste inventories of commercial and Federal SNF are projected to exceed that capacity by 2010, with estimated growth to 130,000 MTHM, either an expansion of the proposed Yucca Mountain repository or a second repository would be required.¹⁴ Currently, there are 17 NRC licensing applications for construction of 26 new reactor units.¹⁵

In addition, the proposed Global Nuclear Energy Initiative ("GNEP") of the Bush Administration, now undergoing a Programmatic EIS, could also increase the number nuclear shipments to YMP as GNEP relies solely on a YMP repository.¹⁶ Analytically, DOE assumes 2 modules, Modules 1 and 2, each with a case A and B, without or with

¹² *NWPA*, Section 114(c), 42 U.S.C. §10134(d).

¹³ *Application*, p. 19

¹⁴ DOE's *Report to the President and the Congress on the Need for a Second Repository*, DOE/RQ-0595, December 2008.

¹⁵ www.nrc.gov, *Nuclear Reactors*

¹⁶ *GNEP DPEIS; DOE/EIS-0396*, 73 FR 61845, 73 FR 75087

recycling under GNEP, all of which result in the increase of YMP's role, size of facilities, and number of shipments of waste from domestic *and* foreign sources.¹⁷

All of the SNF and HLRW commodities to be transported, except Naval SNF, will be wholly owned by DOE. The branch Caliente Line and YMP destination facilities to be constructed will also be wholly owned and operated by DOE.

In Nevada, maps demonstrate DOE's selection of the Caliente Corridor routing for the transport of spent nuclear fuel and high-level radioactive waste to YMP was chosen for its *isolation* and *remoteness* from human habitation and commerce. In stark contrast, US maps also demonstrate that DOE's nationwide transportation plans implicate and affect the entire national rail transportation system and infrastructure running through some of the most populated regions of the country, 30 of which are designated High Threat Urban Areas ("HTUAs") that have new, special regulatory requirements.¹⁸

There is little serious doubt that the infrastructure supporting the national rail system is constrained and in dire need of constructive rehabilitation and improvement. DOE's proposed activities will require both *improvements to existing* and *construction of new* infrastructure involving many different organizations, interests and geographic locations. Its Application states that funding for construction of the Caliente Line will come from the Nuclear Waste Fund,¹⁹ but the NTP has now made clear that DOE "*will not fund upgrades of transportation infrastructure at shipping sites or the national rail*

¹⁷ *R-DSEIS*, p. S-47, *R-FSEIS*, pp. S-51-54.

¹⁸ DOE's *Application* (Exhibit C) and EIS documentation (*R-FSEIS*, p. 20, *RC-FSEIS* pp.2, 20, and *RA-FEIS* p. S-37) representative rail routes evidence that DOE's selection of the Caliente Line option would affect nationwide about 836 counties with a total estimated 2005 Census population of about 138 million and about 193 central cities with a total estimated 2005 Census population of about 39 million. *See also PDS*, p. 10., and *NTP* p. 26 . *See TSA Rules* at 49 C.F.R. 1580.3, HTUAs identified in Appendix A.

¹⁹ *Application*, p. 36, *Reply*, p. 4

system.” (Italics added.)²⁰ Thus, other funding sources must be found for needed system repairs and improvements to main-line and short-line rail infrastructures, as well as intermodal facilities.

Similarly, the Application states that for commercial common carriage operational facilities and commercial sidings would be needed, but suggests only that “*funding for these ...would be provided by the private sector, local, state or federal governmental agencies.*” (Italics added.)²¹

Thus, it is essential to examine funding for the proposed rail construction, rail transportation, and rail operations in terms of the past, present and needed future appropriations. Information on general and specific funding requirements is currently lacking in the Application. Broadly, questions concerning what entity(s) will be involved, what they may or will be required to pay, from what source(s) and how much, all remain unanswered for DOE’s proposed Nevada and national transportation activities for YMP. For evaluation of its Application and cumulative filings, it is singularly significant that DOE is a shipper applicant, and funding for the construction and operation of line in Nevada will be dependant on solely on Federal appropriations and not on revenue from the line.²²

For any meaningful analysis, it is important to keep in mind that the scope of DOE’s proposed transportation activity of spent nuclear fuel and high-level nuclear waste from sites nationwide to YMP will involve very complex operations over an integrated, closed national rail system network. The scope of proposed rail transportation project

²⁰ *NTP*, p. 16

²¹ *Application*, p. 15.

²² *Id.* at 38

requires a comprehensive, somewhat holistic, systematic approach to development of the record, analysis and evaluation of DOE's Application, that involves an inter-connected series of proposed transportation activities related to loading, transit, interchange, and unloading that must occur nationwide and within Nevada.

DOE's proposed transportation plan is not merely a movement from point A to point B, but will force the integrated utilization of the entire national rail system. This is especially true since the proposed rail transportation casks, now under study and development as transportation, aging and disposal storage canisters ("TADs"), represent an entirely *new and as yet a conceptual, unapproved* containment and transportation system.²³ The containment equipment actually utilized will require familiarity with that which the shipper's facility can or normally does handle as well as that which the receiver's facility can and does handle. Carload capacities, track and bridge limits will dictate real world decisions on system use. Currently, general freight service cars weigh 286,000 lbs. loaded and 30,000 lbs. empty, by contrast, SNF cars weigh over 400,000 lbs.²⁴ At present, AAR gross weight limits for unrestricted interchange are 263,000 lbs. for 4-axle cars and 394,500 lbs. for 6-axle cars.²⁵

DOE's proposed rail transportation requires familiarity with waste acceptance, planning and scheduling, proper equipment, verification and inspection procedures. DOE's operational role is not clear nor is the oversight concerning transportation. DOE is largely a non-regulated, governmental entity. It is not clear what Federal or state

²³ *NTP*, pp. 9-12

²⁴ www.aar.org, *Testimony of Edward R. Hamberger, Pres.&CEO of AAR*, before the U.S House of Representatives, the Subcommittees on Highway and Transit and Railroad of the Committee on Transportation and Infrastructure, April 25, 2002.

²⁵ *AAR Rule 91*.

agencies have or will exercise authority over and ability to monitor DOE's implementation of its transportation scheme to ensure compliance with applicable regulations.

DOE is not a regulated entity by either NRC or DOT. NRC's rules will have limited application to shipments. Likewise, the extent that DOT's rules will apply is also not yet clear, as is the ratio of rail/truck shipments. The rules DOE must utilize, adopt, or comply with, will depend on the roles and functions it undertakes in the proposed transportation transactions. DOE is not a rail carrier subject to STB regulation under Section 10501(a). Nor is it a "local government entity" subject to STB authority under Section 10501(c).

Finally, it is appropriate to note that most experts would conclude that shipping spent nuclear fuel and high-level radioactive waste should not be considered a routine activity – it never is! No shipments will be the same. Each shipment will be differentiated by the shipping facility, the containment equipment and service utilized, the routing and available use of intermodal equipment and rail lines, the organizations and personnel handling shipments and transportation, the system events unrelated to shipments of SNF/HLRW, and even weather patterns.

While each SNF/HLRW shipment may differ, all will have a uniform characteristic – the waste is toxic and deadly!

DOE's filings to date provide woefully inadequate information upon which to evaluate its Application. DOE argues its Application is limited in scope to the proposed construction and operation of a railroad in Nevada, and thus its consideration should be confined to proposed Nevada activities. Since the shipments contemplated obviously and

necessarily involve the entire national rail system, assessment of national rail system implications and elements of the National Rail Transportation Policy (“NRTP”), 49 U.S.C. §10101, simply cannot be ignored and must be evaluated. The proposed transportation contemplated by DOE’s Application is not limited in scope and should not be confined to consideration of proposed Nevada activities.

DOE’s seeks to limit the scope of the Board’s analysis to the proposed construction and operation of the Caliente Line while at the same asks the Board to grant a CPCN in order to facilitate the interstate transportation of spent nuclear fuel and high-level radioactive waste over that line from shipping origins nationwide. DOE’s argument on limited scope of review is neither credible nor persuasive. The Caliente Line is but a spur or branch line to enable DOE to serve an alleged national demand, need and interest for transporting highly toxic, deadly HAZMAT nationwide. DOE’s “mostly rail scenario” necessarily relies on the national rail system for access to the Caliente Line and YMP. DOE’s essential reliance on the national rail system places that system under scrutiny for required evaluation of PCN and NEPA issues raised by the proposed transportation of SNF and HLRW to YMP in which the Caliente Line is merely a line segment.

In short, this is not a case about a line segment, but is a case about the entire interstate rail system available for the transportation of SNF and HLRW. Interestingly, DOE *concedes* that the Board’s consideration should be a “*broad national scope*.”²⁶

²⁶ *Id.* at 23

C. Jurisdictional Issue.

In Nevada, the proposed single-line rail spur and related transportation facilities will be wholly owned and operated by DOE.²⁷ The Caliente Line will be used and operated exclusively by DOE to transport the spent nuclear fuel and high-level radioactive waste that DOE owns from various origin sites throughout the US to the YMP destination site that DOE will own. DOE has not identified any contractor or disclosed terms for operational responsibilities, which suggests that DOE itself intends to be the private rail operator within Nevada over the Caliente Line, which it may do.²⁸ Since DOE is not, and undoubtedly never will be, a rail common carrier, assumption of the common carrier obligation remains at issue.

Based on applicable precedent, Nevada previously argued the construction and operation of DOE's proposed single-line rail spur should be deemed private carriage over private track to a private facility beyond the authority of this Board, 49 U.S.C. §10906, and does not qualify for preemptive Board jurisdiction under 49 U.S.C. § 10501(b).

By motion dated April 2, 2008 and amended May 2, 2008, Nevada moved the Board to reject DOE's Application, or alternatively to require its supplementation, based in part on the absence of common carrier service resulting in lack of jurisdiction under 49 U.S.C. §10501(b). By decision served June 27, the Board's denied Nevada's motion.

In its decision the Board presumed common carrier service and premised jurisdiction solely on DOE's "holding out" in its Application that it is "*seriously*

²⁷ *Application*, p. 6.

²⁸ *Application*, pp.34-35 (On the Caliente equipment will be uncoupled from UP locomotives and coupled to "Caliente Line" operated dedicated trains or locomotives.); *Cf. NTP*, p. 16 ("DOE will operate over existing [national highway and rail] systems like any other shipper.")

considering using its line to provide common carrier service by virtue of its filing the instant application” and that “[i]t would prefer to use the line for common carrier service,” despite the uncertainty and absence of any factual operating details in the Application. The Board concluded “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.”(Italics added.)²⁹

DOE’s cumulative filings renew issues concerning the soundness of “holding out” as a premise for Board jurisdiction.

Moreover, if it appears that DOE’s “mostly rail” scenario is or will not be feasible, rail/truck shipment levels will change. If mostly truck shipments become necessary, either as an interim or permanent transportation mode, the nature of motor carrier service and its impacts would be dramatically different for Nevada and the nation, would be activity over which this agency has no jurisdiction.

D. Proceedings on DOE’s Application.

In evaluating an application under Section 10901, the Board customarily adopts two separate procedural schedules inviting public comment: *first*, a schedule for comment on the issues raised by the application related to public convenience and necessity (PCN), and *second*, a later schedule for comment on environmental issues raised by the application related to the National Environmental Protection Act (“NEPA”).³⁰

By Decision served April 11, 2008, the Board adopted a Procedural Schedule calling for all PORs to file comment by July 15, 2008 “in support of or in opposition to”

²⁹ See STB Finance Docket No. 35106, Decision at p. 3, served June 17, 2008.

³⁰ See cases n. 1, *supra*.

DOE's Application, and DOE to reply to those comments by August 29, 2008. Nevada concluded this was the call for public comment on PCN issues.

Nevada and other PORs filed comments on July 15, 2008 to which DOE filed reply on August 29, 2008. On July 18, 2008 Clark County Nevada requested additional time to comment, which the Board denied on July 30. On September 19, 2008 the Timbisha Tribe requested additional time to reply. In addition, on September 18 and October 10, 2008, CSX Transportation ("CSX") and Norfolk Southern ("NS") respectively filed Motions for Leave to file Reply to DOE's Reply. On October 23, 2008 Caliente Hot Springs (CHS) also filed a Motion for Leave to File Reply to DOE's Reply. DOE has filed opposition to Timbisha's request for additional time and CSX's, NS's and CHS's motions to file replies.

To date, the Board has not published a procedural schedule under Part 1105 for public comment on NEPA-related issues raised by DOE's Application.

By decision dated October 31, 2008, the Board set and noticed a public hearing that was held December 4, 2008 in Las Vegas, NV. If intended to be the *only* public hearing in this case, Nevada contends its timing was premature and its non-focused scope too unstructured to be productive, all of which diminishes the inherent value of a public hearing, as to either PCN or NEPA issues.

E. Reasons to Suspend Proceedings on DOE's Application.

For decades since the NWPA amendments of 1987, the proposed repository at Yucca Mountain has been consistently and continuously opposed by the State of Nevada on behalf of its citizens.

Reasons for suspension of proceedings on DOE’s Application are premised on the now-vanished, necessary support for YMP-related activities as evidenced by the history of Congressional appropriations for YMP and the Obama Administration’s opposition to the construction and operation of the repository at Yucca Mountain and its proposed budget for FY2010. These represent *materially changed circumstances* that warrant suspension of proceedings.

1. History of Appropriations for YMP.

Appropriations since 2000 evidence diminished appropriations for YMP-related activities. The past appropriations history of DOE’s Office of Civilian Radioactive Waste Management (“OCRWM”), the office responsible to manage and dispose of spent nuclear fuel and high level radioactive waste, provides insight of Congressional funding for YMP-related budget requests and appropriations:

<u>Year</u>	<u>DOE Request*</u>	<u>Congressional Appropriation*</u>
2000	\$409	\$351
2001	\$438	\$402
2002	\$445	\$377
2003	\$537	\$457
2004	\$591	\$577
2005	\$880	\$572
2006	\$651	\$495
2007	\$544.5	\$444.7
2008	\$494.5	\$386.4
2009	\$494.7	\$288.4

*In millions

For FY2010, the Obama Administration’s budget does not include suggested funding but the budget statement for YMP is: *“The Budget focuses on improved performance and accountability for the environmental legacy of the Nation’s nuclear weapons program by addressing health and safety risks across the country. The Yucca Mountain program will be scaled back to those costs necessary to answer inquiries from*

*the Nuclear Regulatory Commission, while the Administration devises a new strategy toward nuclear waste disposal.”(Italics added.)*³¹

2. Opposition of Obama Administration to YMP.

The Obama Administration’s opposition to YMP and its FY2010 budget are understood by all to eliminate virtually all funding for Yucca Mountain, leaving *only* an amount sufficient for DOE to service inquiries from the Nuclear Regulatory Commission (“NRC”) in connection with DOE’s license application for construction and operation of the proposed repository at Yucca Mountain that was filed in June 2008.

The opposition of President Obama is consistent with the opposition of Candidate Obama to the proposed geologic repository at Yucca Mountain of which he said in a May 20, 2007 letter to the Las Vegas Review-Journal: *“I believe a better short-term solution is to store nuclear waste on-site at the reactors where it is produced, or at a designated facility in the state where it is produced, until we find a safe long-term disposal solution that is based on sound science.”*(Italics added.)

DOE Secretary Chu in a dialogue with Senator McCain before the Senate Energy and Natural Resources Committee on March 5, 2009 confirmed the view of the Administration that YMP was no longer an option:

Sen. McCain: “...is it true that a DOE spokeswoman told Bloomberg that President Obama and you ‘have been emphatic that nuclear waste storage at Yucca Mountain is not an option, period?’”

Sec. Chu: “That’s true”

Sen. McCain: “...so now we’re going to have spent nuclear fuel sitting around in pools all over America, also tell the Nuclear Power industry we have no way of either

³¹ www.whitehouse.gov, President’s FY 2010 Budget, Department of Energy, Budget Statement: **“Focuses on the Cleanup and Management of Radioactive Waste and Nuclear Materials.”**

reprocessing or storing spent nuclear fuel around America, and we expect nuclear power to be an integral part of this nation's energy future. What's wrong with Yucca Mountain, Dr. Chu?"

Sec. Chu: "We have learned a lot more in the last 20-25 years since Yucca Mountain."

Sen. McCain: "I know that. What is wrong with Yucca Mountain, Dr. Chu?"

Sec. Chu: "Uh, I think we can do a better job and, but going to your original question about what to do with the spent fuel, the Nuclear Regulatory agency has said that we can solidify the waste at the current sites without risk to the environment and so, while we do that..."

Sen. McCain: "Has any nuclear power plant made any plans for solidification of the nuclear waste?"

Sec. Chu: "Yes... There are solidification plans going on today."

Sen. McCain: "...Is there any plans for reprocessing of spent nuclear fuel?"

Sec. Chu: "There is, well, I support reprocessing research. I think that's an important part of the nuclear power plan."

Sen. McCain: "Why would we need research when we know the Europeans and the Japanese are already doing it in a safe and efficient fashion?"

Sec. Chu: "Well, I believe the Europeans and the Japanese are doing it, but they're doing it in a way that lends to risk of proliferation, nuclear proliferation. The Japanese have already..."

Sen. McCain: "And you balance that risk of proliferation versus spent nuclear fuel sitting around in pools at nuclear power plants all over the country and telling industry that we may do some research on reprocessing..."

Sen. McCain: "...to say that after 20 years and 9 billion dollars spent on Yucca mountain that there's not an option 'period' to me is a remarkable statement." (Italics added.)³²

Dr. Chu's testimony makes clear that the Obama Administration not only opposes the geologic repository but plans on undertaking a critical re-evaluation of nuclear power and waste issues.

³² www.energy.senate.gov, Full Committee Hearing: to receive testimony regarding draft legislative proposals on energy research and development (SH-216). Thursday, March 5, 2009, Statement and Testimony of Secretary Chu. (Video transcription)

In testimony before the Senate Budget Committee on March 11, 2009 Secretary Chu confirmed that YMP is not an option and stated that a panel will be established soon and expects the panel will have a proposal sometime before the end of the year:

In Opening Statement:

Sec. Chu: "...meanwhile the budget begins to eliminate funding for Yucca Mountain as a repository for our nation's nuclear waste. Both the president and I have made clear that Yucca Mountain is not a workable option and that we'll begin a thoughtful dialogue on a better solution for our nuclear storage waste needs."

In response to Sen. Gregg

Sec. Chu: "...I believe that nuclear power is an essential part of our energy mix, it provides clean, base load generation of electricity. In terms of the Yucca Mountain issues and nuclear waste, I think looking back at how that started it..."

Sen. Gregg: "I don't want to debate Yucca, because I accept the fact that Yucca may not be viable ..."

Sec. Chu: "So, so what I intend going forward to do is beginning to discuss with various people, a blue ribbon panel to say ok let's, let's develop a long term strategy that must include the waste disposal plan in order to go forward."

Sen. Gregg: "But are you going to limit the licensing of these 31 pending plants until you complete this, as you called it 'thoughtful dialogue'".

Sec. Chu: "...Well, I don't think the NRC should be limiting that or putting the licensing on hold, quite frankly, because the NRC has also said that we can put in the waste, currently we now have in distributed sites, into dry cask storage and that dry cask storage can be safe for decades while we develop this, and within this year we hope to develop a plan that can go forward. So, I don't see that as preventing going forward with aggressive licensing quite frankly, but again that's the NRC domain."

In response to Sen. Crapo

Sec. Chu: "...we have to take a fresh look at the nuclear waste repository strategy as well. It's all incorporated in the strategy, which includes research into making fuel cycling, re-cycling a reality."

In response to Sen. Sessions

Sen. Sessions: "...you recognize, do you not, that if we don't do the Yucca that you've decided not to do, if we don't do that we have a very real obligation to come forward

with a positive plan, maybe it's recycling which I favor and have offered legislation to that effect, but some sort of plan that would break the log jam here of how to handle the waste."

Sec. Chu: "I absolutely agree with that. We have to come up with a viable plan that's going to be acceptable to our country. Absolutely. And it has to be done in a timely manner." (Italics added.)³³

The Nuclear Energy Institute ("NEI"), the industry association, has apparently conceded the death of the geologic repository and supports a "blue ribbon committee" study of waste confidence issues.³⁴

3. Materially Changed Circumstances Justify Suspension.

Past and present events represent *materially changed circumstances* when considering further proceedings on DOE's Application. The evidence of dramatically reduced Congressional appropriations and the Obama Administration's clear opposition to YMP-related activities and its FY2010 budget provide ample justification for the Board to suspend further proceedings on DOE's Section 10901 Application to construct and operate a rail line to serve the YMP. If DOE's proposed repository is not to be, then DOE's proposed railroad to serve the repository is not required.

DOE **concedes** *financial ability, public demand and public interest* are critical elements that must be established to support the grant of the CPCN sought by DOE's Application.³⁵ DOE has emphasized that "*The following three factors now guide the Board's public convenience and necessity determination in implementing [the] pro-construction policy: (1) whether the applicant is financially able to undertake the project*

³³ www.budget.senate.gov, Sec. Chu's comments on Yucca Mountain from the March 11, 2009 Senate Budget Committee hearing on **The President's FY2010 Budget for the Department of Energy**. (Video transcription)

³⁴ *Energy Daily*, op-ed article entitled *Obama Strangling Yucca Mountain With Funding Cut*, by Marvin Fertel (Pres/CEO of NEI), February 27, 2009.

³⁵ *Application*, p. 36, *Exhibits E-F, Reply*, p.15 and *Statement*, December 4, 2008, p. 4.

and provide the service; (2) whether is a public demand or need for the proposed service; and (3) whether the proposal is in the public interest and will not unduly harm existing services.”(Italics added.) ³⁶ However, as past and present events demonstrate, these elements no longer exist to support the Application.

DOE’s Project Decision Schedule (“PDS”) anticipates the repository will be operational by 2020, but states “[t]his schedule is predicated upon the enactment of legislation, similar to previous legislation submitted to Congress that addresses funding reform and permanent land withdrawal” **and** “also assumes appropriations by Congress consistent with optimum Project execution...” The PDS further **confirms** that “[s]ustained funding well above the current and historic levels will be required if the repository is to be operational by 2020” and **concedes** that “[f]unding at current levels in future years will not be adequate to support design and the necessary concurrent capitol purchases for repository construction, transportation infrastructure, and transportation and disposal casks.” (Italics added.) ³⁷

It is now evident that DOE’s stated funding requirements have not been and will not be met by government appropriations. No rail line revenue is anticipated.

In light of DOE’s position on elements necessary to support its Application and its concessions on funding requirements, the reduced Congressional appropriations and opposition of the Obama Administration provide demonstrable evidence that in reality financial, public and political support no longer exist for YMP-related activity and facilities. Evidence of materially changed circumstances also contradicts the existence of

³⁶ Reply, p 15.

³⁷ PDS, p.1.

necessary PCN elements necessary to support DOE's Application for a CPCN for a railroad to YMP.

Suspension of proceedings would obviously conserve Board resources, as well as those of DOE, Nevada and other PORs until the status of the proposed YMP is more settled. In the present circumstances, either *suspension of proceedings* until clarification of YMP status, *or alternatively*, as discussed next, *reopening the schedule* to properly develop the record on PCN issues would be an appropriate course of action for the Board.

F. If No Suspension, Reasons to Reopen PCN Schedule and Record.

If the Board declines to suspend further proceedings on DOE's Application, then based on evidence of *materially changed circumstances* discussed above and DOE's "*cumulative filings to date*"³⁸, Nevada moves the Board to reopen the procedural schedule and record on PCN issues to (1) allow, if not compel, DOE to supplement its Application to address the changed circumstances evidenced by appropriations history and, going forward, the Administration's opposition to the construction and operation of the proposed repository at Yucca Mountain, (2) provide Nevada and other Parties of PORs the opportunity for limited discovery on PCN issues in light of changed circumstances, (3) provide Nevada and other Parties of PORs the opportunity for supplemental comment on PCN issues in light of changed circumstances, and (4) schedule public hearing before the Board focused on PCN issues and the changed circumstances.

³⁸ For "*cumulative filings to date*" see n. 2, *supra*.

For several reasons, Nevada believes DOE's filings renew and raise substantial issues that require DOE to supplement its Application and warrant limited discovery, supplemental comment by Nevada and other PORs, and public hearing before the Board.

It is important to note that the need to further address PCN issues assumes the implementation of DOE's "mostly rail" scenario for the interstate transportation of spent nuclear fuel and high level radioactive waste is feasible. In the event, more critical evaluation of PCN issues concludes that scenario is not feasible, and fails, the rail/truck shipments levels change. An increase in motor carrier activity gives rise to new jurisdictional and regulatory issues, as well as new impact issues for Nevada and other stakeholder interests.

Obviously, DOE's Application and cumulative filings did not and could not consider the new PHMSA and TSA final rules for analysis of safety and security risks in the transportation of HAZMAT, such as SNF and HLRW, that became effective December 2008. Reopening to apply the risk analysis criteria under the new rules is warranted for record development on PCN issues as well as NEPA issues.

1. DOE's Filings Continue To Omit Essential, Material Facts.

DOE's filings continue to omit essential, material facts detailing the rail construction proposed as well as the management, operation and maintenance of the rail operations and service proposed, and the costs thereof, all of which renew and raise significant issues concerning (a) the propriety of DOE as an applicant under Section 10901, (b) the essential need and basic purpose for compliance with the information requirements of 49 C.F.R. Part 1150, and (c) the recognized CPCN criteria that require reopening.

(a) Propriety Of DOE As An Applicant Under Section 10901.

DOE filed its Section 10901 Application as a non-carrier, implying that, after construction, other entities would be the carriers providing actual transportation services and assuming the common carrier obligations on the line.³⁹ This is the customary approach when a governmental entity seeks to acquire, construct and/or operate rail lines under Section 10901.⁴⁰

However, although DOE states it will *allow* “shared use” common carrier service over the proposed line, DOE’s Application neither seeks exemption nor makes reference to the common carrier obligation that DOE, or other carrier entity, will actually assume, or for that matter, how that obligation will be terminated at the conclusion of DOE’s 50-year campaign of waste shipments to YMP.

In this case Nevada has continually made the point that, in the absence of a realistic expectation of common carrier activity on the proposed line, the Board has no jurisdiction. DOE’s filings to date, especially its NTP, fail to cure the common carrier information gap or clarify jurisdictional issues.

DOE’s filings do suggest that DOE itself, or a selected operator, intends to be a private rail operator providing dedicated train service to transport SNF/HLRW over a private line within Nevada. DOE’s Application and EIS documentation state that while an operator has not been selected, DOE describes an operation in which cask cars would be uncoupled from UP locomotives and then coupled to Caliente Rail Line operated

³⁹ *Application*, pp. 18, 28-29 and 32; *ROD*, pp. 2, 34,-35 and 42

⁴⁰ See e.g. 49 CFR § 1150.21-.24; *Common Carrier Status of States, State Agency*, 363 I.C.C. 132 (1980), *aff’d sub nom Simmons v. ICC*, 697 F. 2d 326 (D.C Cir. 1982); also *Maine DOT – Acquisition Exemption-Maine Central R. Co.*, 8 I.C.C. 2d 835 (1991)(“*State of Maine*”) and its progeny.

dedicated trains or locomotives, and that DOE “*would operate* an average of 17 one-way trains per week to transport approximately 9500 casks of spent nuclear fuel and high level radioactive waste, and approximately 29,000 rails cars of construction materials, diesel fuel and supplies for the repository and facilities” over the Caliente Line.⁴¹ Further, the EIS documents state “*the proposed railroad could be abandoned after the shipments to the repository were complete*” (Italics added.)⁴²

The NTP provides additional evidence that DOE intends to manage and operate not only the Caliente Line but also ambitiously to manage the national rail system, including lines at shipping sites. The NTP states DOE’s Office of Civilian Radioactive Waste Management (“OCRWM”) will develop and implement its national transportation strategy. DOE will utilize a “National Transportation Operations Center” and that “*all Transportation operations will be managed from a Transportation Center.*” However, for this strategy, the NTP notes that the Center’s “[c]onceptual and final design...will be undertaken by OCRMW” and the “*acquisition strategy...will be developed by OCRWM*” only “*as funding becomes available.*” (Italics added.)⁴³

The NTP states that “*a major activity in the development of the OCRWM transportation system will be the development of the capability to operate the system*” and that “[t]his capability includes shipment planning, coordination with stakeholders, dispatch of unloaded casks and associated equipment to an origin site, transport of loaded casks to the repository, secure communications, shipment tracking, and maintenance of casks and ancillary equipment” and concedes that “*OCRWM is currently*

⁴¹ *Application*, pp.34-35; *RC-FSEIS/RA-FEIS*, p. S-43

⁴² *RC-FSEIS/RA-FEIS*, p. S-47.

⁴³ *NTP*, p. 14-15

developing a generic transportation operations plan that will be used as the basis ...for full scale operations.” (Italics added.)⁴⁴ The NTP states that site-related “*details will be provided in plans developed in coordination with the shipping site, States, Tribes and commercial carries at least two years prior to initiation to the campaign.*”(Italics added.)⁴⁵

The NTP provides no additional information regarding the “shared-use option” or assumption of the common carrier obligation, and simply repeats the statement: “*As stated in the ROD, DOE has also decided to allow shipments of general freight on the rail line (Shared-Use Option,) subject to obtaining a certificate of public convenience and necessity from the Surface Transportation Board and other necessary regulatory approvals.*” (Italics added.)⁴⁶

Based on cumulative filings to date, Nevada contends that, as a governmental agency and non-carrier applicant, DOE is *not* the proper party to undertake the proposed transportation transactions required to implement the national shipping campaign contemplated by its Application, The NTP demonstrates that DOE is neither organized nor staffed to implement and/or manage an undertaking that is a sustained nationwide campaign for transporting SNF and HLRW by rail over 50 years. Nor is there any evidence of record that DOE has contracted with any parties capable of that undertaking.

For that matter, there is no credible evidence to support the proposition that DOE has the ability or capability to act as private carrier, or to implement the “shared-use option, in Nevada over the Caliente Line, or that it has contracted with parties capable of

⁴⁴ *Id.* at 15

⁴⁵ *Id.* at 17

⁴⁶ *NTP*, p. 8

doing so or capable of being effectively monitored to comply with applicable regulations governing rail transportation of SNF/HLRW shipments to YMP.

In the absence of reopening, there is scant record evidence that DOE is an appropriate entity to receive a CPCN based on its Application and cumulative filings.

(b) Essential Need and Basic Purpose of Compliance with the Information Requirements of 49 C.F.R. Part 1150.

DOE's filings raise anew issues regarding the essential need and the basic purpose of the detailed informational requirements in the Board's Regulations, in Part 1150 – *Certificate to Construct, Acquire or Operate Railroad Lines*, compliance with which is essential to both PCN and NEPA issues, and (b) Part 1105 – *Procedures for Implementation of Environmental Laws*, 49 C.F.R. §§1105.1 *et seq.* by failing to include sufficiently complete environmental information and data.

Nevada contends that a fair reading of the October 6, 2008 Record of Decision (“ROD”) and January 2009 final draft of DOE's National Transportation Plan (“NTP”), both issued many months after DOE's March 2008 Application, confirm the lack of definite, factual information concerning DOE's plans for the transportation proposed and provide sufficient justification to reopen.

The ROD acknowledges DOE's Application analysis is “*based on a conceptual design of the proposed railroad that will advance through preliminary to final design during which time many details requested by commentators will become available*” and DOE intends to make “*additional refinements before construction*” that when available DOE “*will determine if there is need for additional NEPA review.*” (Italics added.)⁴⁷

⁴⁷ ROD, p. 31

The NTP itself is merely a plan to create a plan. In its Introduction, the NTP points out that “[t]his Plan outlines the Departments of Energy’s (DOE) current strategy and planning for developing and implementing the transportation system required to transport spent nuclear fuel and high level nuclear waste for where the material is generated or stored to the proposed repository at Yucca Mountain, NV. The Plan provides information about how DOE’s Office of Civilian Radioactive Waste Management (OCRWM) intends to develop a safe, secure and efficient transportation system and how stakeholder collaboration will contribute to the development of that transportation system.” (Italics added.)⁴⁸

With these introductory remarks, the NTP is replete with words and phrases that contain no material facts, only an outline of the possibilities to be developed:

“This Plan describes the elements of the nation transportation system the OCRWM is developing, the phases of that development effort and how OCRWM will collaborate with stakeholders in the development and implementation of that System. This Plan describes the transportation system that will be needed when the repository is operating at full capacity. The transportation system will be developed in stages that are consistent with waste acceptance schedules and the startup and subsequent operation of the repository.”

“The Plan will be updated as appropriate to reflect progress in the development and implementation of the transportation system, accommodate changes to the waste management system, and incorporate stakeholder and public comments. OCRWM also anticipates that detailed implementation plans will be developed in the future in*

⁴⁸ NTP, p. iv

collaboration with the stakeholder community. This document provides the framework for that future detailed planning.” (Italics added.)⁴⁹

** OCRWM anticipates that the more detailed planning documents for the national transportation system will include, but be limited to, a national operations plan, campaign plans, an implementation plan for the NWPA Section 180(c) policy, fleet maintenance and inventory management plans, security plans and emergency response plans.*

By its own terms, the NTP is little more than a plan to develop a plan “*as funding becomes available.*” The 2009 final draft NTP undercuts, if not totally destroys, the credibility of any “detail information” previously provided and relied upon by DOE in its Application filed March 2008.

By motion and comment previously filed, Nevada has raised general and specific information failures, and incorporates those arguments and authorities herein. DOE has dismissed information complaints as if compliance with Part 1150 is not required of a governmental agency such as DOE, especially regarding financial capability and public interest issues of demand, need, or harm, to construct and operate a new railroad.⁵⁰ Despite DOE’s contention, the presumptive nature of Section 10901 does not vitiate compliance with information requirements of Part 1150. DOE’s view would have the statutory presumption favoring issuance of a CPCN swallow the rule requiring supporting factual information. Part 1150 requires informative detail to establish PCN criteria and the evidentiary basis to determine whether that criteria has been satisfied and CPCN should issue. DOE’s interpretation of Section 10901 makes Part 1150 a nullity.

⁴⁹ NTP, p. 1

⁵⁰ Reply, pp. 15-23

(c) Recognized CPCN Criteria Requires Reopening.

Section 10901 does not define public convenience and necessity (PCN), but precedent suggests it is primarily a three-factor analysis:

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; and
3. Whether the construction project is in the public interest and will not unduly harm existing services.

In addition, PCN must be “evaluated in light of the rail transportation policy of 49 USC 10101” and the “interests of shippers are matters of substantial importance in determining the question of [PCN] in railroad construction applications”.⁵¹

The broad analytical criteria used to evaluate PCN are incorporated in the informative detail required by 49 CFR Part 1150, specifically *Subpart A – Applications under 49 U.S.C. 10901*: Sections 1150.1 to 1150.8 to support the application.⁵²

Applying the statutory elements of the national rail transportation policy (“NRTP”), STB regulations and precedent to DOE’s Application and cumulative filings requires review of a broad range of topics and consideration of the expansive scope of the proposed action and alternatives, including its impact on the national transportation system.

⁵¹ *Dakota Minnesota & Eastern Railroad Corporation* STB F.D. No. 33047, (*DM&E I*) served Dec. 10, 1998, pp. 15-16, citing *Tongue River I* and *Indiana and Ohio*, *infra*, n. 52.

⁵² See governing statutes, 49 USC 10101 *et seq.*, and regulations, 49 CFR Part 1150; and cases such as *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*), *I* served November 8, 1996, *II* served October 9, 2007 and *III* served March 13, 2008; *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, and *Indiana and Ohio railroad Company- Construction and Operation- Butler, Warren, and Hamilton Counties, Ohio*, 9 I.C.C. 2d 783 (1993)(*Indiana and Ohio*).

Because there are *no* definite or specific local or regional *common carrier* activities in Nevada to address, many prior comments addressing PCN factors on that issue reflect a degree of speculation.

Under Part 1150, a Section 10901 application requires evaluation of several fact-based issues: (1) the public need for the proposed project, (2) the national transportation impacts of benefit or harm, (3) the financial ability to complete the proposed project, (4) the rail system infrastructure and service construction needs, time and costs, both within Nevada and nationally, (5) the operational data and plans for the proposed transportation, (6) the public interest in safety and security of the proposed transportation, and (7) the overall national rail transportation policies.⁵³

In its Application, DOE offers what it characterizes as “*four compelling purposes*” for seeking to construct and operate the proposed rail line, the *first* of which is firmly tied to Federal Government views as expressed by the Congress, the President and the Secretary of Energy. The *second* is based on the practical fact that because there is no rail line to YMP in Nevada, construction and operation would facilitate the transport of SNF/HLRW to YMP, which necessarily gives rise to the *third*, to facilitate construction of YMP, and the *fourth*, to allow for potential common carrier service.⁵⁴ DOE also relies on the Nuclear Waste Policy Act of 1982 (“NWPA”) and 1987 amendments (“NWPA”) to support its Application.

DOE argues that the “*Board’s determination of public convenience and necessity has become less restrictive over the years as a result of pro-competitive policies reflected in the line construction provisions in the Staggers act of 1980... and [the ICC*

⁵³ *Id.*

⁵⁴ *Application*, pp. 18-24.

Termination Act]”, but as previously noted, *concedes* that “[t]he following three factors now guide the Board’s public convenience and necessity determination in implementing [the] pro-construction policy: (1) whether the applicant is financially able to undertake the project and provide the service; (2) whether is a public demand or need for the proposed service; and (3) whether the proposal is in the public interest and will not unduly harm existing services.” (Italics added.)⁵⁵

Apart from the fact there is no existing rail service or competition factor in this case, DOE’s filings to date fail to adequately address the essential elements of PCN criteria and Part 1150. As discussed in Section E *supra*, the PCN elements of financial ability, public demand, need and interest in YMP related activities have all but totally vanished because of the *materially changed circumstances* of Congressional appropriations and the opposition of the Obama Administration and its FY 2010 budget.

Just as *materially changed circumstances* provide reason to suspend, and if suspension is denied, those circumstances also provide reason to reopen and develop the PCN record. Whether the applicant is financially fit to undertake construction and provide proposed service, whether there is sufficient public need for the proposed project, and whether the applicant has the financial ability to complete the proposed project, are three factual and inextricably intertwined elements of the Board’s PCN criteria.

PCN criteria are best evidenced and evaluated under the Federal appropriations process and its record. In reality, the national public demand, need and interest for the construction and operation of a railroad in Nevada are best demonstrated by the level of Congressional appropriations as well as the Obama Administration’s views and budget

⁵⁵ n. 32, *supra*.

regarding YMP. In sum, appropriations funding for YMP and related projects, including the proposed YMP railroad, are essential elements and the best evidence for evaluating public convenience and necessity for DOE's Application.

DOE's *concedes* as much. The Project Decision Schedule ("PDS") states that "[f]unding at current levels in future years will not be adequate to support design and the necessary concurrent capital purchases for repository construction, transportation infrastructure, and transportation and disposal casks." (Italics added.)⁵⁶

In its January 2009 NTP document, DOE states that it has divided OCRWM's transportation system into two capital projects (1) the National Transportation Project and (2) the Nevada Rail Infrastructure Project (also known as the Nevada Rail Line Project).⁵⁷ Significantly, DOE again *concedes* "the cost and schedule for both projects and for the development of the transportation system will be dependent upon the availability of funding and necessary appropriations." (Italics added.)⁵⁸

As pointed out, for the past several years Congress has consistently reduced DOE's appropriations for YMP and related activities. The Obama Administration has stated its belief that YMP is not supported by sound science and its budget for DOE in FY 2010, released February 26, 2009, begins to eliminate funding for YMP by dramatically reducing DOE's budget for YMP-related activity to a minimum funding level, and for the present, limits use of appropriated resources "to those costs necessary to

⁵⁶ PDS, p.1.

⁵⁷ NTP p. 2.

⁵⁸ *Id.* at 6.

answer inquiries from Nuclear Regulatory Commission, while the Administration devises a new strategy toward nuclear waste disposal”. (Italics added.)⁵⁹

Materially changed circumstances evidenced by appropriations history and the Obama Administration’s approach to YMP and related projects not only suggest that DOE’s Application was premature but that its contents are no longer contain accurate, credible information on critical PCN elements necessary for support the Application.

Because public demand, need and interest for YMP have all but vanished, DOE’s Application cannot rest on its past assumptions and assertions. PCN information DOE has provided under Part 1150 requirements, especially sections 1150.4 .5 and .6, is neither current nor sufficiently credible to support its Application.

Whether there are national transportation impacts of benefit or harm will not be considered here. Suffice it to say a case for benefit has not been made by DOE’s Application, but a case for harm may have been made in light of the materially changed circumstances evidenced by the appropriations process and the Obama Administration’s opposition to YMP, as well as DOE’s cumulative filings to date.

For purposes of adequate development of the record, the absence of essential, material facts has, in the past, irreparably compromised the opportunity of Nevada and other PORs to fairly evaluate and adequately comment on PCN issues raised by the Application previously invited and filed under the Board’s April 11 decision. Reopening the PCN schedule and record as here proposed would remedy the PORs’ disadvantage and the record deficiency.

⁵⁹ See *n. 18, supra*.

2. DOE's Filings Contain Additional, New Factual Information and Assumptions as well as Inconsistent and Contradictory Positions.

The absence of essential, material facts has, in the past, compromised the opportunity of Nevada and other PORs to fairly evaluate and adequately comment on PCN issues raised by the Application previously invited and filed under the Board's April 11 decision.

These difficulties are further compounded by the fact that DOE's cumulative filings to date contain additional, new information and assumptions, as well as inconsistent and changed positions, on essential elements necessary to support and evaluate issuance of a CPCN that, in the absence of an opportunity to discover and more critically examine, will, in the future, compromise the ability of the Nevada and other PORs to fairly evaluate and adequately address the PCN issues raised by the Application under Part 1150.

Moreover, DOE's previously omitted information, as well as that newly proffered, involves facts material to environmental issues raised by the Application that, without discovery, adequate explanation or supplementation, will in the future, compromise the ability of Nevada and other PORs to fairly evaluate and adequately comment on NEPA issues which the Board must and will consider under Part 1105.

(a) Decisions on Rail Service.

The most significant operating issue is the *nature of service* DOE intends to use for transport of SNF/HLRW to YMP. DOE's cumulative filings do not abate concerns over the implementation of dedicated train service (DTS) nationwide, the common carrier obligation to transport of hazardous materials SNF/HLRW or the implementation of the shared-use option (SUO) service in Nevada. Reopening permits examination of issues.

(1) Dedicated Train Service.

Consistent with its Application, the cumulative filings make clear that DOE's *sole purpose* is to facilitate the interstate transportation of spent nuclear fuel and high-level radioactive waste to YMP over the single-line spur in Nevada that branches off the national rail system. DOE's plans call for the Union Pacific to deliver rail cars containing spent nuclear fuel and high-level radioactive waste to a DOE staging yard to be constructed just off UP's mainline, and then to uncouple from those cars. From the staging yard, DOE's power units and personnel would transport the cars to and from DOE's receiving yard at YMP.⁶⁰ That transportation will be dedicated train service (DTS). If DOE will not be the operator, its filings to date do not detail any contract operator role for DTS on the proposed Caliente Line, and make clear that terms with the UP for services have not been negotiated.

In its February 2002 FEIS documentation DOE comparatively considers DTS and general freight service ("GFS"). The FEIS recognizes the superior characteristics and inherent value of DTS for rail transport of SNF/HLRW but does not commit to DTS for its "mostly rail scenario" service nationwide.⁶¹ The FEIS observed that most transportation service issues would necessarily be resolved later.⁶²

In a July 2005 memo DOE reviewed DTS issues in terms of safety, security, cost and operational categories, and ultimately recommended "*adoption of a policy to use dedicated trains as the usual service for OCRWM's shipments to Yucca Mountain.*"

⁶⁰ *Application*, pp.34-35; *R-FSEIS*, pp. S-19; *RC-FSEIS/RA-FEIS*, pp. S-43-45; *ROD*, pp.14-15.

⁶¹ *R-FEIS, Appendix*, pp. J-76-77.

⁶² *R-FEIS*, p. S-89.

(Italics added.)⁶³ The term “usual” apparently did not mean DTS will be *the* service, being that habitually, typically, routinely or customarily utilized. Rather, DTS was to be used if it “*enhances operations*” and all DOE shippers and commercial shippers could continue to use either DTS or general freight service (“GTS”) “*based on considerations of logistics and cost and ... shipments will be safe and secure.*” (Italics added.)⁶⁴

The July 2005 memo recommendation is *contrary to* and *inconsistent with* DOE’s subsequent draft and final supplemental environmental determinations.

In its October 2007 draft supplemental EIS ((R-DSEIS”) DOE acknowledged the July 2005 policy statement, but nevertheless found that “*past and current shipping campaigns have used dedicated train service to address issues of safety, security cost and operations*”, effectively reversing the July 2005 policy in citing benefits of DTS. (Italics added.)⁶⁵

In its subsequent June 2008 final supplemental EIS (“R-FSEIS”) DOE left no doubt that DTS was to be its service of choice for SNF/HLRW transport nationwide, concluding: “*Important elements of DOE’s national transportation policy that have evolved since publication of the Yucca Mountain FEIS include the following: DOE has established the policy to use dedicated trains...(naval SNF excepted)*”. (Italics added.)⁶⁶

Significantly, DOE’s ultimate determination to use DTS nationwide is consistent with the rail industry’s consistent position that for various reasons, DTS best provides safe and secure rail service for transport of SNF and HLRW nationwide. In testimony before the U.S House of Representatives focusing on transportation of SNF/HLRW to

⁶³ *Reply*, Exhibit E.

⁶⁴ *Id.*

⁶⁵ *R-DSEIS*, Appendix H, pp. H-10-11.

⁶⁶ *R-FSEIS*, pp. S-19, 2-45.

YMP, the AAR clearly stated that the “*railroads believe that the safest possible method of transporting SNF by rail is through the use of dedicated trains.*” (Italics added.)⁶⁷ AAR’s testimony enumerated reasons validating the conclusion that DTS is superior to GFS in terms of safety, security, costs and operations, citing operating activities such as switching, accident risk, car weight causing control, slack and derailment issues, suspension and braking systems, in-transit time, safety and security of movement.

In the instant case, CSX and NS motions raise DTS as safety and security concerns in seeking to require DTS nationwide as a service condition in any Board grant of a CPCN. CSX and NS note that contrary to its earlier position, DOE intends to utilize DTS only in Nevada but not nationwide. DOE’s opposition to CSX and NS confirms that DOE’s present commitment to DTS will be limited to transport within Nevada, not nationally.

As in its December 4, 2008 Hearing Statement to the Board, in its January 2009 National Transportation Plan (“NTP”) DOE reiterates its intention to use dedicated trains as “*the usual mode of rail transportation for SNF and HLW to the Yucca Mountain repository.*” (Italics added.) Without referencing the safety and security reasoning in the CSX and NS motions, DOE seemingly challenges the its own earlier analyses and determinations to utilize DTS, asserting that SNF and HLW “*can be shipped safely regardless of mode or type of service due to the stringent regulatory standards in place and the robust nature of the transportation packages involved.*” and concluding that the “*primary benefit of using dedicated trains is the significant cost savings over the lifetime of the Yucca Mountain program due to such factors as the reduced transit and*

⁶⁷ See n. 17, *supra*, AAR Testimony of Edward R. Hamberger.

*turnaround time for casks and rail cars and greater operational flexibility and efficiency.”(Italics added.)*⁶⁸

To reconcile early DOE policy statements with its FSEIS determinations, the term “usual” need not be a qualifier to limit the use of DTS. The term “usual” generally means habitual, typical, routine or customary. “Usual” is not a term of exception or limitation. However, in its August 2008 Reply and subsequent filings, DOE attempts to make it precisely that, stating its Application means DTS will be *the* service for transport of SNF/HLRW only in Nevada but not nationwide. DOE’s early and now repeated policy position on service is inconsistent with, and contradictory to, its final supplemental environmental determination to use DTS for *all* SNF/HLRW shipments. Equally important is the fact that DOE’s new policy position is contrary to the rail industry’s views and experience.

Nevada has consistently taken the position that, for safety and security reasons, DOE’s “mostly-rail scenario” transportation of spent nuclear fuel and high-level radioactive waste requires dedicated train service, both nationally and within Nevada. Throughout the years, DOE has represented, and Nevada has understood, that DTS would be the service of choice utilized by DOE in *all* rail transportation of spent nuclear fuel and high-level radioactive waste, and not just that in Nevada.

Nevada joins CSX and NS in expressing concern that DOE has changed its position and its filings evidence that it no longer intends to utilize dedicated train service for transporting spent nuclear fuel and high-level radioactive waste by rail from sites

⁶⁸ *DOE Statement*, Dec. 4, 2008, pp. 9-10; *NTP*, pp. 4-5

located in other states to Nevada, but that DOE intends to limit such service to use only in Nevada.

DOE has now refused to commit to utilizing *dedicated train service* (DTS) nationwide, a service that had previously been presumed by all to be DOE's service of choice for all SNF/HLRW rail shipments. DOE's Section 10901 Application limits use of DTS to activity in Nevada. Both CSX and NS have noted DOE's change of position for nationwide service. By all accounts, DOE's use of general freight service for rail transport *any* amount of SNF/HLRW to YMP from *any* origin would not only be simply undesirable, it would be unacceptable by rail operating, safety and security standards and the new Federal regulations governing such activity as well as by rail industry concerns.

(2) Common Carrier Obligation and Transport of Hazardous Materials - Ex Parte No. 677 (Sub-No.1) and F.D. 35219.

Issues that prompted the Board to open investigation in *Ex Parte No. 677 (Sub-No. 1) Common Carrier Obligation of Railroads-Transportation of Hazardous Materials*, served June 4, 2008 and recently the declaratory relief action STB Finance Docket No. 35219, *Union Pacific Railroad Company-Petition for Declaratory Order*, served March 10, 2009, are analogous to those in the instant case. The former concern the common carrier obligation and transport of hazardous materials, including toxic by inhalation hazards (TIH), while in this case the common carrier obligation and transport of hazardous materials spent nuclear fuel and high-level radioactive waste (SNF/HLRW) are similarly issues. The transport in each case is nationwide through high-threat urban areas (HTUAs) and other large, populated communities.

Just as the common carrier obligation to transport TIH materials are subjects of evaluation by the Board, so too should the common carrier obligation to transport

SNF/HLRW that can be accomplished by reopening the PCN record in this case. DOE's position on the use of either DTS or GFS to transport SNF/HLRW warrants more critical review in light of the new PHMSA and TSA rules effective December 26, 2008.⁶⁹

The recent declaratory relief proceeding initiated by the Board in response to a request for the Union Pacific in STB Finance Docket No. 35219, *Union Pacific Railroad Company-Petition for Declaratory Order*, served March 10, 2009, concerns both the common carrier obligation and the application of requirements of the new PHMSA and TSA regulations, particularly on HTUA routing issues, for transport of TIH materials.

In the UP case, UP challenges the common carrier obligation to accept long-haul TIH traffic through HTUAs when an ample supply is more locally available. Analogously in the instant case, DOE's proposes transportation that similarly will require long-haul movements through HTUAs and other large communities, from reactor or storage locations where, according to NRC, there is otherwise ample on-site storage in which that waste can be stored for 100-120 years, and thus, a massive interstate transportation campaign may not now be required.

The nature of HAZMAT rail service nationwide is at issue in both the UP case and this case. It is clear that DOE relies on the common carrier obligation to transport SNF/HLRW traffic nationwide. As does UP in that case, CSX and NS suggest otherwise in this case.

⁶⁹ 49 C.F.R. Parts 172, 174, 209, 1520 and 1580.

(3) Shared-Use Option.

DOE's Application describes common carrier service as a "Shared-Use Option" ("SUO"), and defines "to implement the Shared-Use Option" as "*allowing* commercial shippers to use the rail line for general freight shipments." (Italics added.)⁷⁰

Based on filings to date, one may conclude that DOE has decided to construct and operate the Caliente Line within a certain corridor and alignment in Nevada, and that its *principal* transportation service, the transport of spent nuclear fuel and high-level radioactive waste will be by dedicated train service (DTS) over the line. DOE has also decided to implement the Shared-Use Option by *allowing* commercial shippers to use the rail line for general freight shipments.⁷¹

DOE's Rail Corridor FSEIS and Rail Alignment FEIS, and ROD documents evidence that DOE has decided decision to *allow* but *not provide* common carrier service. The ROD states:

"DOE has decided to allow shipments of general freight on the rail line (Shared Use Option). The Department will obtain all regulatory approvals necessary to construct and operate the railroad, and allow common carriage shipments." (Italics added.)⁷²

The Application and ROD make clear that DOE's *sole* focus and purpose is the transport of spent nuclear fuel and high-level radioactive waste to YMP. DOE will *not provide* common carrier service to the public on its line, but presumably will *allow* such service to be provided by another under terms and conditions of agreement not disclosed to date.

⁷⁰ Application, p. 6.

⁷¹ ROD, pp.33-34 (Italics added.)

⁷² Id., pp. 2, 11, 16, 34 and 35.

If DOE's proposed private carriage over its private line is the principle activity, service to other specified customers may be by private, contract carriage under agreed terms and conditions with DOE or it may be by common carriage to the public likewise under agreed terms and conditions with DOE.⁷³

Precedent makes clear that DOE may, by contract, allow service to other customers over its private Caliente Line under contract carriage arrangements that does not necessarily require or involve common carriage, even if that service is provided by a rail common carrier.⁷⁴ If common carrier service were to occur on the Caliente Line, then its cessation would trigger a residual common carrier obligation. DOE's filings do not suggest that a residual common carrier obligation is intended, only activity of cessation of operations, decommissioning, dismantling and removal of assets.⁷⁵

If DOE or its contractor is the DTS provider of rail transport from staging yard to receiving yard over its own rail line to YMP, it will be private rail carriage.⁷⁶

To date DOE has failed to detail how the SUO will be implemented. There is no information regarding the possible rail carrier or arrangements for common carrier service. This failure is critical to both PCN as well as NEPA concerns. Both PCN and NEPA-related STB regulations require such critical operating information. DOE itself

⁷³ See *Hanson Natural Resources Company – Non-Common Carrier Status – Petition for Declaratory Order*, ICC Finance Docket No. 32248 (served Dec. 5, 1994)(*Hanson*), also *B. Willis, C.P.A., Inc.-Petition for Declaratory Order*, STB Finance Docket No. 34013, 2001 WL 1168090, (served Oct. 3, 2001)(*B. Willis*) aff'd sub nom. *B. Willis, C.P.A., Inc. v. STB*, 51 Fed. Appx. 321 (D.C. Cir. 2002).

⁷⁴ Id.

⁷⁵ See *RC-FSEIS/RA-FEIS, Railroad Abandonment*, p. S-47

⁷⁶ See *Hanson*, supra., n.46.

acknowledges that common carrier service, SUO Option, will increase NEPA impacts and consequences.⁷⁷

Its filings specify that DOE intends to use dedicated train service (DTS) for service operations on the rail line in Nevada from its Staging Yard at Caliente all the way to and from its repository at Yucca Mountain. DTS does not contemplate general freight service within the train consists transporting spent nuclear fuel and high- level radioactive waste. DTS is obviously not common carrier, general freight service.

The recent NTP provides no additional detail regarding the “shared-use option” or assumption of the common carrier obligation. The NTP simply repeats the statement that *“As stated in the ROD, DOE has also decided to allow shipments of general freight on the rail line (Shared-Use Option,) subject to obtaining a certificate of public convenience and necessity from the Surface Transportation Board and other necessary regulatory approvals.”* (Italics added.)⁷⁸ As information on common carrier service and obligation, DOE’s ROD and NTP statements are meaningless. Part 1150 information requirements remain in non-compliance.

(b) Additional Operating Issues.

In addition to the nature of service issue for transport of SNF/HLRW to YMP, DOE’s cumulative filings do not address concerns over the implementation of transportation plans that require use of short-line Class II and III carriers, intermodal/ interchange services, and the proposed new transportation, aging and disposal (“TAD”) cask container system. Reopening permits examination of these additional issues.

⁷⁷ ROD, pp. 28, 31.

⁷⁸ NTP, p. 8.

(1) Short Lines.

DOE's cumulative filings to date provide inconsistent and contradictory information regarding use of short-line rail carriers. The R-FSEIS sets out representative rail routes that DOE would use for cross-country rail shipments. The representative rail routes at the national level are shown in Figure 2-11.⁷⁹ These routes were derived using the TRAGIS computer program.⁸⁰ The TRAGIS outputs identify 23 shipping sites using short-line rail carriers. These routes correspond to the routes presented in the state maps in Appendix G, at G-60 to G-150.

The R-FSEIS assumes short-line railroads can be used for SNF shipments. *“In most cases, rail transportation of spent nuclear fuel and high-level radioactive waste would originate with short-line rail carriers that provide service to the commercial and DOE sites. At rail yards near the sites, dedicated rail shipments would switch from shortline carriers to national mainline railroads. Figure 2-11 in Chapter 2 shows the representative rail routes that DOE analyzed and could use for shipments to Nevada.”* (Italics added.)⁸¹

Table I, prepared by Nevada based on the TRAGIS route data, identifies the 23 shipping sites which would use Class II or Class III railroads, or railroads operated by the U.S. government, to originate rail shipments to Yucca Mountain via the Caliente Line. [The Hope Creek and Salem 1 & 2 reactors in southern New Jersey are considered one site.]

⁷⁹ R-FSEIS at 2-46.

⁸⁰ R-FSEIS at 3-95.

⁸¹ R-FSEIS, p. 3-95.

Table I. DOE Rail Routes to YMP Using Short-Line Railroads At Origin

State	Originating Site	Short Line Railroads	Miles
AL	Farley	Georgia and Florida Railroad	25.1
CT	Haddam Neck	Providence and Worcester Railroad	20.3
CT	Haddam Neck	New England Central Railroad	79.6
CT	Millstone	Providence and Worcester Railroad	78.5
FL	St. Lucie	Florida East Coast Railway	224.5
IA	Arnold	Iowa Northern Railway	19.4
IL	Byron	Iowa, Chicago & Eastern Railroad	76.5
IL	Dresden	Elgin, Joliet and Eastern Railway	39.1
IL	Morris	Elgin, Joliet and Eastern Railway	39.0
MA	Yankee Rowe	Springfield Terminal (Pan Am Railways)	67.2
ME	Maine Yankee	Maine Eastern Railroad	19.2
ME	Maine Yankee	Springfield Terminal (Pan Am Railways)	339.4
MI	Big Rock Point	Lake State Railway Company	121.0
MO	Callaway	Ozark Valley Railroad	24.0
NC	Brunswick	U.S. Government	21.7
NH	Seabrook	Springfield Terminal (Pan Am Railways)	253.0
NJ	Hope Creek/Salem	Winchester and Western Railroad Company	20.3
NY	West Valley	Buffalo and Pittsburgh Railroad	59.5
OR	Trojan	Willamette and Pacific Railroad	86.1
PA	Susquehanna	North Shore Railroad	46.3
SC	Savannah River Site	U.S. Government	12.0

TX	Comanche Peak	Fort Worth and Western Railroad	59.0
VT	Vermont Yankee	New England Central Railroad	51.9
WA	Columbia	U.S. Government	13.4
WA	Hanford	U.S. Government	35.0

Prior to filing its Application, DOE did not systematically assess the financial status, infrastructure conditions, current traffic, or traffic capabilities of these short-line railroads. An FRA preliminary evaluation of short-line railroads, prepared for DOE prior to DOE's submitting its application for a CPCN, concluded that short-lines might not be capable of safely transporting spent nuclear fuel without significant upgrading.⁸² The NTP, published after DOE submitted its CPCN application, states that DOE funding will not be available for infrastructure upgrades.⁸³

FRA conducted a preliminary evaluation of short-line railroads that might be used for Yucca Mountain shipments, but the FRA results are not reported in the cumulative DOE filings. The FRA developed a methodology for the evaluation, conducted a pilot field review in September 2007, and reported its results at a DOE-sponsored meeting in February 2008. FRA tasks were to identify potentially affected short-line carriers, establish contact with railroad officials, conduct field reviews of physical and operational infrastructure, qualify each railroads present operational status against a safe acceptable standard, and facilitate upgrades to meet safe acceptable

⁸² U.S. DOT Federal Railroad Administration, "Evaluation of Shortline Railroads Tasked for the Transportation of Spent Nuclear Fuel" Presentation by M. Massaro, DOE Rail TEC Winter Meeting, February 6, 2008, San Antonio, TX.

⁸³ *NTP*, p. 16.

standards. The FRA contacted 18 of 28 short line railroads potentially involved, and received responses from 6 of the 18 railroads contacted.

FRA conducted a pilot field assessment of the Winchester and Western Railroad route for spent fuel shipments from the Hope Creek and Salem nuclear power plants in southern New Jersey.⁸⁴ The FRA assessment of the Winchester and Western Railroad route found a number of safety and security-related conditions: 3 miles of excepted track, 8 miles of class 1 track, numerous grade crossings, and questionable feasibility of the heavy haul truck route from the reactor to the railroad.

The FRA preliminary evaluation of short lines generally identified conditions that might require significant upgrading before such routes could be used for spent nuclear fuel shipments, including: class of track, rail weight, track restrictions, signals, hazardous materials registration and training, grade crossings, track conditions, sharp curves, tunnels and bridges. The FRA concluded that there was a “*need for in-depth look at shortline railroads servicing nuclear power plants.*” Where rail service using short lines appeared to be “the logical route,” FRA posed three questions: (1) are there grants available from FRA and state; (2) would it be economically viable to upgrade the railroad; and (3) should the minimum acceptable standard be class 2 track?”⁸⁵

In its January 2009 National Transportation Plan (NTP), DOE fails to mention the FRA evaluation of short-line railroads that might be used for spent nuclear fuel shipments. Yet, the NTP says “*OCRWM expects to consult with the Federal Railroad*

⁸⁴.U.S. DOT, Federal Railroad Administration, “Shortline Railroad Study: Exploratory Assessment Winchester & Western Railroad Co. Spent Fuel Routing for the Hope Creek and Salem NPP,” Presentation by M. Massaro, DOE Rail TEC Winter Meeting, February 6, 2008, San Antonio, TX.

⁸⁵ *Id.*

Administration (FRA) to review short-line rail track capability near reactors,” but makes clear that “OCRWM will not fund upgrades to transportation infrastructure at shipping sites or the national transportation system.” (Italics added.)⁸⁶

The issues of short-line capabilities and funding for upgrades should be part of the PCN issues on reopening.

(2) Intermodal Activities.

DOE’s cumulative filings to date provide inconsistent and contradictory information regarding intermodal transportation of TAD canisters and other large rail casks. DOE’s application assumes that heavy haul trucks (HHTs) or barges can be used at shipping sites that lack direct rail access. This assumption is carried forward in the NTP. Yet DOE’s cumulative filings to date fail to provide updated information on current transportation capabilities at and near the shipping sites, and fail to assess the cost of upgrading existing transportation infrastructure to allow use of HHT and/or barge transport for the proposed TAD canister system or other large rail casks.

The R-FSEIS identifies 22 shipping sites that cannot directly ship TAD canisters or other large rail casks by rail and identifies 16 of these sites as possible candidates for barge shipments.⁸⁷

The distances for HHT shipments range from 2.1 miles (3.4 kilometers) for the Indian Point reactor in New York, to 150 miles (241.4 kilometers) for the Humboldt Bay reactor in California. Thirteen sites would require HHT shipments of at least 18.6 miles (30 kilometers). The HHT shipment routes would use a combination of local, state, and federal highways. The HHTs that DOE has proposed using to haul TAD canisters and

⁸⁶ NTP, p. 16

⁸⁷ NTP, p. 5; Table G-7 at G-14; and Table G-21 at G-59

other large rail casks, would be up to 220 feet (67.1 meters) in length, and have gross vehicle weights of as much as 500,000 pounds (227,000 kilograms).

The HHT shipment routes identified in the SEIS would use a combination of local, state, and federal highways.⁸⁸ DOE's cumulative filings to date do not provide updated information on current transportation capabilities for the HHT routes identified in the R-FSEIS, nor does DOE provide route specific information on the likely cost of upgrading roads, bridges, traffic controls, and emergency response capabilities necessary to allow HHT shipments from reactor sites to nearby railroads.

Despite the range of distances noted in the R-FSEIS (13 sites require HHT shipments of 18 miles or more), DOE characterizes the needed HHT movements as "*short-distance transport.*"⁸⁹ DOE asserts, without citing the distances involved, that the "viability" of HHT shipments in the US is demonstrated by HHT shipments in France.⁹⁰

DOE admits that its last systematic studies of utility facilities interface capabilities and near-site infrastructure capabilities were conducted in 1992. DOE states that utilities "*are responsible for any necessary infrastructure upgrades within their gates.*" DOE assumes that any needed off-site infrastructure upgrades will be provided "*by States, counties and railroads.*" DOE anticipates that it will "*consult with State transportation departments*" regarding highway and bridge upgrade needs despite the fact DOE "*will not fund upgrades to transportation infrastructure at shipping sites or the national transportation system.*" (Italics added.)⁹¹ The issues of intermodal transport

⁸⁸ BCO-006, 10-04-2007.

⁸⁹ NTP, p. 13.

⁹⁰ *Id.* at 5.

⁹¹ *Id.* at 16

feasibility and funding for infrastructure upgrades should be part of the PCN issues considered on reopening.

(3) Transportation, Aging and Disposal (TAD) Cask Systems.

DOE's cumulative filings to date provide inconsistent and contradictory information regarding the operational requirements of the proposed TAD canister shipping casks for SNF shipments to Yucca Mountain. Amidst all the uncertainties about the proposed TAD canister system designs, one certainty is that the loaded TADs, mounted on rail cars, will be sufficiently heavy to challenge the accepted weight limits for unrestricted interchange of rail cars, and will likely challenge weight and dimensional limits for track and bridges all along the U.S. rail system. The weight and size of the TAD shipping casks, combined with the dangerous nature of their cargo, will conflict with DOE's stated intention in the NTP to operate over the U.S. rail system "like any other shipper."

None of DOE's cumulative filings provide sufficient information on the size and weight of the proposed TAD shipping casks, in their fully-loaded, ready for transport configuration, to assess their operational requirements and their implications for the overall operation of the rail system. The NTP, provides no specific design details other than the assurance that DOE will use "specifically designed rail cars: cask cars, buffer cars, and escort cars."⁹² Two contracts for the design licensing and demonstration of the TAD canisters were awarded in May 2008 with the anticipation of initial commercial availability in 2013 and that 90% of the shipments to YMP will arrive in TAD canisters.⁹³

⁹² NTP, p. 12

⁹³ DOE Press Release, May 22, 2008

DOE's most recent Basis of Design (BOD) for the TAD-based Repository (October 2008) states that the maximum weight for a fully loaded TAD canister, in a transportation overpack (its shipping cask), on its skid, will be 360,000 lbs (180 tons). None of DOE's cumulative filings with the Board contain any details about the design of the rail car on which DOE intends to mount and ship the TADs, and thus DOE provides no basis for assurance that DOE shipments will comply with the AAR maximum gross weight limit for unrestricted interchange, 394,500 lbs for a 6-axle car. Indeed, DOE's Transportation Scope of Operations states that the DOE rail cars may have to accommodate loads of up to 200 tons. There may also be dimensional concerns about the length and diameter of the TAD with its impact limiters, versus bridge and tunnel clearances.

The issues of TAD shipping cask size and weight, the operational requirements for TAD shipping casks on rail cars, and the implications for infrastructure upgrades and service requirements, should be part of the PCN issues considered on reopening.

3. Impact of New Safety and Security Regulatory Requirements.

Just as materially changed factual circumstances evidenced by Congressional appropriations history and Presidential opposition to YMP provides a basis for reopening the PCN schedule and record, materially changed regulatory circumstances evidenced by the new rules for safety and security risk analysis for transportation of hazmat, such as SNF and HLRW, effective December 2008, also provide reason to reopen.

In November 2008, the Department of Transportation's Pipeline and Hazardous Materials Safety Administration ("PHMSA") in conjunction with the Federal Railroad Administration ("FRS") and the Department of Homeland Security's Transportation

Security Administration (“TSA”) both issued new final rules that, effective December 26, 2008, established new safety and security requirements for the transportation of hazardous materials, such as spent nuclear fuel and high-level radioactive waste.⁹⁴ As a result, there is a significant, new substantive regulatory environment for transport of hazmat traffic at issue in this case.

As a consequence of the new regulatory requirements, DOE must now re-evaluate and revise all of its proposed plans for the nationwide transportation of SNF and HLRW to YMP. Going forward in this case, the new safety and security regulatory factors not only warrant, but also mandate, the reopening of the PCN schedule and record to compel DOE to critically assess the impacts of the new rules on the transportation proposed in its Application and to supplement that Application accordingly. Indeed, the new rules may foreclose use of the representative rail routes and/or carriers selected to date, as well as the ability to utilize the “mostly rail” transportation options.

Recently, the STB recognized the potential impact of these new rules on the nationwide transportation of hazmat TIH traffic in the declaratory relief action opened on the UP petition in F.D. No. 35219, served March 10, 2009.⁹⁵ Surely, the safety and security requirements for rail transport of hazmat SNF/HLRW nationwide are no less impacted under the new rules.

⁹⁴ See final rules adopted by PHMSA in coordination with the FRA in 49 C.F.R. Parts 172, 179, and 209, 73 FR 72182, and by TSA in 49 C.F.R. Parts 1520 and 1580, 73 FR 72130.

⁹⁵ *Union Pacific Railroad Company-Petition for Declaratory Order*, STB Finance Docket No. 35219, served March 10, 2009; see also *Ex Parte No. 677 (Sub-No. 1) Common Carrier Obligation of Railroads-Transportation of Hazardous Materials*, served June 4, 2008.

Reopening the PCN schedule and record is the appropriate remedy to assess safety and security requirements under the new PHMSA and TSA rules for the SNF/HLRW traffic in this case, assuming the feasibility of a “mostly rail” scenario.

Recalling that rail/truck shipment levels will vary based on the availability of rail service, the new safety and security rules may alter not only the rail routes but also the availability of rail service itself. In as much as the new rule requirements may foreclose selection of certain rail routes and/or carriers, reopening the PCN record is appropriate to re-examine DOE’s proposed routing options, the use of intermodal or the TAD cask system for rail transportation and the potential for increased truck shipments under the new rules.

(a) Rail Route Selections to Date.

In addition to being inconsistent, DOE’s selections to date concede that representative rail routes must be re-evaluated and re-designed to comply the *new* safety and security rules. In its January 2009 National Transportation Plan (NTP), DOE presents a national map of potential rail and truck shipment routes to Yucca Mountain. *“Figure F shows the representative rail and truck routes analyzed in the Final Repository SEIS. These representative routes will be considered when identifying a preliminary suite of national routes.”* (Italics added.)⁹⁶ Also in its January 2009 Project Decision Schedule (PDS), DOE makes the statement *“Representative shipping routes were evaluated in the Yucca Mountain FEIS issued in 2002. Identification of a final suite of routes and detailed*

⁹⁶ *Id.* at 25-26

planning is anticipated to begin approximately three to five years before shipments take place.”(Italics added.)⁹⁷

However, the map presented in the PDS includes several long-distance rail routes that are *not* included in the map shown in the NTP. The PDS map includes rail routes from the Pacific Northwest, the Midwest and the South that could substantially increase the number of cross-country shipments routed to YMP through Las Vegas via California. Prior analyses by Nevada found that use of these differing cross-country rail routes could result in 40-80 percent of the total rail shipments to YMP traveling through downtown Las Vegas, compared to DOE’s estimate that about 8 percent of the rail shipments would traverse Las Vegas.⁹⁸

Going forward in this proceeding, the *new* rules require that DOE re-evaluate the proposed routes and supplement its Application to disclose the *revised* or *new* routes selected under the new rules.

(b) Rail Route Selections - Compliance with New Safety/Security Rules.

In its January 2009 National Transportation Plan (NTP) DOE acknowledges that route selection for rail shipments to YMP must comply with the *new* PHMSA rules, but fails to mention the need to also comply with the TSA rules as well.⁹⁹ All of the representative rail routes shown in the DOE filings in this docket were selected *prior to* publication of the *new* rules in November 2008.

Presently it is not clear how the *new* rules could have been or will be applied to the routes previously selected, but it is clear those rules have *not as yet* been applied.

⁹⁷ *PDS*, p. 10

⁹⁸ Get Cite

⁹⁹ *NTP*, p. 24.

Although routing criteria in the *new* rules have long been anticipated, DOE has not indicated when its proposed routes will be *revised* or *new* routes will be selected and identified for the purpose of its Application in this proceeding. Clearly, transportation to YMP over the national rail system and the Caliente Line will be impacted by compliance with the new safety and security requirements of the new rules. However, DOE has provided no information on the new rules impact on route selection.

PHMSA's routing objective is explained in its April 2008 interim final rule: "*A primary safety and security concern related to the rail transportation of hazardous materials is the prevention of catastrophic release or explosion in proximity to densely populated areas, including urban areas and events or venues with large numbers of people in attendance. Also of major concern is the release or explosion of rail cars in close proximity to iconic buildings, landmarks, or environmentally significant areas,*" and noted the difference in consequences between an intentional and unintentional release in that "*the consequences of an intentional release of hazardous material by a criminal or terrorist action are likely to be ore severe than the consequences of an unintentional release because an intentional action is designed to inflict the most damage possible.*" (Italics added.)¹⁰⁰

The PHMSA November 2008 final rule summarizes the cumulative intent of the new route evaluation requirements:

"Rail carriers transporting certain explosives, poisonous by inhalation (PIH), and radioactive materials must compile information and data on the commodities transported, including the routes over which these commodities are transported."

¹⁰⁰ 73 FR 20752.

“Rail carriers transporting the specified hazardous materials must use the data they compile and relevant information from state, local, and tribal officials, as appropriate, regarding security risks to high-consequence targets along or in proximity to a route to analyze the safety and security risks for each route used and practicable alternative routes to the route used.”

“Using these analyses, rail carriers must select the safest and most secure practicable route for the specified hazardous materials.” (Italics added.)¹⁰¹

The PHMSA final rule adopts the list of 27 specific rail risk analysis factors that must be considered by rail carriers when performing the required route analyses.¹⁰² The risk factors include proximity to iconic targets, environmentally sensitive or significant areas, population density along the route, venues along the route (stations, events, places of congregation), and high consequence targets (*“a property, natural resource, location, area, or other target designated by the Secretary of Homeland Security that is a viable target of national significance, the attack of which by railroad could result in catastrophic loss of life, significant damage to national security or defense capabilities, or national economic harm.”*) (Italics added.)¹⁰³

The TSA November 2008 final rule *“adopts a risk-based approach by focusing on shipments of certain hazardous materials and establishing chain of custody and control procedures and other measures for rail cars that pose the greatest security vulnerabilities. While an IED attached to any rail car (such as a car transporting coal or household appliances) would obviously cause major damage to that car and its contents*

¹⁰¹ 73 FR 72183

¹⁰² Appendix D, 49 CFR Part 172

¹⁰³ 49 CFR 172.820(c).

upon detonation, the more likely scenario is that terrorists would target a car containing highly toxic, explosive, or radioactive hazardous materials, which would cause the greatest loss of life and property and damage to the national economy.”¹⁰⁴

The TSA final rule states: *“Although the number of rail shipments carrying explosives and radioactive materials is relatively low, a release of these materials could cause serious and devastating harm. If terrorists detonated certain explosives at critical points in the transportation cycle, they could cause significant loss of life and damage to infrastructure, and harm the national economy through the accompanying disruption to commerce. Likewise, if terrorists perpetrated an attack against a rail car transporting certain radioactive materials, they could endanger a significant number of people as well as disrupt the supply chain as a result of contamination.”* (Footnotes deleted, italics added.)¹⁰⁵

The NTP makes clear that DOE is aware of the existence of the PHMSA final rule for rail carrier hazardous materials security plans and route selection, but makes no reference to the companion TSA final rule for hazardous materials rail shipments and facilities security. Nowhere does the NTP give any indication that DOE considered the implications of the PHMSA *and* TSA final rules for operations planning or for identification of potential shipment routes.

DOE filings to date have provided no information necessary to evaluate anticipated required compliance with the final rules on issues such as:

¹⁰⁴ 73 FR 72132

¹⁰⁵ *Id.*

*How proposed rail shipments to Yucca Mountain would impact the 46 HTUAs in 28 states and the District of Columbia.

*How many HTUAs would be traversed by the representative rail routes identified by DOE in its CPCN filings, in its NTP, and in its PDS?

*How many of the representative rail routes identified by DOE would traverse one or more HTUAs?

*How many carriers would be required to prepare route evaluations and security plans for the proposed DOE shipments to Yucca Mountain?

*What are the implications for the national rail system of applying the new final rules to a shipping campaign that would affect more than 30,000 miles of track, in 44 states, for a period of 50 years or more?

(c) Rail Route Selection - High Threat Urban Areas (HTUAs).

The TSA final rule includes a list of 46 designated high threat urban areas (HTUAs) in 28 states and the District of Columbia.¹⁰⁶ Rail shipments of spent nuclear fuel and high-level radioactive waste through these HTUAs would be subject to the new chain of custody and control and other procedures, such as designation of rail security coordinators and monitoring plans.¹⁰⁷

In selecting representative rail routes for the R-FSEIS, DOE obviously could not and did not consider the HTUAs identified in the new TSA rule. The R-FSEIS national rail routes to Caliente are shown in Figure G-1, and the state rail routes to Caliente are shown in Figures G-3 to G-47. These are rail routes to Caliente that DOE considers

¹⁰⁶ 49 CFR Part 1580, Appendix A.

¹⁰⁷ See summary, 49 CFR Part 1580, Appendix B.

*“representative of routes that it could use.”*¹⁰⁸ The representative routes were selected under the assumption that *“Federal regulations do not restrict the routing of spent nuclear fuel and high-level radioactive waste shipments by rail.”* (Italics added.)¹⁰⁹

Nevada challenged DOE’s failure to consider the implications of the PHMSA and TSA proposed rules in comments on DOE’s Application.¹¹⁰ DOE defended its decision to ignore the PHMSA and TSA rules in its Response to Comments filed with the STB in August 2008, prior to publication of the final rules. *“Those proposed rules are still pending and thus are not current law. Equally important, the proposed rules would not apply to the Board’s public convenience and necessity determinations. They concern certain recordkeeping and oversight by the FRA which are not pertinent to the Application.”* (Italics added.)¹¹¹

Now that the PHMSA and TSA rules are final, Nevada has evaluated the DOE “representative routes” to Caliente relative to the HTUAs designated by TSA. The rail routes to Caliente shown in the R-FSEIS, Figure G-1 at G-7, are the routes selected by DOE contractors using the TRAGIS computer program.¹¹² These routes correspond to the routes presented in the state maps in Appendix G, at G-60 to G-150. The R-FSEIS identifies 68 commercial reactor and storage sites that will ship to Yucca Mountain by rail, and 4 DOE sites that will ship by rail. Another 7 commercial sites will ship by truck only, and 2 DOE sites will ship by truck in addition to rail. Of the 68 commercial sites

¹⁰⁸ *R-FSEIS*, p. 6-4.

¹⁰⁹ *Id.*

¹¹⁰ *NV Comments*, p. 57-58.

¹¹¹ *DOE Reply*, p. 30.

¹¹² *R-FSEIS*, p. 3-95.

that ship by rail, 22 lack direct rail access, and DOE assumes that these sites ship rail casks to nearby railroads using heavy haul trucks or barges.¹¹³

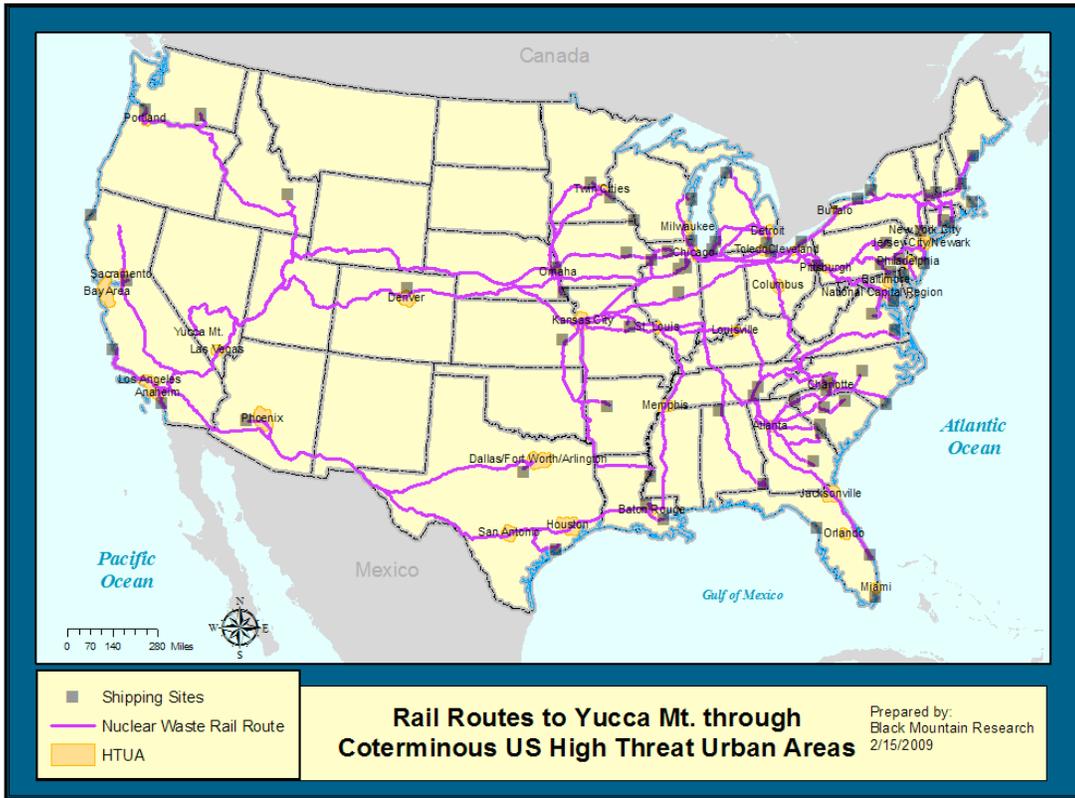


Figure 1. HTUAs Traversed by DOE Rail Routes to YMP

Figure 1 shows the high threat urban areas (HTUAs) traversed by DOE rail routes to Caliente. Of the 46 HTUAs designated in 49 CFR Part 1580, Appendix A, 30 HTUAs in 25 states and the District of Columbia would be traversed by at least one DOE rail route to YMP, and 5 HTUAs could be traversed by DOE barge deliveries to railroads. Figure 1 also shows that the vast majority of the 72 DOE rail routes to YMP via Caliente traverse one or more HTUAs.

¹¹³ Table G-10, at G-16; Table G-8, at G-14; and Table G-7, at G-14.

Table II identifies the affected HTUAs and representative rail routes to YMP. Several HTUAs, including Atlanta, Chicago, Kansas City, and St. Louis are traversed by two or more rail routes. Major carrier interchanges occur in HTUAs, including Chicago, Kansas City, and St. Louis. Barge-to-rail intermodal transfers could occur in the Baltimore, Bay Area, Los Angeles, Miami, Milwaukee, and New York HTUAs.

Table II. DOE Rail Routes to YMP and Affected HTUAs.

Origin	State	HTUAs Traversed by Rail Route to Yucca Mountain via Caliente	Carriers
Browns Ferry	AL	St. Louis, Kansas City	CSXT, TRRA, UP
Farley	AL	St. Louis, Kansas City	CSXT, TRRA, UP
Arkansas	AR	Kansas City	UP
Palo Verde	AZ	Phoenix, Las Vegas	UP
Diablo Canyon	CA	Los Angeles, Las Vegas	UP
Humboldt Bay	CA	Sacramento, Las Vegas	UP
Rancho Seco	CA	Las Vegas	UP
San Onofre	CA	Los Angeles, Las Vegas	BNSF, UP
Haddam Neck	CT	Buffalo, Cleveland, Chicago	PW, NECR, CSXT, IHB, UP
Millstone	CT	Buffalo, Cleveland, Chicago	PW, NECR, CSXT, IHB, UP
St. Lucie	FL	Jacksonville, Atlanta, St. Louis, Kansas City	FEC, CSXT, TRRA, UP
Hatch	GA	Atlanta, Louisville, St. Louis, Kansas City	NS, UP
Vogtle	GA	Atlanta, Louisville, St. Louis, Kansas City	NS, UP
Arnold	IA	None	IN, UP
INL	ID	None	UP
Braidwood	IL	St. Louis, Kansas City	UP
Byron	IL	None	ICE, UP
Dresden	IL	None	EJE, UP
LaSalle	IL	Denver	BNSF, UP
Morris	IL	None	EJE, UP
Quad Cities	IL	Denver	BNSF, UP
Zion	IL	Chicago	UP
Wolf Creek	KS	Kansas City	UP
River Bend	LA	Baton Rouge, Memphis, St. Louis, Kansas City	CN, UP
Waterford	LA	Houston, San Antonio, Las Vegas	UP

Yankee Rowe	MA	Buffalo, Cleveland, Chicago	ST, CSXT, IHB, UP
Calvert Cliffs	MD	District of Columbia, Pittsburgh, Chicago	CXST, UP
Maine Yankee	ME	Buffalo, Cleveland, Chicago	ME, ST, CSXT, IHB, UP
Big Rock Point	MI	Chicago	LSRC, CSXT, IHB, UP
Fermi	MI	Detroit, Chicago	CN, IHB, UP
Palisades	MI	Chicago	CSXT, UP
Monticello	MN	Twin Cities, Denver	BNSF, UP
Prairie Island	MN	Twin Cities	CPRS, UP
Callaway	MO	Kansas City	OV, KCS, UP
Grand Gulf	MS	Kansas City	KCS, UP
Brunswick	NC	Atlanta, St. Louis, Kansas City	USG, CSXT, TRRA, UP
Harris	NC	Atlanta, St. Louis, Kansas City	CSXT, TRRA, UP
McGuire	NC	Charlotte, Columbus, Chicago	CSXT, UP
Cooper	NE	Omaha	UP
Fort Calhoun	NE	None	UP
Seabrook	NH	Buffalo, Cleveland, Chicago	ST, CSXT, IHB, UP
Hope Creek	NJ	Philadelphia, Pittsburgh, Chicago	WW, CR, NS, UP
Oyster Creek	NJ	Jersey City, Pittsburgh, Chicago	CR, NS, UP
Salem	NJ	Philadelphia, Pittsburgh, Chicago	WW, CR, NS, UP
FitzPatrick	NY	Buffalo, Cleveland, Chicago	CSXT, UP
Indian Point	NY	Buffalo, Cleveland, Chicago	CSXT, UP
Nine Mile Point	NY	Buffalo, Cleveland, Chicago	CSXT, UP
West Valley	NY	Buffalo, Cleveland, Chicago	BPRR, CSXT, IHB, UP
Davis-Besse	OH	Toledo, Chicago	NS, UP
Perry	OH	Cleveland, Kansas City	NS, UP
Trojan	OR	Portland	WPRR, UP
Beaver Valley	PA	Cleveland, Kansas City	NS, UP
Limerick	PA	Pittsburgh, Kansas City	NS, UP
Peach Bottom	PA	Pittsburgh, Kansas City	NS, UP
Susquehanna	PA	Pittsburgh, Toledo, Chicago	NSHR, NS, UP
Three Mile Island	PA	Pittsburgh, Kansas City	NS, UP
Catawba	SC	Charlotte, Louisville, St. Louis, Kansas City	NS, UP
Oconee	SC	Atlanta, Louisville, St. Louis, Kansas City	NS, UP
Robinson	SC	Atlanta, St. Louis, Kansas City	CSXT, TRRA, UP
Savannah	SC	Atlanta, St. Louis, Kansas City	USG, CSXT,

River			TRRA, UP
Summer	SC	Atlanta, Louisville, St. Louis, Kansas City	NS, UP
Sequoyah	TN	Louisville, St. Louis, Kansas City	NS, UP
Watts Bar	TN	Louisville, St. Louis, Kansas City	NS, UP
Comanche Peak	TX	Dallas-Fort Worth, Las Vegas	FWWR, UP
South Texas	TX	San Antonio, Las Vegas	UP
North Anna	VA	District of Columbia, Pittsburgh, Chicago	CSXT, UP
Surry	VA	Louisville, St. Louis, Kansas City	NS, UP
Vermont Yankee	VT	Buffalo, Cleveland, Chicago	NECR, CSXT, INB, UP
Columbia	WA	None	USG, UP
Hanford	WA	None	USG, UP
Kewaunee	WI	Chicago	CN, IHB, UP
Point Beach	WI	Chicago	CN, IHB, UP

Table II also lists the HTUAs traversed by each rail route. Of DOE's 72 rail routes, 63 traverse at least one HTUA, 49 traverse two or more HTUAs, and 28 traverse 3 or more HTUAs.

(d) Rail Route Selections - Specific HTUAs Impacted.

Rail shipments of spent nuclear fuel and high-level radioactive waste through designated HTUAs would be subject to the new chain of custody and control and other procedures, such as designation of rail security coordinators and monitoring plans, established by the TSA final rule. DOE's cumulative filings to date evidence no effort to assess the implications of the TSA final rule for specific HTUAs traversed by Yucca Mountain shipments.

For example, as Nevada's prior filings demonstrate, the Las Vegas HTUA would be heavily impacted by rail shipments to Yucca Mountain over the projected life of repository operations.

In comments filed with the Board in July 2008, Nevada addressed the issue of rail shipments through Las Vegas. Under the Proposed Action, DOE would make about 755 rail cask-shipments through Las Vegas, about 8 percent of the total. If there is no second repository, and the same percentage shipments enter NV from CA, there could be about 1,929 rail cask-shipments through Las Vegas. The lowest estimate of train 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. Since there is no regulatory requirement for using dedicated trains, DOE could ship casks one at a time in general freight service, resulting in 15-39 train shipments per year through Las Vegas.

DOE significantly underestimates the potential number of rail shipments to Yucca Mountain through Las Vegas if the Caliente Line goes forward. Nevada has identified alternative rail routes under which 40-80 percent of the rail shipments could travel through Las Vegas. When the consolidated southern cross-country rail routes identified by Nevada are used, development of the Caliente rail line results in about 7,494 rail cask-shipments (79 percent of the total) in about 2,416 dedicated trains (85 percent of the total) through Las Vegas over 50 years. Using DOE cask-shipment estimates, if there is no second repository and the same percentage shipments enter NV from CA, there could be about 19,048 rail cask-shipments through Las Vegas, in about 6,144 trains. Thus, if DOE develops the Caliente Line and uses dedicated trains, the impact on Las Vegas could be 46-118 trains per year, every year, over 50 years.

Shipments through the Las Vegas HTUA would be a matter of concern on account of population density and the presence of iconic targets. The estimated 2006 census population of the Las Vegas HTUA is about 1.8 million. The State of Nevada

estimates at least 95,000 of these residents live within one-half mile of the Union Pacific route for shipments to Yucca Mountain via Caliente. The world-famous Las Vegas “Strip” is located within the HTUA. Nevada consultants estimate that 34 Las Vegas hotels and about 49,000 hotel rooms are located within 800 meters (one-half mile) of the Union Pacific mainline route to YMP.

Outside of Nevada, other HTUAs, such as the Chicago HTUA, would also be heavily impacted by rail shipments to Yucca Mountain by way of Caliente.

About 25 percent of the rail shipments to Yucca Mountain, about 700 trains hauling 2,100 casks, would travel through the Chicago area over a period of 50 years, under the DOE Proposed Action (emplacement of 70,000 MTU at Yucca Mountain). About 54 percent of the truck shipments, more than 1,400 trucks, would travel I-80 and I-294 between Lansing and Tinley Park. Another 94 trains hauling 279 casks would travel just west of the Chicago area between Morris and West Chicago.

According to the 2000 census, about 4.4 million people live in the affected area in and around Chicago. About 585,000 people in the Chicago high threat urban area live within 800 meters (one-half mile) of the rail lines that would be used for Yucca Mountain shipments. The rail routes through Chicago traverse at least 9 U.S. congressional districts.

One Illinois reactor, Zion, and 23 out of state reactors and storage facilities, would ship to Caliente by rail through the Chicago HTUA. Zion shipments originate on the UP, and travel directly through Chicago with no interchange. Shipments from Wisconsin reactors enter from the north on the CN. Shipments from eastern reactors enter from Indiana on the CN, CSXT, and the NS. Shipments from two Illinois sites, Dresden and

Morris, originate on the Elgin, Joliet and Eastern Railway (EJE) and interchange with the UP at West Chicago.

Rail shipments would enter the Chicago area on four major (Class I) carriers – CSX Transportation (CSXT), Canadian National Railway (CN), Norfolk Southern Railway (NS), and Union Pacific Railroad (UP). Two carriers, CN and CSXT, would transfer (interchange) some shipments to the Indiana Harbor Belt (IHB) Railroad (a Class III regional carrier), which in turn would transfer (interchange) those shipments to the UP. CSXT would also transfer (interchange) some shipments directly to the UP. NS shipments would transfer (interchange) all shipments directly to the UP. Transfers or interchanges would occur at four locations - Blue Island, Franklin Park, Melrose Park, and Rockwell Street. All of the shipments would exit the Chicago area on the UP from Proviso to West Chicago. According to the DOE representative routes, the shipments would travel the UP system to Caliente via Fremont, Gibbon, and Salt Lake City.

(e) Rail Route Selection - Urban Areas Not Designated as HTUAs.

Rail shipments of spent nuclear fuel and high-level radioactive waste through all major urban areas, including those which are not designated high threat urban areas (HTUAs), would be subject to the new rail transportation route analyses required under the PHMSA final rule. DOE's cumulative filings evidence no effort to incorporate PHMSA final rule guidance for preparation of rail transportation route analyses for the urban areas that would be affected by DOE rail shipments to YMP.

The PHMSA final rule is intended to prevent “*catastrophic release or explosion in proximity to densely populated areas, including urban areas and events or venues with*

large numbers of people in attendance.”¹¹⁴ The PHMSA final rule includes a list of 27 risk analysis factors to be considered in rail route evaluations, including “[p]roximity to iconic targets,” “[p]opulation density along the route,” and “[v]enues along the route (stations, events, places of congregation).” (Italics added.)¹¹⁵

DOE’s representative routes, identified in the R-FSEIS prior to publication of the final rule, were not evaluated in accordance with the 27 risk analysis factors in Appendix D. If these route analyses factors had been applied, the representative routes to YMP identified in the R-FSEIS might not be permissible. For example, DOE proposes to use the Union Pacific main line through Salt Lake City, Utah, for about 8,355 rail cask shipments of SNF and HLW to YMP¹¹⁶. Those cask shipments would constitute about 87 percent of all rail shipments to YMP.

According to the 2000 census, about 660,000 people live in the affected area in and around Salt Lake City. About 136,000 people in the Salt Lake City area live within 800 meters (one-half mile) of the rail lines that would be used for Yucca Mountain shipments. Put another way, one out of every 20 residents of Utah lives within 800 meters of a rail route to Yucca Mountain.

In addition to high residential population density, the area has a large population of day-time business and government employees, visitors and tourists. Nearby iconic buildings and landmarks include Temple Square, the State Capitol, the State Fairgrounds, and the Delta Center/Energy Solutions Arena. The City Creek Center, a billion-dollar redevelopment project, is being constructed in this area on the site

¹¹⁴ 73 FR 20752

¹¹⁵ 49 CFR Part 172, Appendix D

¹¹⁶ R-FSEIS, Figure G-41 at G-138, Table G-31 at G-79, Table G-66 at G-149.

previously occupied by the ZCMI Center Mall, one of the largest downtown shopping malls in the country. The Temple Square area reportedly draws up to 5 million tourists and visitors per year. The 20,000-seat Energy Solutions Arena is located within 800 meters of the Union Pacific rail line.

(f) Rail Route Selection - Carrier Compliance with Safety/ Security Rules.

Rail carriers transporting DOE shipments of spent nuclear fuel and high-level radioactive waste through major urban areas, including those which are designated high threat urban areas (HTUAs) and those which are not designated HTUAs, would be required to prepare rail transportation route analyses under the *new* final rules.

DOE's cumulative filings to date show no effort to apply the *new* final rules guidance for preparation of rail transportation route analyses to the representative rail routes identified in the R-FSEIS for shipments to Yucca Mountain using the proposed Caliente rail line. The State of Nevada has prepared a preliminary assessment of the railroads that would be required to prepare rail transportation route analyses for the representative rail routes identified in the R-FSEIS. Nevada's assessment, presented in Table III, includes the HTUAs and other major urban areas, along each railroads' routes to YMP, based on the R-FSEIS.

Under the *new* final rules, as many as 18 railroads would be required to prepare rail transportation route analyses for DOE shipments to Yucca Mountain. The Union Pacific Railroad would likely be required to prepare route analyses involving at least 13 designated HTUAs and at least 23 other major urban areas. The Norfolk Southern Railroad and CSX Transportation would each likely be required to prepare rail transportation route analyses involving at least 10 designated HTUAs and at least 11

other major urban areas. The NS and CSXT route analyses would have to be integrated with those prepared by the UP for routes involving carrier interchanges, especially the large number of route interchanges in Chicago, St. Louis, and Kansas City. Dozens of other interchanges with originating and connecting carriers would also have to be integrated with the analyses prepared by CSXT, NS, and UP.

It is likely that Nevada’s preliminary assessment significantly underestimates the number of carrier route analyses that would be required for DOE shipments under the *new* final rules. The PHMSA final rule requires consideration of 27 route analysis factors. Nevada has applied only two of those factors, high population and iconic locations, in addition to designated HTUA status, for this assessment. In addition to the HTUAs designated by TSA, Nevada identified 39 urban areas with 2000 census population greater than 100,000, and 12 state capitol cities, along the DOE SEIS rail routes to Caliente. Application of the full list of route analysis factors adopted by PHMSA in 49 CFR Part 172 Appendix D could significantly increase the number (and complexity) of the route analyses required for DOE shipments to Yucca Mountain. Nowhere in its cumulative filings has DOE considered the implications of Yucca Mountain shipments for the national rail system and the rail carriers that make up the national system.

It is evident that route selection under the *new* final rules could potentially foreclose utilizing certain rail routes and/or carriers.

Table III. Rail Route Area Considerations for DOE Shipments to YMP.

Railroad	Designated High Threat Urban Areas (HTUAs)	Major Urban Areas & Other Areas of Concern
Burlington Northern	Anaheim/Santa Ana, Denver*,	San Bernardino, Lincoln*, Provo, Quad Cities, Riverside, Sioux City

Santa Fe (BNSF)	Twin Cities*	
Buffalo & Pittsburgh (BPRR)	Buffalo	
Canadian National (CN)	Baton Rouge*, Chicago, Detroit, Memphis, St. Louis	Appleton, Jackson MS*, South Bend, Milwaukee-Waukesha
Canadian Pacific (CPRS)	Twin Cities*	
Conrail (CR)	Newark	Camden NJ
CSX Transportation (CSXT)	Atlanta*, Buffalo, Chicago, Cleveland, Columbus*, District of Columbia, Jacksonville, Kansas City, Pittsburgh, St Louis	Akron, Athens, Birmingham, Chattanooga, Erie, Montgomery*, Lansing*, Nashville*, Springfield MA, Syracuse, Youngstown
Florida East Coast (FEC)	Jacksonville, Orlando	Cape Canaveral
Fort Worth & Western (FWWR)	Dallas-Fort Worth	
Indiana Harbor Belt (IHB)	Chicago	
Iowa Northern		Cedar Rapids
Kansas City Southern (KCS)	Kansas City	Joplin, Shreveport, Topeka*
New England Central (NECR)		New Haven, Hartford*, Springfield MA
Norfolk Southern (NS)	Atlanta*, Charlotte, Chicago, Cleveland, Kansas City, Louisville, Philadelphia, Pittsburgh, St Louis, Toledo	Allentown, Asheville, Camden NJ, Dalton, Elkhart, Fort Wayne, Harrisburg*, Lafayette IN, Macon, South Bend, Springfield IL*
Providence and Worcester (PW)		New Haven, New London Submarine Base, Worcester
Springfield Terminal (ST)		Lowell, Worcester, Portland ME
Terminal Railroad Assn of St. Louis (TRRA)	St. Louis	
Union Pacific (UP)	Chicago, Dallas-Fort Worth, Houston, Kansas City, Las Vegas, Los Angeles, Omaha, Phoenix*, Portland,	Ames, Bakersfield, Beaumont TX, Bloomington, Cedar Rapids, Cheyenne*, El Paso, Fresno, Jefferson City*, Modesto, Ogden, Pocatello,

	Sacramento*, San Antonio, St Louis, Twin Cities*	Provo, Salt Lake City*, San Bernardino, San Luis Obispo, Santa Barbara, Sioux City, Springfield IL*, Stockton, Topeka*, Tucson
Willamette & Pacific (WPRR)	Portland	

*State capitols designated by asterisk.

III. Conclusions and Request for Relief.

Nevada submits that materially changed circumstances evidenced by past Congressional appropriations and present Presidential opposition and FY2010 budget for YMP provide justification for the Board to suspend further proceedings on the DOE Application in this case.

In the alternative, if suspension of proceedings is not deemed appropriate, Nevada submits that the materially changed circumstances, the omissions of material information, inconsistent and contradictory positions in cumulative filings to date and the new, materially changed regulatory requirements provide ample justification to reopen the PCN schedule and record.

Wherefore, for the all reasons offered and discussed herein, as well as those submitted and argued in its prior filings, Nevada requests the Board to suspend further proceedings on DOE’s pending Application under Section 10901 to construct and operate the Caliente Line as proposed, or in the alternative, to reopen the schedule and record on PCN issues to compel DOE to supplement its Application on PCN issues under Part 1150 requirements and to allow Nevada and Parties of Record the opportunity for limited discovery, supplemental comments and public hearing on PCN issues.

Dated this 7th day of April, 2009, by _____/s/_____
Paul H. Lamboley, for

Martin G. Malsch
Charles J. Fitzpatrick
EGAN FITZPATRICK & MALSCH
12500 San Pedro Avenue, Suite 555
San Antonio, TX 78216
Tel. 210.496.5001
Fax 210.496.5011
Email: *mmalsch@nuclearlawyer.com*

Paul H. Lamboley
Law Offices of Paul H. Lamboley
Bank of America Plaza, Ste. 645
50 W. Liberty Street
Reno, NV 89501
Tel. 775.786.8333
Fax 775.786.8334
Email: *phlamboley@aol.com*

Catherine Cortez Masto
Attorney General
Marta A. Adams
Chief Deputy Attorney General
Office of the Attorney General
of the State of Nevada
100 North Carson Street
Carson City, NV
Tel. 775.684.1100
Fax 775.684.1108
Email: *MAdams@ag.nv.gov*

Attorneys for State of Nevada

Certificate of Service

I HEREBY CERTIFY that true and correct copies of the foregoing document with exhibits 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 7th day of April, 2009:

Bradley L. Levine
Office of General Counsel (GC-52)
United States Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585
Bradley.Levine@hq.doe.gov

Nevada Central Railroad
c/o Robert Alan Kemp
Aviation Technologies Ltd.
4959 Talbot Lane, Unit #69
Reno, NV 89509

Honorable Shelley Berkley
U.S. House of Representatives
405 Cannon House Office Building
Washington, DC 20515

Fred Millar
915 S. Buchanan Street, Apt. 29
Arlington, VA 22204
fmillar@erols.com
Louis E. Gitomer
The Adams Building
600 Baltimore Avenue, Suite 301
Towson, MD 21204
Lou_Gitomer@verizon.net

Jan Cole
Caliente Hot Springs Resort LLC
6772 Running Colors Avenue
Las Vegas, NV 89131
jancole@land-water.com

David Wright
Nuclear Waste Strategy Coalition
P.O. Box 5233
Pinehurst, NC 28374
thenwsc@nc.rr.com

Mayor Kevin Phillips
City of Caliente
P.O. Box 158
Caliente, NV 89008
mayor@cityofcaliente.com

Kevin W. Bell
California Energy Commission
1516 9th Street
Sacramento, CA 95814
kwbell@energy.state.ca.us

Gracian Uhalde
P.O. Box 151088
Ely, NV 89315

Deborah Teske
Lander County
315 S. Humboldt Street
Battle Mountain, NV 89820
dteske@landercounty.org

Linda Mathias
Mineral County Nuclear Projects Office
P.O. Box 1600
Hawthorne, NV 89415
yuccainfo@mineralcountynv.org

Connie Simkins
N-4 State Grazing Board
P.O. Box 461
Panaca, NV 89042
ninescattle@yahoo.com

Michael S. Cyphers
City of Henderson
240 S. Water Street, Msc #133
Henderson, NV 89015
michael.cyphers@cityofhenderson.com

John E. Hadder
Healing Ourselves & Mother Earth
P.O. Box 6595
Reno, NV 89513
hadder@gbis.com

Joe Fallini
Twin Springs Ranch
HC-76, Box 1100
Tonopah, NV 89049

Barry S. Neuman
Carter Ledyard & Milburn LLP
701 8th Street, N.W., Suite 410
Washington, DC 20001
neuman@clm.com

G. Paul Moates
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005
pmoates@sidley.com

Elizabeth A. Vibert
Clark County District Attorney
500 South Grand Central Parkway
P.O. Box 552215
Las Vegas, NV 89155
Vibert@co.clark.nv.us

Mike Simon
White Pine County Nuclear
Waste Project Office
959 Campton Street
Ely, NV 89301
wpnucwst1@mwpower.net

Rochelle Becker
Alliance for Nuclear Responsibility
P.O. Box 1328
San Luis Obispo, CA 93406
rochelle@a4nr.org

Rex Massey
Churchill County Comptroller
P.O. Box 19549
Reno, NV 89511
Rexmassey@aol.com

Robert T. Opal
Union Pacific Railroad Company
1400 Douglas Street, Stop 1580
Omaha, NE 68179
rtopal@up.com

R. J. Gillum
Esmeralda County, NV
Board of County Commissioners
P.O. Box 490
Goldfield, NV 89013
muellered@msn.com

Margene Bullcreek
Native Community Action Council
P.O. Box 140
Baker, NV 89311
mbullcreek@yahoo.com

Pamela M. Fischhaber
Colorado Public Utilities Commission
1560 Broadway, Suite 250
Denver, CO 80202
pamela.fischhaber@dora.state.co.us

Edmund G. Brown, Jr.
Attorney General
State of California Department of Justice
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244
susan.durbin@doj.ca.gov

Joe Kennedy
Timbisha Shoshone
785 N. Main Street, Suite Q
Bishop, CA 93514
chairperson@timbisha.org

David A. Hirsh
Harkins Cunningham, LLP
1700 K Street, Suite 400
Washington, DC 20006
dhirsh@harkinscunningham.com

Laura Raicovich
Dia Art Foundation
535 West 22nd Street
New York, NY 10011
ksonnenborn@diaart.org

Michael and Mary Heizer
Triple Aught Foundation
P.O. Box 33
Hiko, NV 89017
ksonnenborn@diaart.org

Bradford R. Jerbic
City of Las Vegas
400 Stewart Avenue, Ninth Floor
Las Vegas, NV 89101
bjerbic@lasvegasnevada.gov

Jeffery D. VanNeil
530 Farrington Court
Las Vegas, NV 89123
nbrjdn@gmail.com

_____/s/_____
Paul H. Lamboley