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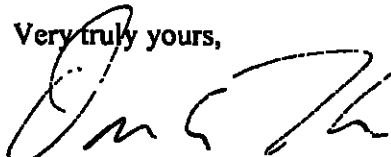
Anne K. Quinlan, Esq
Acting Secretary
Surface Transportation Board
Office of the Secretary
395 E Street, S.W.
Washington, DC 20423-0001

**Re: *United States Department Of Energy – Rail Construction And Operation –
Caliente Rail Line in Lincoln, Nye, and Esmeralda Counties, NV* (STB Finance
Docket No. 35106)**

Dear Ms Quinlan:

Enclosed for filing in the above-referenced docket please find the Comments of the Nuclear Energy Institute in support of the Department of Energy's Application for a Certificate of Public Convenience and Necessity.

Very truly yours,



David A. Hirsh

Counsel for Nuclear Energy Institute

Enclosure

cc All parties of record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35106

**UNITED STATES DEPARTMENT OF ENERGY
- RAIL CONSTRUCTION & OPERATION -
CALIENTE RAIL LINE
IN LINCOLN, NYE, & ESMERALDA COUNTIES, NV**

COMMENTS OF THE NUCLEAR ENERGY INSTITUTE

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July 15, 2008

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COMMENTS OF THE NUCLEAR ENERGY INSTITUTE

BACKGROUND

On March 17, 2008, the Department of Energy ("DOE") filed an application seeking authority to construct and operate a line of rail, approximately 300 miles in length, known as the Caliente Line ("Application"). The Caliente Line would run between a connection with an existing line of Union Pacific Railroad Company near Caliente, Nevada, and the proposed geologic repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain, Nevada. On April 11, 2008, the Board published notice of the Application and adopted a procedural schedule providing for comments in support of or in opposition to the Application to be filed by July 15, 2008 ("April 11 Decision").

Most recently, by decision served June 27, 2008, the Board denied a motion filed on April 2, 2008, by the State of Nevada,¹ asking the Board to reject the Application as incomplete ("June 27 Decision"). The June 27 Decision also addressed the State of Nevada's motion for

¹ Nevada's Motion To Reject DOL's Application, Or Alternatively, To Require Responsive Comments Only After Application Has Been Fully Completed By Proper Supplement (filed Apr. 2, 2008) ("Nevada's Motion to Reject").

leave to amend its April 2, 2008 motion to add additional claims,² including one asserting that the Board lacks jurisdiction over the proposed rail line. The Board granted the State of Nevada's motion for leave to amend, but denied all of the State's challenges to the Application. In the June 27 Decision, the Board found that it has jurisdiction over the proposed rail line and that DOE's Application was sufficiently complete to permit the Board to proceed to a determination on its merits with no modification in the schedule established by the April 11 Decision.

In accordance with the April 11 Decision, the Nuclear Energy Institute ("NEI"), on behalf of the nuclear energy industry, submits these comments in support of the Application.

INTRODUCTION

NEI is the policy organization of the nuclear energy and technologies industry and participates in both the national and global policy-making processes. Its more than 300 corporate members include operators of nuclear power plants, design and engineering firms, fuel suppliers and service companies, companies involved in nuclear medicine and nuclear industrial applications, radionuclide and radiopharmaceutical companies, universities and research laboratories, and labor unions. NEI works to foster and encourage the continued safe utilization and development of nuclear energy to meet the nation's energy, environmental, and economic goals. Its objective is to ensure the formation and implementation of policies that promote the beneficial uses of nuclear energy and technologies in the United States and around the world.

NEI and its members, which include all companies operating commercial nuclear power plants in the United States, have a direct interest in the construction of the proposed rail line.

Used or spent nuclear fuel and/or high level radioactive waste from these nuclear plants, owned

² State Of Nevada's First Amended Motion To Reject DOE's Application Or Alternatively: To Require Responsive Comment Only After Application Has Been fully Completed By Proper Supplement (filed May 2, 2008) ("Nevada's Amended Motion to Reject").

and operated by NEI members, would be transported along the proposed rail line and disposed of at the Yucca Mountain repository if the site is licensed by the Nuclear Regulatory Commission. Transportation and disposal of spent nuclear fuel in this manner would further the integrated, three-pronged strategy which NEI and its members have long supported for the safe and efficient management of such fuel.

This fuel management strategy involves (1) centralized interim storage of spent nuclear fuel until recycling or permanent disposal is (or both are) available, (2) research into and development and demonstration of advanced recycling technologies to close the nuclear fuel cycle, and (3) development of a permanent disposal facility for used fuel and/or residual waste. A major component of this strategy – disposal in a permanent geologic repository – would be realized by the Yucca Mountain project. DOE's Application helps achieve that goal by providing the groundwork for the rail transportation of spent nuclear fuel to the proposed Yucca Mountain geologic repository.

As discussed below, DOE's Application meets the Board's criteria for approval. Additionally, the potential environmental impacts of the Board's approval have been thoroughly analyzed as part of DOE's two recently published Final Environmental Impact Statements ("FEISs"), for which the Board served as a cooperating agency.³ As the Board determined in its June 27 Decision, the Board's Section of Environmental Analysis ("SEA") will "thoroughly

³ See Final Supplemental Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada – Nevada Rail Transportation Corridor, DOE/EIS-0250F-S2 ("RC-FSEIS"); Final Environmental Impact Statement for a Rail Alignment for the Construction and Operation of a Railroad in Nevada to a Geologic Repository at Yucca Mountain, Nye County, Nevada, DOE/EIS-0369 ("RA-FEIS"). The RC-FSEIS and RA-FEIS were issued in a combined document and are available at http://www.ympp.gov/transport/draft_eis/index.shtml (DOE issued a combined Summary of both FEISs, available at the same Web page. The RC-FSEIS is contained entirely within Volume I of the combined document. The roman numeral that precedes a citation to the RA-FEIS refers to the volume number of the combined document.)

review" the environmental impact statements prepared by DOE and "determine whether [they] provide[] an adequate analysis." June 27 Decision at 5. Instead of conducting a redundant environmental review, the Board can and should adopt and utilize those FEISs to discharge its obligations under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq* ("NEPA").

DISCUSSION

I. THE LAW FAVORS NEW RAILROAD CONSTRUCTION AND REQUIRES THAT THE APPLICATION BE APPROVED UNLESS CONSTRUCTION WOULD BE CONTRARY TO THE PUBLIC CONVENIENCE AND NECESSITY.

The Board must approve a proposed railroad construction unless it finds that it would be "inconsistent with the public convenience and necessity." 49 U.S.C. § 10901(c). As the Board has ruled, the statute, reflecting its amendment by the ICC Termination Act of 1995 ("ICCTA"), embodies a "permissive licensing policy" reflecting a "presumption . . . that new rail lines and new rail operations should be approved." *Tongue River R.R. – Constr. & Operation – W Alignment*, STB Finance Docket No. 30186 (Sub-No. 3), slip op. at 13 (STB served Oct. 5, 2007) ("*Tongue River III*"); see also *Mid States Coal. for Progress v. STB*, 345 F.3d 520, 552 (8th Cir. 2003) ("*Mid States*") (tracing successive liberalization of statutory standard for approval of rail construction proposals).⁴ Reading this requirement in conjunction with ICCTA's broad policy

⁴ The present standard is the culmination of a series of Congressional steps to liberalize the standards governing approval of rail construction and to encourage the creation of new lines and new service. Prior to 1980, the ICC had been directed to scrutinize rail construction proposals closely to prevent excess capacity, and the ICC was to issue a license only if it found that the public convenience and necessity "require or will be enhanced by" the new line. 49 U.S.C. § 10901(a) (1976 & Supp. III 1978) (amended 1980 and 1995). In the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980), Congress relaxed the standard by providing that the ICC need only find that the public convenience and necessity "permit" the proposed construction. 49 U.S.C. § 10901(a) (1976 & Supp. IV 1980) (amended 1995). With ICCTA, Congress completed its shift in policy, directing that the Board "shall" issue a construction

directives, the Eighth Circuit also recognized that “there is a statutory presumption that rail construction is to be approved.” *Mid States*, 345 F.3d at 552.

Under this pro-construction standard, the Board’s only role is to “determine whether [the proposed] common carrier project is inconsistent with the public convenience and necessity” June 27 Decision at 3. For purposes of the transportation merits, this requires the Board to consider whether (1) the applicant is financially able to undertake the project and provide rail service, (2) there is a public demand or need for the proposed service, and (3) the project is in the public interest and will not unduly harm existing services. *Tongue River III* at 13; *Dakota, Minn. & E R R. Constr. into the Powder River Basin*, 3 S T.B. 847, 863 (1998) (“DM&E”). As discussed in more detail below, these three considerations all weigh strongly in favor of approval of the Application.⁵

Additionally, the role of the Board is not to reshape or develop the proposal, but “rather to determine if the proposal submitted . . . meets the statutory criteria.” *Louisville & Jefferson County Riverport Auth. – Constr. & Operation Exemption – In Jefferson County, KY*, 4 I.C.C.2d 749, 758 (1988). Its duty is not to “second guess applicants or to choose between alternatives.” *Id.* at 754. Therefore, while some parties may prefer changes in the proposal,⁶ it is neither

license “unless” the agency finds a proposal “inconsistent” with the public convenience and necessity. 49 U.S.C. § 10901(c)

⁵ In addition to considering the transportation merits of the proposed construction and operation, NEPA requires the Board to review the environmental consequences of the proposed construction and operation before making a final decision on the application. 42 U.S.C. § 4332(2)(C). As discussed in Part III, below, the Board can and should, for that purpose, adopt DOE’s just-completed Final Environmental Impact Statements.

⁶ See, e.g., Supplemental Comments of Nye County, Nevada (filed July 7, 2008) (through route), Comments of Churchill County, Nevada (filed July 9, 2008) (alternative route); Comments of Caliente Hot Springs Resort LLC (filed July 9, 2008) (alternative route); Comments of Mineral County, Nevada (filed July 11, 2008) (through route); Comments of Lander County, Nevada (filed July 11, 2008) (through route) NEPA, of course, separately

necessary nor appropriate for the Board to attempt to determine whether variations of the proposed project might (in the view of some) better serve the public interest. Nor should the Board assume responsibility for reshaping the proposal. The Board's only decision is whether DOE's Application as submitted meets the statutory criteria for approval. If it does, it must be approved.

II. DOE'S APPLICATION TO CONSTRUCT AND OPERATE THE CALIENTE RAIL LINE MEETS ALL TRANSPORTATION MERITS CRITERIA FOR CONSTRUCTION AND OPERATION AUTHORITY

A. DOE Properly Invoked the Board's Jurisdiction and Provided All Information Necessary for the Board to Grant Construction and Operation Authority

The June 27 Decision denied the State of Nevada's motion to reject the Application, and determined, among other things, that (1) the Board has jurisdiction over the proposed rail line, and (2) DOE's Application is "sufficiently complete" and the Board does not need additional information from DOE "at this time." June 27 Decision at 3, 6. NEI agrees with these conclusions, and offers the following further comments as to why those conclusions are correct and should not be revisited or disturbed.

First, the Board correctly determined that it had jurisdiction over the proposed rail line in light of DOE's clear invocation of that jurisdiction through its request for common carrier authority, and given the fact that the grant of authority by the Board is permissive rather than mandatory in nature.⁷ *Id.* at 3. As noted in the June 27 Decision, although DOE may not have

requires consideration of alternatives as part of an EIS DOE, however, has fully met that requirement in its thorough FEISs

⁷ The Board's decision is further supported by the fact that this clearly is not a case of a party invoking the Board's authority in bad faith or for an impermissible purpose. *Cf. Jefferson Terminal R R – Acquisition & Operation Exemption – Crown Enters, Inc.*, STB Finance Docket No. 33950 (STB served Mar. 19, 2001) (citing questions whether "this case involves bona fide

definitively committed to providing common carrier service on the proposed rail line, that was understandable, as DOE was not in a position to do so prior to completing its environmental review. DOE has now completed that environmental review, and concluded that its preferred alternative is the Shared-Use Option (1 RA-FEIS at 2-117), which would require DOE to obtain a certificate of public convenience and necessity to construct and operate the railroad as a common-carrier rail line (*id.* at 2-111). Accordingly, the statement of that preference clears the way for DOE to adopt the Shared-Use Option formally in its Record of Decision.⁸ If DOE does so, it will put to rest any lingering doubt as to its intention to provide common carrier service by holding itself out to provide rail service to potential shippers and consignees on the proposed line.⁹

Second, with respect to the operating data, DOE made clear in its Application that it would, if necessary, submit additional information after selecting an operator for the rail line. Application at 34. In considering the State of Nevada's challenge to the adequacy of DOE's operating data, the Board found that it was sufficient "to warrant continuing processing its application" (June 27 Decision at 4), and that the Board did not "need additional information

railroad operations" as grounds for revoking class exemption as applied to rail construction proposal).

⁸ CEQ regulations provide that an agency should not issue an ROD until after expiration of a 30-day period following publication by the Environmental Protection Agency of notice of its FEIS in the Federal Register. *See* 40 C.F.R. §§ 1505.2, 1506.10(b). EPA published notice of DOE's FEISs on July 11, 2008. 73 Fed. Reg. 39,958 (July 11, 2008)

⁹ Indeed, there would still be no issue as to Board jurisdiction even if DOE does not adopt the shared-use option. It would make no difference if DOE ultimately declines to make use of construction authority granted by the Board and chooses instead to build and operate a private railroad, pursuant to whatever authority it may have in the absence of authorization from the Board, even then, the fact would remain that the proposal before the Board is for construction and operation of a line of railroad in common carrier service. That proposal is clearly within the Board's jurisdiction under 49 U.S.C. § 10901.

from the applicant at this time” (*id.* at 6). This statement seems to leave open the possibility that the Board might later require the submission of additional operating information in order to reach a final decision on the Application. NEI submits that the Board need not and should not require submission of additional data, especially now that DOE has issued its FEISs, which themselves include significant operating information. Potential delays and practical difficulties could arise if closure of the record were postponed, particularly if that postponement was until after selection of a line operator (which might not occur for many months). More importantly, the operational information provided by DOE in its Application and now in its FEISs is fully adequate for the Board to make a final decision on the merits.

The Application and the supporting FEISs contain detailed information about the proposed operation of the rail line. The Application contains information regarding the projected amount of traffic on the line; commodities expected to be transported (including commodities other than material destined for disposal at the Yucca Mountain repository); estimated frequency of DOE trains; and number and frequency of projected commercial freight shipments on the line. *See* Application at 14-18, 34-36. The RA-FEIS likewise contains detailed information regarding the proposed operation of trains carrying spent nuclear fuel and high-level radioactive waste, inspection of such trains; inspection of casks used to transport spent nuclear fuel and high-level radioactive waste, potential crew changes for trains carrying spent nuclear fuel and high-level radioactive waste; operation of trains carrying other materials, coordination of shipments, coordination with state and local governments; and maintenance. 1 RA-FEIS at 2-81-2-88.

As can be seen from Part II B, below, in the circumstances of this proceeding, additional operating information is not required for the Board to make the necessary determinations

concerning the three elements of the pro-construction public convenience and necessity standards – (1) financial fitness, (2) public demand or need, and (3) the public interest, including whether a project will cause harm to existing services. Operating information is generally most needed in order to assess potential costs for purposes of evaluating financial fitness or potential for loss of existing services. These are not relevant issues here given the fact that: the applicant is an agency of the Federal Government, which has the resources to complete the project, DOE does not currently provide rail service; and there is no other rail carrier currently providing DOE's proposed rail services to existing or prospective shippers. Because service over the line will be designed to serve the Yucca Mountain repository efficiently, and because the new service offered on the line to other shippers is an added public benefit, additional operating information is not needed to conclude that the line will meet a public demand or need and serve the public interest. Although the identity of the eventual operator of the line may not presently be known, this is not a barrier to approval, as noted by the Board in its June 27 Decision (at 4 & n 5, *citing Tongue River III*). Finally, sufficient operating information was adduced for DOE to prepare its environmental analyses. Accordingly, the Board should clarify that no additional operating information is or will be required in order for the Board to reach a final decision on the Application.

B. DOE's Proposed Project Would Serve the Public Interest and Otherwise Meet the Criteria for Construction and Operation Authority

1. DOE Is Financially Able to Undertake the Project and Provide Rail Service

The purpose of the inquiry into the financial fitness of an applicant is not to protect the applicant, but to protect (1) existing shippers from a carrier jeopardizing its ability to carry out its common carrier obligations, and (2) affected communities from needless disruptions and

environmental impacts that could occur if unfit applicants were to start construction but be financially unable to complete the project and provide the proposed service. *Tongue River III* at 14. This factor strongly supports approval of the Application.

First, because DOE is not an operating railroad, there are no existing shippers that depend upon its service. Second, it is evident that the Federal Government is financially capable of undertaking and completing this project and providing the service proposed by DOE. Although it is possible that DOE might begin this project and not bring it to conclusion, that would only happen as the result of a policy decision by the Federal Government, and not because the Federal Government lacks the financial wherewithal to continue the project, which is the subject of the Board's inquiry in this area.¹⁰

2. There Is a Public Demand or Need for the Proposed Service to Yucca Mountain

There can be no serious question as to the demand for the services that would be provided through the proposed line construction and operation. DOE, nuclear utilities, and the law all make clear that the repository site and the rail line that will serve that site are needed and will be used for the important purpose of disposing of spent nuclear fuel and high-level radioactive waste. DOE expects the railroad will ship materials to the Yucca Mountain repository for up to 50 years. Application at 14. DOE or its contractor would operate an average of 17 one-way trains per week to transport approximately 9,500 casks of used nuclear fuel, and approximately

¹⁰ Funding for the project, which is expected to cost approximately \$2.6 billion (in 2008 dollars) (Application at 4), is provided for through the Nuclear Waste Fund ("NWF"). The NWF is funded by fees on nuclear-generated electricity, which, by law, must cover the entire cost of the Yucca Mountain project (see 42 U.S.C. § 10222(a)(1), (c), (d)(4) (providing for "payment of fees" into the NWF "sufficient to offset expenditures" for the repository, including "any costs that may be incurred . . . in connection with the transportation . . . of spent nuclear fuel or high-level radioactive waste . . ."), and which has a present value of approximately \$21.6 billion (Application at 36, and Exhibits E & F).

29,000 railcars of construction materials, diesel fuel, and supplies for the repository and facilities. I RA-FEIS at 2-82, Application at 14.

Additionally, DOE's preferred alternative is to provide common carrier rail service along the line, and it anticipates handling shipments of stone and other nonmetallic minerals, petrochemicals, non-radioactive waste materials, and other commodities. Application at 15. Both DOE and Nye County studied the potential demand for commercial shipments on the proposed rail line other than to Yucca Mountain, and concluded that there would be approximately 8 trains (222 carloads) a week of commercial freight on the proposed rail line. *Id.* at 16.

In sum, the Caliente line would satisfy a strong transportation need.

3. The Rail Line Is in the Public Interest and Will Not Unduly Harm Existing Services

Construction and operation of the Caliente Line will further the national rail transportation policy. Specifically, it will be used to provide more efficient transportation service for spent nuclear fuel and high-level radioactive waste to the Yucca Mountain repository, as well as a new transportation option for shippers and potential future shippers along the new line, contributing to a sound transportation system. *See* 49 U.S.C. § 10101(5).

The Yucca Mountain geologic repository, and the proposed rail line that would serve it, are clearly in the public interest. The United States depends on nuclear technology and science in many different ways, but nuclear activities generate waste products. These waste products have been accumulating since the mid-1940s. Finding a long-term storage solution for these products is critical, and as the Secretary of Energy has found, "there is a near-universal consensus that a deep geologic facility is the only scientifically credible, long-term solution to a problem that will only grow more difficult." *See* Recommendation by the Secretary of Energy

Regarding the Suitability of the Yucca Mountain Site for a Repository Under the Nuclear Waste Policy Act of 1992 at 26 (2002) (“Energy Secretary Recommendation”), *available at* http://www.ocrwm.doe.gov/ym_repository/sr/sar.pdf.

As the Secretary of Energy has determined (*see* Energy Secretary Recommendation at 26-31), advancing the Yucca Mountain repository would serve the public interest in many compelling ways. For example, it would advance energy security by facilitating the use of diverse sources of energy, thus limiting our vulnerability to shortages and price spikes. Without a repository, spent nuclear fuel must continue to be managed on an interim basis at multiple locations throughout the country. The repository would also increase operational certainty for the U.S. nuclear navy, which must store spent nuclear fuel from its most important vessels at a temporary location, a situation that cannot continue indefinitely. Additionally, the repository would facilitate the decommissioning of surplus nuclear weapons, preventing the proliferation and securing the disposal of potentially weapons-grade nuclear materials. The repository would also protect the environment, by allowing safe disposal of spent nuclear fuel and high-level radioactive waste and facilitating the continued expansion of nuclear power as a clean, greenhouse-gas-free energy source.

The President and Congress have both formally adopted the Secretary of Energy’s assessment that the Yucca Mountain repository is in the national interest, promulgating that assessment as national policy. Thus, the President has determined that the Yucca Mountain project “is necessary to protect public safety, health, and the Nation’s security.”¹¹ Likewise, upon receiving the President’s recommendation, Congress held hearings and received evidence and comments regarding the Yucca Mountain project. Congress found that “continued progress

¹¹ President’s Letter to Congressional Leaders Recommending the Yucca Mountain Site for the Disposal of Spent Nuclear Fuel and Nuclear Waste, 2002 WLNR 5183928 (Feb. 15, 2002).

towards the permanent disposal of high-level radioactive waste and spent nuclear fuel in a deep geologic repository that will isolate these wastes from the accessible environment remains in the national interest.” See H.R. Rep. No. 107-425 (2002); S. Rep. 107-159 at 14 (2002). It thus adopted the “Yucca Mountain Repository Site Approval Act” as a joint resolution Pub. L. No. 107-200, 116 Stat. 735 (2002). The Board, of course, must accept these clear and unambiguous Executive and Congressional policy determinations, particularly in this highly complex and technical area and where those determinations were the product of many years of study and debate.

NEI and its members, who understand and are directly engaged in the production and support of the nuclear industry in the United States, also recognize and support the Yucca Mountain project as serving the public interest. NEI sees that facility as an important part of an integrated strategy to manage spent nuclear fuel, which would contribute to the closure of the nuclear fuel cycle, thus preserving the environment, and facilitating access to a clean form of energy.

Just as the Yucca Mountain repository would serve the public interest, the proposed rail line that would permit DOE to safely and efficiently transport used fuel by rail to Yucca Mountain is an integral part of that project and should be recognized as serving the same compelling public interests. After exhaustive study, DOE determined that rail is the preferred method of transportation of used fuel to the repository. Record of Decision, 69 Fed. Reg. 18,557 (Apr. 8, 2004). Rail is highly efficient, and the mostly rail scenario is preferred due in part to its lower potential impacts on the health and safety of workers and the public. *Id.* at 18,561. Moreover, if the Board timely grants construction and operating authority, it may permit completion of the rail line and commencement of operations in time for it to be used for the

construction of the repository itself, potentially lowering costs for and expediting completion of the facility.

In addition to serving the Yucca Mountain repository itself, the proposed line would be used to offer service to commercial shippers and communities along its route. DOE has identified at least 10 shippers with facilities near the proposed line, and estimated a demand for 8 trains, consisting of 222 carloads, a week. Application at 17, 32. This shared use of the line would not only benefit these shippers themselves, but surrounding communities by allowing for their further development. These last two benefits – the potential use of the proposed rail line for construction of the Yucca Mountain geologic depository itself and for service to other shippers – underscore the added benefits that will flow from expeditious review and approval of DOE's Application.

It should also be noted that the proposed rail line would not harm existing rail service to Yucca Mountain or to shippers or consignees along the proposed rail route, because no such service currently exists. Further, the suggestion that the Caliente Line could disrupt the national or regional rail systems is implausible,¹² given the low levels of traffic projected for the line and the fact that the new line would connect with only one carrier, at only one point. Thus, there is nothing to suggest that potential impacts from construction or operation of the line could be significant or require further study.

Moreover, the proposed line is expected to bring jobs to the region (III RA-FEIS at 4-292), and because the length of the right-of-way would be almost entirely within BLM-administered land (*id.* at 4-296), potential economic impacts on private land owners would be

¹² See Supplemental Comments of Nye County, Nevada, at 7-8 (filed July 7, 2008) (arguing that DOE should be required to study further the potential impact on "regional rail systems").

minimal (*id.* at 4-292 – 4-299) With regard to potential impacts on Native American groups, DOE developed the alignment to avoid Native American lands (*id.* at 4-64) and has proposed mitigation to avoid, minimize, or otherwise reduce impacts on Native Americans to the greatest extent possible. See II RA-FEIS at 3-714.

Finally, as discussed in Part III.D., below, none of the potential impacts identified as part of the environmental analysis of the project remotely rises to a level that could outweigh the public benefits of the proposed Caliente Line

III. THE BOARD CAN AND SHOULD ADOPT DOE'S FEISs AND GIVE FINAL APPROVAL TO DOE'S APPLICATION.

A CEQ Regulations Authorize the Board to Adopt DOE's FEISs

Consistent with judicial precedent, CEQ regulations encourage agencies to adopt Environmental Impact Statements prepared by other federal agencies. Those regulations specifically call for “[c]liminat[ion of] duplication . . . with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency.” 40 C.F.R. § 1500.4 To avoid undue delay and needless, repetitious consideration of issues already exhaustively evaluated by DOE, the Board should adopt the FEISs prepared by DOE and close the record on environmental issues.

CEQ regulations contemplate the use of a lead agency and cooperating agency under circumstances such as these 40 C.F.R. §§ 1501.5, 1501.6. A cooperating agency may then adopt, without recirculating for comments, the EIS of a lead agency, subject only to the cooperating agency's independent review and conclusion that “its comments and suggestions have been satisfied.” 40 C.F.R. § 1506.3.

Thus, the Board, which was a cooperating agency, can here adopt the FEISs prepared by DOE without soliciting further public and agency comment. Further, there is nothing improper about one federal agency adopting an EIS prepared by another federal agency, even where the preparing agency is an applicant before the reviewing agency. For example, in an analogous situation, the Second Circuit held that in issuing permits to the Navy for certain dumping activities, the Army Corps of Engineers properly relied on an EIS prepared by the Navy as lead agency. *Natural Res. Def Council v Callaway*, 524 F 2d 79, 86-87 (2d Cir. 1975).

B. DOE's FEISs Satisfy the Board's Obligations Under NEPA

The FEISs prepared by DOE meet all the requirements of NEPA and address the same issues the Board would consider were it to undertake a separate evaluation of the environmental impacts of the proposed rail line. There is no need for the Board to re-analyze the issues already considered by DOE, or to allow comments on the issues DOE has already addressed and to which it has responded. This includes issues related to the appropriate scope of DOE's studies and to appropriate alternatives for consideration, which are fundamental issues as to which all parties have already had an opportunity to comment and which should now be considered settled. Neither should parties be allowed at this point to raise speculative concerns or matters that do not have the potential to cause significant environmental impacts. As the Supreme Court has ruled, even new evidence presented after issuance of an FEIS does not warrant further environmental analysis absent a showing that potentially substantial impacts have been overlooked. *Marsh v Or Natural Res. Council*, 490 U.S. 360, 373-74 (1989) (agency need not supplement completed environmental review every time new information comes to light; supplementation only required where the new information shows that significant environmental impacts will result from federal

action remaining to be done). Such analysis would be even less warranted in response to unsupported suggestions of possible subjects for further review

There are two issues concerning the sufficiency of the FEISs that were suggested by the State of Nevada and addressed by the Board in its June 27 Decision (at 5, 6), but which still bear comment. First, the State of Nevada argued that the Federal Railroad Administration ("FRA") and Transportation Security Agency ("TSA") should have been included as cooperating agencies in DOE's EISs. Nevada's Amended Motion to Reject at 4-5. However, cooperating agencies participate either at the request of the lead agency or upon their own request to participate. 40 C.F.R. § 1501.6. There is no requirement that an agency participate if it is not requested to do so by the lead agency and chooses not to do so, even if it may have some particular expertise that could conceivably assist the lead agency. DOE did not request TSA or FRA to participate, nor did those agencies request to participate. Further, DOE is aware of, and has stated its intention to operate and maintain the line in accordance with, applicable regulations of both agencies. See, e.g., I RA-FEIS at 2-81 ("DOE would operate and maintain the railroad in accordance with applicable regulations, guidelines, and standards of the Federal Railroad Administration").

Second, the State of Nevada suggested that DOE failed to evaluate adequately the risk of terrorism. Nevada's Motion to Reject at 13-15. This is simply incorrect. The FEIS, which is or should become part of the record before the Board, includes an extensive evaluation of transportation sabotage.¹³ See III RA-FEIS at 4-344 – 4-350. Additionally, DOE explained that the analyses provided by opposing parties used values for parameters that would be "at or near

¹³ DOE's evaluation of the risks of terrorism and sabotage clearly distinguishes these FEISs from the Environmental Assessment ("EA") prepared by the Nuclear Regulatory Commission ("NRC") in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm.*, 449 F.3d 1016 (9th Cir. 2006). In that case, the court determined that the EA was inadequate because "the NRC decided categorically that NEPA does not require consideration of the environmental effects of potential terrorist attacks." *Id.* at 1028

their maximum values ” *Id.* at 4-344. DOE properly avoided such an analysis because “the approach yields unrealistically high results” that “do not represent the reasonably foreseeable consequences of severe transportation accidents.” *Id.* at 4-344.¹⁴ Further, in response to a comment on the draft EIS that the consideration of terrorist attacks was incomplete and required additional analysis, DOE explained that it “relied on conservative assumptions that tend to overestimate impacts.” VI RA-FEIS at CRD3-209.

Indeed, NEI believes the DOE’s analysis of the risk of terrorism substantially overstates both the likelihood and potential consequences of a sabotage event. The storage containers that will be used to transport spent fuel or high-level radioactive waste on the proposed rail line are extremely robust and highly resistant to sabotage, and NRC regulations already require that a strict security plan be in place for all shipments of used fuel. DOE specifically did not consider the effectiveness of these measures (*see* III RA-FEIS at 4-350), which “would make the likelihood of a sabotage event even lower” (*id.*).

C. DOE’s FEISs Amply Satisfy Any NEPA Requirement for Discussion of Environmental Mitigation, and Provide an Adequate Basis for Any Environmental Mitigation Imposed by the Board

As the Supreme Court has held, “it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.” *Robertson v Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citing cases). Thus, there is no requirement that the Board impose conditions on DOE that would mitigate all adverse environmental impacts of the action under consideration, or reduce them to the point of insignificance. *See id.* at 353 & n.16.

¹⁴ Such a “worst case analysis” is no longer required by CEQ regulations (*see Robertson v Methow Valley Citizens Council*, 490 U.S. 332, 354-56 (1989)), because CEQ found that such an analysis lacks a defensible rationale or procedure and that requiring one is counterproductive because it forces agencies to devote substantial time and resources to preparation of analyses which are not useful to decision-makers. *Id.* at 356 n.17

Nevertheless, "one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences," and such a discussion may be implicitly required by NEPA's mandate that an EIS contain a statement of "any adverse environmental effects which cannot be avoided should the proposal be implemented " *Id.* at 351-52 (quoting 42 U.S.C. § 4332(2)(C)(ii)). The RA-FEIS issued by DOE amply satisfies this requirement. It includes a list of 70 "Best Management Practices," embodying "the practices, techniques, methods, processes, and activities commonly accepted and used throughout the construction and railroad industries that DOE would implement as part of the Proposed Action to ensure compliance with applicable requirements and that provide an effective and practicable means of preventing or minimizing the adverse impacts of an action on human health and the environment " IV RA-FEIS at 7-14 – 7-39. Additionally, DOE provided a list of 46 measures specifically designed to mitigate potential impacts of constructing and operating the proposed rail line. *Id.* at 7-40 – 7-51. These mitigation measures described by DOE provide an adequate basis for any environmental mitigation the Board may choose to impose upon DOE as a condition of approval of the Application.

D. The Board Should Adopt the FEISs and Close the Environmental Record

With DOE's issuance of the two FEISs, the Board is now in a position to close the record on environmental issues, and it should do so. There is neither a need nor a legal requirement for the Board to allow further comment on environmental issues, as the NEPA process leading to the FEISs provided interested and affected parties a full opportunity for involvement and comment on the environmental issues relevant to this case. Therefore, as discussed further at Section

III A., the Board has neither an obligation nor any good reason to give parties an opportunity to submit duplicative and redundant comments.¹⁵

Further, the analysis of potential impacts in the FEISs supports granting DOE's Application. The FEISs do not identify any direct or cumulative impacts from the proposed rail line that would outweigh the significant public benefit from having a rail line available to transport spent nuclear fuel and high-level radioactive waste. Transportation of those materials to Yucca Mountain primarily by rail was found to have lower potential impacts on the health and safety of workers and the public than the alternative of transportation primarily by truck. Record of Decision, 69 Fed. Reg. 18,557, 18,561 (Apr. 8, 2004). Further, the State of Nevada itself has indicated that DOE should maximize the use of rail. *Id.*

CONCLUSION

DOE's Application clearly meets the statutory standard and the Board's requirements for approval, and a thorough record on all relevant environmental issues has been prepared and completed.¹⁶ NEI therefore respectfully requests that the Board grant DOE's Application so that the rail line will be available for receipt of used nuclear fuel once the repository is licensed by

¹⁵ Since the environmental record may be considered closed, NEI does not attempt in these comments to offer comprehensive environmental comments. However, if other parties raise new environmental issues or other matters that the Board may be inclined to consider, NEI reserves the right to comment further.

¹⁶ The Board's procedural schedule in this proceeding does not provide for an oral hearing (April 14 Decision at 5), and as in other recent construction proceedings, including the *Tongue River* proceeding after which the Board's procedural schedule is modeled, there is no need for one. *See, Tongue River III*, at 12 ("We see no need for an oral hearing."). The issues presented by the Application are straightforward, DOE has provided all of the information required for a decision on its Application, and the Board's already extended procedural schedule has provided ample opportunity for parties to file written comments. *See also Dakota, Minn. & E. R.R. Constr. into the Powder River Basin*, slip op. at 3 n.9 (STB served July 16, 1998) ("[T]he Board handles almost all of its cases under the modified procedure (*i.e.*, on a written record). The Board rarely undertakes oral hearings.")

NRC, and further requests that the Board do so expeditiously so that the rail line can be used for the construction of the repository, and local communities can begin to realize the economic benefits of the proposed line as soon as possible

Respectfully submitted,



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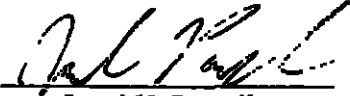
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July 15, 2008

CERTIFICATE OF SERVICE

I certify that I have this 15th day of July, 2008, served copies of the foregoing Comments of the Nuclear Energy Institute upon all parties of record in this proceeding by first-class mail, postage prepaid, or a more expeditious method of delivery.


Jared H. Powell