UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
U.S. DEPARTMENT OF ENERGY	)	Docket No. 63-001
License Application for Geologic Repository At Yucca Mountain, Nevada	)	
CONTENTION NO. 1 BY CALIENTE HOT SPRINGS RESORT LLC	)	

CALIENTE HOT SPRINGS RESORT - NEPA - IMPACTS ON LAND USE AND OWNERSHIP

1. A one-sentence statement of the contention itself

The DOE Final Supplemental Environmental Impact Statement for Yucca Mountain, DOE/EIS 0250S-F1 (July 2008) (at 6-32), hereinafter referred to as the "Final SEIS", acknowledges that construction and operation of the proposed Caliente rail line would "adversely affect" the Caliente Hot Springs Resort (Final SEIS at 6-33), but defers the full analysis of impacts required under NEPA until some future date under a "longer-term, iterative process" proposed in Section 7.1 of the Final Environmental Impact Statement for a Rail Alignment, DOE/EIS 0369 (June 2008), incorporated by reference in the Final SEIS at 9-13, and hereinafter referred to as the "RA FEIS".

2. A brief one-sentence summary of the basis for the contention

Because DOE has failed to fully evaluate the impacts of construction and operation of the proposed Caliente rail line on the Caliente Hot Springs Resort, there can be no adequate disclosure of alternatives under NEPA; if reasonable alternative

corridors, alignments, and segments were assessed, the disclosure of impacts on the Caliente Hot Springs Resort could be materially different, and thus the Final SEIS, of which the RA FEIS is truly a part, cannot be adopted by the NRC.

3. A demonstration that the contention is within the scope of the hearing

This contention challenges whether DOE has complied with the NRC requirements applicable to Yucca Mountain (10 CFR 51.67, 63.21, 63.24, and 63.31) and NEPA and, therefore, falls within the scope of the hearing as specified in section II, paragraph 1 of the Notice of Hearing.

4. A demonstration that the contention is material to the findings NRC must make to license Yucca Mountain

NRC regulations (10 C.F.R. 51 and 63) require DOE to submit an environmental impact statement with its license application. DOE has submitted the Final SEIS with its application, which Final SEIS incorporates the RA FEIS by reference. In these environmental reports, DOE must consider the transportation impacts of the proposed action. DOE has made a partial, though unsatisfactory job of such obligation, and filed the results with NRC. DOE must take a hard look at the potential environmental impacts of the proposed action and reasonable alternatives. NRC cannot provide DOE a construction authorization without first evaluating the impacts of the proposed action and alternatives, including selection of an alternative rail corridor, alignment, or alignment segment that would eliminate the adverse impacts on the Caliente Hot Springs Resort. The DOE Final SEIS, including the RA FEIS, fails to comply with these requirements. This raises a material issue within the scope of the licensing proceeding.

5. A concise statement of the facts or expert opinions supporting the contention, along with appropriate citations to supporting scientific or factual materials

The DOE failed (even in face of Caliente Hot Springs Resort's oral testimony and written comments to the draft statements during DOE's EIS process) to even consider,

let alone investigate or report on, the geologic hazard and the energy resource that are presented by the active Caliente Geothermal Field, the surface expression of which includes: (i) the Caliente Hot Springs, which are commercially developed and used by the Caliente Hot Springs Resort; and (ii) a geothermally-induced sink hole that has developed in the middle of the proposed right-of-way for DOE's Caliente Alternative Segment of the Caliente rail line, which has been adopted by DOE as its preferred route.

DOE failed to fully consider and report the impacts to Caliente residents and property resulting from exposure to non-radiological and radiological risks and failed to fully consider and compare the Eccles Alternative Segment, which would completely avoid the risks and impact to Caliente residents and property.

DOE failed to complete the detailed compensatory riparian habitat restoration program as required by the Environmental Protection Agency ("EPA") in its letter of April 11, 2008 to DOE prior to and as a part of the DOE's record of decision concerning the Caliente rail line alignment, including preferred segments. A copy of EPA's letter is attached as Exhibit A.

Symptomatic of DOE's failures with regard to its studies and the people and property of Caliente, Nevada, including Caliente Hot Springs Resort, are: (i) the fact that DOE proposes to move the Caliente rail line alignment through Garden Valley, Nevada, two miles farther south in an effort to lessen impacts to The City land sculpture (with all due respect, an inanimate object of art); (ii) proposes to cooperate with local ranchers operating on the federal domain to provide additional fencing, water facilities, and crossings, and the like, to mitigate impacts to cattle; whereas (iii) DOE fails to adequately compare and adopt the Eccles Alternative Segment, which would avoid by 4 miles the residents, homes and property of 1,000 living, breathing people in Caliente, Nevada.

Rather, DOE has decided in favor of the Caliente Alternative Segment, which

would run high-level radioactive waste into the very center of Caliente, Nevada, its residents, businesses and property, and over the Caliente the Geothermal Field and Caliente Hot Springs Resort, even though the Eccles Alternative Segment would destroy no wetlands, whereas the Caliente Alternative Segment would have long-term impact on 26.9 acres of wetlands (Table S-9, Summary, RA FEIS).

6. There must be sufficient information to show that there is a genuine dispute with DOE, along with specific references to the portions of the LA being controverted

Certainly there is a genuine dispute between DOE and Caliente Hot Springs Resort. DOE wants to run its Caliente rail line into the very center of Caliente, Nevada, (the Caliente Alternative Segment) to connect with the Union Pacific Railroad ("UPRR") when DOE has a very practical alternative (the Eccles Alternative Route), which would provide connection to the UPRR four (4) miles out of town where only jack rabbits will be impacted.

The Caliente Alternative Segment would result in construction of the Caliente rail line, and subsequent transportation of high-level radioactive waste to Yucca Mountain, over the top of the Caliente Geothermal Field and Caliente Hot Springs Resort property, and through the very center of the populace of Caliente, Nevada, without: (a) DOE having considered and reported the impacts to or risks associated with the Caliente Geothermal Field and the full risks and impacts to the Caliente Hot Springs Resort and the 1,000 people residing in Caliente, Nevada; (b) without DOE making a full and adequate comparison of the Eccles Alternative Segment; and (c) without DOE compliance with EPA requirements concerning a detailed compensatory habitat restoration plan.

The dispute between DOE and the Caliente Hot Springs Resort LLC is three-fold: (1) DOE has improperly and in violation of law and regulations deferred full evaluation of

impacts and mitigation costs to the Caliente Hot Springs Resort, the risks, impacts and mitigation costs relating to the Caliente Geothermal Field, and the risks, impacts and mitigation costs to the residents and property owners of Caliente, Nevada; (2) DOE has improperly and in violation of law and regulations failed to compare the Caliente Alternative Segment to the alternative of selecting the Eccles Alternative Segment or some other alternative; and (3) DOE has improperly and in violation of law and regulations failed to provide the detailed compensatory riparian restoration plan that was required by the EPA for the Caliente Alternative Segment (EPA made no such requirement of DOE for the Eccles Alternative Segment since the Eccles Alternative Segment would destroy no wetlands, whereas the Caliente Alternative Segment will destroy wetlands).

Caliente Hot Springs Resort has stated for the record and filed comments in DOE's process of completing the Final SEIS and RA SEIS consistent with the statements above and provide basis and grounds for DOE to correct and remedy the deficiencies and failures, as well as in DOE's proceedings before the U.S. Surface Transportation Board for a certificate of public convenience and necessity for the Caliente rail line.

Respectfully submitted:

CALIENTE HOT SPRINGS RESORT LLC

John H. Huston
Attorney at Law
Managing Member

EXHIBIT A

Caliente Hot Springs Resort – NEPA
Impacts on Land Use and Ownership
and on Business

Reference:
U.S. Department of Energy
License Application for Geologic Repository
at Yucca Mountain, Nevada

Docket No. 63-001

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

AUG 11 2008

Dr. Jane Summerson
EIS Document Manager
Regulatory Authority Office
Office of Civilian Radioactive Waste Management
U.S. Department of Energy
1551 Hillshire Dr., M/S 011
Las Vegas , NV 89134

Dear Dr. Summerson:

In accordance with our responsibilities under Section 309 of the Clean Air Act (CAA) and the National Environmental Policy Act, the Environmental Protection Agency (EPA) has reviewed the Department of Energy's (DOE) Final Supplemental Environmental Impact Statement (SEIS) on the Nevada Rail Transportation Corridor for the proposed Yucca Mountain Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste (CEQ #20080264) and Final Environmental Impact Statement (EIS) for a Rail Alignment for the Construction and Operation of a Railroad in Nevada to the proposed Yucca Mountain Repository (CEQ #20080265).

Comments on the Nevada Rail Corridor Final SEIS

As stated in our January 10, 2008 comment letter on the draft SEIS, EPA supports DOE's conclusion to evaluate potential alignments in the Caliente and Mina Rail Corridors. We understand that the Walker River Paiute Tribe continues to object to a rail line transporting nuclear waste across its Reservation. As a result, the Mina rail corridor was designated as the "non-preferred" alternative. *Appendix F Floodplain and Wetlands Assessment* of the Rail Alignment final EIS provides additional information on the floodplain and wetlands associated with the Caliente, Mina and Eccles rail alignments. Additional information is also provided regarding potential impacts to wetlands and proposed modifications to the alignment alternatives to minimize wetland impact. Accordingly, we reiterate that EPA does not have any concerns about this project.

Comments on the Rail Alignment Final EIS

DOE proposes to construct and operate a railroad in Nevada to transport spent nuclear fuel, high-level radioactive waste, and other materials to a repository at Yucca Mountain. DOE intends to implement this action through the use of the Caliente Rail Corridor.

EPA appreciates the efforts DOE has made to address our comments on the Rail Alignment Draft EIS. The revised *Appendix F, Floodplain and Wetlands Assessment*, includes an analysis of how the proposed discharges of fill material associated with the construction of the rail line and support facilities would meet the requirements of the Clean Water Act Section 404(b)(1) Guidelines ("Guidelines"). The Final EIS provides additional clarification regarding: 1) the extent of waters of the U.S. that may be impacted by the proposed alignments; 2) a description of the nature of the potential impacts; and 3) a differentiation between impacts that would occur from construction of the rail line, staging yards, interchange yards and quarries. The final EIS also contains additional information regarding the practicability of the Eccles and Mina alternatives. In addition, DOE evaluates rail alignment alternatives to minimize impacts to waters of the U.S.

According to the information in Appendix F, direct impacts to waters of the U.S. resulting from the preferred project alignment have been reduced from up to 81 acres to 8.6 acres (Table F-6). DOE evaluated alternatives to avoid wetlands. Based on that evaluation, there is no location in the Caliente Rail Corridor that would completely avoid all wetlands.

Further analysis was conducted to minimize the amount of wetland fill along the Caliente alternative segment. The construction right-of-way along this segment would be reduced to 30 meters to minimize wetlands impacts (F-26). In addition, in some areas (*e.g.*, Bennett Springs Wash), the roadbed was shifted to avoid additional wetlands (F-27), and the rail line would be constructed on the abandoned Union Pacific Railroad road bed. In addition, where practicable, bridge abutments would be placed out of wetlands (F-27). Through an evaluation of alternatives, DOE is also proposing to place the staging yard to the west of the abandoned rail road bed at the Upland Site avoiding all wetlands as compared to the Indian Cove Staging Area (47.0 acres) (F33-34), and has proposed a quarry siding site with less wetlands impacts from two locations originally being considered (F-34).

DOE also examined other locations in eastern Nevada to interface with the Union Pacific Railroad Mainline, such as existing sidings between the Utah border and Caliente, but could not find a practicable location with sufficient flat terrain to construct an interchange yard or an associated alignment that would not exceed the maximum allowable grade or other design requirements (F-66).

Based on the additional information and analysis provided in the final EIS (Appendix F), it appears that the preferred Caliente alignment, as described in the final EIS, represents the least environmentally damaging practicable alternative.

In our comments on the draft EIS, we requested DOE provide a detailed compensatory mitigation plan for unavoidable impacts. The Section 404(b)(1) Guidelines for Specification of Disposal Sites for Dredged or Fill Material, require compensatory mitigation for unavoidable impacts to waters (see 40 CFR 230.10(d) and 40 CFR Part 230, Subpart J, 73 Fed. Reg. 19594). The final EIS identifies compensatory mitigation options for the wetland impacts associated with the preferred alignment (F-73). These options include onsite restoration/creation and enhancement (*e.g.*, cattle exclusion fencing, riparian plantings), as well as off-site mitigation through a partnership with BLM (*e.g.*, riparian plantings, fish passage barrier removals, instream debris removal). However, while some of these options appear viable, the proposed mitigation is too conceptual at this time to determine whether it would adequately compensate for the loss of 8.6 acres of wetlands, as required by the Guidelines. Further, we note that EPA generally does not support cattle exclusion along the railroad right-of-way as part of the compensatory mitigation plan to offset impacts to aquatic resources. Typically, fencing of these areas is conducted to prevent cattle from accessing the rail line and causing any rail mishaps.

The wetlands that will be impacted by the Caliente rail alignment alternative represent one of the few remaining riparian areas in southern Nevada that support mature native vegetation. These wetlands provide habitat for wildlife, including the endangered southwestern willow flycatcher. To achieve adequate replacement of lost acreage and function, EPA recommends implementing one of the following compensatory mitigation options:

1) 3:1 restoration or creation of wetlands of equivalent function within the watershed.

2) 1:1 restoration or creation of wetlands of equivalent function within the watershed, and 5:1 non-native plant removal within the watershed.

3) 1:1 restoration or creation of wetlands of equivalent function within the watershed, and 5:1 enhancement of the riparian wetland habitat in Upper Meadow Valley, including Rainbow Canyon.

The mitigation ratios presented above are based on: 1) the uncertainty of the science of mitigation; 2) the challenges associated with wetland creation/restoration in an arid environment; and 3) the temporal loss of function until the wetland matures. Each of the mitigation options includes a minimum 1:1 restoration/creation component. The higher ratios for enhancement (*e.g.*, non-native plant removal and riparian plantings) account for the fact that enhancement does not replace lost wetland acreage. Enhancement provides a lift to specific functions within the suite of functions these wetlands perform. These mitigation ratios are also based on the assumption that the specific wetland restoration/creation and enhancement projects will complement restoration and enhancement efforts currently underway in the Meadow Valley Wash watershed.

Moreover, as part of the restoration and enhancement, a monitoring and management plan must be developed and implemented, consistent with the requirements of the Wetlands Compensatory Mitigation Rule found in 40 CFR 230.94-230.97 (73 FR 19594, published April 10, 2008). Further, the Army Corps of Engineers' Sacramento District has developed its Mitigation and Monitoring Proposal Guidelines, December 30, 2004, which recommends a mitigation monitoring period of 10 years, with the possibility of demonstrating success in 7 years. In addition, DOE should implement Best Management Practices to control storm water discharges during project construction to minimize impacts to the water quality from the proposed project.

Conclusion

As noted above, EPA agrees with the conclusions of the Nevada Rail Corridor final SEIS and does not object to the implementation of this action. Regarding the Rail Alignment final EIS, EPA supports the conclusions of the *Floodplain and Wetlands Assessment* contained in Appendix F, provided that DOE provides adequate compensatory mitigation for wetland losses, as discussed above. It is our understanding, based on our July 16, 2008, conference call, that DOE will provide a more detailed compensatory mitigation plan in the Record of Decision (ROD).

We appreciate the opportunity to review and comment on this document and look forward to continued collaboration on this project as it moves forward to the final design stage. Should there be modifications to the project as its currently proposed in the final EIS, we request that DOE resubmit a revised *Floodplain and Wetlands Assessment* as well as the mitigation plan for review. We also request a copy of the ROD upon its conclusion.

We appreciate the opportunity to review and comment on these documents. If you have any further questions you may contact me at (202) 564-5400. You may also call my staff point of contact, Marthea Rountree. She can be reached at (202) 564-7141.

Sincerely,

Susan E. Bromm

Susan E. Bromm
Acting Director
Office of Federal Activities

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LICENSING SUPPORT NETWORK DOCUMENT REQUIREMENTS	)	
CERTIFICATE OF COMPLIANCE	)	

All of the documentary materials to which I refer in Caliente Hot Springs Resort LLC's Contention No. 1 are publicly available on the LSN, with the possible exception of the EPA's letter of April 11, 2008 to DOE, a copy of which is attached to the contention as Exhibit A. This includes the material I have cited, as well as the materials put on the LSN by DOE, which could be cited either in support, or in opposition, of Caliente Hot Springs Resort LLC's contention.

John H. Huston

December 18, 2008