UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	January 15, 2009
U.S. Department of Energy	)	
	)	
(License Application for Geologic Repository at Yucca Mountain)	)	Docket No. 63-001

ANSWER OF THE U.S. DEPARTMENT OF ENERGY TO CALIENTE HOT SPRINGS RESORT'S PETITION TO INTERVENE

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.309 and 10 C.F.R. Part 63, and the Advisory Pre-Application Presiding Officer (PAPO) Board Order of June 17, 2008, the U.S. Department of Energy (DOE) hereby files its Answer to the "Petition" to intervene in this proceeding filed by Caliente Hot Springs Resort (the Resort).[1] The Resort evidently wishes to participate as a party in this proceeding before the Atomic Safety and Licensing Board (Board) concerning the DOE License Application (Application or LA) for authorization from the U.S. Nuclear Regulatory Commission (NRC or Commission) to construct a geologic repository at Yucca Mountain, Nevada for the disposal of spent nuclear fuel (SNF) and high-level radioactive waste (HLW).[2] For the reasons discussed below, the Resort's Petition should be dismissed in its entirety.

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[1] The Resort did not file a petition to intervene, but instead it submitted only a single contention entitled "Caliente Hot Springs Resort – NEPA – Impacts on Land Use and Ownership." For purposes of this Answer only, DOE construes the Resort's document as a petition to intervene. As discussed below, the "petition" was not filed until January 5, 2009.

[2] DOE's Answer to Nevada's Petition contains a "Background" section summarizing the Yucca Mountain site, proposed repository operation, applicable NRC regulatory framework, and the NRC Staff's technical review and the hearing process. DOE has omitted that section from this Answer in the interest of brevity.

Although the Resort has filed one contention purporting to challenge DOE's Application, it may not participate as a party to this proceeding because it fails to satisfy the applicable pleading requirements under 10 C.F.R. § 2.309. In particular, the Resort's Petition is untimely and fails to meet the late-filing requirements of § 2.309(c)(1)(i)-(viii). As further demonstrated below, the Petition is deficient on its face because the Resort: (1) is not in substantial and timely compliance with its Licensing Support Network (LSN) obligations; (2) has not established legal standing; and (3) fails to proffer a single admissible contention. Each of these deficiencies requires that the Resort's Petition be dismissed summarily.

II. THE PETITION IS UNTIMELY

The Resort's Petition – which was not properly filed and served until January 5, 2009 – should be rejected as untimely. On October 22, 2008, the NRC published a notice in the *Federal Register* directing that petitions to intervene in this proceeding be filed "no later than 60 days after the date of publication" of that notice; *i.e.*, no later than December 22, 2008. *See In re U.S. Dep't of Energy* (High Level Waste Repository), 73 Fed. Reg. 63,029, 63,030 (Oct. 22, 2008). The NRC also specified that petitions must comply with 10 C.F.R. § 2.309 and must be filed and served electronically in accordance with 10 C.F.R. Part 2, Subpart J. *Id.* at 63,029-30; *see also* 10 C.F.R. § 2.1013(c) (requiring service via EIE [electronic information exchange system]). The NRC made clear that a "non-timely petition or contention will not be entertained unless the Commission . . . determines that the late petition or contention meets the late-filed requirements of 10 C.F.R. § 2.309(c)(1)(i)-(viii)." *Id.* at 63,030. The Resort has not satisfied any of these requirements.

The Resort's Petition was late. Although the Resort evidently mailed its petition before the December 22 deadline,[3] it did not file and serve it using the mandated e-filing system. Thus, service was ineffective. 10 C.F.R. §§ 2.305(c), 2.1013(c). Despite repeated calls from the Office of the Secretary of the Commission to discuss the e-filing requirements, the Resort did not effect service using the e-filing system until January 5, 2009. *See* Memorandum from Annette L. Vietti-Cook, Sec'y of the NRC, to E. Roy Hawkens, Chief Admin. Judge, Atomic Safety and Licensing Bd. (Jan. 6, 2009).

Despite serving its Petition two weeks late, the Resort has made no attempt to excuse its late filing, or even address the governing late-filed standards found in Section 2.309(c)(1). Not only does it fail to articulate any "good cause," but the Resort ignores the requirement to address in its Petition the factors relevant to the Board's determination whether or not to consider an untimely petition. *See* 10 C.F.R. § 2.309(c)(2). Having failed to even *try* to meet the late-filing requirements, the Resort's untimely Petition should "not be entertained." 73 Fed. Reg. at 63,030.

III. THE RESORT HAS NOT COMPLIED WITH ITS LSN OBLIGATIONS

The Board also should deny the Resort's Petition, pursuant to 10 C.F.R. §§ 2.1012(b)(1) and (c), because the Resort has not demonstrated that it is in substantial and timely compliance with the LSN requirements of 10 C.F.R. Part 2, Subpart J and the PAPO Board Orders. In fact, the record establishes that the Resort is *not* in compliance for numerous reasons.

First, the Resort did not participate in the pre-license application phase of this proceeding, which is grounds for denying intervention. *See* 10 C.F.R. § 2.309(a) (providing that, in ruling on a petition to intervene in this proceeding, the presiding officer shall consider "any

[3] It is not clear that the Resort even tried to serve the correct participants in this proceeding because it never filed a proper certificate of service. Although the Resort appended a "List of Parties of Record" with its Petition, that document relates to a *different* proceeding before the Surface Transportation Board (which involved different participants than this proceeding).

failure of the petitioner to participate as a potential party in the pre-license application phase" governed by 10 C.F.R. Part 2, Subpart J). The Resort also failed to make the required LSN certification to the PAPO Board within 90 days after DOE's initial LSN certification, as required by 10 C.F.R. § 2.1003(a). Likewise, the Resort did not make any monthly supplemental productions and certifications as required by the PAPO Board's Second Case Management Order. Revised Second Case Management Order § VI(A) (July 6, 2007).

Second, the Resort has not made *any* documentary material available on the LSN. And, insofar as DOE can ascertain, the Resort has not obtained the computer system necessary to comply with electronic document production on the LSN. *See* 10 C.F.R. § 2.1011(a) (providing that each potential party is "responsible for obtaining the computer system necessary to comply with the requirements for electronic document production and service").

Furthermore, the one-page compliance certificate appended to the Resort's Petition is facially inadequate. The certificate was not filed with the PAPO Board as required by 10 C.F.R. § 2.1009(b). The certificate also fails to address all of the Resort's LSN obligations, which require, among other things, that it (i) designate an official to be responsible for administration of the Resort's responsibility to provide electronic files of documentary material, (ii) establish procedures to implement the requirements in § 2.1003, and (iii) provide training to its staff on the procedures for the implementation of the responsibility to provide electronic files of documentary material. 10 C.F.R. § 2.1009(a). The Resort's certificate does not address, much less demonstrate compliance with, any of these requirements.

Rather, the certificate states only that the documentary materials referred to in its Petition are available on the LSN. But that statement is insufficient. It does not address all three categories of documentary material; *i.e.*, supporting information, non-supporting information,

and reports and studies. *See* 10 C.F.R. § 2.1001 (definition of "documentary material"). Nor does it state unqualifiedly that all the documentary material in the Resort's possession has been identified and made electronically available on the LSN as required by the PAPO Board. *U.S. Dep't of Energy* (High-Level Waste Repository: Pre-Application Matters), LBP-04-20, 60 NRC 300, 339 (2004).

Because the Resort has not demonstrated timely and substantial compliance with its LSN obligations, the Board should deny the Resort's Petition.[4]

IV. THE RESORT HAS NOT ESTABLISHED LEGAL STANDING

Yet another fatal flaw in the Petition is the Resort's failure to even attempt to demonstrate legal standing to intervene in this proceeding as required by 10 C.F.R. § 2.309(d). Having failed to make any showing, the Resort likewise cannot satisfy any of the traditional concepts of Article III standing. *See Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998), *aff'd sub nom Envirocare of Utah, Inc. v. U.S. Nuclear Regulatory Comm'n*, 1994 F.3d 72 (D.C. Cir. 1999) (setting forth requirements for petitioner to establish standing in NRC licensing proceedings).

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[4] 10 C.F.R. § 2.1012(b)(1) is clear that a potential party "may not be granted" party status or participate under 10 C.F.R. § 2.315(c) if it cannot demonstrate substantial and timely compliance "at the time it requests participation." 10 C.F.R. § 2.1012(b)(2) makes clear that the time to cure any such failure to meet LSN requirements is *after* party status or the right to participate has been "denied," and not in any such Reply.

The Resort may not "cure" this or any other defect in its Petition, in its Reply pursuant to 10 C.F.R. § 2.309(h)(2). It is well recognized that "[r]eplies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in the answers to it." *Nuclear Mgmt Co., L.L.C.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006) (citing cases); *see La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004) (citing Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2203 (Jan. 14, 2004)). Replies cannot be used to "expand the scope of the arguments set forth in the original hearing request," nor should they be used to introduce new bases for contentions submitted with the original petition. *See Nuclear Mgmt Co., L.L.C.*, CLI-06-17, 63 NRC at 732. Additionally, the Advisory PAPO Board explicitly stated that "[r]eplies shall be limited to addressing points that have been raised in answers." *U.S. Dep't of Energy* (High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board), LBP-08-10, 67 NRC __ (slip op. at 9) (June 20, 2008).

DOE reserves the right to move to strike any portions of any Replies that fail to adhere to these limitations or seek other appropriate relief.

The Petition does not articulate any particularized injury to the Resort. Even if the Board were to infer from the Resort's NEPA contention some cognizable injury-in-fact that is fairly traceable to DOE's proposed action, the Resort has not alleged a basis to and cannot meet the other prongs of the standing analysis. Any such inferred injury is not "redressable" because, as discussed in detail below: (1) the NRC does not have regulatory authority over DOE's transportation decisions, and (2) in any event, the NRC cannot require DOE to do more than take a "hard look" at the environmental impacts, which it has done. *See Westinghouse Elec. Corp.* (Nuclear Spent Fuel Export License for Czech Republic-Temelin Nuclear Power Plants), CLI-94-7, 39 NRC 322, 331-32 (1994) (holding that petitioner has no standing if the NRC cannot take action to cure the claimed injury).

Nor would any such injury be within the "zone of interest" regulated by NEPA. *See Quivira Mining Co.*, CLI-98-11, 48 NRC at 8. NEPA is a procedural statute designed to "insure a fully informed and well-considered decision." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978). Fundamentally, the Resort complains that DOE should "adopt the Eccles Alternative Segment" to avoid impacting the "residents, businesses and property" in the area. Petition at 3-4. DOE has conducted the requisite environmental impact assessment, and the Resort's objection to the outcome because of possible economic impact on the Resort is not the sort of injury resulting from environmental damage with which NEPA is concerned. *See Quivira Mining Co.*, CLI-98-11, 48 NRC at 10.

Having failed to demonstrate standing on its own behalf, the Resort also fails to invoke standing on behalf of anyone else in Caliente, Nevada, as their representative. *See Consumers Energy Co.* (Palisades Nuclear Power Plant) CLI-07-18, 65 NRC 399, 408-10 (2007) (setting forth requirements of representational standing). It does not distinguish between injuries to itself

(an organization) and injuries to any unidentified members. It has not shown that any members authorized the organization to represent their interests. Nor has it attempted to show that any members – or any other local "residents, businesses and property" that it purports to represent (Petition at 4) – have standing in their own right. Thus, the Resort has not established a basis for representational standing.

V. THE RESORT'S PURPORTED NEPA CONTENTION IS INADMISSIBLE

Even if the Resort had complied with all the procedural requirements to participate in this proceeding, it has failed to proffer a single admissible contention. In its single contention, "NEPA – Impacts on Land Use and Ownership," the Resort alleges that DOE has not fully and timely evaluated, as required by NEPA, the proposed Caliente rail line's environmental impact on the Resort. Petition at 1.[5] Having proffered a NEPA contention, the Resort must satisfy both (a) the criteria set forth in 10 C.F.R. § 51.109 and 10 C.F.R. § 2.326, which apply to environmental contentions, and (b) the general admissibility requirements of 10 C.F.R. § 2.309. As discussed below, the Resort satisfies neither set of requirements.

A. The Resort Fails to Satisfy the Standards Applicable to Environmental Contentions.

The Resort fails to meet (or even attempt to meet) the express requirements of 10 C.F.R. §§ 2.326 and 51.109 for admitting its single NEPA contention in this proceeding. Among other things, § 2.326(a) requires that the Resort; (1) raise a significant environmental issue; and (2) demonstrate that its contention, if proven to be true, would or would likely result in a materially different outcome in this proceeding. Furthermore, the burden imposed by Section

[5] In February of 2002, DOE issued the *Final 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* (DOE/EIS-0250F, February 2002) (2002 FEIS). On April 8, 2004, DOE announced in a Record of Decision (2004 ROD) the selection of the mostly rail alternative analyzed in the 2002 FEIS for transporting spent nuclear fuel and high-level radioactive waste nationally and within Nevada. 69 Fed. Reg. 18,557. DOE also announced in the 2004 ROD that it had selected the Caliente rail corridor in which to examine possible alignments for construction of a rail line in Nevada. In July 2008, DOE issued the *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* (DOE/EIS-0250F-S1) (Repository SEIS), the *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) (Nevada Rail Corridor SEIS), and the *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) (Rail Alignment EIS). On October 10, 2008, DOE issued a Record of Decision (2008 ROD) announcing its decision to construct and operate a railroad along a rail alignment within the Caliente corridor. 73 Fed. Reg. 60,247.

2.326 can be met only by an affidavit submitted in support of each proposed NEPA contention that sets forth the factual and/or technical basis supporting the claim that the criteria of 10 C.F.R. § 2.326(a) have been met. 10 C.F.R. § 2.326(b); *see also* 10 C.F.R. § 51.109(a)(2). The Commission has emphasized that it "expects its adjudicatory boards to enforce the [section 2.326] requirements rigorously – *i.e.*, to reject out-of-hand reopening motions that do not meet those requirements within their four corners." *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2) ALAB-915, 29 NRC 427, 432 (1989).

The Resort has not addressed these mandatory requirements. Fundamentally, it fails to raise a significant environmental issue. While it superficially alleges that the proposed Caliente rail line may impact wetlands (Petition at 4), its core concern is its generalized fear of the rail line's supposed "impacts to the [Resort] residents and property resulting from exposure to non-radiological and radiological risks" (Petition at 3). Hence, the Resort insists that DOE should "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." *Id*. The Resort does not even try to connect the supposed impact on wetlands to the people and property it hopes to protect. Nor does it even attempt to demonstrate that a "materially different result would be or would have been likely" if its contention were proven to be true. Laid bare, this contention is not an environmental claim, but a not-in-my-back-yard objection, which is not the province of the NRC's review under NEPA.

Furthermore, notwithstanding the clear requirement set forth in both §§ 2.326(b) and 51.109(a)(2), the Resort did not submit a supporting affidavit of any kind. Instead, the contention is limited to a series of conclusory statements devoid of any analysis or factual underpinnings. Having failed to submit the requisite expert affidavit, and having made no

attempt to address the criteria of 10 C.F.R. §§ 51.109 and 2.326, the contention should be rejected.

B. The Resort's Contention Fails under the Admissibility Criteria of Section 2.309(f).

The Resort's failure to proffer a single admissible contention meeting the strict terms of § 2.309(f) provides yet another independent basis for dismissing the Resort's petition.

a. Statement of Issue of Law or Fact to be Controverted

Without prejudice to other positions taken by DOE, DOE expresses no legal objection based upon this requirement.

b. Brief Explanation of Basis

Without prejudice to other positions taken by DOE, DOE expresses no legal objection based upon this requirement.

c. Whether the Issue is Within the Scope of the Proceeding

This contention is directed at the Rail Alignment EIS and, therefore, challenges DOE's transportation decisions and the environmental impact statements upon which those decisions are based. For at least two reasons, that is a matter beyond the scope of this proceeding.

First, under the Atomic Energy Act and the Energy Reorganization Act (ERA), the NRC has regulatory authority over only certain DOE facilities and activities, including those for disposal of SNF and HLW. *See* 42 U.S.C. § 5842. Neither the ERA, nor the Nuclear Waste Policy Act (NWPA), nor any other statute provides the NRC with regulatory authority over DOE's transportation facilities and activities. Indeed, the NRC has recognized that its regulations do not cover transportation of waste to the repository because "the NRC's regulatory authority is limited to the operations at a GROA [i.e, the Yucca repository]." GROA Security and Material Control and Accounting Requirements, 72 Fed. Reg. 72,522, 72,527 (Dec. 20,

2007). Thus, absent direct authority over transportation facilities and activities, the NRC can have no NEPA responsibilities with respect to those facilities and activities, either. To the extent such transportation facilities and activities may contribute to the cumulative impacts of the proposed Yucca Mountain repository, NRC must take DOE's transportation facilities and activities as a given in considering the cumulative impacts of the proposed repository. *See, e.g.*, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004).

Second, any challenges to the analysis of environmental impacts arising from DOE transportation decisions, to the extent reviewable, are within the original and exclusive jurisdiction of the federal courts of appeals. In particular, challenges to the April 2004 ROD and the transportation-related portions of the 2002 FEIS on which it was based are no longer subject to review in any forum as a result of the expiration of the 180-day period to challenge that ROD set forth in § 119 of the NWPA. Any challenges to DOE's transportation decisions set forth in the October 10, 2008 ROD and the transportation related portions of the Repository SEIS and the Rail Corridor SEIS on which it was based also are not appropriately a part of this proceeding; such challenges may be pursued only through a petition for review to a federal court of appeals.

The Resort also specifically complains that DOE has not yet prepared a "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 part of the DOE's record of decision . . . ." Petition at 3. DOE's compliance with EPA regulations (here, the Clean Water Act), however, is plainly outside the scope of this proceeding. The regulations contemplate only a discussion of the "means to mitigate adverse environmental impacts." *See* 40 C.F.R. § 1502.16(h). DOE has done that. As EPA recognized in the letter referenced by the Resort, DOE discussed compensatory mitigation options for wetland impacts. *See* Rail Alignment EIS, Vol. V at F-73 to F-78.

Furthermore, in the October 10, 2008 ROD, DOE expressly stated that "DOE will prepare a Mitigation Action Plan in accordance with its NEPA regulations (10 C.F.R. 1021.331)." ROD Floodplain Statement of Findings – Nevada Rail Alignment for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, NV, 73 Fed. Reg. 60,247, 60,255 (Oct. 10, 2008). That provision provides that DOE shall prepare a Mitigation Action Plan "[f]ollowing completion of each EIS and its associated ROD" but "before DOE takes any action directed by the ROD that is the subject of a mitigation commitment." 10 C.F.R. § 1021.331(a). To the extent that the Resort's argument is that such a plan must be included as part of the EIS, it is in direct conflict with 10 C.F.R. § 1021.331. Such a challenge to agency regulations is beyond the scope of this proceeding.

d. Whether the Issue is Material to the Findings that the NRC Must Make

For the reasons discussed in section "c" above, this issue is not material to the findings NRC must make because the Resort's challenge to DOE's transportation decisions are outside the scope of this proceeding. Additionally, this contention fails to raise a material issue because DOE has taken a "hard look" at the environmental impacts of the proposed rail line.

Under NEPA, a potential intervenor must demonstrate that DOE has failed to take a "hard look" at environmental consequences. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). An EIS is adequate under this standard if it "contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences." *Churchill County v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519 (9th Cir. 1992).

DOE has thoroughly considered the environmental impacts associated with constructing the Caliente rail line to transport SNF casks. In fact, DOE analyzed a range of reasonable

alternatives, and it specifically considered in detail both the Eccles and Caliente alternatives at the interface with the Union Pacific Railroad Mainline. *See* Rail Alignment EIS, Vol. I at 2-117 to -118; Vol. III at 4-13 to -15; Vol. V at F-21 to -41. In assessing the alternatives, DOE considered potential environmental impacts to all resources. *See id.*, Summary at S-100 to -107. In addition to environmental factors, DOE also considered constructability, operational issues, and costs when assessing its preferred alternatives. *Id.* at S-78

DOE specifically considered the impacts to land use and ownership for both the Caliente and Eccles alternative segments. *Id.*, Vol. III at 40-39; Vol. IV at 8-3. It also assessed impacts to the City of Caliente's land-use plans, finding that it would not "substantially conflict with applicable land-use plans or goals." *Id.*, Vol. III at 4-64; *see also* Vol. III at 4-41. It also considered the relative impacts to private land on both the Caliente and Eccles alternative segments. *Id.,* Vol. III at 4-42 to -44. While there would be some impact on private lands in Caliente, DOE "would work with the affected landowners to develop specific measures to avoid, reduce or mitigate impacts to private land." *Id.,* Vol. III at 4-64.

Contrary to the Resort's assertion (Petition at 3), DOE's analyses included discussion of both non-radiological and radiological impacts during transport, including risk assessments. Rail Alignment EIS, Vol. III at 4-326 to -355. Recognizing the potential impact on population centers (including Caliente), DOE analyzed potential impacts associated with air quality (*id.*, Vol. III at 4-101 to -131), noise and vibration (*id.*, Vol. III at 4-266 to -289), and socioeconomics (*id.*, Vol. III at 4-290 to -317). The Resort presents no new information or analyses to demonstrate that DOE's analyses of these impacts were inadequate. Nor does the Resort present information to refute DOE's conclusion that "there are no important differences" among alignments, facility locations, or Staging Yard locations in relation to non-radiological

transportation impacts, non-radiological occupational health and safety impacts, or radiological impacts for the Caliente rail alignment. *Id.*, Vol. III at 4-358.

The Resort also mistakenly states that DOE failed to consider geologic hazards. Petition at 3. DOE explicitly discussed various subsurface conditions, including potential geologic hazards, that could affect the rail corridor. Rail Alignment EIS, Vol. I at 2-41. In fact, DOE specifically considered the geology where the Caliente rail alignment would interface with the Union Pacific Railroad Mainline for both the Caliente and Eccles alternative segments. *Id.*, Vol. II at 3-19 to -20. DOE also analyzed the impacts of constructing the Caliente alternative segment over geothermal resources. *Id.*, Vol. III at 4-14 to -15. DOE specifically assessed possible impacts to the commercially developed hot springs, concluding that "because the Caliente alternative segment would utilize the footprint of the former Pioche and prince Branchline, there would be no additional disruption to these geothermal resources." *Id.*, Vol. III at 4-55.

DOE also discussed compensatory mitigation options for wetland impacts. *Id.*, Vol. V at F-73 to -78. DOE has further committed to developing a more detailed plan to comply with the Clean Water Act, but, as discussed above in section "c," that is a matter outside the scope of this proceeding. As such, the Resort's objection to the timing of DOE's development of that plan (*see* Petition at 3) does not raise a material issue.

In sum, DOE has taken the requisite hard look at the probable environmental consequences of constructing the Caliente rail line. While the Resort deems DOE's review "unsatisfactory" (Petition at 2), it provides no principled basis for that argument. Moreover, a simple disagreement with the agency's findings is insufficient. *See Los Angeles v. Nat'l Highway Traffic Safety Admin.*, 912 F.2d 478, 488 (D.C. Cir. 1990). Courts reviewing the

adequacy of EISs have instructed that that the mere identification of a deficiency in an EIS does not render it "inadequate." Indeed, the D.C. Circuit so held in denying Nevada's challenge to the transportation-related portions of DOE's 2002 FEIS. *Nevada v. DOE*, 457 F.3d 78, 93 (D.C. Cir. 2006). The court emphasized that it "will not 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor." *Id.*; *accord Sys. Energy Res., Inc.* (Early Site Permit for Grand Gulf Site), CLI-05-4, 61 NRC 10, 13 (2005). Here, too, Caliente's disagreement with DOE's assessment should be rejected.

The Resort fundamentally – and mistakenly – argues that NEPA requires DOE to "adopt the Eccles Alternative Segment" (Petition at 3), or any other alternative, "including selection of an alternative rail corridor, alignment or alignment segment that would eliminate the adverse impact on the Caliente Hot Springs Resort." *Id.* at 2. NEPA "does not impose any substantive requirements on federal agencies – it exists to ensure a process." *The Lands Council v. McNair*, 537 F.3d 981, 1000 (9th Cir. 2008) (internal citations and quotations omitted). Thus, simply finding that a project will have an impact does not require DOE to consider, much less choose, any particular alternative.

NEPA regulations require only that government agencies evaluate "reasonable alternatives" to a proposed action. 40 C.F.R. § 1502.14(a). The "rule of reason" governs which alternatives the agency needs to discuss as well as the extent to which it needs to evaluate them. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991). As the Supreme Court has held, "the concept of alternatives must be bounded by some notion of feasibility." *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. at 551. Thus, an agency "is required to examine only those alternatives necessary to permit a reasoned choice."

Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin., 126 F.3d 1158, 1185 (9th Cir. 1997).

DOE did analyze rail alternatives, including the Eccles alternative suggested by the Resort. In response to public comments, DOE summarized its preference for the Caliente segment:

> The Eccles alternative segment would require construction in Clover Creek and would present greater engineering challenges because there would not be sufficient room for a wye track, which would make it difficult to handle train switching operations in the Interchange Yard. In addition, a 2-percent grade leaving the Eccles Interchange Yard would require trains to park with their brakes on, presenting a safety risk during operations. The Caliente alternative segment would have easier access to a nearby ballast quarry and would be easier to operate.

Rail Alignment EIS, Vol. VI at 3-45. Those reasons, coupled with the extensive reasons discussed throughout the Rail Alignment EIS (as discussed above), are more than sufficient to demonstrate that DOE's selection was reasonable. Naturally, the Resort prefers that the rail line be constructed elsewhere. But the fact that the Resort may be impacted does not require DOE to select the Resort's preferred alternative.

e. Statement of Alleged Facts or Expert Opinion Supporting Petitioner's Position and Supporting References

For the reasons discussed above in section V.A, the Resort has failed to provide the supporting facts, references and expert opinions as required by 10 C.F.R. §§ 2.326 and 51.109.

f. Existence of a Genuine Dispute on a Material Issue of Law or Fact, With Supporting References to the License Application

For the reasons set forth in section c, this contention presents no genuine dispute concerning an issue material to any finding that the NRC must make in this proceeding. Even assuming this contention addresses an issue within the scope of the proceeding, however, it still

fails as a matter of law to raise a material issue under NEPA. As discussed in section d, there is no genuine dispute on a material issue of law or fact. The Resort has not established any inadequacy under NEPA because DOE in fact took a "hard look" at the environmental impacts, and NEPA does not require the adoption of any particular alternatives. Furthermore, the Resort raises no more than "flyspeck" objections that would not render the EIS inadequate in any case.

VI. CONCLUSION

The Resort has not filed a timely Petition, is not in substantial and timely compliance with its LSN obligations, has failed to demonstrate legal standing to intervene in this proceeding, and has not submitted at least one admissible contention. For all the foregoing reasons, the Resort's Petition must be denied.

Respectfully submitted,

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Dated in Washington, D.C.
this 15th day of January 2009.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	January 15, 2009
U.S. Department of Energy	)	
	)	
(License Application for Geologic Repository at Yucca Mountain)	)	Docket No. 63-001

CERTIFICATE OF SERVICE

I hereby certify that copies of the "**ANSWER OF THE U.S. DEPARTMENT OF ENERGY TO CALIENTE HOT SPRINGS RESORT'S PETITION TO INTERVENE"** have been served on the following persons this 15th day of January, 2009 by the Nuclear Regulatory Commission's Electronic Information Exchange.

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