



STATE OF NEVADA

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April 22, 2004

Honorable James L. Connaughton, Chairman  
U.S. Council on Environmental Quality  
722 Jackson Place N.W.  
Washington, D.C. 20503

**RE: CEQ Investigation of the Energy Department's Usurpation of  
Procedural Laws for Developing a 319-Mile Rail Line in Nevada**

Dear Mr. Connaughton:

On April 8, 2004, the Department of Energy ("DOE") issued a Notice of Intent ("NOI") to prepare an Environmental Impact Statement ("EIS") for the alignment, construction, and operation of a 318-mile rail line from an interchange point in Caliente, Nevada to the proposed geologic repository for high-level nuclear waste and spent nuclear fuel at Yucca Mountain, Nevada, in Nye County. 69 Fed. Reg. 18565. The purpose of the proposed new rail line is to facilitate the interstate rail transportation of tens of thousands of tons of high-level waste and spent fuel on a nationwide basis and within Nevada, involving many thousands of shipments. According to DOE, "construction of the rail line would require the clearing and excavation of previously undisturbed lands, and the establishment of borrow and spoils areas." *Id.* at 18566. An intermodal transfer facility would also be built in conjunction with the rail line, and additional rail connections would be needed for many nuclear power plants in other states. Indeed, what DOE proposes in the NOI is nothing less than the largest new rail project in North America in many decades.

The State of Nevada objects to the NOI because, in assigning to itself "lead agency" status for this massive transportation project, *id.* at 18568, DOE appears to have blatantly preempted the exercise of exclusive regulatory authority by the Surface Transportation Board ("STB," or "Board") over this new rail line and the precise activities proposed by DOE in the NOI. Accordingly, Nevada respectfully requests that the CEQ investigate this matter and, if appropriate, issue corrective instructions to DOE.

### ***Discussion***

As articulated in the NOI, DOE's proposal for the alignment, construction and operation of a rail line falls squarely within the longstanding exclusive regulatory jurisdiction of the STB over rail transportation under the Interstate Commerce Act ("ICA"), 49 U.S.C. §§ 10101 *et seq.*, and any such project would require the prior approval of the STB. 49 U.S.C. § 10901. A person "may construct an additional railroad line," "provide transportation over, or by means of, an extended or additional railroad line," or "in the case of a person other than a rail carrier, acquire or operate an extended or additional railroad line" "*only if* the Board issues a certificate authorizing such activity." 49 U.S.C. §§ 10901(a)(2), (3), and (4) (emphasis added).

Indeed, it is the *Board* which must commence a proceeding to construct a new rail line, not DOE. Such a proceeding "begins when an application is filed" with the Board. 49 U.S.C. § 10901(b). The Board then gives public notice and notifies the Governor of any affected State of the beginning of the proceeding. *Id.* DOE has filed no such application, and it took it upon itself to issue a Record of Decision announcing the new rail corridor in April of this year. 69 Fed. Reg. 18557 (April 8, 2004). Indeed, DOE's underlying Final Environmental Impact Statement for the Yucca Mountain repository and its accompanying national transportation project – the putative foundation for DOE's Nevada rail corridor Record of Decision – does not list the Board as an agency with which DOE even *consulted* in preparing these environmental documents. DOE/EIS 0250 at Vol. II, App. C.

The STB's regulations implementing the requirements of the ICA are at Title 49, Chapter X of the Code of Federal Regulations. The "purpose" of these regulations is "to assure adequate consideration of environmental and energy factors in the Board's decisionmaking process pursuant to the National Environmental Policy Act ["NEPA"]... and related laws...." 49 C.F.R. § 1105.1. Absent a finding that "a service or transaction is not within the STB's jurisdiction," the NEPA process for major federal actions is commenced *by the Board*. 49 C.F.R. § 1105.5. DOE has made no finding (nor can it) that the proposed new rail line is not within the Board's jurisdiction.

The STB's regulations also contain, at Part 1105, "Procedures for Implementation of Environmental Laws." CEQ of course actively participated in proceedings resulting in the updating and revising of Part 1105. See Ex Parte No. 55 (Sub-No.22A) *Implementation of Environmental Laws*, 7 I.C.C. 2d 807 (1991).<sup>1</sup> Those regulations require that a prospective rail applicant such as DOE must provide STB's Section of Environmental Analysis "with written notice of its forthcoming proposal at

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<sup>1</sup> The Interstate Commerce Commission ("ICC") was terminated by the ICC Termination Act of 1995, P.L. 104-88, 109 Stat. 803, effective December 31, 1995. That act created the STB as the successor agency to assume responsibilities under the ICA, as amended.

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least 6 months prior to filing its application.” 49 C.F.R. § 1105.10(a)(1). Nevada is aware of no such written notice having been provided the Board by DOE. The regulations also require that, when an Environmental Impact Statement is needed for a proposed rail action, “*the Board* will publish in the Federal Register a notice of its intent to prepare an EIS....” 49 C.F.R. § 1105.10(a)(2) (emphasis added). The *Board* then solicits public comments and publishes a notice of the final scope of the EIS, indicating if there will be a cooperating agency or agencies involved in preparing the EIS. *Id.* DOE has stood this mandatory procedural process on its head, issuing by itself the NOI and indicating only that it “expects to invite” the STB to be a cooperating agency. 69 Fed. Reg. at 18565. Part 1105 contains numerous other procedural requirements that DOE is now well poised to ignore.

Even if the above laws and regulations were somehow discretionary, CEQ regulations provide that uncertainties over lead agency status “shall” be resolved “by letter or memorandum.” 40 C.F.R. §1501.5(c). To Nevada’s knowledge, no such written resolution exists between DOE and the STB. CEQ regulations also provide a number of requirements to facilitate agency cooperation, 40 C.F.R. §1501.6, most of which appear to have been circumvented by DOE. Yet, DOE has formally adopted CEQ’s NEPA regulations. 10 C.F.R. §§ 1021.101 and 1021.103. Most ironically, DOE’s NEPA implementation regulations specifically require adherence to CEQ’s above-cited requirements for lead agency memoranda and for interagency cooperation. See 10 C.F.R. § 1021.342.

For its part, DOE has historically submitted to ICC jurisdiction and participated in cases seeking relief involving transportation of spent fuel and high level waste under the Nuclear Waste Policy Act, 42 U.S.C. §§ 10101 *et seq.* See, e.g., *Commonwealth Edison v. Aberdeen & Rockfish RR., et al.*, 2 I.C.C. 2d 642 (1986) *rev’d and remanded*, 856 F.2d 646 (D.C. Cir. 1989); *DOE & DOD v. B & O Railroad Co., et al.*, 10 I.C.C. 2d 112 (1994), and cases cited therein. See also, *Railroad Interterritorial Agreement*, 2 I.C.C. 2d 86, 90 (1986).

For all the above reasons, and pursuant to 40 C.F.R. § 1501.5(e), Nevada respectfully asks CEQ to investigate DOE’s NOI and its unilateral undertaking of the lead agency role in the proposed Caliente rail line in Nevada, contrary to applicable federal statutory requirements and the regulations of the STB, CEQ, and of DOE itself. For your convenience, I have attached copies of the NOI and DOE’s related Record of Decision on the Caliente corridor. Please call me if you have any questions.

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Thank you for your consideration of this matter of great urgency to Nevada's citizens.

Sincere regards,

BRIAN SANDOVAL  
Attorney General

c: Honorable Spencer Abraham, Secretary  
U.S. Department of Energy

Honorable Roger Nober, Chairman  
Surface Transportation Board