IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEVADA, Petitioner, v. UNITED STATES DEPARTMENT OF ENERGY and SPENCER ABRAHAM, SECRETARY, Respondents.	)	Case No. 04-_____

PETITION FOR REVIEW

Introduction and Jurisdictional Statement

1. Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure and Section 119(a)(1) of the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. § 10139(a)(1), the State of Nevada petitions this Court for review of the U.S. Department of Energy's ("DOE's") final decisions and actions recorded in its *Record of Decision on Mode of Transportation and Nevada Rail Corridor for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada* (the "ROD"), filed by DOE on April 8, 2004. 69 Fed. Reg. 18557. The decisions recorded in the ROD, if implemented, would facilitate the nationwide movement of tens of thousands of shipments of lethal waste to Nevada, and construction of a rail line that would constitute the longest

new rail project in the United States in over 80 years. As described in this petition, these decisions are contrary to law and grounded in arbitrary and capricious action.

2. The ROD chose from among policy options purportedly analyzed by DOE in its *Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain* (the "FEIS"), issued on February 14, 2002. This Court addressed the justiciability of the FEIS in *Nuclear Energy Institute v. Environmental Protection Agency*, 373 F.3d 1251 (D.C. Cir. July 9, 2004). In that decision, this Court deferred judicial review of the Yucca FEIS to support a transportation decision until DOE had made a "concrete and final decision" based on the FEIS, including any "transportation-alternative selection." *Id.* at 96, 97. The April 8, 2004 ROD is such a transportation decision.

3. Petitioner challenges the Yucca FEIS insofar as DOE relied on its transportation assessment in the ROD to frame concrete and final decisions on the selection of a transportation mode and a rail corridor, under section 119(a)(3) of the Nuclear Waste Policy Act, 42 U.S.C. § 10139(a)(3). This challenge is specifically directed to DOE's uses of the FEIS to support these final agency actions.

4. The ROD includes both DOE's final decision on a transportation mode and its final selection of a rail corridor. It records DOE's selection of a "mostly rail"

transportation mode both in Nevada and the nation as a whole, predicated on the view that DOE "will ultimately" construct a rail line connecting the repository site to an existing rail line in Nevada. The ROD also selects the Caliente corridor as the one railway route within Nevada, from among five routes that were evaluated. But due to DOE's likely inability to complete the Caliente railway before commencing shipments to the repository, DOE also selected in the ROD a supplemental national mode of transportation in which legal-weight truck casks would be loaded onto rail cars, transported by rail to a transfer station in Nevada, and carried by legal-weight trucks to the repository. DOE selected that supplemental mode notwithstanding its summary rejection of this very mode in prior environmental review as an impractical alternative having the highest costs and the highest public health and safety impacts.

DOE's Rail Corridor Selection

5. The ROD selected the Caliente corridor as the route for rail transport of waste to the Yucca Mountain site. But DOE unilaterally assigned to itself lead agency status for this new rail project, preempting the exclusive regulatory jurisdiction of the federal Surface Transportation Board ("STB" or "Board"). DOE failed to even consult the STB about its participation as lead or cooperating agency prior to issuing the ROD.

6. In its FEIS, DOE did not identify the Caliente corridor, or any other, as a preferred alternative. Instead, the FEIS expressly declined to identify or analyze DOE's preferred alternative among the Nevada rail corridor options, notwithstanding the explicit requirement to do so in the Council on Environmental Quality's ("CEQ's") NEPA regulations. 40 C.F.R. § 1502.14.

7. Prior to publication of the ROD, DOE filed an application with the Bureau of Land Management ("BLM") to have withdrawn from alternative uses 308,600 acres of land within Nevada for the rail corridor, cutting a one-mile wide swath along the Caliente route. 68 Fed. Reg. 74965 (Dec. 29, 2003).

8. In its corridor selection, DOE has stood the procedure mandated by NEPA and Section 114(f) of the NWPA, 42 U.S.C. § 10134, on its head, first usurping the STB's jurisdiction over the new rail line, then applying to withdraw specific parcels of land for a Nevada rail corridor, then issuing a ROD selecting that same corridor in which to build the new line, and finally announcing that it will only now begin to prepare an Environmental Impact Statement analyzing the impacts of this line. *Notice of Intent to Prepare Environmental Impact Statement*, 69 Fed. Reg. 18565 (the "NOI").

DOE's Transport Mode Decision

9. The ROD selected a supplemental mode of transport by which legal-weight truck casks would be loaded onto rail cars and transported to Yucca, despite

summary rejection in the FEIS of this very mode of transport as having the "highest estimates of occupational health and public health and safety impacts," as well as being "impractical" and more costly than all the other alternatives by "more than $1 billion." FEIS at App. J, p. 75. Thus, this option was "eliminated from further consideration" by DOE years before the FEIS was completed, and it was not even considered in the FEIS's balancing of the alternatives required by NEPA.

10. In a "Supplement Analysis" issued by DOE on March 10, 2004, pursuant to DOE's NEPA implementing regulations at 10 C.F.R. § 1021.314(c), DOE sought to justify its refusal to prepare a Supplemental Environmental Impact Statement ("SEIS") for the unanalyzed new transport mode by arguing, directly contrary to DOE's conclusion in the Yucca FEIS, and with no additional impact analysis, that the environmental impacts of the mode it would select one month later in the ROD were *less* than those of transport mode alternatives analyzed in the FEIS. DOE/EIS-0250/SA-1 (March 2004).

11. DOE's new argument is demonstrably false. In the FEIS, DOE had recognized the disadvantages of mounting "much smaller" legal-weight truck casks onto railcars, and therefore every rail option it actually considered in the FEIS involved the use of far more robust and larger *rail casks* to minimize the risks of collision, fire, or penetration in rail accidents or terrorist incidents. DOE had also recognized that use of legal weight truck casks instead of newly designed, large-

capacity rail casks in the "mostly rail" option would sharply raise the number of shipments and casks required. In summarily eliminating this option from further study, DOE had also estimated that "radiological impacts from truck casks on rail cars would increase by approximately a factor of five, and the non-radiological impacts would increase by approximately a factor of three."

Summary of Claims

12. DOE's actions described in this petition are contrary to law in at least the following respects:

(a) DOE's unilateral assignment to itself of lead agency status for the corridor selection decision in the ROD, and its failure to consult with the STB about its lead or cooperating agency status prior to that final decision, unlawfully preempted the STB's exclusive regulatory jurisdiction in violation of the Interstate Commerce Act and STB regulations, and was contrary to NEPA and to DOE's and CEQ's NEPA regulations.

(b) DOE's failure to prepare a Supplemental Environmental Impact Statement prior to the transport mode decision in the ROD, despite its adoption of a supplemental transportation mode summarily rejected in the FEIS as the most hazardous, most expensive, and most impractical alternative, was contrary to NEPA and to DOE's and CEQ's NEPA regulations.

(c) DOE's failure to identify in the FEIS its preferred alternative from among the Nevada rail options, and to explain the rationale for that selection, was contrary to NEPA and to DOE's and CEQ's NEPA regulations, and it led to selection of the Caliente corridor after only the most cursory analysis of impacts within that corridor.

(d) DOE's actions described in this petition, including (1) improper assumption of lead agency status, (2) selection of a supplemental transportation mode summarily rejected in the FEIS, and (3) failure to identify a preferred alternative in the FEIS, and then selecting a corridor it had only cursorily analyzed, amounted to arbitrary and capricious action and were contrary to law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

CLAIMS FOR RELIEF

Improper Assumption of Lead Agency Status

13. DOE's unilateral assumption of "lead agency" status in the environmental assessment of the corridor selection for the nation's longest new rail project in decades preempts the exclusive regulatory authority of the STB. Under the Interstate Commerce Act, 49 U.S.C. §§ 10101 *et seq.* (the "ICA"), the Board has exclusive regulatory jurisdiction over rail transportation, and any rail project broadly affecting national rail transportation and commerce, such as DOE's

"mostly rail" transportation project for Yucca Mountain referenced in the ROD, requires the prior approval of the Board under 49 U.S.C. § 10901.

14. It is the Board that must commence a proceeding to analyze the environmental impacts of a new rail line and to construct that line, not DOE. Such a proceeding "begins when an application is filed" with the Board. 49 U.S.C. § 10901(b). DOE issued the ROD without filing that application, and has still filed no such application. The FEIS, the putative foundation for DOE's ROD announcing the new Nevada rail corridor and the withdrawal of 308,600 specifically itemized acres of land, does not even mention the Board as an agency with which DOE ever consulted in preparing its environmental study. DOE/EIS 0250, Vol. II, App. C.

15. Absent a finding that "a service or transaction is not within the STB's jurisdiction," STB's regulations at 49 C.F.R. § 1105.5 require that the NEPA process for major federal rail actions is commenced *by the Board*. DOE made no such finding either before or after issuing the ROD.

16. STB's regulations at 49 C.F.R. § 1105.10(a)(1) require that a prospective rail applicant must provide the Board's Section of Environmental Analysis "with written notice of its forthcoming proposal at least 6 months prior to filing its application." DOE provided no such notice either before or after issuing the ROD.

17. STB's regulations at 49 C.F.R. § 1105(a)(2) 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 [NOI] to prepare an EIS," not DOE. Those regulations provide that *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.

18. DOE issued its ROD in derogation of these mandatory procedures. Instead, it inverted the required procedure, basing its ROD on a Yucca FEIS not involving any consultation with the Board, then unilaterally issuing its NOI and indicating only that DOE "expects to invite" the Board to be a cooperating agency sometime in the future. The NOI therefore provides further indication of DOE's usurpation of STB's lawful role in the issuance of the ROD.

19. In its unilateral assumption of lead agency status, DOE also failed to determine by letter or memorandum, in accordance with NEPA procedure specified in 40 C.F.R. § 1501.5, whether the STB should serve as lead or cooperating agency in connection with the decisions reached in the ROD.

20. DOE's usurpation of the traditional and legally required role of the Board, as indicated by DOE's FEIS and ROD and further indicated in its NOI, and DOE's unilateral assumption of lead agency status in its ROD addressing the longest new rail project in the United States in eight decades, violate NEPA, the ICA, and the

Board's implementing regulations, are arbitrary and capricious, and constitute an abuse of discretion.

Failure to Prepare Supplemental EIS Prior to Decision-Making

21. CEQ regulations at 40 C.F.R. § 1502.9 (which DOE has adopted and incorporated at 10.C.F.R. §§ 1021.101 and 1021.103), and DOE regulations at 10 C.F.R. §1021.314(a), require DOE to prepare a SEIS if there are "substantial changes to a proposal" or "significant new circumstances or information relevant to environmental concerns" subsequent to publication of the Yucca FEIS.

22. The newly selected transportation mode DOE adopted in the ROD is not an alternative analyzed in the FEIS. Instead, it is a composite of several transportation phases that the FEIS never proposed combining. These phases include loading of legal-weight truck casks onto rail cars, rail transport of legal-weight casks, transfer of the casks from rail to trucks (and associated construction of a transfer station), trucking of casks from the transfer station to the repository, and return shipment of empty casks. Not only did the FEIS decline to analyze this new composite as an alternative; it also failed to analyze the individual phases that now have been combined to form that composite. For example, the phase involving rail transportation of legal-weight casks was rejected even for analysis as an alternative in the FEIS, which dismissed it as impractical and identified it as having higher costs and safety impacts than the other alternatives.

23. DOE's decision in its ROD to adopt a supplementary transportation mode summarily rejected in the FEIS, one which did not comprise one of the analyzed alternatives in the FEIS, is a "substantial change" to DOE's transportation proposal raising "significant new circumstances" that are "relevant to environmental concerns." DOE was therefore required to prepare a SEIS and solicit public comment prior to issuing any ROD selecting the new transport mode. DOE's failure to do so subjects petitioner and the public to an impractical alternative that exceeds all others studied in cost and risk, is a violation of CEQ's and DOE's NEPA regulations, is arbitrary and capricious, and constitutes an abuse of discretion.

24. DOE's release of a brief so-called "Supplement Analysis" on March 10, 2004, cannot cure DOE's failure to prepare the required SEIS prior to issuing the ROD. Regulations at 10 C.F.R. § 1021.314(c) provide that, "when it is unclear whether or not an EIS supplement is required, DOE shall prepare a Supplement Analysis." That analysis must contain "sufficient information for DOE to determine whether an SEIS should be prepared or whether existing documentation is sufficient." DOE's Supplement Analysis does not contain such information.

25. Even after conceding that the FEIS "did not evaluate explicitly the environmental impacts" of the new mode option, DOE opines in its Supplement Analysis that the FEIS sufficiently bounds its impacts. That assertion of bounding

neglects the absence of analysis of the new mode in the FEIS, including but not limited to the rail transportation of legal-weight casks. That problem is compounded by DOE's failure in the Supplement Analysis to provide further study accounting for these omissions.

26. DOE distorts and mischaracterizes the FEIS by asserting in its Supplemental Analysis that the environmental impacts associated with that new mode will be *less* than the impacts associated with all other transport mode options. That assertion cannot be reconciled with the FEIS's conclusion that the selected transport mode option would not even be analyzed because it poses the *greatest* environmental impacts and costs and is also impractical. DOE's determination not to prepare an SEIS based on its Supplement Analysis is thus arbitrary and capricious, constitutes an abuse of discretion, and violates CEQ's and DOE's NEPA regulations.

Failure to Identify and Study Preferred Rail Corridor in the FEIS

27. Even if DOE had been authorized to be lead agency for corridor selection, DOE has committed itself to follow NEPA regulations promulgated by the CEQ relating to assessment of alternatives in the EIS. These regulations require that the agency must, among other duties, "[i]dentify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of a preference." 40 C.F.R. § 1502.14.

28. Contrary to that requirement and to the recommendation of petitioner in its public comments on the Draft EIS, the FEIS failed to identify DOE's preferred alternative from among Nevada rail options or to explain the rationale for any such selection. Both the Draft EIS and the FEIS explicitly declined to state a preferred rail alternative. That refusal compromised public assessment and discussion of actual impacts and land use conflicts associated with the alternatives and vitiated NEPA's requirement that "environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1.

29. For that reason, ranchers and other citizens and businesses along the now-designated Caliente route lacked any notice that their land was to be appropriated or divided until DOE's *fait accompli* was announced by the BLM. DOE issued a cursory and post-hoc "Notice of Preferred Nevada Rail Corridor" on December 29, 2003, the same day BLM announced its receipt of DOE's application to withdraw 308,600 specifically itemized acres of land within that corridor, more than ten months after publication of the FEIS. That post-hoc action, which afforded no further public comment, cannot correct DOE's failure to ensure the identification of a preferred alternative in, rather than after, the FEIS. 40 C.F.R. §§1502.10, 1502.14.

30. The consequence of DOE's failure to select a preferred rail corridor in the FEIS is significant. The Yucca FEIS evaluated five potential rail corridors within Nevada for use in the event DOE selected the "mostly rail" nationwide transportation option for nuclear waste shipments. The FEIS evaluated impacts cursorily and generally for each corridor, but deferred more detailed evaluations of impacts to some future date, and promised that these future evaluations would be done in consultation with the affected stakeholders. In this respect the FEIS resembled the Draft EIS, which likewise failed to identify a preferred alternative or perform such analysis. In the FEIS, DOE promised that "[i]f, for example, mostly rail was selected (both nationally and in Nevada), DOE would then identify a preference for one of the rail *corridors* in consultation with affected *stakeholders*, particularly the State of Nevada." FEIS, p. 1-3, italics in original. But such promised consultation prior to corridor selection did not occur.

31. DOE's analysis of land use impacts in the FEIS failed to support a comparison of the proposed corridors, neglecting to evaluate numerous and easily ascertainable land use conflicts in each corridor, contrary to CEQ's NEPA regulations. 40 C.F.R. § 1502.16. A partial list of these follows:

(a) The FEIS did not include analysis of expected impacts on specific parcels and current users of land in these corridors, or specific land use conflicts or necessary land exchanges. DOE's analysis of the Caliente corridor, for example,

ignored or dismissed obvious and potentially irreconcilable conflicts with numerous ranching and mining operations.

(b) DOE ignored well-documented, potential adverse impacts of the Caliente corridor on downtown Las Vegas, which could be traversed by many, or even most, of the rail shipments to Caliente via existing Union Pacific mainlines.

(c) DOE's analysis of the Caliente corridor failed to identify a clear conflict with a major outdoor art installation on private land, described by the *New York Times* in 1999 as "one of the most massive modern sculptures ever built."

32. Documents released since the FEIS underscore DOE's faulty and unlawfully deferred assessment of land use conflicts. DOE conceded in its December 29, 2003 notice on its rail corridor preference that the Caliente corridor was not "clearly environmentally preferable" and was the most costly alternative. That notice offered no additional analysis that might have cured the deficiencies in comparative corridor evaluations in the FEIS. Yet DOE speculated, without further explanation or consultation with residents, businesses, or government operations along the route, that it "appears to have the fewest land use or other conflicts that could lead to substantial delays in acquiring the necessary land and rights-of-way, or in beginning construction." Remarkably, after ignoring or deferring assessment of the conflicts described above, DOE then relied upon an assumed *absence* of land use conflicts as the basis for selecting Caliente.

33. DOE's April 8, 2004 NOI announced its intention to begin analyzing comparative corridor impacts well after its ROD, filed the same day. Yet, the NOI's severely truncated proposed analysis of "alternatives" seeks only to compare the impacts of various rail alignments within a single one-mile wide swath of land, which would fail to provide an adequate basis for comparison under NEPA even if it had been timely.

34. DOE's issuance of a ROD selecting the Caliente corridor for construction of the nation's longest new rail line in decades without first having adequately compared environmental and land use impacts among the Nevada corridor alternatives, violates CEQ and DOE regulations, is arbitrary and capricious, and constitutes an abuse of discretion.

Administrative Procedure Act

35. The Administrative Procedure Act, 5 U.S.C. § 706(2)(A), empowers this Court to set aside agency action that is arbitrary and capricious, an abuse of discretion, or contrary to law.

36. DOE's actions described in this petition, including (1) improper assumption of lead agency status, (2) selection of a supplemental transportation mode summarily rejected in the FEIS, (3) failure to identify a preferred alternative in the FEIS, and then selecting a corridor it had only cursorily analyzed, amounted to

arbitrary and capricious action and were contrary to law in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that the Court grant this petition and:

1. Declare that DOE's unilateral assumption of lead agency status in proposing to construct and evaluate the impacts of the nation's longest new rail project in decades is inconsistent with the ICA and STB regulations and NEPA; and, pursuant to the APA, § 706(2)(A), set aside the decision as arbitrary and capricious, an abuse of discretion, or contrary to law.
2. Declare that DOE's decision selecting a composite transportation mode that was not evaluated and was expressly rejected in the FEIS, without first preparing a Supplemental Environmental Impact Statement, is inconsistent with NEPA, and CEQ and DOE regulations; and, pursuant to the APA, § 706(2)(A), set aside the decision as arbitrary and capricious, or an abuse of discretion, or contrary to law
3. Declare that DOE's decision selecting the Caliente corridor for construction of a new rail line is inconsistent with NEPA, and CEQ and DOE regulations; and, pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §

706(2)(A), set aside the decision as arbitrary and capricious, or an abuse of discretion, or contrary to law;

4. Issue injunctive relief as appropriate;

5. Award petitioner costs and attorney's fees; and

6. Award such further relief as the Court deems appropriate.

Respectfully submitted,

Brian Sandoval*
Attorney General
Marta A. Adams*
Senior Deputy Attorney General
STATE OF NEVADA
100 N. Carson Street
Carson City, NV 89701
775-684-1237 – Telephone
775-684-1108 – Facsimile

Joseph R. Egan*
Special Deputy Attorney General
Charles J. Fitzpatrick*
Martin G. Malsch*
Robert R. Cynkar*
EGAN, FITZPATRICK, MALSCH & CYNKAR, PLLC
7918 Jones Branch Drive; Suite 600
McLean, VA 22102
703-918-4942 – Telephone
703-918-4943 – Facsimile

Antonio Rossmann*
Special Deputy Attorney General
Roger B. Moore*
Special Deputy Attorney General
Dave Owen
ROSSMANN AND MOORE, L.L.P.

380 Hayes Street; Suite One
San Francisco, CA 94102
415-861-1401 – Telephone
* Member, D.C. Circuit Bar 415-861-1822 – Facsimile

_____

Joseph R. Egan*
Counsel of Record
Attorneys for Petitioner

DATED: _____