

### *Facilities Associated With the Caliente Rail Alignment*

DOE also has decided to construct and operate the Nevada Railroad Control Center and the National Transportation Operations Center, collocated with the Upland Staging Yard, along the Caliente alternative segment, rather than one mile from the southern boundary of the geologic repository operations area at the Rail Equipment Maintenance Yard. In making this selection, DOE recognizes that locating these facilities at the Upland Staging Yard would require the use of private land, but believes that locating these facilities nearer Caliente, Nevada, is responsive to public comments received on the draft Rail Alignment EIS.

### *Shared Use*

Lastly, the Department has decided to select the Shared-Use Option for the railroad. DOE finds that the potential impacts from the Shared-Use Option generally would result in a small incremental increase relative to those of the Proposed Action without the Shared-Use Option. Further, DOE believes that this decision is responsive to public comments received on the draft Rail Alignment EIS, which generally supported the Shared-Use Option and identified economic benefits that could accrue to those communities through which the railroad would pass.

### **Floodplain Statement of Findings**

In accordance with 10 CFR Part 1022, "Compliance with Floodplain and Wetland Environmental Review Requirements," DOE prepared a floodplain and wetland assessment for the Caliente rail alignment (see Appendix F of the final Rail Alignment EIS). Many of the floodplains that would be encountered unavoidably by the railroad are associated with internally draining basins with few, if any, inhabitants or facilities, and where the floodwaters end in playa areas. The floodplains are primarily those areas of normally dry washes that are temporarily and infrequently inundated from runoff during 100-year or 500-year floods.

Construction of the Caliente rail alignment will affect floodplains, either through direct alteration of the stream channel cross section that will affect the flow pattern of the stream, or through indirect changes in the amount of impervious surfaces and additional water volume added to the floodplain. In most areas, construction in a floodplain will not increase the risk of future flood damage or increase the impact of floods on human health and

safety, because there are very few human activities or facilities in the areas adjacent to the rail alignment, except for example, in the City of Caliente. Potential impacts from construction will be minimized because DOE will reduce the area of disturbance where the rail alignment will cross floodplains, and because construction activities will be based on design standards that limit the degree to which floodwaters will be allowed to rise. DOE will incorporate hydraulic modeling into the engineering design process to ensure that crossings are designed to limit adverse impacts to nearby populations and resources.

In areas where drainage structures cross a 100-year floodplain designated by the Federal Emergency Management Agency, the railroad will be designed in compliance with the Agency's floodplain protection standards and applicable county regulations. In other areas, hydraulic design will be based upon Class 1 freight railroad standard design criteria, which require that the 50-year flood not come into contact with the top of a culvert or the lowest point of a bridge. For the 100-year flood, these criteria require that the floodwaters not rise above the subgrade elevation of a structure. The Department will construct bridges where flows will be larger and where the rail surface elevation would not be high enough to accommodate a sufficiently sized culvert. Culverts, bridge abutments, and piers will be constructed to include riprap around the exposed ends to protect the fill material. In places, channel improvements might be necessary for a short distance upstream and downstream of the rail line to intercept and redirect flows through drainage structures. DOE also will design the rail line to accommodate 100-year floods, based on Class 1 freight railroad standard design criteria, as described above.

Constructing structures to cross washes or other flood-prone areas may reduce the area through which floodwaters naturally flow, which could cause water levels to rise at the upstream side of crossings. Sedimentation would be likely to occur on the upstream side of crossings in those areas where the flow of water is restricted to the point where ponding occurs. DOE will manage sedimentation of this type under a regular maintenance program.

While some changes will be unavoidable, DOE will take steps to ensure that the alterations to natural drainage, sedimentation, and erosion processes will not increase future flooding potential, increase the impact of floods on human health and safety, or

cause identifiable harm to the function and values of floodplains. The Department will implement best management practices, including erosion control measures such as the use of silt fences and flow-control devices, to reduce flow velocities and minimize erosion, and other mitigation measures, as needed (see Use of All Practicable Means to Avoid or Minimize Harm below).

### **Section 404(r) of the Clean Water Act**

DOE has complied with section 404(r) of the Clean Water Act. Pursuant to the requirements of that section, DOE included in Appendix F of the final Rail Alignment EIS an analysis of wetlands impacts under the guidance of section 404(b)(1) of the Act and has submitted the final Rail Alignment EIS, including the requisite analysis under the guidelines, to members of Congress. As required by the guidelines, which are described in 40 CFR Part 230, Appendix F included a demonstration of the need to fill wetlands, an analysis and comparison among alternatives of the potential impacts to aquatic resources demonstrating that the practicable alternative with the least impact to aquatic resources has been selected, and a description of methods for mitigating unavoidable impacts (see Use of All Practicable Means to Avoid or Minimize Harm below). On the basis of the conclusions in Appendix F, the proposed discharge of fill materials into wetlands and other waters of the United States complies with the guidelines of 40 CFR Part 230, and DOE has met the associated requirements of section 404(r) by including in the final Rail Alignment EIS an analysis of wetlands impacts in accordance with the guidelines developed under section 404(b)(1).

### **Section 7 of the Endangered Species Act**

DOE has complied with section 7 of the Endangered Species Act. Pursuant to the regulations that implement the Act (50 CFR Part 402), in March 2008, DOE submitted a biological assessment regarding the potential impacts to the threatened Mojave desert tortoise, the endangered southwestern willow flycatcher, and the threatened Ute ladies'-tresses from the construction and operation of a railroad in the Caliente corridor, and initiated consultation with the Fish and Wildlife Service. The Bureau of Land Management and the Surface Transportation Board were supporting agencies on this consultation.

On September 19, 2008, the Fish and Wildlife Service issued its biological opinion and found that construction

and operation of the railroad is not likely to jeopardize the continued existence of the threatened Mojave population of the desert tortoise or the Ute ladies'-tresses. In addition, the Fish and Wildlife Service concluded that the railroad will not result in adverse effects to the critical habitat designated for the Mojave desert tortoise, and further analysis of potential critical habitat impacts is not necessary (critical habitat for the Ute ladies'-tresses in Nevada has not been designated). The Fish and Wildlife Service also included an incidental take<sup>12</sup> statement and identified reasonable and prudent measures (mitigation measures) that must be implemented by DOE to minimize take of Mojave desert tortoise, and conservation and minimization measures that must be implemented if the Fish and Wildlife Service determines that the loss of Ute ladies'-tresses by construction activities would be significant. The Department is committing to these measures, the details of which will be included in the Mitigation Action Plan (see below under Use of All Practicable Means to Avoid or Minimize Harm).

The Fish and Wildlife Service concurred with DOE's determination that construction and operation of a railroad in the Caliente corridor may affect, but is not likely to adversely affect, the southwestern willow flycatcher. The Service's concurrence concluded the informal consultation for that species pursuant to regulations implementing the Endangered Species Act.

#### **Use of All Practicable Means To Avoid or Minimize Harm**

Pursuant to the NHPA, spent nuclear fuel and high-level radioactive waste will be transported in casks certified by the Nuclear Regulatory Commission (NRC). The NRC regulates and certifies the design, manufacture, testing and use of these casks. Additionally, the NHPA requires that DOE comply with NRC regulations regarding advance notification of State and local governments prior to transportation of spent nuclear fuel or high-level radioactive waste.

In its Record of Decision of April 8, 2004 (69 FR 18557), DOE committed to implementing measures to avoid or minimize harm related to the shipment of spent nuclear fuel and high-level radioactive waste, identified specific measures, and committed to following

<sup>12</sup> Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or attempt to engage in such conduct without a special exemption.

current and future Department of Transportation and NRC transportation rules. DOE also committed to consult with states, Native American tribes, local governments, utilities, the transportation industry, and other interested parties in a cooperative manner to refine the transportation system as it is developed. DOE, in this Record of Decision, is reaffirming its commitment to those implementing measures, which are incorporated by reference herein.

In the final Rail Alignment EIS (Chapter 7), DOE identifies preliminary best management practices and mitigation measures that represent the initial step in an iterative process to develop and eventually implement these practices and measures. The preliminary best management practices and mitigation measures will be further developed and detailed through (1) the regulatory compliance process, such as that associated with DOE's right-of-way application to the Bureau of Land Management and DOE's application for a Certificate of Public Convenience and Necessity to the Surface Transportation Board; (2) development of the final design and associated specifications, such as the selection of specific seed mixes and application techniques for reclaiming disturbed land; and (3) consultation with directly affected parties, such as grazing permittees and local communities through which the Caliente rail alignment will pass.

The Department will undertake this mitigation process in consultation with federal, state, and local regulatory authorities having jurisdiction over the construction and operation of the railroad, and in consultation with directly affected parties. To that end, DOE proposes to constitute one or more Mitigation Advisory Boards to assist DOE, the Bureau of Land Management, and the Surface Transportation Board in developing, implementing, and monitoring best management practices and mitigation measures during the construction and operation of the railroad.

Further, DOE will conduct an ethnographic evaluation of the rail alignment area to develop a cultural resources management program. DOE proposes that the Consolidated Group of Tribes and Organizations<sup>13</sup> assist in the ethnographic evaluation, and in the development and implementation of

<sup>13</sup> DOE maintains a Native American Interaction Program. As part of this Program, 17 tribes and organizations have formed the Consolidated Group of Tribes and Organizations, which consists of appointed tribal representatives responsible for presentation of their respective tribal concerns and perspectives to DOE.

best management practices and mitigation measures.

In Appendix F of the final Rail Alignment EIS, DOE identifies preliminary measures to mitigate the potential adverse impacts of actions in a floodplain or wetlands, including but not limited to, minimum grading requirements, runoff controls, design and construction constraints, and protection of ecologically sensitive areas. To the extent practicable, DOE will avoid disturbing floodplains and wetlands, and, if avoidance is not possible, will minimize impacts to the extent practicable. In general, DOE will minimize impacts to floodplains and wetlands through the implementation of engineering design standards and best management practices. DOE has designed the rail alignment to avoid potential direct and indirect impacts to water resources wherever practicable. Due to the nature of rail line design and the construction activities that would be required to implement the design, the rail line cannot avoid crossing floodplains or wetlands. The engineering design process will ensure, however, that the engineered structures used to pass water runoff from one side of the rail line to the other will do so in a way that will minimize impacts to floodplains and wetlands. Such impacts will be limited mostly to the construction phase, which will be subject to Clean Water Act regulations. In most cases, DOE will minimize potential adverse impacts through the implementation of best management practices in concert with the permits and plans regulatory agencies will require.

DOE will implement a wetlands compensatory mitigation plan that will meet the requirements of the Environmental Protection Agency for mitigating losses of aquatic resources (Subpart J, 40 CFR Part 230). As specified in the Agency's comment letter of August 11, 2008, this plan will include one of the following options to compensate for the loss of wetlands: (1) Restore or create three acres of wetlands of equivalent function within the watershed for every acre of wetlands filled to construct the railroad; (2) restore or create one acre of wetlands of equivalent function within the watershed, and remove non-native plants in five acres within the watershed for every acre of wetlands filled; or (3) restore or create one acre of wetlands of equivalent function in the watershed, and enhance five acres of riparian wetland habitat in upper Meadow Valley, including Rainbow Canyon, for every acre of wetlands filled. The compensatory mitigation

plan will be developed and implemented in accordance with requirements of the Environmental Protection Agency (40 CFR 230.91 through 230.97), and in coordination with the Army Corps of Engineers and the Bureau of Land Management.

The Department will implement the conservation and minimization measures listed in the biological opinion to protect Ute ladies'-tresses, and the reasonable and prudent measures identified by the Fish and Wildlife Service to protect the Mojave population of the desert tortoise. Implementation of these measures will be coordinated with the Bureau of Land Management and Surface Transportation Board, as appropriate.

Based on all of the above, DOE will prepare a Mitigation Action Plan in accordance with its NEPA regulations (10 CFR 1021.331). The Mitigation Action Plan will include an introduction describing the basis, function, and organization of the plan; a summary of the potential impacts to be mitigated; a description of preliminary best management practices and specific mitigation measures from Chapter 7 of the final Rail Alignment EIS; a description of all mitigation commitments in this Record of Decision, including wetlands compensatory measures and measures to protect the Mojave desert tortoise and Ute ladies'-tresses; a description of the Mitigation Action Plan monitoring and reporting system that DOE will implement to ensure that elements of the plan are met and are effective; and a schedule for actions and identification of the responsible parties. DOE will develop the Mitigation Action Plan in consultation with the proposed Mitigation Advisory Board(s) and directly affected parties.

The Mitigation Action Plan will be completed and made publicly available before DOE takes any action under this decision that is the subject of a mitigation commitment. DOE may revise the Plan as more specific and detailed information becomes available, or in consultation with the proposed Mitigation Advisory Board(s) and directly affected parties. At this stage in the process, the Department has adopted all practicable means to avoid or minimize environmental harm.

Issued in Washington, DC, on October 6, 2008.

**Edward F. Sproat, III,**

*Director, Office of Civilian Radioactive, Waste Management.*

[FR Doc. E8-24168 Filed 10-9-08; 8:45 am]

BILLING CODE 6450-01-P 6450-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. PR08-15-003]

#### Energy Transfer Fuel, LP; Notice of Compliance Filing

October 6, 2008.

Take notice that on October 1, 2008, Energy Transfer Fuel, LP filed a Report of Refunds in compliance with the Commission's letter order issued on July 11, 2008 in Docket Nos. PR08-15-000 and PR08-15-001.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Such protests must be filed on or before the date as indicated below. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

*Comment Date:* 5 p.m. Eastern Time Tuesday, October 14, 2008.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. E8-24159 Filed 10-9-08; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ER09-2-000]

#### Butler Ridge, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

October 6, 2008.

This is a supplemental notice in the above-referenced proceeding of Butler Ridge, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and § 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR Part 34, of future issuances of securities and assumptions of liability, is October 27, 2008.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at <http://www.ferc.gov>. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any