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August 1, 2019

John Michael Japp
FFA Project Manager
Oak Ridge Environmental Management
U.S. Department of Energy Oak Ridge Operations
P.O. Box 2001
Oak Ridge, TN 37831

RE: Continuing lack of meaningful public comment on Proposed Plan for the Disposal of Oak Ridge Reservation Comprehensive Environmental Response, Compensation, and Liability Act Waste (September 2018)

Dear Mr. Japp,

The U.S. Department of Energy (Department) has failed to provide an opportunity for meaningful public comment on its proposed plan to build and operate a hazardous and radioactive waste landfill that would corrupt existing greenfields (Proposed Plan).¹ Under established law, the Department failed to “include sufficient information” regarding the Proposed Plan before the first public comment period.² Simply speaking, this means the Department must not only reopen public comment, but also provide the “notice and analysis” necessary to fully inform the public and provide for meaningful public comment.

This is not the first time that we have raised this concern. In a letter dated December 10, 2018, the Southern Environmental Law Center, Advocates for the Oak Ridge Reservation, Tennessee Chapter of the Sierra Club, and Tennessee Citizens for Wilderness Planning commented on the Proposed Plan for the Disposal of Oak Ridge Reservation Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Waste (the Proposed Plan).³ We stated that the Proposed Plan was inadequate for many reasons, including the Department’s failure to provide sufficient supporting analysis, data, and information, including an incomplete characterization of the proposed landfill location and proposed regulatory waivers that have not been obtained.⁴ The Proposed Plan also failed to include waste acceptance criteria, discuss long-term effectiveness and permanence of the proposed landfill, disclose its primary

¹ U.S. Dep’t of Energy, *Proposed Plan for the Disposal of Oak Ridge Reservation Comprehensive Environmental Response, Compensation, and Liability Act Waste* (Sept. 2018) [hereinafter “Proposed Plan”].

² 42 U.S.C. § 9617(a) (“[T]he notice and analysis published . . . shall include sufficient information as may be necessary to provide a reasonable explanation of the proposed plan”); 40 C.F.R. § 300.430(f)(3) (requiring the lead agency to provide a reasonable opportunity for public comment on “the proposed plan and the supporting analysis and information located in the information repository”).

³ Attachment (Att.) 1, Letter from Christina I. Reichert, SELC, et al., to John Michael Japp, DOE, Dec. 10, 2018.

⁴ *Id.* at 3–4.

balancing criteria, or account for the proposed landfill's long-term liability and costs.⁵ As a result, the public comment period was too hobbled for the Department, based on its "review [of] the public comments . . . to determine if the alternative remains the most appropriate remedial action for the site or site problem."⁶

The Department should not be allowed to rush ahead with a Proposed Plan that could put higher levels of radioactive pollution into nearby waters that Tennesseans use for recreation and fishing, particularly when both the State of Tennessee and the U.S. Environmental Protection Agency have raised concerns that this proposed landfill would impact human health and the environment.⁷ After the close of the comment period, correspondence between the Department, the Tennessee Department of Environment and Conservation (TDEC), and the U.S. Environmental Protection Agency Region IV (EPA Region IV), regarding gaps in the Department's Proposed Plan has only heightened our concern about the Proposed Plan and the Department's ongoing failure to provide sufficient information to support it.

Our concern is further heightened because the Department has a history of failure to adequately address the legacy of waste created as part of its nuclear program.⁸ Indeed, at Oak Ridge Reservation, TDEC has expressed concern that the Department's existing landfill, which

⁵ Att. 2, Letter from Virginia H. Dale, Advocates for the Oak Ridge Reservation (AFORR), to John Michael Japp, DOE, Dec. 3, 2018 [hereinafter "AFORR Comment Letter"]; Att. 3, Comments from Mark Watson, City of Oak Ridge, to John Michael Japp, DOE, at the Public Hearing on the U.S. Department of Energy's Proposed Plan for the Disposal of Oak Ridge Reservation Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Waste, Nov. 7, 2018 [hereinafter "City of Oak Ridge Comments"]; Att. 4, Letter from Axel C. Ringe, Tennessee Chapter of the Sierra Club, to John Michael Japp, DOE, Dec. 10, 2018 [hereinafter "Sierra Club Comment Letter"].

⁶ 40 C.F.R. § 300.430(f)(1)(ii).

⁷ Att. 5, Letter from Chuck Head, TDEC, to David Adler, DOE, Jul. 8, 2019 [hereinafter "TDEC's Groundwater Conditions Letter"], https://www.tn.gov/content/dam/tn/environment/remediation/documents/oakridgereservation/emdf-documents/rod-&-supplemental-documents/73212_EMDF_GW_Model_TDEC_07_08_2019.pdf; Att. 6, Letter from David W. Salyers, TDEC, to John A. Mullis, DOE, & Mary S. Walker, EPA, Apr. 5, 2019 [hereinafter "TDEC Formal Dispute Position"], https://www.tn.gov/content/dam/tn/environment/remediation/documents/oakridgereservation/emdf-documents/ffs-water-management/ffs-water-management/73212_EMWFM EMDF FFS Formal Dispute_TDEC_04_05_2019.pdf; Att. 7, Letter from Mary S. Walker, EPA, to John A. Mullis II, DOE, & David W. Salyers, TDEC, Mar. 21, 2019; [hereinafter "EPA Formal Dispute Position"], https://www.tn.gov/content/dam/tn/environment/remediation/documents/oakridgereservation/emdf-documents/ffs-water-management/73212_EMWFM EMDF FFS Formal Dispute EPA_03_21_2019.pdf; Att. 8, Letter from David W. Salyers, TDEC, to Andrew Wheeler, EPA, Jul. 5, 2019, [hereinafter "TDEC Formal Dispute Position Supplement"] https://www.tn.gov/content/dam/tn/environment/remediation/documents/oakridgereservation/emdf-documents/ffs-water-management/73212_EMWFM EMDF FFS Formal Dispute TDEC_07_05_2019.pdf.

⁸ Att. 9, U.S. Gov't Accountability Office, Report to the Chairman of the Subcommittee on Strategic Forces, Committee on Armed Services, U.S. Senate, *Department of Energy: Program-Wide Strategy and Better Reporting Needed to Address Growing Environmental Cleanup Liability* (Jan. 2019); Att. 10, U.S. Gov't Accountability Office, Report to the Subcommittee on Strategic Forces, Committee on Armed Services, U.S. Senate, *Nuclear Waste: DOE Should Take Actions to Improve Oversight of Cleanup Milestones* (Feb. 2019); Att. 11, U.S. Gov't Accountability Office, Testimony Before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives, *Department of Energy: Environmental Liability Continues to Grow, and Significant Management Challenges Remain for Cleanup Efforts* (May 2019).

is strikingly similar to the proposed landfill, is sited within the water table and is contaminating groundwater and nearby surface water.⁹ It is important that the Department take the time necessary to ensure that this clean up does not repeat, again, the mistakes of the past.

The Department itself has admitted that there are significant information gaps in the Proposed Plan that was provided for public comment, including but not limited to an unfinished characterization of the proposed landfill location and proposed waivers for three applicable or relevant and appropriate requirements from the Toxic Substances Control Act and Tennessee law.¹⁰ Moreover, the Department has still not provided the public with a complete site characterization, groundwater modeling based on actual conditions, or the Department's waste acceptance criteria. These are not the only information gaps that prevented meaningful public comment. At a minimum, the Department should provide:

- 1) Complete data demonstrating the hydrologic conditions underlying the proposed disposal site under both wet and dry conditions;¹¹
- 2) All of the applicable or relevant and appropriate requirements (ARARs) under federal environmental, state environmental, or facility siting laws. The proposed plan includes exceptions to known ARARs before those requirements were evaluated by TDEC and EPA Region IV. Since then, both TDEC and EPA Region IV have insisted that the Department abide by the ARARs and objected to some of the exceptions the Department generated for itself;¹²
- 3) Waste acceptance criteria, including an analytical limit for mercury co-contamination;¹³
- 4) A complete Composite Analysis and a Comparative Analysis of costs for Onsite and Offsite alternatives;¹⁴
- 5) Adequate detail to assess the Department's plan for remediation and disposal of mercury wastes;¹⁵
- 6) Data to assess the proposed landfill's control of radionuclides;¹⁶ and
- 7) Its knowledge of the failures caused by the design, construction, and operation of the Environmental Waste Management Facility landfill (EMWMF landfill) that began receiving waste in 2002, and any other information regarding the short and long-term performance of the EMWMF.¹⁷

⁹ TDEC's Groundwater Conditions Letter.

¹⁰ Proposed Plan at 6, 18, 21.

¹¹ TDEC Groundwater Conditions Letter; AFORR Comment Letter; City of Oak Ridge Comments.

¹² TDEC Formal Dispute Position; EPA Formal Dispute Position; TDEC Formal Dispute Position Supplement; City of Oak Ridge Comments; Sierra Club Comment Letter.

¹³ EPA Formal Dispute Position; TDEC Groundwater Conditions Letter; AFORR Comment Letter; City of Oak Ridge Comments; Sierra Club Comment Letter.

¹⁴ TDEC Groundwater Conditions Letter; AFORR Comment Letter; City of Oak Ridge Comments; Sierra Club Comment Letter.

¹⁵ City of Oak Ridge Comments; Sierra Club Comment Letter.

¹⁶ TDEC Groundwater Conditions Letter; Sierra Club Comment Letter.

¹⁷ TDEC Groundwater Conditions Letter; Sierra Club Comment Letter.

All of this information should have been made available to the public prior to the public comment period. As a result, the Department must “[s]eek additional public comment on a revised proposed plan,”¹⁸ once it has provided the necessary information to the public.

Based on the concerns raised above, we ask that the Department provide meaningful opportunities for public comment. Since the Department failed to adequately perform its required tasks prior to the initial public comment period, it must now, to the extent it has taken any steps to address the numerous deficiencies in the Proposed Plan, provide this information to the public and reopen the public comment period. Before any record of decision is approved, the Department must hold a new public comment period after it has provided the information it is required to provide pursuant to CERCLA and the Department’s regulations.

Sincerely,

A handwritten signature in blue ink, appearing to read "Nate Watson", with a large, sweeping horizontal stroke across the end.

Nate Watson*
Southern Environmental Law Center

Christina Reichert
Southern Environmental Law Center

Ellen D. Smith
Advocates for the Oak Ridge Reservation

Axel Ringe
Tennessee Chapter of the Sierra Club

Sandra Goss
Tennessee Citizens for Wilderness Planning

*Tennessee Bar Applicant

Attachments provided via ShareFile: <https://southernenvironment.sharefile.com/d-sd546379b8554d858>

¹⁸ 40 C.F.R. § 300.430(f)(3)(ii)(B).