

September 19, 2022

VIA e-mail to

Roger Petrie
OREM Regulatory Affairs
DOE Oak Ridge Operations
P.O. Box 2001
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RE: Deficiencies with the U.S. Department of Energy's Response to Community Group Comments in the Draft 2/Revision 1 Record of Decision for the Environmental Management Disposal Facility and with the Administrative Record

Dear Mr. Petrie:

The Southern Environmental Law Center, on behalf of Advocates for the Oak Ridge Reservation, Tennessee Chapter of the Sierra Club, and Tennessee Citizens for Wilderness Planning (Community Groups), write to highlight the Department of Energy's (DOE or Department) inadequate and deficient response to comments submitted by Community Groups to DOE regarding its proposed construction and operation of the Environmental Management Disposal Facility (EMDF) at Oak Ridge, Tennessee. DOE has failed to follow the public participation requirements required for Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cleanup actions as outlined in federal law and regulations. Further, the Department has repeatedly sought to stymie the local community's ability to receive, evaluate, and comment upon DOE's preferred remedial action and its supporting data and analyses. As previously stated by Community Groups, DOE cannot issue a final Record of Decision (ROD or Decision) for the EMDF until it has complied with the public participation requirements of CERCLA and demonstrated that its proposed remedial action fulfills the protectiveness standards mandated by that statute. Community Groups also write to insist that the Administrative Record include "the whole record," 5 U.S.C. § 706, including the numerous comments and all attachments submitted to DOE throughout this remedy selection process by Community Groups, former TDEC employees, and other members of the public.

On August 31, 2022, DOE published its Draft D2 (D2)/Revision 1 (R1) ROD selecting construction and operation of the EMDF landfill on the Oak Ridge Reservation as its preferred alternative for its remedial action pursuant to CERCLA.¹ Part 3 of the Decision contains DOE's summary of public comments it has received on its proposed remedial action as well as the Department's responses to those comments, including those submitted by Community Groups.

¹ U.S. Dep't of Energy, *Record of Decision for Comprehensive Environmental Response, Compensation, and Liability Act Oak Ridge Reservation Waste Disposal at the Environmental Management Disposal Facility, Oak Ridge, Tennessee*, DOE/OR/01-2794&D2/R1 (Aug. 29, 2022) ("D2/R1 ROD").

DOE's response to comments fails to address several of the concerns raised by Community Groups. Moreover, the Department's justification for refusing to issue a revised Proposed Plan is at odds with the public participation requirements of CERCLA.

CERCLA requires that a proposed remedial plan and its accompanying notice and analysis "shall include sufficient information" to provide the public with "a reasonable explanation" of the proposed remedy and other alternatives considered. 42 U.S.C. § 9617(a). CERCLA regulations further specify that an agency "shall" issue a revised proposed plan when new, significant information which "could not have been reasonably anticipated by the public" is made available after a previous proposed plan is put forth but before a ROD is finalized. 40 C.F.R. 300.430(f)(3). In their comments on the EMDF "fact sheets," Community Groups pointed to this language to explain that DOE must issue a revised proposed plan given that the Department issued a Proposed Plan for this remedial action before a Remedial Investigation/Feasibility Study (RI/FS), wastewater focused feasibility study (FFS), waste acceptance criteria (WAC), list of complete applicable or relevant and appropriate requirements (ARARs), or sufficient information regarding the geology and hydrology of the selected site had been made available to the public.²

In the D2/R1 ROD, DOE rejects Community Group's request, responding that "a final list of ARARs, and a final approach for both WAC and discharge limits" should have been "reasonably anticipated" by the public because "these final elements were included in the Proposed Plan as topics to be finalized."³ Moreover, DOE asserts that the important details contained in these remedial elements are not "significant" because they "did not change the essence of the disposal facility design nor change any of the protectiveness, effectiveness, implementability, or cost evaluation criteria" of the remedial action.⁴ Given that all of this new information is not, in DOE's view, "significant," and moreover should have been "reasonably anticipated" by the public, DOE asserts that its public participation obligations under CERCLA have been met.

Not so. DOE's attempts to evade public review of its proposed landfill violate the purpose and intent of CERCLA. The Department is essentially arguing that because it *acknowledged* the vast deficiencies of its Proposed Plan when it was issued in 2018, including naming the fact that it had yet to finalize the RI/FS, FFS, WAC, list of ARARs, or adequately survey the geology and hydrology of the site, it was thereafter unburdened from having to listen to or respond to public comments on any of these crucial topics, because eventual publication of these details would be "reasonably anticipated" by the public. Such an interpretation makes a mockery of CERCLA's public participation requirements, which repeatedly emphasize the importance of community feedback and involvement throughout remedial selection process. For

² Letter from Amanda Garcia (SELC) et al. to Roger Petrie (DOE), Re: Request to Provide Completed Information for Public Discussion of the EMDF and an Additional Period of Public Comment as Required under CERCLA (May 10, 2022); Letter from Amanda Garcia (SELC) et al. to Roger Petrie (DOE), Re: Comments on the Environmental Management Disposal Facility Fact sheets (June 7, 2022).

³ D1/R2 ROD, 3-415.

⁴ *Id.*

instance, CERCLA regulations specify that the public should be able to review and comment on remedial alternatives underpinned by “detailed analysis” generated and distributed *prior* to issuance of a proposed plan. 40 C.F.R. 300.430(f). And U.S. Environmental Protection Agency (EPA) guidance confirms that “the lead agency must ensure that any information that forms the basis for selecting the response action is included as part of the Administrative Record file *and is available to the public during the public comment period.*”⁵ DOE, instead, takes the position that a tip of the hat acknowledging the “detailed analysis” which must be done is all the public is entitled to, and the Department is under no obligation to compile those details—once formulated—into a revised proposed plan for the public despite CERCLA’s clear insistence otherwise.

In the same breath that DOE asserts the public should have “reasonably anticipated” the details it mentions as incomplete in its Proposed Plan, it then asserts that the eventual publication of these details is not “significant” because they do not change the final character of the remedial action. The Department’s tortured argument is that decisions such as what waste is accepted into the landfill, which laws apply to that waste, and the amount of waste to be received somehow do not ultimately impact the protectiveness or effectiveness of a remedial plan that has never heretofore contemplated or analyzed these details. Under DOE’s theory of CERCLA, if it asserts to the public that any final remedy will be protective of human health and the environment in the Proposed Plan (even if it omits all of the necessary details to justify that assertion), the eventual release of those details is not “significant” because they just demonstrate what DOE already said it was going to do. With the public left to comment on bare bones assertions amounting to “trust us,” the result is that DOE is left free to craft the cleanup project it wishes to undertake without meaningful public input.

To put it simply, the details contained in the D2/R1 ROD and its administrative record are both significant and were not reasonably anticipated by the public because they represent *the first time* DOE has shared many basic decisions with the public regarding the remedial action’s scope and performance. The public is entitled to review of these details in a revised proposed plan and accompanying administrative record as specified in CERCLA. DOE cannot issue a final ROD until it has complied with these requirements.

Not only has DOE failed to adequately respond to Community Groups’ comments and comply with the public participation requirements of CERCLA, but remarkably it has even failed to include in the Administrative Record the comments provided to DOE by Community Groups and others. The index to the Administrative Record submitted with the D2/R1 ROD completely omits all comments and attachments submitted by Community Groups and others.⁶ These omissions render the Administrative Record incomplete. A complete record includes “all

⁵ U.S. Env’t Prot. Agency, *A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents*, EPA 540-R-98-031 OSWER 9200.1-23P PB98-963241, 2-6-2-7 (1999).

⁶ DOE, AR Database Printout, EM Disposal Facility (August 31, 2022), available at https://www.tn.gov/content/dam/tn/environment/remediation/documents/oakridgereservation/emdf-documents/rem-73212_EMDF_ROD_D2R1_Admin_Record_08_31_2022.pdf.

documents and materials directly or *indirectly* considered by agency decision-makers . . . includ[ing] evidence contrary to the agency's position." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (citation omitted). DOE must conduct a new search and correct the Administrative Record. At a minimum, we are aware of the following sets of comments that Community Groups provided to DOE that should be included in the Administrative Record, including all attachments:

Letter from Amanda Garcia (SELC) et al. to Roger Petrie (DOE), Comments on the Environmental Management Disposal Facility Fact sheets (June 7, 2022).

Letter from Amanda Garcia (SELC) et al. to Roger Petrie (DOE), Re: Request to Provide Completed Information for Public Discussion of the EMDF and an Additional Period of Public Comment as Required under CERCLA (May 10, 2022).

Letter from Amanda Garcia, SELC, et al., to Carleton Waterhouse, EPA, re: Additional Information Regarding Communities Potentially Affected by the U.S. Environmental Protection Agency's Oversight of Cleanup Decisions at the Oak Ridge Reservation and the Radionuclide Pollution Decision (February 16, 2022).

Letter from Amanda Garcia et al. (SELC) to Michael Regan (EPA), Re: Request for Update Regarding the U.S. Environmental Protection Agency's Review of the Radionuclide Pollution Decision and for a Revised Proposed Plan Regarding Environmental Management Disposal Facility at the Oak Ridge Reservation (Nov. 4, 2021).

Letter from Steve Goins et al. to Michael Regan (EPA), Re: Misinformation concerning the Department of Energy (DOE) Oak Ridge Reservation (ORR) Environmental Management Waste Management Facility (EMWMF) and the proposed Environmental Management Disposal Facility (EMDF) that affects the EMDF Record of Decision (ROD), Oak Ridge, Tennessee (Nov. 4, 2021).

Letter from Amanda Garcia (SELC) et al. to Michael Regan (EPA), Re: Concerns Regarding the U.S. Department of Energy's Recent Actions During the U.S. Environmental Protection Agency's Review of the December 31, 2020 Radionuclide Pollution Decision for the Oak Ridge Reservation Facility in Oak Ridge, Tennessee (Aug. 2, 2021).

Letter from Lawrence Starfield (EPA) to Amanda Garcia and Stephanie Biggs (SELC), Re: Request to Review December 31, 2020, Radionuclide Pollution Decision (Decision) Regarding Discharge of Radioactive Wastewaters at the Oak Ridge Reservation Facility in Oak Ridge, Tennessee (June 9, 2021).

Letter from Amanda Garcia (SELC) et al. to Michael Regan (EPA), Re: Request to Review December 31, 2020 Radionuclide Pollution Decision Regarding Discharge of Radioactive Wastewaters at the Oak Ridge Reservation Facility in Oak Ridge, Tennessee (May 26, 2021).

Letter from Christina Reichert (SELC) et al. to John Japp (DOE), Re: New information regarding the proposed landfill site for Oak Ridge Reservation Comprehensive Environmental Response, Compensation, and Liability Act Waste. (Oct. 1, 2019).

Letter from Nate Watson (SELC) et al. to John Japp (DOE), 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) (Aug. 1, 2019).

Letter from Christina Reichert (SELC) et al. to John Japp (DOE), Re: Proposed Plan for the Disposal of Oak Ridge Reservation Comprehensive Environmental Response, Compensation, and Liability Act Waste (Dec. 10, 2018).

The D2/R1 Record of Decision and the Administrative Record are inadequate, premature, and should not be accepted by EPA or TDEC. DOE must comply with the public participation requirements of CERCLA and prepare an adequate administrative record for the proposed EMDF.

Sincerely,



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