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VIA e-mail to

Administrator Michael S. Regan
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20004
Regan.Michael@epa.gov

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

Dear Administrator Regan:

The Southern Environmental Law Center, Advocates for the Oak Ridge Reservation, Tennessee Chapter of the Sierra Club, and Tennessee Citizens for Wilderness Planning (Community Groups) write to inquire regarding the status of the review by the U.S. Environmental Protection Agency (Agency or EPA) of the decision issued by former EPA Administrator Andrew Wheeler regarding the discharge to surface water of wastewater generated at the existing Environmental Management Waste Management Facility (EMWMF) and proposed Environmental Management Disposal Facility (EMDF) at the U.S. Department of Energy's (DOE) Oak Ridge Reservation site in Oak Ridge, Tennessee (Radionuclide Pollution Decision). We also write to underscore the importance of disclosing radionuclide pollution limits and other missing information in a revised proposed plan for public comment prior to considering approval of any revised Record of Decision (ROD) for the EMDF.

I. Request for Update Regarding EPA Review of Radionuclide Pollution Decision

On May 26, 2021, Community Groups requested that EPA review the Radionuclide Pollution Decision under Executive Order 13990.[1] On June 9, 2021, EPA confirmed that it was undertaking that review.[2] After reviewing EPA's comments on DOE's third revised wastewater focused feasibility study,[3] Community Groups wrote to EPA again on August 2, 2021, to

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

[2] Letter from Lawrence Starfield, EPA, to Amanda Garcia et al., 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).

[3] U.S. ENV'T PROT. AGENCY, EPA Comments on the Focused Feasibility Study for Water Management for the Disposal of CERCLA Waste on the Oak Ridge Reservation, Oak Ridge, Tennessee, (DOE/OR/01-2664&D3) (July 22, 2021),

emphasize the importance of reviewing and revising the Radionuclide Pollution Decision prior to taking any additional action regarding the EMDF.[4] Now, having reviewed EPA's comments on the draft ROD for the EMDF (DOE/OR/01-2794&D1), [5] and other recent announcements and correspondence from DOE, we are concerned that your administration has adopted the legally flawed and erroneous interpretation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) set forth in the previous administrator's Radionuclide Pollution Decision.

Community Groups appreciate the Agency's detailed comments on the draft ROD and agree with EPA's overall conclusion that the draft ROD and accompanying administrative record as currently compiled do not meet CERCLA and National Oil and Hazardous Substances Pollution Contingency Plan (NCP) threshold requirements. EPA Comments, 4. However, EPA repeatedly references the Radionuclide Pollution Decision as the framework that applies to the establishment of radionuclide wastewater limits at the EMDF and does not expressly address whether DOE will be required to comply with technology-based effluent limits (TBELs) or the State of Tennessee's antidegradation policy.[6] Because EPA directs DOE to provide a revised focused feasibility study and record of decision that address EPA's comments, it is difficult for Community Groups not to infer that EPA has adopted the Radionuclide Pollution Decision as it stands. This inference is further supported by recent correspondence from DOE which indicates, without reference to any ongoing review by EPA of the Radionuclide Pollution Decision, that DOE will address comments on the wastewater focused feasibility study "30 calendar days following the date the radiological discharge limits are agreed upon by the three parties."[7]

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https://www.tn.gov/content/dam/tn/environment/remediation/documents/oakridgereservation/emdf-documents/rem-73212_EMDF_Wastewater_FFS_EPA_07_22_2021b.pdf.

[4] Letter from Amanda Garcia et al., SELC, 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, 202- Radionuclide Pollution Decision for the Oak Ridge Reservation Facility in Oak Ridge, Tennessee (Aug. 2, 2021).

[5] U.S. ENV'T PROT. AGENCY, EPA Comments on the 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&D1) (Oct. 6, 2021), https://www.tn.gov/content/dam/tn/environment/remediation/documents/oakridgereservation/emdf-documents/rem_73212_EMDF_ROD_D1_EPA_10_06_2021.pdf (EPA Comments).

[6] *See e.g.*, EPA Comments, 1("The D1 ROD does not clearly state that the [CWA] is an ARAR for radiological discharges, per the wastewater dispute decision (Wheeler, 12/31/20). Please address this oversight and state that the CWA is an ARAR for radiological discharge as appropriate throughout the document."); *see also id.* at 2–5, 14, 24, 27, 43–44.

[7] Letter from Brian Henry et al., DOE, to Constance Jones et al., EPA, re: Focused Feasibility Study for Water Management for the Disposal of CERCLA Waste on the Oak Ridge Reservation, Oak Ridge, Tennessee, (DOE/OR/01-2664&D4) (Oct. 28, 2021),

As Community Groups have previously noted, reinstating TBELs and the State of Tennessee's antidegradation policy as applicable or relevant and appropriate requirements (ARARs) for radionuclides is in accordance with CERCLA's stated preference for technology-based solutions; would clarify many of the remaining unresolved issues being negotiated by DOE, EPA, and the Tennessee Department of Environment and Conservation (TDEC); and would provide maximum protection for the surrounding environment and local community. The Agency's silence, coupled with the hurried steps taken by DOE to finalize its preferred remedial alternative, appear to be an implicit denial of Community Groups' request that EPA review and revise the Radionuclide Pollution Decision.

As we explained in our May 26 and August 2 letters, the Radionuclide Pollution Decision is contrary to the remedial purpose and goals of CERCLA and the Clean Water Act—statutes your agency is charged with administering. If left as it stands, the Decision will continue to unreasonably limit EPA's authority to require a remedy at Oak Ridge that is protective of human health and the environment as required by CERCLA. To make matters worse, the Decision's impact will not be limited to Oak Ridge, notwithstanding former Administrator Wheeler's assertion to the contrary. If the Decision remains effective, DOE and other potentially responsible parties will be able to use it to support remedies that eschew technology-based treatment and state use designations for rivers and streams affected by radionuclide pollution.[8]

For all of these reasons, we respectfully request an update on the status of EPA's review of the Radionuclide Pollution Decision.

II. Request for Revised Proposed Plan for Proposed EMDF

When an agency publishes a proposed remedial plan, CERCLA requires that the plan and its accompanying notice and analysis "shall include sufficient information" to provide the public with "a reasonable explanation" of the proposed remedy as well as the other alternatives which were considered. 42 U.S.C. § 9617(a). DOE's initial proposed remedial plan for the EMDF fell far short of this statutory mandate. As EPA notes in its comments on the draft ROD, when DOE issued its Proposed Plan for public comment in 2018, several portions of the administrative record were incomplete. EPA Comments, 7. At that time, DOE had yet to finalize a Remedial Investigation/Feasibility Study (RI/FS), wastewater focused feasibility study (FFS), waste acceptance criteria (WAC), list of complete ARARs, or to present the public with sufficient information regarding the geology and hydrology of the selected site. In sum, the 2018 Proposed Plan was not the culmination of an effective fact-gathering and evaluative process but rather set

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https://www.tn.gov/content/dam/tn/environment/remediation/documents/oakridgereservation/emdf-documents/rem-73212_EMDF_FFS_DOE_10_28_2021.pdf.

[8] John McGahren et al., *EPA Announces Review of Trump Administration Decision on Nuclear Cleanup*, JDSUPRA (June 30, 2021), https://www.jdsupra.com/legalnews/epa-announces-review-of-trump-8819693/ ("While Administrator Wheeler's decision only applied to ORR, it is still seen as setting a precedent by rejecting the use of technology-based effluent limits to develop PRGs for radionuclide-contaminated water discharges.").

forth a pre-selected remedy accompanied by overtures that the agency would later fill in the necessary informational and analytic gaps.

Community Groups appreciate that both EPA and TDEC recognize in their comments on the draft ROD that further opportunity for public participation is necessary.[9] However, EPA appears to stop short of requiring DOE to issue a revised proposed plan as required by CERCLA and implementing regulations. And DOE appears to have full confidence that it will be allowed to move forward with the EMDF regardless of the extensive missing information or any forthcoming public input. On October 26, 2021, DOE's Office of Environmental Management announced that it has awarded a contract for, among other things, "design, construction, and operation of the new onsite disposal facility, Environmental Management Disposal Facility (EMDF)."[10] This latest announcement from DOE merely continues the pattern it has established of putting the cart before the horse in pre-selecting a remedy at Oak Ridge.

DOE's award of construction contracts for the EMDF at this point in the remedial selection process signals that DOE is prioritizing shovels in the ground over compliance with the law. Yet EPA must comply with the substantive and procedural requirements of CERCLA prior to approving a record of decision for the EMDF.[11] Given the extensive amount of information missing from the administrative record at the time the 2018 Proposed Plan was issued, CERCLA requires DOE to issue a revised proposed plan. As EPA correctly notes, "[u]nder the NCP, new information should be made available for public review and comment consistent with 40 CFR 300.430(f)(3)" before issuance of a final ROD. EPA Comments, 18. That regulation mandates that an agency "shall" issue "a revised proposed plan" when new, unanticipated information is made available to the public after a previous proposed plan is put forth but before a ROD is finalized. 40 CFR 300.430(f)(3). The revised proposed plan should include "appropriate

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[9] EPA Comments, 7–8; Letter from Randy Young, TDEC, to Roger Petrie, DOE, re: TDEC Comment Letter: *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&D1), 2, 8 (Oct. 8, 2021), https://www.tn.gov/content/dam/tn/environment/remediation/documents/oakridgereservation/emdf-documents/rem_73212_EMDF_ROD_D1_TDEC_10_08_2021.pdf (TDEC Comments).

[10] U.S. DEP'T OF ENERGY, *DOE Awards Oak Ridge Reservation Cleanup Contract* (Oct. 26, 2021), https://www.energy.gov/em/articles/doe-awards-oak-ridge-reservation-cleanup-contract.

[11] In recent correspondence, three members of Congress allege, in reference to our advocacy, that "special interests" are causing delay in the remedial process at Oak Ridge. Letter from Charles Fleishmann et al., to Michael Regan, EPA (Sept. 22, 2021), https://www.tn.gov/content/dam/tn/environment/remediation/documents/oakridgereservation/emdf-documents/rem_73212_EMDF_Congress_EPA_07_22_2021a.pdf. To the contrary, Community Groups simply request that EPA implement the requirements imposed by CERCLA. The fact that DOE issued a grossly inadequate proposed plan in 2018 and has sought to evade straightforward procedural and environmental protections should not be blamed on Community Groups. Nor should the public be deprived of its legal right to participate in the remedial process as a result of DOE's short-sighted actions.

supporting material that provides the necessary engineering, cost, and risk information" absent from the first proposed plan and its supporting analysis, and should further discuss how the updated selected alternative "compares to the other alternatives with respect to the nine evaluation criteria [in 40 CFR 300.430(e)(9)]." U.S. Env't Prot. Agency, *A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Decision Documents*, 4-4 (July 1999).[12]

By requiring substantial new and unanticipated information to be compiled into a revised proposed plan and analyzed anew, CERCLA ensures that agencies substantively reevaluate selected remedies in response to new and significant information, and that both the information and analysis are presented in a consolidated way for the public to review. Given the amount of new information that must be compiled, analyzed, and reviewed prior to finalizing a ROD in this case, DOE must issue a revised proposed plan.[13]

The severe informational deficiencies, which hobbled the public's ability to provide meaningful and informed comments on the Proposed Plan in late 2018 and early 2019 must now be addressed. As EPA has determined, further public involvement is necessary and warranted before any issuance of a final ROD. EPA Comments, 2, 31. This new period of public comment is necessary to allow the public to comment on the significant new information that has been made available to the public since January 2019—when the public comment period closed—including new technical reports analyzing the geology and groundwater elevation at the proposed site location. *See* EPA Comments, 2, 7, 18. DOE must also finalize and make public a completed RI/FS, wastewater FFS with preliminary remedial goals, WAC, and limits for radionuclides and mercury in surface water **before** any period of public comment is reopened and **before** any final record of decision may be approved. *See id.* Without this information, the public will lack the "sufficient information" necessary to understand whether DOE's continued fealty to its pre-selected remedial alternative is reasonable and meets the threshold criteria for record of decision approval under CERCLA. Without this information, the public will not be able to comment in an informed manner on basic and important agency decisions such as the type of waste that will be accepted at the landfill and how much pollution from that waste will be allowed to discharge into the surrounding community.

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[12] *Available at* https://www.epa.gov/sites/default/files/2015-02/documents/rod_guidance.pdf.

[13] Community Groups incorporate by reference the concerns outlined in a letter and accompanying attachment recently sent to EPA by several former TDEC employees which provides context on the history and operation of the EMWMF and the proposed EMDF, highlights inconsistencies in the draft EMDF ROD which must be addressed in a revised proposed plan, and shows how the current administrative record does not support a finding that the threshold criteria of protectiveness of public health and the environment and compliance with non-waived ARARs will be met. *See* Att. 1, 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 EMDR Record of Decision (ROD), Oak Ridge, Tennessee (Nov. 4, 2021).

DOE must also include in this analysis, for the first time, information regarding the potential impacts of climate change on its preferred remedy. Although the draft ROD evaluates the amount of greenhouse gas emissions that could result from offsite disposal of the hazardous waste, DOE is notably silent on the impacts climate change could have on its preferred onsite disposal alternative. As EPA notes, DOE must address this deficiency because its selected remedy could be impacted by "potential changes in rainfall, storm events and hydrologic conditions," EPA Comments, 1; "increase in flood events," *id.* at 9; and the area's increasing historical average rainfall, *id.* at 31. *See also* TDEC Comment Letter, 43 (noting that historically high average annual rainfall levels "are no longer extreme events, but rather the norm, and this must be taken into consideration for storage treatment and design").

Coupled with the new, alarming information that has come to light regarding the high groundwater levels at DOE's preferred disposal site, DOE must analyze how increasingly wet weather conditions in Oak Ridge might affects its preferred onsite disposal plans. It is worth noting, in this regard, that the contact water holding ponds at the existing EMWMF have come close to failing in the past during heavy rain events, and as a result, thousands of gallons of untreated wastewater containing radionuclides and other hazardous pollutants have been discharged from EMWMF into Bear Creek.[14]

DOE must also supplement the information currently contained in the draft ROD about the impacts its selected remedy will have on environmental justice communities. Community Groups applaud EPA's comments on the draft ROD regarding the inadequacy of DOE's current environmental justice analysis. EPA notes that a screening-level analysis of the preferred remedy's potential impacts on and existing risks to minority, low-income, and indigenous populations is needed. EPA Comments, 18. The importance of these measures is underscored by the close proximity of the Scarboro community to DOE's preferred disposal location, as well as the anecdotal information Community Groups have provided to EPA Region 4 regarding fishing practices of nearby low-wealth Latino communities.

As EPA so aptly notes, "there currently is no factual basis in the D1 ROD or the Administrative Record for this ROD" to justify DOE's assertion that DOE's preferred remedy at the ORR site "will meet [remedial action objectives], will protect human and ecological receptors, and will prevent adverse impacts to surface water." EPA Comments, 27. DOE must address these deficiencies before issuing a revised proposed plan for public comment. EPA should facilitate this process by revising the Radionuclide Pollution Decision so that DOE can issue a revised wastewater focused feasibility study, proposed plan, and record of decision that are consistent with CERCLA's requirements and afford the community around the Oak Ridge Reservation the participation, and ultimately, the environmental protection, they deserve under the law.

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[14] *See, e.g.*, Att. 2, Plea Agreement, *United States v. Duratek Federal Services*, No. 3:06-cr-00172-CCS (E.D. Tenn. 2006); Att. 3, Factual Basis at 2–3, *United States v. Duratek Federal Services*, No. 3:06-cr-00172-CCS (E.D. Tenn. 2006).

Sincerely,

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