



Department of Energy
Washington, DC 20585

June 21, 2019

The Honorable Andrew R. Wheeler
Administrator, US Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Mr. Administrator:

I write to supplement this Department's April 5, 2019 letter from Oak Ridge, Tennessee Manager Mullis seeking your review of the March 21, 2019 decision by then Acting EPA Regional Administrator Walker in which she declined to approve the water management practices at Oak Ridge Reservation (ORR) in connection with the Department's plans to construct a new landfill disposal facility at the ORR on the ground that the Department's water management practices are not adequately protective with respect to radiation exposures.

This action by the Regional Administrator is of considerable concern to the Department. First, the decision explicitly states the conclusion that DOE's dose-based radiation exposure standards are not protective of human health and the environment, and proceeds (seemingly gratuitously) to add that the similarly dose-based radiation exposure standards promulgated by the Nuclear Regulatory Commission also are not protective of human health and the environment. Second, the decision indicates the view that the currently operating neighboring disposal facility, which EPA approved decades ago, also fails to meet CERCLA protectiveness requirements. In addition, the decision makes clear that at least one additional DOE facility in EPA Region IV suffers from the same CERCLA deficiencies as those perceived and related to the proposed disposal cell under consideration at the ORR. And there is nothing in the reasoning and other perceptions displayed in the Regional Administrator's decision that could not be advanced with respect to the Department's cleanup activities at any other location across the country. Third, as to the contemplated new facility itself, incorporating the technology that would be necessitated under the Regional Administrator's decision would add an estimated \$150 million to the cost of this particular element of the cleanup activities the Department is conducting at the ORR, without any measureable reduction in risk.

The Department's environmental management and remediation activities are nationwide in scope and require annual appropriations of approximately \$6 billion to sustain. Significant as these amounts may be, the Department constantly weighs competing claims on its resources in its remediation activities to maximize the protection of the human health and protection of the environment. DOE has a comprehensive set of directives based on Atomic Energy Act (AEA) authorities that establish limits for radiological exposure. Had DOE's experience in conducting remediation activities at the ORR (including operation of landfills such as the contemplated new one whose design has provoked this dispute) indicated the need to commit significant amounts of



its available resources to interposing additional technology to the wastewater effluents at issue, it would have done so.

In fact, however, the actual performance of the operating landfill measured over the last 13 years demonstrates that discharges of radionuclides in the wastewater have been on average at least ten times more protective than EPA's CERCLA risk range of 10^{-4} to 10^{-6} . As demonstrated by the publicly-available Annual Site Environmental Reports for the ORR, conservatively estimated doses to the public from all operations at ORR including the landfill have been well below all dose limits and constitute less than one percent of the U.S. national average background radiation exposure level. The DOE contribution to the population dose of the community is a small fraction of the one percent of the background collective dose. If the actual performance of the proposed new facility resembles that of its operating predecessor (which we have every reason to expect), then it is difficult to understand how the Regional Administrator's decision can posit that its performance will not be protective of the human health and environment. There is no body of existing scientific observations that teaches the imposition of more strenuous EPA standards will present any real reduction of risk whatsoever.

Despite this reassuring performance record, the Regional Administrator's decision finds two seeming flaws in DOE's approach. First, the point of measurement of radiation levels of the outfalls is distant from the point source, which means that any reduction in contaminant levels has been achieved, at least in part, by dilution with surface water. Second, ignoring for the moment that the ORR is a controlled site with limits to public access to locations closer to the point source at issue, application of the DOE standards of 25 mrem and As Low As Reasonably Achievable yields an impermissibly lenient result from a standard imposed through a means (DOE orders) that themselves are not "promulgated" within the distinctive meaning of that term under CERCLA. The reason that DOE contends it is appropriate for the point of measurement to be situated near the site boundary is because that location is the one closest to the discharges in question that generally would be accessible to any member of the public. The ORR is currently an actively managed DOE site that conducts operations involving source, special nuclear, and byproduct material. As to the legal status of DOE orders, they are clearly "applicable" to the current and contemplated new ORR landfills, even though not necessarily binding on members of the public because the orders were not promulgated by use of notice and comment rulemaking under the Administrative Procedure Act. That said, they do "apply" by their terms and govern the activities and prescribe the responsibilities of DOE personnel and DOE contractors, the categories of individuals having access to these DOE facilities. Consequently, EPA's own ARARs guidance (OSWER 9234.1-02 (Aug. 1989)) recognizes DOE orders as having the same force for DOE's facilities as regulations. So it is somewhat puzzling that, despite the pioneering experience of DOE and its predecessors in managing nuclear risks, and contrary to EPA's prior written guidance, the Regional Administrator's decision would seem to foreclose even consideration of DOE standards in fashioning a CERCLA remedy.

The Regional Administrator's decision, however, has chosen the Clean Water Act standards as the ones to be applied for regulation of DOE-regulated radioactive materials in wastewater effluents anticipated from the new facility. It has done so despite conceding that DOE-regulated source, special nuclear, and byproduct material is not subject to regulation under the Clean Water Act. The decision reasoned that, despite the inapplicability of the Clean Water Act, under

CERCLA the Clean Water Act standards still could be used as a “relevant and appropriate” regulatory norm because section 121(d) of CERCLA itself expressly permits forming a remedy by resort to either an “applicable” standard or a “relevant and appropriate” one.

While the Regional Administrator’s decision is correct in observing that a CERCLA remedy can be founded on a standard that is either “applicable” or “relevant and appropriate,” it is equally true that the text of CERCLA section 121(d) is more suggestive of coping with a regulatory void than it is of authorizing an administering agency to resurrect the application of a regulatory authority that was consciously and overtly withheld by the Congress from the agency that now would seek to employ it. In *Train v. Colorado PIRG*, 426 U.S. 1, 15 (1976), the Supreme Court concluded that the Congress had determined explicitly to interdict the authority of the EPA to prescribe water pollution control standards for emissions of source, special nuclear, and byproduct material regulated under the Atomic Energy Act and “that the [DOE] was to retain full authority to regulate the materials covered by the AEA, unaltered by the exercise of regulatory authority by any agency under the [Clean Water Act].” See also *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (“The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.”). Neither the text nor the legislative history of CERCLA reveals any specific initiative by Congress to reconsider that determination. And to understand the enactment of CERCLA, which does provide the EPA certain authorities with respect to radioactive materials, as repealing or amending by implication the jurisdictional relationship legislated by Congress in 1972, would constitute a highly disfavored repeal by implication. See *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (It is a “cardinal rule . . . that repeals by implication are not favored.”) (quoting *Posadas v. Nat’l City Bank*, 296 U.S. 497, 503 (1936)); *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 n.8 (2007) (“[I]mplied amendments are no more favored than implied repeals.”); accord *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). Instead the two regimes should be understood to allow each other to function as fully as possible.

In addition, I wish to draw your attention to, and emphasize, the potentially damaging and corrosive effects of statements as here in the Regional Administrator’s decision that regulatory standards and decisions by other federal agencies are not protective of human health and the environment. The standards formulated and applied by DOE and its predecessors reflect the pioneering scientific work meticulously analyzing potential effects of radiation over many years by many eminent researchers and scores of dedicated professionals, and published in scientifically peer-reviewed national and international consensus standards. Examination of the history of EPA’s authorities with respect to source, special nuclear, and byproduct material stemming from the Federal Radiation Council suggests that EPA’s authorities regulating those materials were to complement, and not supplant, the responsibilities of DOE under the Atomic Energy Act. An approach that appropriately has each agency respecting the other’s regulatory responsibilities is the approach contained in the memorandum of understanding between the U.S. Environmental Protection Agency and the U.S. Nuclear Regulatory Commission in 2002. Presumably the EPA then concluded that this agreement satisfactorily protected human health and the environment when it deferred to NRC-promulgated standards for radiation protection under the Atomic Energy Act, notwithstanding the broad statements to the contrary in the Regional Administrator’s March 21 decision. I commend this approach for your consideration in resolving matters such as the current dispute.

Finally, as noted above, the application of CWA standards to DOE-regulated materials in a CERCLA context could have major cost and schedule implications, potentially affecting not just the Department, but other federal agencies as well, without any commensurate demonstrated reduction of risk to human health or the environment. Given that the current dispute stems in major part from a scientific disagreement spanning several decades between DOE and the EPA, the Administration should undertake a systematic scientific review, prior to imposing CWA standards on DOE, of the risk levels sought to be applied by EPA in cases such as this one.

Sincerely,

A handwritten signature in blue ink that reads "Thomas L. Cabbage, III". The signature is written in a cursive style with a distinct "III" at the end.

Thomas L. Cabbage, III
Deputy Under Secretary for Science