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Re: Final Environmental Impact Statement for Remediation of Area IV
and the Northern Buffer Zone of the Santa Susana Field Laboratory

Dear Mr. Jones and Ms. Jennings:

The Department of Energy (DOE) has recently issued its Final Environmental Impact Statement (FEIS) for remediation of Area IV and the Northern Buffer Zone of the Santa Susana Field Laboratory (SSFL). The FEIS violates the National Environmental Policy Act (NEPA), 42 U.S.C. §4321, *et seq*; the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6901 *et seq*; the Administrative Order on Consent (AOC) executed with the California Department of Toxic Substances Control (DTSC) in 2010; and other legal requirements, as well as commitments made by DOE. There are both unlawful fouls of process and fouls of substance that will harm Californians and foreclose meaningful cleanup for future generations. The decision by the Trump Administration DOE to move forward on the basis of this FEIS sets the stage for abandoning huge amounts of radioactively and chemically hazardous material and consigns this portion of Southern California, set in the midst of millions, to never be cleaned up. We urge DOE to reverse course, and to not approve a Record of Decision (ROD) based on this fundamentally flawed document.

NEPA Requirements

The Trump Administration DOE should be well aware that the fundamental requirement of the National Environmental Policy Act (NEPA) 42 U.S.C. § 4321, et seq., is to require the responsible federal agency to subject every major federal action to a “hard look” at the *environmental impact comparison of reasonable alternatives*.¹ The Council on Environmental Quality’s (CEQ) regulations governing implementation of NEPA direct that Federal agencies “shall to the fullest extent possible...(b)...emphasize *real environmental issues and alternatives*...(e) Use the NEPA process to identify and assess the *reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions* upon the quality of the human environment.”² In setting out the fundamental purpose of an EIS, CEQ’s regulations also state, “It [the EIS] shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the *reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment*. Agencies shall focus on *significant environmental issues and alternatives*...”³ Satisfying these requirements is a non-discretionary duty of the DOE’s NEPA process and obligations under the law.

Bait-and-Switch – Fully Half of the FEIS is Entirely New

At the heart of NEPA, described above, is the requirement of the agency’s hard look and the public’s chance for review of that analysis. This means an opportunity for the public to conduct a thorough review of the major federal action at issue, comment on the matters at hand, and then followed by a concomitant response to those comments by the agency. Here, however, DOE has engaged in a kind of bait-and-switch behavior, thumbing its nose at those fundamental NEPA requirements. In short, DOE published for public comment one Draft EIS (DEIS), and then issued a FEIS that is almost completely different, without meaningful explanation to the comments filed on the initial draft.

More than half—the equivalent of more than a thousand full pages—of the FEIS (not counting the response to comments volumes) is completely new:

- Approximately 60% of the 124-page summary volume is new.
- Nearly half of the 857-page Volume I, Books 1 and 2, i.e., Chapters 1-14, is comprised of material that is new to the public and therefore was unavailable for review.
- Half of Appendix G, the deeply flawed Risk Assessment, comprising 157 pages, is entirely new.
- Appendix J, the Biological Opinion (discussed in more detail below) of 107 pages, did not exist in the DEIS and therefore has not been subject to any scrutiny or comment.

¹ See NEPA, 42 U.S.C. §4321, et seq.; see also 40 C.F.R. §1502.14, 10 C.F.R. 51.85, and § 51.10-125 and App A.

² 40 C.F.R. §1500.2 (emphasis added).

³ 40 C.F.R. §1502.1 (emphasis added).

³ 40 C.F.R. §1502.1 (emphasis added).

- The Biological Assessment of 201 pages, prepared by DOE, and the misrepresentations therein relied upon for the Biological Opinion, is also now released for the first time.
- At least half of the 131-page Appendix K is new material.
- Appendix L didn't exist in the DEIS.

The changes and new material go to the core of the EIS. In essence, DOE published one DEIS for comment and has now adopted an FEIS that is fundamentally different, on the central matters the EIS addressed, without recirculating it for public review and comment.

The FEIS's Proposed Action – Leaving 98% of the Contaminated Soil Not Cleaned Up – Wasn't Even Proposed or Considered in the DEIS

Most egregious, the action now proposed by DOE in the FEIS, its preferred alternative—cleaning up to what it calls an “open space” standard, and thus leaving 98% of the contaminated soil not cleaned up—was not even considered, proposed, or analyzed in the DEIS. By contrast, the legally binding AOC that DOE signed requires, with very narrow exemptions, cleanup to background levels of contamination. This new, extraordinarily weak “open space” proposed standard, based on risk to someone on the property rarely for hiking, would leave the half million people who live and work nearby at perpetual risk. The public has had no opportunity whatsoever to review, analyze, or comment upon the very proposed action DOE now intends to adopt. To depart the matter at this juncture without reissuance would allow DOE to move forward with no future obligation to consider and respond to comments.

DOE estimates in the FEIS that there are 1,616,000 cubic yards of soil in SSFL Area IV and the Northern Buffer Zone with concentrations of contaminants exceeding the AOC cleanup levels (Lookup Table values) [see Table S-2, “Preliminary Estimated Soil Volumes for Remedial Actions per 2010 AOC Considerations,” FEIS p. S-21]. DOE now proposes, however, to clean up only 38,200 cubic yards (FEIS p. S-42). This represents a mere 2%, leaving 98% of the soil with contamination above the AOC LUT values not cleaned up. This extraordinary breach of DOE commitments and affront to the public trust was not disclosed in any way in the DEIS and there has been no opportunity for meaningful comment on that precise proposal, wrong as it is.

There Have Been No Significant New Developments that Justify the New Proposed Action and the Essentially Completely New FEIS

DOE attempts to justify choosing a preferred alternative – that was not even considered in the DEIS – on the basis of purportedly changed circumstances; that is, a supposed change in the anticipated end-use of the land. DOE states in the FEIS (at p. 1-27) that the selection of a proposed action not even considered in the DEIS was because of the changed land use circumstances due to Boeing entering into a conservation easement for the land to be open space.

However, open space was precisely what the DEIS said would be the end use of the land. In section 1.4, “Future of Area IV and the Northern Buffer Zone,” p. 1-8 of Chapter 1 of the DEIS, it was stated: “Boeing is the landowner of Area IV and the NBZ; therefore, Boeing will decide the potential future land use of these areas. Boeing has stated that its intent is to maintain its portion of SSFL (including Area IV and the NBZ) as undeveloped open space. Further,

Boeing states that it would restrict future land use to prevent development for any commercial, industrial, agricultural, or residential purpose. Boeing also states that it would restrict future land use to ensure the property would be protected as undeveloped open space, regardless of zoning changes beyond its control (Boeing 2016b).” Boeing’s intentions have not changed since then; thus, there are no changed circumstance justifying choosing an alternative not included in the DEIS.

However, assuming *arguendo* that DOE’s assertion of dramatically changed circumstances were correct, NEPA would require the issuance of a *draft supplemental EIS*, with all the requirements of public notice and comment and agency response to those comments. NEPA does not allow an agency to bypass those requirements and issue what amounts to an almost entirely different EIS as a final, with alternatives chosen that weren’t examined in the DEIS, based on a claim of changed circumstances.

The Biological Opinion and Biological Assessment Are Entirely New; They—And Their Misuse in the FEIS—Have Thus Been Shielded from Public Review and Comment; And the Biological Opinion Triggers No Permissible Cleanup Exception Under the AOC

We—and many other commenters on the DEIS—noted the failure to include a Biological Opinion in it. The County of Los Angeles, for example, formally demanded that “the EIS should be recirculated for additional public review and comments after the USFWS Biological Opinion is submitted.” In response, DOE simply said it did not intend to do so; no explanation was given for this failure. [Volume 3, Book 1, p. 3-211.]

Central to the FEIS is DOE’s claim of exempting vast amounts of contaminated soil from cleanup on the basis of an asserted AOC biological exception. This claim is based purportedly on the Biological Opinion, which in turn is based on DOE’s Biological Assessment, neither of which were made available for public review and comment in the DEIS process.

However, the Biological Opinion does not in fact trigger any of the AOC possible exceptions. The AOC biological exception language is as follows (there is identical language for the radioactive contamination):

The end state of the site (the whole of Area IV and the Northern Buffer Zone) after cleanup will be background (i.e., at the completion of the cleanup, no contaminants will remain in the soil above local background levels), subject to any special considerations specified below.

· Clean up chemical contaminants to local background concentrations.
Possible exceptions (where unavoidable by other means):

· The framework acknowledges that, where appropriate, DOE will engage in an Endangered Species Act (ESA) Section 7(a)(2) consultation with the U.S. Fish and Wildlife Service (FWS) over any species or critical habitat that may be affected by a federal action proposed to be undertaken herein on a portion of the site. **Impacts**

to species or habitat protected under the Endangered Species Act may be considered as possible exceptions from the cleanup standard specified herein only to extent that the federal Fish and Wildlife Service, in response to a request by DOE for consultation, issues a Biological Opinion with a determination that implementation of the cleanup action would violate Section 7(a)(2) or Section 9 of the ESA, and no reasonable and prudent measures or reasonable and prudent alternatives exist that would allow for the use of the specified cleanup standard in that portion of the site.

(emphasis added)

DOE simply failed to request ESA§7(a)(2) consultation with the US Fish & Wildlife Service for cleaning up Area IV and the NBZ to background, the standard required in the AOC. Instead, it requested consultation for an action that would violate the AOC—failing to clean up most of the contamination.

In any case, the Biological Opinion issued makes no finding that the cleanup action would violate Section 7(a)(2) or Section 9 of ESA. Thus, no exception to the AOC requirement to clean up the full site to background is allowed. Nonetheless, DOE now intends to issue a Record of Decision, based on the FEIS, to leave 98% of the contaminated soil not cleaned up, despite the absence of an exception allowed under the AOC.

Failure to Examine the Implications of the Recent Fire

On November 8, 2018, weeks before the FEIS was released, a devastating fire, called the Woolsey Fire, broke out at SSFL. Southern California Edison reported a failure at its electric substation on Area IV (built in part to handle electricity from the SRE reactor that eventually suffered a partial meltdown). DOE estimates that as a result of the Woolsey Fire 80% of the entire SSFL burned. (Melissa Simon, quoting John Jones, “Calls Continue for Independent Study of Fire Impact,” *Thousand Oaks Acorn*, January 10, 2019.) After initially denying that any of DOE’s Area IV had been affected by the fire (DOE statement November 13, 2018), DOE subsequently had to admit that that assertion was incorrect and parts of Area IV did burn, including “Milk Vetch [sic] Hill” (DOE statement November 19, 2018).

Braunton’s milkvetch is the one endangered plant in Area IV and the NBZ, and the area which burned is the primary area identified by DOE for a possible AOC biological exception. Since it has now burned, any argument for an exception to cleaning up the contamination in that area because of the presence of the plant has now gone up in smoke. The FEIS does not address the implications arising from the fire, which, as indicated above, occurred before issuance of the document and thus could have been evaluated.

Furthermore, the fire makes clear the fallacy of the claims in the FEIS that there is essentially no public health risk from leaving virtually all the chemical and radioactive contamination in Area IV and the NBZ in place, as stated in the FEIS. DOE now argues that the site would be restricted to people hiking through it occasionally, regardless of what future

generations might do or intend with the contaminated land, and that risks of contamination migrating offsite to people who live and work in the area can be for all intents and purposes ignored. There are many reasons why this is inadequate as a cleanup decision, but among them is the now profoundly obvious potential for future fires causing releases of radioactive and toxic chemical contamination from SSFL if not cleaned up. That possibility is also not examined.

FEIS Proposed Action Would Also Fail to Clean Up Most Contaminated Groundwater

DOE's FEIS identifies as its proposed action treating groundwater to merely reduce somewhat the level of contaminants, leaving contamination at levels far above permissible levels. That remaining contamination in the groundwater would be simply left to hopefully (or wishfully) attenuate naturally over long periods of time.

Failure to clean up the contaminated groundwater is not an environmentally acceptable solution for California, is inconsistent with the 2007 Consent Order, and represents a further abdication of DOE's obligations to remedy the environmental pollution its poorly controlled operations caused.

The Entire Suite of Proposed Actions in the FEIS Violate the AOC

The AOC requires clean up of all soil (defined as including structures, debris and anthropogenic materials) to background, with extremely limited exceptions which, as discussed above regarding biological features, do not apply. The FEIS no longer even makes a pretense of complying with the AOC. The Trump Administration DOE admits in the FEIS that the proposed action would breach the AOC. It says merely it will "discuss" the matter with DTSC.

This is unacceptable. The AOC is a legally binding agreement. DOE does not have the authority to ignore it.⁴

DOE Mischaracterizes Both the AOC and the 2007 Federal District Court Decision

In the FEIS, DOE tries to defend its failure to comply with the AOC requirement of cleaning up Area IV and the NBZ by 2017 on its obligations under the decision by the US District Court for the Northern District of California. That decision by Judge Samuel Conti in *Natural Resources Defense Council, Inc., Committee to Bridge the Gap, and City of Los Angeles v. Department of Energy, et al.*, Case No. C-04-04448 SC, was issued May 7, 2007 (WL 1302498). There is no excuse for DOE to have dragged its feet for nearly a dozen years from the time of that order before issuing a FEIS; its own negligent conduct cannot excuse its failure to

⁴ There are numerous breaches of the AOC, besides the purported choice by DOE in the FEIS of an "open space" standard that would leave the great bulk of the contamination not cleaned up. For example, the AOC requires a "not to exceed" cleanup approach, whereby any soil that exceeds the cleanup level is remediated, with averaging high and low concentrations forbidden. The FEIS instead puts forward averaging. This violates both the AOC and EPA guidance, which says to not average if exposures might not be random. See US EPA, *Radiation Risk Assessment At CERCLA Sites: Q & A*, Directive 9200.4-40; EPA 540-R-012-13, May 2014.]

timely follow either the Conti Order or the AOC.

DOE also implies that its obligations under the AOC are “suspended” because of a section of the AOC that says that if there were inconsistencies between the AOC and the Conti Order, DOE would work with the parties to request any relief needed. This had to do with possible need to remove DOE buildings in order to take soil measurements beneath them for the FEIS. The Conti case parties discussed the issue and concluded no inconsistency existed and no relief necessary. And, in any case, DOE decided not to remove the buildings prior to issuing the FEIS. It is troubling, therefore, that DOE would attempt to misuse the Conti adverse ruling as an excuse for failing to comply with the AOC it, supposedly in good faith, entered into three years later.

The FEIS Violates NEPA, Because it is Entirely Based on Justifying Actions Which it Does Not Have the Discretion Under RCRA or the AOC to Take

NEPA, as we pointed out in comments on the DEIS, is triggered for major *discretionary* federal actions that can significantly affect the human environment. It is to provide environmental information and analyses useful to the federal decision-maker in making federal decisions. The original DOE scoping description⁵ for the DEIS was consistent with NEPA in this regard; it said that DOE didn’t have discretion to do anything inconsistent with the AOC requirement of cleanup to background, but the EIS would examine *ways to carry out* the AOC background requirement, which was within DOE’s discretion and NEPA purview:

DOE has signed two agreements with the California Department of Toxic Substances Control: the 2007 Consent Order of Corrective Action and 2010 Administrative Order on Consent for SSFL Area IV. Those agreements stipulate cleanup standards – how clean the site must be before cleanup can be declared completed. DOE is committed to full compliance with both the 2007 and the 2010 orders. However, neither Order dictates how DOE should accomplish the cleanup standards. For that reason, the EIS will explore if there are reasonable alternatives for accomplishing the cleanup levels that are stipulated in the Orders.

DOE agrees that the AOC committed DOE to clean up to background (as described in the “purpose and need” above), but the AOC did not provide adequate or detailed description of the best way to accomplish cleanup to background. DOE believes there may be more than one way to accomplish cleanup to background as described in the Administrative Order on Consent.

DOE subsequently broke those promises, and now we have a FEIS that is entirely based on actions DOE is legally barred by the AOC from undertaking.

⁵ DOE, “Public Participation in the Development of Alternatives to be Considered in the Santa Susana Field Laboratory Area IV Environmental Impact Statement,” May 2012

Additionally, even were there no AOC, under RCRA, it is the regulator—not the polluter—that decides how much contamination the polluter is required to clean up. DOE asserts that the great majority of the contamination is chemical. That is regulated by RCRA. DOE is subject to RCRA. RCRA in California is carried out by DTSC, pursuant to a delegation of authority by USEPA. DOE must follow DTSC directives, which are based on RCRA and the state’s hazardous materials laws. Quite simply, DOE has no authority to decide how much of its chemical contamination it will either clean up or abandon in place. That is up to the regulators. The entire FEIS thus is an attempt to illegally misappropriate authority for cleanup decisions from the regulators.

Conclusion

The Trump Administration DOE has issued what amounts to an entirely new and unreviewed EIS in the guise of a FEIS. The very action it proposes to now ratify with a ROD—cleanup to a purported “open space” standard that would leave 98% of the contaminated soil not cleaned up—was not even considered in the DEIS. Vast amounts of new material, absolutely critical to the issues at hand, have been added. These actions violate the fundamental purposes of NEPA—meaningful public participation in the review of environmental analysis.

Furthermore, DOE has walked away from compliance with the legally binding AOC it executed with California, which requires cleanup of all contamination that can be detected, with very limited exceptions. The DOE claims of exceptions that are essentially as large as the contamination itself are in direct contradiction to the exceptions allowed. Moreover, the cleanup standard DOE now puts forward explicitly violates the 2010 agreement.

Fundamentally, the FEIS is a usurpation of the authority of the California regulator, under both RCRA and the AOC. The polluter does not get to choose how much of its pollution it must remedy. As such, DOE has breached the public trust. DOE, and its predecessor the Atomic Energy Commission, conducted extremely dangerous operations at SSFL in an environmentally irresponsible fashion. This resulted in widespread contamination, which places at risk the people who live nearby. Our organizations had to challenge DOE’s actions in federal court in order to halt the then Bush Administration DOE from walking away from the contamination and leaving the mess in place. The Court ruled for the City of Los Angeles, NRDC and CBG, and required a serious, probing environmental review. Out of that process emerged the AOC, ultimately agreed to by the then Obama DOE and California. In 2010 DOE promised to clean up all the contamination, by 2017, in a legally binding agreement. Having failed to even commence the cleanup by that date, DOE has now issued a FEIS that breaches its solemn promises and the public trust.

We object, and urge DOE to withdraw the FEIS, issue no Record of Decision (ROD) based on it, and issue a new FEIS that is compliant with the AOC and with NEPA. Should it decline to do so, it should not issue any ROD based on the FEIS, but instead recirculate the FEIS for public comment, as it is in essence an entirely new EIS, the substance of which the public has never been able to review and comment upon in draft as required by NEPA. However, what

DOE should fundamentally do is stop evading its commitments to a full cleanup of the contamination it created and to cease violating the AOC it signed.

Sincerely,



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