ENTERED

STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION

IN THE MATTER OF:	)	DIVISION OF SOLID
	)	WASTE MANAGEMENT
	)	
U.S. DEPARTMENT OF ENERGY	)	NO. 99-0438
	)	
RESPONDENT	)	DOCKET NO.

CONSENT ORDER

Upon the consent of the Commissioner and the United States Department of Energy (hereinafter "DOE"), this matter came before the Solid Waste Disposal Control Board. After consideration of the Commissioner's Order and the Respondent's Petition for Review, the Board made the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On November 2, 1999, Commissioner's Order No. 99-0438 was duly served upon DOE. Said Order is attached hereto as Exhibit A and incorporated herein by reference. The referenced Order was timely appealed by DOE to this Board for its review. The petition for review is also attached hereto as Exhibit B and incorporate herein by reference. The Respondent has raised, in the petition for review, various legal issues in challenging the Commissioner's Order, but agrees to accept the provisions of this Consent Order as a settlement of the matters in controversy, without waiving, and specifically preserving, any and all defenses DOE may have with respect to the Commissioner's Order. This Consent Order shall not be construed as an admission or evidence of any liability and shall not be used for any other purpose or in any judicial or administrative proceeding purpose or in any judicial or administrative proceeding except for a proceeding brought by a party for the purpose of enforcing the terms and conditions herein.

33257

ORDER

WHEREFORE, PREMISES CONSIDERED, the Board approves the parties' Stipulations and Orders that:

1. In settlement of the current controversy, DOE shall pay TDEC the sum of fourteen million dollars ($14,000,000). This sum shall be payable in fourteen (14) annual installments, with each installment to be paid before September 30 of each year, with the first installment due by September 30, 2000 and the last installment due by September 30, 2013. By written mutual agreement, the DOE Group Leader, ORR Remediation Management Group and the TDEC Director, DOE Oversight Division may modify the schedule and amount of the installments required by this paragraph. Refusal of either official to agree to modify the schedule and amount of the installments shall not be subject to challenge in any forum by any person.

2. TDEC shall deposit the payments in the pooled investment fund established by T.C.A. §9-4-603. The payments shall be invested and managed in accordance with T.C.A. §9-4-602, §9-4-603, and the policy guidelines duly adopted pursuant to the authority of T.C.A. §9-4-602. The Fund shall be otherwise managed and administered in accordance with the Fund Implementation Plan, attached hereto as Exhibit C and incorporated herein by reference.

3. The payments made pursuant to paragraph 1. of this Order shall satisfy any requirement for DOE or its contractors to make future payments, based (in whole or in part) on the authority of T.C.A. §68-212-108, with respect to the EMWMF, including disposal of wastes at the EMWMF for future response actions.

4. It is DOE's position that any requirement for the payment or obligation of funds by DOE established by the terms of this Consent Order, including the Fund Implementation Plan, is subject to the availability of appropriated funds, and that no provision of this Consent Order, including the Fund Implementation Plan, should be interpreted to require the obligation or payment of funds in violation of the Anti-Deficiency Act, 31 USC Section 1341, as amended.

5. It is TDEC's position that the federal Anti-Deficiency Act, 31 USC Section 1341, does not apply to any obligations set forth under this Consent Order or the Fund Implementation Plan. If appropriated funds are not available to fulfill DOE's obligations under this Consent Order, including the Fund Implementation Plan, DOE shall meet promptly with TDEC representatives to discuss whether the parties can reach an accommodation on adjustments to requirements involving the payment or obligation of such funds. If no agreement can be reached, then the TDEC and DOE agree that in an action by the TDEC to enforce any provision of this Consent Order, including the Fund Implementing Plan, the DOE may raise as a defense that its failure or delay was caused by the unavailability of appropriated funds. The TDEC disagrees that the lack of appropriations or funding is a valid defense. However, the TDEC and DOE agree and stipulate that it is premature at this time to raise and adjudicate the existence of such a defense.

6. Nothing in this Consent Order shall be construed as modifying the Oak Ridge Federal Facilities Agreement. In the event that the Fund is insufficient to perform Surveillance and Maintenance for the EMWMF, DOE retains its responsibility pursuant to CERCLA.

REASONS FOR DECISION

The Board encourages settling cases in the interest of avoiding the time and expense of prolonged litigation. The approval of the parties' agreement protects the environment and is in the best interests of the public.

Adopted and approved by a majority of the Board, a quorum being present, this _____ day of _____, 1999.

FOR THE SOLID WASTE DISPOSAL CONTROL BOARD

_____

James P. Newman, Chairman

APPROVED FOR ENTRY:

_____

Nancy Carnes, BPR #009383
Assistant Chief Counsel for Environment
Attorney for U.S. Department of Energy
Office of Chief Counsel
U.S. DOE, Oak Ridge Operations Office

_____

E. Joseph Sanders, BPR #006691
General Counsel
Tennessee Department of Environment
and Conservation

NOTICE AND WAIVER OF RIGHTS TO APPEAL

The DOE is hereby notified and advised of its right to administrative and judicial review of this FINAL ORDER, pursuant to the Tennessee Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-101 et seq. and the Tennessee Hazardous Waste Management Act, Tenn. Code Ann. §§ 68-212-101 et seq.

Tenn. Code Ann. § 4-5-316 gives a party the right to submit to the Board a petition for a Stay of Effectiveness of a FINAL ORDER within seven (7) days after its entry.

Tenn. Code Ann. § 4-5-317 gives any party the right to file a Petition for Reconsideration with in ten (10) days after the entry of a FINAL ORDER, stating specific grounds upon which relief is requested.

T.C.A. §§ 4-5-322 and 68-212-113 provide any party the right of judicial review by filing a Petition in the Chancery court of Davidson County within sixty (60) days of this ORDER becoming effective.

DOE understands the aforementioned rights and knowingly and voluntarily waive these rights as to this Consent Order.

A copy of this FINAL ORDER shall be served upon the DOE by certified mail, return receipt requested. This Final Order shall become effective upon entry.

Filed in the Administrative Procedures Division, Office of the Secretary of State, on this _____ day of _____, 1999.

_____

Charles C. Sullivan, II, Director
Administrative Procedures Division

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document has been served upon all interested parties by placing a true and correct copy of the same in the United States mail postage prepaid. This _____ day of _____, 1999.

_____

E. Joseph Sanders
Tennessee Department of Environment
and Conservation

DOE/Stewardship/Consent Order 10-22-99.doc

EXHIBIT A

STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION

IN THE MATTER OF:	)	**DIVISION OF SOLID WASTE MANAGEMENT**
	)	
	)	
UNITED STATES DEPARTMENT OF ENERGY	)	**CASE NO. 99-0438**
	)	
RESPONDENT	)	

COMMISSIONER'S ORDER

NOW COMES Milton H. Hamilton, Jr., Commissioner of the Tennessee Department of Environment and Conservation, and states that:

PARTIES

I.

Milton H. Hamilton, Jr., is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation (hereinafter "the Department").

II.

The United States Department of Energy (hereinafter "DOE") is a department, agency and instrumentality of the United States Government. Process may be served on Leah Dever, Manager of Oak Ridge Operations, U.S. Department of Energy, P.O. Box 2001, Oak Ridge, TN 37831.

JURISDICTION

III.

Pursuant to T.C.A. § 68-212-108(c) (2), the Commissioner has the authority to require the payment of sums to a statutorily created fund called the "Perpetual Care Trust Fund", if the Commissioner determines that there is a reasonable probability that a site "will eventually cease to operate while containing, storing, or otherwise treating hazardous waste on the premises which will require continuing and perpetual care or surveillance over the site to protect the public health, safety, or welfare." In establishing the requirement of paying these additional sums, the Commissioner "shall give due consideration to the nature of the hazardous waste material, the size and the type of facility or site to be decommissioned, and the anticipated expenses of perpetual care and surveillance."

IV.

Under Rule 1200-1-11-05(8)(f)5., once it is determined by the Commissioner that there is a "reasonable probability that a site will cease to operate while hazardous waste constituents remain on or in the site, the Commissioner may require the posting of an additional bond to insure the perpetual care of the site."

V.

The Respondent is a "person" within the meaning of T.C.A. § 68-212-104.

FACTS

VI.

DOE is the owner of a large complex of facilities located near Oak Ridge in Anderson and Roane Counties, Tennessee, commonly known as the Oak Ridge Reservation.

VII.

The Department of Energy-Oak Ridge Reservation (hereinafter "DOE-ORR") consists of approximately thirty-seven thousand (37,000) acres of federally owned land near the City of Oak Ridge, which is located in both Anderson and Roane Counties, Tennessee. DOE-ORR consists of three (3) major operating facilities: East Tennessee Technology Park (formerly known as the K-25 Gaseous Diffusion Plant), Oak Ridge National Laboratory, and Y-12 Plant.

VIII.

On December 21, 1989, the DOE-ORR was placed on the EPA National Priorities List (hereinafter "NPL") established under CERCLA, 54 F.R. 48184. An interagency agreement (hereinafter "FFA") among DOE, EPA and the Department became effective in 1992. *Federal Facility Agreement for the Oak Ridge Reservation*, DOE/OR-1014 (U.S. Dept. of Energy 1992). The FFA provides the context for coordination of remedial activities at DOE-ORR. Pursuant to the FFA entered into under Section 120(e) of the *Comprehensive Environmental Response, Compensation, and Liability Act* (hereinafter "CERCLA"), DOE submitted to the Department a plan for an on-site disposal cell of waste resulting from the performance of remedial activities required under CERCLA. The plan is in the form of a proposed *Record of Decision for the Disposal of Oak Ridge Reservation Comprehensive Environmental Response, Compensation, and Liability Act of 1980 Waste, Oak Ridge, Tennessee* issued in May 1999 (hereinafter ROD-1999). DOE/OR/01-1791&D1 (U.S. Dept. of Energy 1999).

IX.

On January 20, 1999, the Department and EPA formally approved the public release of a proposed plan for DOE-ORR CERCLA waste disposal (hereinafter "DOE-1999a"). *Proposed Plan for the Disposal of Oak Ridge Reservation Comprehensive Environmental Response, Compensation, and Liability Act of 1980* DOE/OR/02-1652&D3 (U.S. Dept. of Energy 1999). Recognizing the need for community participation in the evaluation process, DOE held various

public meetings and made fact sheets available to the public. Comments from the general public and from interested organizations (such as the City of Oak Ridge, Environmental Quality Advisory Board, Local Oversight Committee, Site Specific Advisory Board, the Oak Ridge Environmental Peace Alliance, and Friends of Oak Ridge National Laboratory) have been instrumental in identifying the available alternative disposal options and ultimately in the selection of the on-site disposal facility.

X.

ROD-1999 sets forth the selected remedy for the handling of wastes generated in the remediation required under CERCLA at the DOE-ORR facility. The remedy includes the construction and operation of an engineered, above-grade, earthen disposal cell and supporting facilities in the East Bear Creek Valley. The substances designated for disposal at this on-site cell include contaminated media and radioactive and hazardous mixed wastes. Although this is a remedy under CERCLA, the substances that are designated for disposal include hazardous waste under T.C.A. §68-212-101 *et seq.* The remedy also includes the closure of the on-site disposal cell by covering the cell with a RCRA-compliant cap. The implementation of post closure surveillance and maintenance, institutional controls, and media monitoring that will continue indefinitely are also included in this remedy.

ORDER

XI.

WHEREFORE, PREMISES CONSIDERED, pursuant to the authority vested by T.C.A. § 68-212-107, § 68-212-108 and T.C.A. § 68-212-111, I, Milton H. Hamilton, Jr., Commissioner of the Tennessee Department of Environment and Conservation, hereby, after proper consideration of ROD-1999, determine that there is a reasonable probability that DOE-ORR will eventually cease to operate while containing, storing, or otherwise treating hazardous waste on the premises which will require continuing and perpetual care or surveillance over the site to protect the public health, safety, or welfare. After considering the nature of the hazardous waste material resulting from the remediation under CERCLA of the DOE-ORR site, the size and type

of the DOE-ORR site to be decommissioned, and the anticipated expense of perpetual care and surveillance, the Commissioner Orders that:

1. The Respondent shall provide the sum of ONE MILLION DOLLARS ($1,000,000.00) per year for the next fourteen (14) years.

2. The Respondent shall make the first payment of $1,000,000.00 within NINETY (90) DAYS of receipt of this ORDER.

3. The payments shall be paid into the Perpetual Care Trust Fund established for the DOE-ORR facility by the State of Tennessee within NINETY (90) DAYS of approval of ROD-1999. Subsequent annual payments shall be due in the consecutive years on the same date (month and day) as the initial payment.

4. The DOE-ORR Perpetual Care Trust Fund shall be maintained in the Treasury of the State of Tennessee. Both principal and interest will be retained in the Fund provided that the interest generated by investments may be spent in the perpetual care and surveillance of the DOE-ORR site.

In issuing the foregoing ORDER, the Commissioner does not implicitly or expressly waive any provisions of the Acts or regulations promulgated thereunder. Compliance with this ORDER will be considered as a mitigating factor in determining the need for future enforcement action(s).

Issued this ___29__ day of _____Oct._____, 1999, in the Office of the Commissioner of the Tennessee Department of Environment and Conservation.

_____

Milton H. Hamilton, Jr., Commissioner
Tennessee Department of Environment
and Conservation

NOTICE OF RIGHTS

The Respondent is hereby advised that in accordance with T.C.A. § 68-212-113, it may secure a review of the necessity for, or reasonableness of, this ORDER by filing with the Commissioner a written petition setting forth the grounds and reasons for objection, and asking for a hearing before the Solid Waste Disposal Control Board. This ORDER shall become FINAL and not subject to review unless such a petition is filed (received) within thirty (30) days after this ORDER is served. Any hearing will be conducted in accordance with the provisions of the *Tennessee Uniform Administrative Procedures Act*, T.C.A. § 4-5-301 *et seq.*

All correspondence pertaining to this matter should be addressed to Steven R. Stout, Assistant General Counsel, Office of General Counsel, Tennessee Department of Environment and Conservation, 312 8th Avenue North, 25th Floor, William R. Snodgrass Building, Nashville, Tennessee 37243-1548, phone (615) 532-0131.

_____

Steven R. Stout, BPR # 014074
Assistant General Counsel

DOE/STEWARDSHIP/Commissioner's Order – 10-25-99

EXHIBIT B

STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION

IN THE MATTER OF:	)	
	)	
UNITED STATES DEPARTMENT	)	**DIVISION OF SOLID**
	)	**WASTE MANAGEMENT**
OF ENERGY,	)	
	)	**NO. 99-0438**
	)	
RESPONDENT.	)	

PETITION OF THE DEPARTMENT OF ENERGY
OBJECTING TO THE COMMISSIONER'S ORDER

The Department of Energy (DOE), pursuant to T.C.A. Section 68-212-113, moves the Tennessee Solid Waste Disposal Control Board for review and dismissal of the Commissioner's Order captioned above and served on November 2, 1999, and requests a hearing before the Tennessee Solid Waste Disposal Control Board. The ground for this objection and request for a hearing are as follows:

1. With respect to the entirety of the Order, including paragraphs 1, 2, 3, and 4 of the ORDER Section: The State of Tennessee lacks jurisdiction over the radioactive component of the waste to be disposed at the EMWMF. The radioactive component of the waste consists of source, by-product, or special nuclear material as those terms are defined by the Atomic Energy Act. The State's jurisdiction under its solid waste laws extends only to "solid waste," which is defined by law to exclude source, by-product, and special nuclear material.

2. With respect to the entirety of the Order, including paragraphs 1, 2, 3, and 4 of the ORDER Section: The State of Tennessee is preempted by the Atomic Energy Act from imposing the Order's requirements relating to radioactivity at DOE facilities.

3. With respect to the entirety of the Order, including paragraphs 1, 2, 3, and 4 of the ORDER Section: DOE is part of the executive branch of the Federal Government. As such, it is entitled to sovereign immunity of the United States. The United States has not waived its immunity with respect to the payment requirements which the State of Tennessee seeks to impose in this matter. Additionally, the United States has not waived DOE's sovereign immunity with respect to the Order's requirements as they pertain to AEA materials. Therefore, the State of Tennessee lacks jurisdiction and authority to impose such requirements upon DOE.

4. With respect to the entirety of the Order, including paragraph 1, 2, 3, and 4 of the ORDER Section: With regard to the non-radioactive component of the waste that will be placed in the EMWMF, not all such waste will constitute hazardous waste within the meaning of the T.C.A. Section 68-212-108(c)(2). Accordingly, to the extent the Order seeks to impose requirements based upon the presence of non-hazardous wastes, the Order exceeds the State's jurisdictional authority under the statute.

5. With respect to the first paragraph in the introduction to the ORDER Section: DOE disagrees that there is a reasonable probability that DOE will eventually cease to operate while containing, storing, or otherwise treating hazardous waste on the premises which will require continuing and perpetual care or surveillance over the site to protect the public health, safety, or welfare.

6. With respect to paragraphs 1, 2, 3, and 4 of the ORDER section: The Comprehensive Environmental Response, Conservation and Liability Act, 42 U.S.C. Sections 9601, et seq., prohibits the State from imposing the Order's requirements upon DOE with respect to the EMWMF.

7. With respect to the entirety of the Order, including paragraphs 1, 2, 3, and 4 of the ORDER Section: T.C.A. Section 68-212-108(c)(2) only applies to permitted facilities. The EMWMF does not constitute a permitted facility within the meaning of T.C.A. Section 68-212-108(c)(2). Accordingly, the Order exceeds the State's jurisdictional authority under the statute.

8. DOE neither admits nor denies the truth or sufficiency of provisions of the Order not specifically addressed herein. DOE reserves the right to amend this Petition. In submitting this Petition, DOE does not implicitly or expressly waive any defenses it may have in this or any other future enforcement action.

9. DOE respectfully requests that the Commissioner's Order be reversed, and that DOE be granted any such other relief to which it may be entitled.

Respectfully submitted,

Nancy L. Carnes
Assistant Chief Counsel for Environment
Office of Chief Counsel
U.S. Department of Energy
Post Office Box 2001
Oak Ridge, Tennessee 37831-8510
(423) 576-1207

Attorney for DOE

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition Of The Department of Energy Objecting To The Commissioner's Order was served on the following this 2nd day of November, 1999, by hand delivery:

Steven R. Stout
Counsel for Tennessee Department
Of Environment And Conservation

_____

Nancy L. Carnes
Assistant Chief Counsel for Environment
Office of Chief Counsel
U.S. Department of Energy
Post Office Box 2001
Oak Ridge, Tennessee 37831-8510
(423) 576-1207

EXHIBIT C

FUND IMPLEMENTATION PLAN

Section 1. Definitions. As used in this Plan:

(a) The term "DOE" means the United States Department of Energy, its successors and assigns, and its authorized representatives.

(b) The term "TDEC" means the Tennessee Department of Environment and Conservation, its successors and assigns, and its authorized representatives.

(c) The term "EMWMF" means the Environmental Management Waste Management Facility described in the *Record of Decisions for the Disposal of Oak Ridge Reservation Comprehensive Environmental Response, Compensation, and Liability Act of 1980 Waste,* Oak Ridge, Tennessee (hereinafter "EMWMF Record of Decision") issued pursuant to the Oak Ridge Federal Facility Agreement.

(d) The term "Surveillance and Maintenance" means regular inspections that will verify the condition and performance of a given facility. With respect to the EMWMF, surveillance and maintenance will include such activities as clearing plant growth from the cell cover and side slopes, repairing and clearing surface water drainages, maintaining fences and signs, and routine monitoring of groundwater, surface water, air, and biota for the presence of contaminants.

(e) The term "DOE-Oak Ridge Operations Office (ORO) related activities" means activities having a reasonable nexus to the missions and functions of ORO. For example, such activities may include, but are not limited to, surveillance and maintenance activities for the EMWMF, surveillance and maintenance activities for other waste sites on the Oak Ridge Reservation (ORR), response action activities conducted at the ORR and at sites off the ORR having a reasonable nexus to the missions and functions of ORO, state oversight of ORO's waste management and environmental restoration activities, and DOE activities associated with the assessment and/or payment of natural resource damages on the ORR for which DOE will receive a dollar-for-dollar credit against DOE's total liability for natural resource damages and assessments.

(f) The term "Oak Ridge Reservation (ORR)" means the lands owned by the United States and under the jurisdiction of the DOE that are located in Roane and Anderson Counties in Eastern Tennessee, as more fully described in the Oak Ridge Federal Facility Agreement.

(g) The term "Consent Order" means the Consent Order in which this Fund Implementation Plan ("Plan") is incorporated by reference and to which this Plan is attached as Exhibit C.

(h) The term "Fund" means the installments which DOE has agreed to pay in accordance with the terms and schedule as set forth in paragraph 1. of the Consent Order, together with all earnings and profits thereon, less any payments or distributions made pursuant to this Plan.

(i) The term "Final Resolution of Dispute" means either (1) a written agreement reached between TDEC and DOE as a result of the dispute resolution process set forth in Section 4 of this Plan; (2) a final written determination by the Commissioner issued in accordance with the provisions of the dispute resolution process set forth in Section 4 of this Plan; or (3) a final determination by a federal court with respect to any dispute filed with such court in accordance with the provisions of the dispute resolution process set forth in Section 4 of this Plan.

(j) The term "Corpus" shall mean the total amount of assets in the Fund upon DOE's payment of the final installment in accordance with paragraph 1. of the Consent Order. This amount shall include all earnings and profits thereon, including interest, that has accumulated in the Fund as of the date of DOE's payment of such final installment.

(k) The term "Income" shall mean all earnings and profits, including interest, generated by the Fund after the date of DOE's payment of the final installment into the Fund in accordance with paragraph 1. of the Consent Order.

Section 2. Payments From and Use of the Fund

(a) After completion of construction of the final cap and associated EMWMF monitoring systems, Income will be used by TDEC for TDEC's performance of the Surveillance and Maintenance of the EMWMF required to be performed pursuant to the EMWMF Record of Decision issued under the Oak Ridge Federal Facility Agreement. In the event Income exceeds the amount necessary to perform Surveillance and Maintenance of the EMWMF, the Commissioner may also use Income for other DOE-Oak Ridge Operations Office related activities as defined in this Plan. In no event, will the Corpus of the Fund be invaded.

(b) DOE may at any time propose expenditures from the Income for other DOE-ORO related activities as that term is defined in this Plan. If the Commissioner objects to the proposed expenditure, DOE may invoke dispute resolution.

(c) Subject to dispute resolution, DOE may object to any proposed payment from the Fund for any reason, including but not limited to concerns that a proposed payment would unacceptably compromise the Fund's corpus, would be inconsistent with the terms of this Plan or the Consent Order, or would violate applicable law.

(d) Payments from the Fund shall only be made as the Commissioner of TDEC (hereinafter "Commissioner") shall direct, in writing. At least forty-five (45) days prior to any

payment, the Assistant Manager for Environmental Management of the DOE-ORO (hereinafter "Assistant Manager") shall be given written notice of the proposed payment. Such proposed payment shall not be made if within thirty (30) days of receipt of this notice, the Assistant Manager objects to the proposed payment and forwards a written statement of dispute to the Dispute Resolution Committee pursuant to Section 4 (c). The proposed payment shall not be made until and unless a Final Resolution of Dispute providing for such payment is issued pursuant to Section 4 and shall be made only in accordance with the Final Resolution of Dispute.

Section 3. Annual Valuation.

TDEC shall annually, at least 30 days prior to the anniversary date of the payment of the first installment pursuant to paragraph 1 of the Consent Order, furnish to the Assistant Manager a statement confirming the value of the Fund. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of such first installment. TDEC shall ensure maintenance of accurate records and accounts of the administration of the Fund. During the life of the Fund, TDEC shall annually furnish to DOE a full and complete statement of all receipts, disbursements, gains, and losses of the Fund. Additionally, TDEC shall, when requested in writing by DOE, furnish to DOE a statement of the current value of the Fund.

Section 4. Dispute Resolution. Except as specifically set forth elsewhere in this Implementation Plan, if a dispute arises under this Implementation Plan, the procedures of this Section shall apply.

a. Prior to any Party invoking formal dispute resolution, the disputing Party shall engage the other Party in informal dispute resolution at the level of the Group Leader, ORR Remediation Management Group, for DOE and the Director, DOE Oversight Division for TDEC. During the informal dispute resolution process, the Parties shall make reasonable efforts to informally resolve the dispute and shall meet as many times as are necessary to discuss and attempt resolution of the dispute.

b. If resolution cannot be achieved informally after a reasonable period of time, then the formal dispute resolution procedures of this Section shall be implemented to resolve a dispute.

c. In the event the informal dispute resolution process fails, a disputing Party who wishes to invoke formal dispute resolution shall, within 30 days of such failure, forward a written statement of dispute to the Dispute Resolution Committee (DRC), thereby elevating the dispute to the DRC for resolution. The written statement of dispute shall set forth the nature of the dispute, the work affected by the dispute, the disputing Party's position with respect to the dispute, and the information the disputing Party is relying upon to support its position. For purposes of this Section, informal dispute resolution will be deemed to

have failed only upon issuance of a written notification from either or both of the Parties stating that such failure has occurred.

d. The DRC will serve as a forum for resolution of disputes for which agreement has not been reached through informal dispute resolution. The Parties shall each designate one individual and an alternate to serve on the DRC. The individuals designated to serve on the DRC shall be employed at a policy level. The DOE designated member on the DRC is the Assistant Manager for Environmental Management, Oak Ridge Operations Office (ORO). The TDEC designated member of the DRC is the Assistant Commissioner for the Bureau of Environment.

e. Following elevation of a dispute to the DRC, the DRC shall have twenty-one (21) days to unanimously resolve the dispute and issue a written decision. If the DRC is unable to unanimously resolve the dispute within the twenty-one day period, the written statement of dispute shall be forwarded to the Senior Executive Committee (SEC) for resolution.

f. The SEC will serve as a forum for resolution of disputes for which agreement has not been reached by the DRC. The DOE representative on the SEC is the Manager, ORO. The TDEC representative on the SEC is the Commissioner. The SEC members shall, as appropriate, confer, meet, and exert their best efforts to resolve the dispute and issue a written decision. If unanimous resolution of the dispute is not reached within twenty-one (21) days, the following procedures shall apply:

1. For disputes involving interpretation and/or application of federal law, the Parties agree they will seek resolution before the federal judiciary. The final resolution by the federal judiciary of the matter under dispute shall be conclusive.

2. For all disputes other than those described in f (1) above, the Commissioner shall issue a final written decision with respect to the dispute. Upon resolution, the Commissioner shall provide all Parties with a written final decision setting forth resolution of the dispute. The determination of the Commissioner shall be conclusive.

g. The Parties may agree at any time to immediately elevate disputes to the SEC level without first submitting the dispute to the DRC. Any agreement to so elevate a dispute must be in writing signed by both parties. Failure to reach agreement as to whether a dispute should be elevated in accordance with this Section shall not be subject to dispute resolution under this Agreement.

Section 5. Communications

All orders, requests, directions, and instructions by TDEC to the persons or agencies managing the Fund shall be in writing, copies of which shall be provided to the Assistant Manager.

Section 6. Modification.

This plan may be modified by agreement of DOE and TDEC. All modifications shall be in writing and shall become effective upon the date on which the Commissioner of TDEC and the Manager of DOE-ORO have signed such modifications. The decision whether to agree to modification of this Plan is left to the sole discretion of TDEC and DOE respectively. The refusal by DOE or TDEC to agree to modification of this Plan shall not be subject to challenge in any forum by any party.

Section 7. Termination.

Subject to the right of the parties to modify this Plan as provided in Section 6, this plan shall remain in effect until terminated. The Fund shall terminate upon the written agreement of the Commissioner of TDEC and the Manager of the ORO that (1) surveillance and maintenance for the EMWMF is no longer required for the protection of human health or the environment or (2) the Fund should otherwise be terminated. Upon termination, the balance of the Fund shall be immediately delivered to DOE. In the event the EMWMF does not receive waste for disposal, surveillance and maintenance shall be deemed to no longer be required for the protection of human health and the environment.

Section 8. Interpretation.

As used in this Plan, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Plan shall not affect the interpretation or the legal efficacy of this Plan.

Section 9. Severability.

Should any provision of this Plan or the Consent Order be or become invalid or unenforceable, the remaining provisions shall be and continue to be fully effective.

Exhibit C for Consent Order.doc