

**STATE OF TENNESSEE  
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

<b>IN THE MATTER OF:</b>	)	<b>DIVISION OF SOLID</b>
	)	<b>WASTE MANAGEMENT</b>
	)	
<b>U.S. DEPARTMENT OF ENERGY)</b>	<b>NO. 99-0438</b>	
	)	
<b>RESPONDENT</b>	)	<b>DOCKET NO. 04.27-007507A</b>

**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 \_\_\_\_, 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 incorporated 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

except for a proceeding brought by a party for the purpose of enforcing the terms and conditions herein.

**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) equal and consecutive 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 Implementation 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

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

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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 within 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 waives 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.

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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.

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E. Joseph Sanders  
Tennessee Department of Environment  
and Conservation

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