

VIA ELECTRONIC MAIL

March 20, 2020

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**Re: Request to Publish Notice of Draft Supplement Analysis in the Federal Register, DOE/EIS-0380-SA-06: Draft Supplement Analysis**

On behalf of our clients Nuclear Watch New Mexico, Savannah River Site Watch, and Tri-Valley Communities Against a Radioactive Environment, we are writing to request that the Department of Energy (“DOE”) and National Nuclear Security Administration (“NNSA”) publish a notice in the Federal Register to inform the public of the availability of NNSA’s new draft Supplement Analysis (SA; DOE/EIS-0380-SA-06) of the 2008 Site-wide Environmental Impact Statement (“SWEIS”) for Continued Operations of Los Alamos National Laboratory (“LANL”). While our clients appreciate that DOE and NNSA have made this draft SA available for public comment, we strongly believe that publication in the Federal Register is the best and most appropriate method for the agencies to effectively solicit public comment.

Publication in the Federal Register is a widely accepted form of public notice for federal proceedings. Agencies routinely publish notice of important proceedings in the Federal Register, which courts recognize as effectively providing public notice. *See, e.g., Suntec Indus. Co. v. United States*, 857 F.3d 1363, 1369 (Fed. Cir. 2017) (“Like the Court of International Trade, we conclude that the Federal Register notice did constitute notice as a matter of law.”). Indeed, Congress adopted the Federal Register Act specifically to provide a mechanism—i.e. publication in the Federal Register—that “is sufficient to give notice of the contents of the document to a person subject to or affected by it.” 44 U.S.C. § 1507. “Congress intended a proper publication



in the Federal Register to be considered reasonable public notice unless otherwise provided by statute.” *Suntec*, 857 F.3d at 1370.

Likely for these reasons, publication in the Federal Register is also the regular practice of DOE and NNSA when making draft SAs available for public comment. For example, when DOE and NNSA issued the closely related draft SA for its 2008 Complex Transformation Programmatic Environmental Impact Statement, it published a notice in the Federal Register. 84 Fed. Reg. 31,055. Likewise, when the agencies announced their overall NEPA strategy for expanding plutonium pit production, which described the draft SA at issue in this letter, the agencies also published a notice in the Federal Register. 84 Fed. Reg. 26,849. These previous publications in the Federal Register constituted an appropriate process for notifying the public and soliciting public comment.

As our clients have explained repeatedly in formal comments at every available opportunity, our clients are profoundly concerned that DOE and NNSA’s NEPA process for the expansion of plutonium pit production is wrongfully excluding the public from commenting on critical aspects of the agency’s plan, for example by eliminating any opportunity for the public to propose or comment on programmatic alternatives. Refusing to publish a notice of the current draft SA in the Federal Register would be a further troubling indication of the failure to fully involve the public in the agencies’ decision-making process. *See* 40 C.F.R. § 1506.6(b)(2) (“In the case of an action with effects of national concern notice *shall include publication in the Federal Register . . .*” (emphasis added)).

Accordingly, we respectfully request that DOE and NNSA issue a notice in the Federal Register to inform the public of the availability of the current draft SA and the opportunity for public comment. To ensure that the public has a full opportunity for comment, we further request that the agency set the deadline for comments 45 days from the publication of such notice in the Federal Register.<sup>1</sup>

In light of the fact that your response to this letter will affect our clients’ deadline for commenting on the current draft SA, we request a response to this letter within 14 days, by no later than Friday, April 3, 2020.

Sincerely,

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<sup>1</sup> In addition, we expect that any draft EIS regarding plutonium pit production at the Savannah River Site will be made available for public comment through the publication of notice in the Federal Register (among other means), although we stress that the agency must first complete the programmatic environmental review required by NEPA.