Appeal No. 11-55903

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BOEING COMPANY, *Plaintiff – Appellee,*
v.

DEBBIE RAPHAEL, in her official capacity as the Acting Director of the California Department Of Toxic Substances Control, *Defendant – Appellant.*

SOUTHERN CALIFORNIA FEDERATION OF SCIENTISTS, LOS ANGELES CHAPTER OF PHYSICIANS FOR SOCIAL RESPONSIBILITY, ROCKETDYNE CLEANUP COALITION, AND COMMITTEE TO BRIDGE THE GAP, *Amici Curiae*

On Appeal from the United States District Court
Central District of California
Hon. John F. Walter
Case No. 2:10-CV-04839-JFW (MANx)

AMICI CURIAE BRIEF IN SUPPORT OF REVERSAL

DANIEL P. SELMI, ESQ.
(State Bar No. 67481)
Law Offices of Daniel P. Selmi
919 South Albany Street
Los Angeles, CA 90015
Telephone: (949) 675-9871
Facsimile: (949) 380-3769

Attorneys for Amici Southern California Federation of Scientists, Los Angeles Chapter of Physicians for Social Responsibility, Rocketdyne Cleanup Coalition, and Committee to Bridge the Gap

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici Southern California Federation of Scientists, Los Angeles Chapter of Physicians for Social Responsibility, Rocketdyne Cleanup Coalition, and Committee to Bridge the Gap certify that they have not issued shares of stock. Accordingly, they have no parent companies, and no public corporations own 10% or more of their stock.

Dated: December 19, 2011

By: s/ Daniel P. Selmi

DANIEL P. SELMI
LAW OFFICES OF DANIEL P. SELMI
919 South Albany Street
Los Angeles, CA 90015

Attorneys for Southern California Federation of Scientists, Los Angeles Chapter of Physicians for Social Responsibility, Rocketdyne Cleanup Coalition, and Committee to Bridge the Gap

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STATEMENT OF IDENTITY OF AMICI CURIAE

(Ninth Circuit Rule 29(c)(4))

Four groups authorized this *amici curiae* brief: (1) the Southern California Federation of Scientists, an interdisciplinary organization of scientists, engineers, technicians, scholars, and citizens with a special focus on nuclear issues; (2) the Los Angeles Chapter of Physicians for Social Responsibility, the U.S. affiliate of the international organization that won the Nobel Peace Prize in 1985 for its work on the nuclear threat; (3) the Rocketdyne Cleanup Coalition, an organization of individuals who reside near the Santa Susana Field Laboratory (SSFL); and (4) the Committee to Bridge the Gap, a 40-year old organization focused on reducing risks from nuclear technology. Each has long urged a comprehensive cleanup of SSFL. The groups actively supported the passage of California Senate Bill 990 (SB 990), whose constitutionality is at issue in this appeal. They filed two *amici curiae* briefs in the District Court below.

RULE 29(a) STATEMENT

Appellant Debbie Raphael and Appellee The Boeing Company (Boeing) have consented to the filing of this brief pursuant to Rule 29(a) and the Circuit Rules.

RULE 29(c)(5) STATEMENT

No party's counsel authored the brief, in whole or part. No party or party's counsel, and no other person, contributed money intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Boeing asserts as undisputed fact that the contamination at SSFL is due to activities by and for the U.S. Department of Energy (DOE) and the National Aeronautics and Space Administration (NASA). Boeing then claims that federal law preempts SB 990, which requires cleanup of that contamination. However, DOE and NASA are not parties to this litigation and have not claimed preemption. Instead, they have entered into consent agreements with the California Department of Toxic Substances Control (DTSC) for cleanups consistent with SB 990. In enforcing those agreements they also have agreed to forego claims that federal law preempts SB 990. These facts form the backdrop for the issues before the Court.

This brief makes five arguments:

1. Boeing asserts as undisputed fact that the federal government bears responsibility for all radioactive contamination at SSFL. Furthermore, Boeing asserts that the federal government has agreed contractually to pay for cleanup of all radioactive waste at SSFL. Under these circumstances, Boeing

suffers no injury from the cleanup of radioactive contamination pursuant to SB 990, and thus lacks constitutional standing to bring this action.

2. The Atomic Energy Act does not preempt state regulation of radioactive contamination at SSFL. The Act authorizes delegation to states of authority to regulate radioactive materials. 42 U.S.C. § 2021. California entered into such an Agreement with the Atomic Energy Commission in 1962 and has regulated radioactive materials at SSFL ever since. This regulatory history includes decades of issuing radioactive materials licenses to Boeing and approving its cleanup proposals. Moreover, under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq*., the federal government has delegated authority to California to regulate cleanup of chemical waste from both private and federal government sources. Accordingly, Boeing cannot claim preemption as to the chemical contamination.

3. If, contrary to Boeing's facts, the source of any contamination at SSFL is private, then no question of federal preemption arises, and California retains full authority to regulate the cleanup at the site.

4. The provisions of SB 990 do not discriminate against the federal government. Furthermore, those provisions employ well-accepted standards used in cleanups of other contaminants, such as hazardous waste. As a result, SB 990 does not violate the doctrine of intergovernmental immunity.

5. Even if federal law preempts the cleanup of radioactive waste under SB 990, California's authority over the cleanup of chemical waste under RCRA is severable from the cleanup of radioactive waste.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

I. STATEMENT OF FACTS

A. The Radioactive Contamination at SSFL.

Three sets of uncontested facts concerning the radioactive contamination at SSFL are central to this appeal:[1]

First, the site contains four operational areas—Areas I through IV—as well as two buffer zones of undeveloped land.[2] ASER 22. Area IV was the site of the nuclear work, while rocket testing occurred in Areas I, II, and III. *Id.* NASA owns Area II and part of Area I. *Id.* In a Boeing exhibit, DOE states, "The use of radioactive materials at the SSFL was restricted to Area IV only."[3] ASER 71; *see also* ER 193; ASER 72 ("There are no radiological facilities outside of Area IV.").

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[1] In this brief, citations to the record are from two sources: (1) "ER," the "Excerpts of Record" filed by the State; and (2) "ASER," the "Amici Supplemental Excerpts of Record," which are excerpts from the trial court record not included in the State's excerpts. Boeing has not yet submitted its excerpts. *Amici* have used the "excerpt of record" format to ensure that the Court has ready access to documents in the record cited in this brief.

[2] Much of the history of the SSFL site is discussed in *Natural Res. Def. Council, Inc. v. Dep't of Energy (NRDC v. DOE)*, No. C-04-04448 SC, 2007 WL 1302498 (N.D. Cal. May 2, 2007). ER 153–69.

[3] The Declaration of Boeing's Mr. Rutherford, ¶ 33 (ASER 29–30), identifies two small places outside of Area IV where radioactive material has been

Second, other than radioactive contamination, the contamination at SSFL necessarily is chemical.

Third, under Boeing's facts, all radioactive contamination at SSFL is of federal origin. ER 197; ASER 30. Additionally, Boeing asserts that the federal government is responsible for all chemical contamination at SSFL. ER 206–08.

B. The Federal Delegations to the State of California Under the Atomic Energy Act and the Resource Conservation and Recovery Act.

As Appellant showed, the Atomic Energy Commission delegated authority over specified radioactive materials to California. *See* Appellant's Brief, 16; ER 148–51. Since then, the State has continuously regulated radioactive materials at SSFL, including the cleanup of radioactive waste. ASER 63–65, ER 180–85.

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potentially found. Rutherford asserts that the federal government is responsible for both:

(1) One place contains some soil with levels of cesium-137 possibly above background. This is "in Area II, which is owned by NASA." *Id.* Thus its cleanup is the responsibility of NASA.

(2) Secondly, some soil samples containing traces of radium-22—possibly from radium paint used for luminescent dials—were discovered in a burn pit in Area I. The Atomic Energy Act did not even regulate radium until passage of Section 651 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified at 42 U.S.C. § 2014(e)). Mr. Rutherford declares that the radium was almost certainly federal (non-DOE) in origin, so again, the federal government is responsible for its cleanup. Alternatively, if the source of the radium was non-federal, it would be subject to regulation under California's Agreement State powers over byproduct material, which after 2005 includes radium.

Boeing and its predecessors have operated for decades under Radioactive Materials Licenses issued by the State. ASER 65.

Boeing has explicitly recognized the need for State approval of cleanup decisions at the site. One Boeing document states, "Since then [1962], the California Department of Health Services has had the responsibility for regulating the use and disposal of byproduct material (low-level waste and radioactive isotopes) from the SSFL." ASER 65. Another Boeing document details the process by which Boeing must seek California's approval for the cleanup of radioactively contaminated buildings at SSFL. ER 179–87. Before enactment of SB 990, the State actively regulated the cleanup of radioactive materials at SSFL by issuing Radioactive Materials Licenses, performing inspections, and approving cleanup efforts and standards. ER 179–87; ASER 74–75.

Additionally, under RCRA, EPA may delegate to states the authority to regulate hazardous chemical materials. 42 U.S.C. § 6926(b). California has received such a delegation. California: Final Authorization of Revisions to State Hazardous Waste Management Program, 66 Fed. Reg. 49,118 (Sept. 26, 2001). The State regulates cleanup of chemical contamination at SSFL under this authority. ASER 76. The delegated authority includes regulation of Boeing, DOE, and NASA. ASER 12.

C. The Enactment and Provisions of SB 990.

The California Legislature enacted SB 990 after years of controversy over cleanup efforts at SSFL. ER 144–145. SB 990 primarily:

(1) Authorizes the State to order all parties responsible for the contamination at SSFL to take removal or remedial actions to protect the public health and safety, and the environment, from the contamination at SSFL;

(2) Requires cleanup to EPA's standards for the release of property to be used for unrestricted rural residential/agricultural or suburban residential use, whichever is more protective; and

(3) Bars the sale, lease, sublease, or other transfer of land until DTSC certifies that the cleanup is acceptable. ER 294–95.

D. The Administrative Orders of Consent.

After Boeing initiated the present litigation, DOE and NASA entered into "Administrative Orders of Consent" (AOCs) with the State of California. ER 38–137. The DOE AOC covers all of Area IV at SSFL. ER 38. The NASA AOC covers all of Area II and NASA's part of Area I. ER 92. The AOCs commit the federal agencies to remediating contamination in these areas to background levels, ER 42, 96, and specify that this remediation would be deemed consistent with SB 990's requirements. ER 40, 94.

The AOCs contain other important provisions. DOE and NASA forego, in the context of the AOCs, all claims: (1) of preemption or lack of authority of DTSC to enforce the SB 990-compliant cleanups; and (2) that the cleanup would not be required of a private entity. ER 73–74, 125–26. The AOCs explicitly bind all DOE and NASA contractors, such as Boeing. ER 76, 129.

The AOCs thus cover *all* of the areas where nuclear operations occurred and where DOE caused radioactive contamination.

E. Boeing's Contract with DOE.

As noted above, with two extremely small exceptions, Area IV contains all of the radioactive contamination at SSFL, and all of the DOE contamination. Before signing the AOC, DOE signed a contract with Boeing in which DOE "has taken the responsibility for the cleanup of all radioactive contamination in Area IV . . . ." ASER 32, 46–47. Boeing's witness further declares that the DOE-Boeing contract requires DOE to pay for cleanup of all chemical (i.e. "hazardous") contamination in Area IV. *Id*.

II. PROCEDURAL HISTORY

The District Court granted Boeing's motion for summary judgment. The Court should note one important procedural action that occurred. A month before Boeing filed its summary judgment motion, the State stipulated with Boeing that, with limited exceptions, the State would not contest any facts that Boeing might

put forward in its motion. Pursuant to the stipulation, the vast majority of Boeing's 114 alleged facts were undisputed.

ARGUMENT

I. BOEING LACKS THE REQUIRED INJURY TO ESTABLISH STANDING FOR ITS PREEMPTION CLAIM.

A. Boeing Must Prove Injury with Specific Facts at the Summary Judgment Stage.

The "irreducible constitutional minimum of standing" has three elements: injury in fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *see also Barnum Timber Co. v. EPA*, 633 F.3d 894, 897 (9th Cir. 2011). "[T]hroughout the litigation, the party seeking relief must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *United States v. Juvenile Male*, 131 S. Ct. 2860, 2864 (2011). When a plaintiff moves for summary judgment, it must specifically prove the facts showing injury. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 n.3 (1992) ("*Lujan*, since it involved the establishment of injury in fact at the *summary judgment stage*, required specific facts to be adduced by sworn testimony.").

Standing is a jurisdictional issue that the Court must examine sua sponte. *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 796–97 (9th Cir. 2001). It is a question of law reviewed *de novo*. *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 706 (9th Cir. 1997).

B. Boeing Will Suffer No Injury Because DOE Has Committed To Clean up All Radioactive Waste at SSFL.

Amici raised the issue of standing before the District Court, which found that Boeing had standing to raise the preemption claim under the Atomic Energy Act:

> Boeing has been injured by the enactment of SB 990. SB 990 has caused Boeing to sustain, and will continue to cause Boeing to sustain, harm in the form of substantial additional expenses and demands on its resources and time that did not exist prior to SB 990.

Boeing Co. v. Robinson, No. CV 10–4839–JFW (MANx), 2011 WL 1748312 at *9 (C.D. Cal. April 26, 2011). However, four of Boeing's own facts demonstrate that injury is nonexistent.

(1) First, Boeing states that the activities of federal agencies caused the radioactive contamination at SSFL. ER 197. As the District Court found, "it is highly unlikely that Boeing's private commercial activity contributed to any existing contamination at the site." *Boeing Co. v. Robinson*, 2001 WL 1748312 at *2.

(2) Second, all of the DOE radioactive contamination is located in Area IV. ASER 71–72; ER 193.

(3) The federal government has contractually committed to paying for cleanup of *all* of the contamination in Area IV, according to Boeing's declarant and the DOE-Boeing contract. ASER 32, 47–48.

(4) Other Boeing evidence asserts, "Since the nuclear program conducted at the SSFL was performed for the benefit of the federal government, the DOE retains the financial responsibility for the remaining decontamination and decommissioning activities to be performed at the SSFL." ASER 61.

Under these facts, Boeing cannot suffer injury, for the federal government has committed to cleaning up all the radioactive contamination. As a landowner, Boeing will suffer no economic loss.

Nor can Boeing claim injury as a contractor for the federal government, for its position in this litigation directly contradicts those of DOE and NASA. The DOE and NASA AOCs expressly waived any argument of federal preemption related to the AOC cleanup:

> DOE shall not assert any defenses based on either party's alleged lack of legal authority to agree to, or enforce, the terms herein, including, without limitation, a defense *based on an alleged preemption by federal law* of DTSC's authority to oversee and enforce the terms of this Order.

DOE AOC 7.19.9 (ER 74) (emphasis added); *see also* NASA AOC § 5.19.9 (ER 126). Moreover, the DOE and NASA AOCs bind not only those agencies, but also their contractors, such as Boeing: "This Order shall apply to and be binding upon DOE [NASA] and agents, employees, *contractors*, consultants, successor, and assignees." DOE AOC §7.23 (ER 76); NASA AOC §5.23 (ER 129) (emphasis added).

In short, the federal government has agreed in the AOCs to clean up the entire nuclear area. And, by its contract with Boeing, the federal government has agreed to pay for that cleanup, whether caused by its activity or Boeing's activity. In the end, Boeing will own property where comprehensive cleanup has occurred, and on the record in this litigation, will pay for none of that cleanup. Boeing has demonstrated no injury.[4]

Similarly, Boeing claims that all the chemical contamination is federal. ER 208–209, 211. If so, once again, cleanup under SB 990 cannot injure Boeing. Moreover, as discussed below, in the case of chemical contamination, the State unquestionably has regulatory authority over both Boeing and any federal agencies responsible for such contamination.

C. The Justifications for Standing Offered by Boeing in the District Court Are Meritless.

In response to the brief of *Amici* in the District Court, Boeing offered four explanations of why it has suffered injury. None withstands examination.

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[4] In upholding Boeing's standing, the District Court cited *Indep. Living Ctr. v. Shewry*, 543 F.3d 1050, 1065 (9th Cir. 2008), and *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 851 (9th Cir. 2009). These cases, however, are inapposite. They hold that a private party may bring a cause of action under the Supremacy Clause. That issue, however, is separate from the issue of standing, which a plaintiff still must establish. *Indep. Living Ctr.*, 543 F.3d at 1057 ("We address ILC's standing to bring suit separately below, as that inquiry raises questions apart from whether the Supremacy Clause provides a valid cause of action to seek injunctive relief on the basis of federal preemption."); *Cal. Pharmacists*, 563 F.3d at 851 (allowing preemption claim "so long as they had Article III standing . . . .").

1. The AOCs Address Cleanup of All Radioactive Contamination.

Boeing asserts that the AOCs do not address the cleanup of all federal contamination at SSFL. This assertion is true, for the AOCs apply to the DOE and NASA parts of the SSFL site. However, Boeing claims that the Atomic Energy Act preempts cleanup of *radioactive* materials. Under Boeing's own facts, the DOE nuclear activity was limited to Area IV, which its AOC *does* cover. Moreover, the DOE contract requires DOE to pay for cleaning up all radioactive contamination in Area IV. The remainder of SSFL contains only chemical contamination governed by RCRA, and Boeing makes no claim of RCRA preemption.

Boeing also asserts injury because the AOCs exclude the cleanup of groundwater and associated bedrock. *Amici* submit that Boeing has misread the agreements.

The AOCs require groundwater cleanup pursuant to the 2007 Consent Order covering chemicals. DOE AOC §1.5.1 to 1.5.2 (ER 39–40); NASA AOC §1.4.1 to 1.4.2 (ER 93–94). That order covers cleanup of groundwater and associated bedrock for chemical contamination. ASER 16. The AOCs retain that cleanup requirement but add cleanup of radioactivity.

The AOCs also cover bedrock. Section 1.84 of the DOE AOC and Section 1.74 of the NASA AOC include "weathered bedrock" in defining soils that must be

cleaned up pursuant to the AOCs. ER 42, 96. Additionally, Section 2.3.II of the 2007 Consent Order lists unweathered bedrock as part of the groundwater operable unit that must be remediated. ASER 14.

Accordingly, the AOCs include cleanup of weathered bedrock, groundwater, and associated unweathered bedrock.

2. The AOCs Are Fully Effective Rather Than Conditional.

Next, Boeing argued that the AOCs are conditional and may never take effect. However, the AOCs are legally binding agreements that took effect when signed. *See* DOE AOC § 10.0 ("Effective Date") (ER 77–78); NASA AOC § 8.0 (same) (ER 130–31).

Contrary to Boeing's claim, the DOE AOC is not conditioned on successfully modifying the judgment in *NRDC v. DOE*. Section 6.2 of this AOC states that some AOC provisions are *potentially* inconsistent with aspects of that judgment, and *if so*, the parties commit to working with the plaintiffs in that case to request relief. However, the AOCs do not declare that an inconsistency exists. Furthermore, the DOE AOC does not condition implementation upon subsequent modification. Instead, the AOC states that if such relief is necessary but unavailable, the parties will agree upon a procedure to carry out the AOC in a way that meets the requirements of the decision. ER 57.

Nor, as Boeing asserted, is the NASA AOC conditioned upon completion of the process under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*. The NASA AOC Section 2.1 binds both parties to a cleanup to background levels, and Section 4.2.1, addressing NEPA review, does not render that commitment conditional. ER 96, 108. Instead, it declares, "NASA shall make its specific decisions on how to conduct the cleanup to background defined in this Agreement in accordance with the requirements of [NEPA]." ER 108.

Finally, the agreement is not "conditioned" upon compliance with the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code §21000 *et seq*. Section 4.1.4 of the NASA AOC identifies the purpose of the CEQA review as investigating "alternative mitigation measures." ER 108. Thus, the CEQA review identifies potential impacts and measures to mitigate those impacts.

Under SB 990, the decision on cleanup levels is not within DTSC's discretion. SB 990 effectively mandates cleanup to background levels, and DTSC must comply. The agreement is in effect now.

3. Speculation About Possible Future Contribution Claims Against Boeing Does Not Constitute Present Injury.

Next, Boeing claims that the federal government has not agreed to bear all the costs of the cleanup covered by the AOCs. Boeing cites provisions in which DOE and NASA retain rights to recover the costs of complying with the AOCs "from any person not a Party to this Order." ER 67, 119.

However, the declaration of Boeing's witness averred that in a *separate* contract with Boeing, DOE has taken responsibility for paying for the cleanup of *all* contamination in Area IV, whether due to DOE activities or Boeing's non-DOE activities. ASER 32. He cited the DOE-Boeing Contract attached to his declaration. This contract is independent of and pre-dates the AOCs. Irrespective of any DOE reservation of residual rights in the AOC, in this prior contract DOE waived the right to try to recover costs from Boeing.

Furthermore, another Boeing exhibit states that DOE has taken financial responsibility for cleaning up radioactive contamination anywhere at SSFL. That exhibit declares: "Since the nuclear program conducted at the SSFL was performed for the benefit of the federal government, the DOE retains the financial responsibility for the remaining decontamination and decommission activities to be performed at the SSFL." ASER 61. Thus, according to its own witness, Boeing has no potential cost, and thus no injury, from cleanup of nuclear contamination.

Finally, any concern about possible liability in a *future* contribution action cannot constitute present injury. Indeed, if anything, this argument would show that Boeing's claims have not yet sufficiently ripened into an injury that would support standing. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (ripeness inquiry may "be characterized as standing on a timeline.").

4. The Land Transfer Provisions Do Not Cause New Injury.

Finally, Boeing argues that it is injured by SB 990's restriction on land transfer until the future completion of the cleanup. To demonstrate such injury, Boeing asserted that SB 990 bars it from transferring land for 50,000 years, relying on a deposition statement by Richard Brausch, a DTSC witness. ASER 10. Mr. Brausch was explaining how long it might take to clean up groundwater pollution at the site to SB 990 standards using a temporary pump and treat system now utilized there by Boeing.

But the transcript of that deposition is in the record and includes an immediate *subsequent* response from Mr. Brausch. The follow-up question was whether DTSC could approve a transfer under SB 990 *before* completion of groundwater remediation. Mr. Brausch answered affirmatively: "DTSC could decouple the two, where we could issue a certification for the soils and the AOC remedies that does not require completion of the groundwater cleanup." *Id*. Boeing thus did not prove, as a matter of law, that SB 990 would prevent a transfer for "50,000 years."

Section 2.9(7) of the DOE AOC and section 2.8(7) of the NASA AOC specify a cleanup completion date of 2017, just six years from now. At that time, the lands controlled by DOE and NASA could transfer. ER 51, 85, 103, 136.

Boeing could also transfer its remaining property if it completed its cleanup by then.

II. AS BOEING ITSELF HAS RECOGNIZED, THE STATE IS NOT PREEMPTED FROM SETTING RADIOACTIVE CLEANUP STANDARDS.

A. The Atomic Energy Commission Delegated Radioactive Regulatory Authority to California in 1962.

Boeing claims that the federal Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, preempts State regulation of radioactive materials at SSFL. However, the Act authorizes the federal government to discontinue its authority over regulation of most radioactive materials and delegate that authority to an "Agreement State." *Id.* § 2021(b). Here, the Atomic Energy Commission did just that in 1962. Notice of Agreement with the State of California, 27 Fed. Reg. 3864 (April 21, 1962). Article I of this delegation states that the State received authority over: (1) byproduct materials; (2) source materials; and (3) special nuclear materials in quantities not sufficient to form a critical mass (i.e., nuclear reaction). The State has continuously carried out this delegated regulatory function since 1962, and it issued Radioactive Materials Licenses to Boeing and regulated Boeing's use and cleanup of those materials. *See* ASER 63; ER 183–184.

B. Both DOE and Boeing's Documents Recognize California's Authority Over the Cleanup of Radioactive Contamination at SSFL.

DOE has explicitly recognized the State's authority over the SSFL cleanup. In its Environmental Assessment for the cleanup of the DOE Energy Technology Engineering Center (known as "ETEC") at SSFL, DOE stated:

> As an Agreement State under the provisions of the Atomic Energy Act, the State of California also has jurisdiction over non-DOE radioactive activities at ETEC. The California Department of Health Services (DHS) oversees the radioactive materials license held by Rocketdyne [Boeing's predecessor], *radioactive facility cleanup*, and environmental monitoring .... In particular, before a former DOE radioactive facility at ETEC may be released for unrestricted (non-DOE) use *in accordance with state regulatory standards, DHS must concur with the DOE determination regarding the decontamination and decommissioning of the facility.*

ASER 74 (emphasis added). In other words, the State has jurisdiction over Boeing's non-DOE activities, and both DOE *and* the State must concur on the cleanup standards for release of DOE facilities. DOE then listed the "steps [that] occur in the cleanup process for a particular radiation facility or facilities at ETEC." *Id*. at 75. After an independent "verification survey" is done, the results "are forwarded to the DHS, which is asked to either release the facility for unrestricted use (for Rocketdyne-owned buildings) or to concur with the release for

unrestricted use (for DOE-owned buildings)." DHS then issues a "release concurrence letter." *Id*.[5]

In other words, DOE explicitly recognizes that, for both Boeing-owned buildings and DOE-owned buildings, the State regulates the cleanup and must issue a release for the property. Indeed, DOE's Environmental Assessment contained a table showing that, of the 21 radioactive facilities listed as decontaminated and decommissioned at the site, DHS had released 14 of them. ASER 95–97.[6]

Boeing also has long recognized California's regulatory authority over the cleanup. In a 2007 document entitled "Radioactive Release Process: Process for the Release of Land and Facilities for (Radioactively) Unrestricted Use," Boeing summarized California's involvement in the radioactive release process, "since California is an Agreement State." ER 179. Under the heading "Radiation Cleanup Standards," Boeing stated that "Rockwell [Boeing's predecessor] submitted these cleanup standards to DOE and [California] DHS *for approval* in

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[5] Thus, when DOE intends to give up control of a former radioactive facility, and thereby vacate the field to the State, release of the facility requires approval of both DOE and the State.

[6] In its second Summary Judgment motion, Boeing included excerpts from the DOE Environmental Assessment. *Amici* included the DOE excerpts referenced here in their first amicus brief filed in the District Court (attached to and incorporated by reference into the second amicus brief).

1996 . . . ." *Id*. at 180 (emphasis added); s*ee also* ASER 49–54 (documenting Boeing request that California approve radioactive cleanup standards for SSFL).

Boeing then summarized the regulatory steps needed for Boeing to obtain a "release" for a building after a cleanup:

> Release for Unrestricted Use. The legal and regulatory process for "releasing a building for unrestricted use" means that
>
> - Approved cleanup standards have been met.
> - DOE and DHS impose no further radioactive controls or regulatory oversight for the building or land.
> - DHS removes the building from the Radioactive Materials License.

ER 184. And, after DHS carries out a radiation survey:

> Boeing then forwards a copy of the [Boeing's consultant's] report to the DHS and requests either, that DHS release the facility for unrestricted use (Boeing-owned buildings) or that DHS concur with the release for unrestricted use (DOE-owned buildings).

ER 183; *see also* ASER 65 (Boeing document noting that since 1962 "the California Department of Health Services has had responsibility for regulating the use *and disposal* of byproduct material…") (emphasis added).

In sum, Boeing now claims that the State lacks authority over the SSFL cleanup. However, DOE long recognized the State's authority, and DOE never changed its position to support Boeing. For decades, Boeing has similarly recognized the State's authority to regulate radioactive activities at SSFL, including cleanup. In the present case, the key conclusion of law by the District

Court was that "Agreement States lack authority over . . . cleanup of radiological contamination resulting from [operation of nuclear reactors]." *Boeing Co. v. Robinson*, 2011 WL 1748312 at *11; *see also id*. (Agreement States lack authority over materials that result from the operation of nuclear reactors "because the authority to regulate the operation of nuclear reactor and the manufacturer [sic] of nuclear fuel necessarily includes the cleanup of radiological contamination resulting from such activities."). However, as seen above, DOE—the pertinent federal agency—disagrees with that conclusion.

C. The Authorities Relied Upon by the District Court Are Distinguishable from the SSFL Factual Situation.

No authority cited by the District Court disturbs the conclusion of non-preemption. The Court cited 42 U.S.C. §2021(c)(1), which prohibits the NRC from delegating power over construction and operation of reactors or uranium enrichment facilities. *Boeing Co. v. Robinson*, 2011 WL 1748312 at *11. But here NRC never delegated power over construction and operation of such facilities. Instead, it delegated authority over byproduct, source, and special nuclear material, as expressly permitted under the Act. And neither DOE, nor Boeing in a private capacity, currently operates such facilities; there is no NRC license, and thus no NRC preemption. The only remaining issue is who cleans up the contamination, whether from reactors or other radioactive sources at the site.

These facts distinguish the key cases relied upon by Boeing and accepted by the District Court. The decision in *United States v. Manning*, 527 F.3d 828 (9th Cir. 2008), involved the cleanup of the Hanford Nuclear Reservation. However, DOE itself, not a private entity such as Boeing, owned and controls this site. Id. at 831, 839–40. In contrast, DOE does not own SSFL, has released numerous parts of SSFL from its control, and intends to release it all. Likewise, the decision in *United States v. Commonwealth of Kentucky*, 252 F.3d 816 (6th Cir. 2001), concerned a DOE-owned uranium enrichment facility. In the present case, Boeing, rather than DOE, owns the site, and DOE is vacating the field by relinquishing control of the land that it used to lease.

Likewise, the decisions in *N. States Power v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), and *Missouri v. Westinghouse Elec., LLC*, 487 F. Supp. 2d 1076 (E.D. Mo. 2007), are distinguishable. Unlike California, neither Minnesota nor Missouri is an "Agreement State." *N. States Power*, 447 F.2d. at 1148–49 ("[I]t is undisputed on this record that Minnesota has not entered into a turn-over agreement with the AEC."); *Missouri v. Westinghouse*, 487 F. Supp. 2d at 1083 n. 4 (same). In both states, federal preemption existed from the outset and never changed.

III. SB 990 DOES NOT IMPROPERLY DISCRIMINATE AGAINST BOEING OR THE SSFL FACILITY.

The District Court found that SB 990 improperly discriminates "against a Federal contractor, lessor, and facility," and thus violates the doctrine of intergovernmental immunity. *Boeing Co. v. Robinson*, 2011 WL 1748312 at *13. The doctrine of intergovernmental immunity concerns relations between the federal and state branches of government. Here, of course, the two relevant federal agencies—DOE and NASA—are not parties to this lawsuit and have agreed to SB 990-compliant cleanups. Rather, Boeing attempts to raise the claim despite their absence.

Certainly a state may not indirectly discriminate against the federal government when it could not do so directly. Boeing, however, provides no authority to support a claim of discrimination by a contractor where the relevant federal agencies have *refused* to make that claim. Here, both DOE and NASA affirmatively agreed in the AOCs *not* to make such a claim. DOE AOC § 7.19.8 (for purposes of enforcement of this order "DOE shall not contest DTSC's allegation that the standards and requirements in this Order are no more stringent than the standards and requirements that would be applicable to a similar facility operated by a private party") (ER 73); NASA AOC §5.19.8 (same language) (ER 126).

Moreover, SB 990 sets the same requirements for a private entity at SSFL as it does for a federal one. Contamination from Boeing's private activities is treated exactly the same as contamination from DOE or NASA activities. SB 990 is based on the unique accidents and releases that occurred at the site, not on who operated it. No discrimination exists.

In adopting Boeing's argument, the District Court cited three aspects of SB 990's operation. *Boeing Co. v. Robinson*, 2011 WL 1748312 at *13. However, none of them will support summary judgment for Boeing on a claim of discrimination.

First, the Court found that SB 990 singles out Boeing and the SSFL site "for a cleanup scheme that applies solely to SSFL [and] is the most restrictive in California." *Id*. The State, however, contested this assertion of facts. Its Statement of Undisputed Fact (SUF) 139 declares: "DTSC has cleaned up contaminants at other sites to background levels in situations where the calculated risk levels are below the local background concentrations for contaminants." ASER 7. *See also* State SUF 138 (ASER 7).

Moreover, even if the standard applied only to SSFL, a rational basis would exist for that choice: SSFL is the *only* site in California to experience *a partial meltdown of a nuclear reactor*. SSFL also sits in proximity to millions of people in Southern California. Indeed, the Legislature's findings in adopting SB 990 list

eight paragraphs of "unique circumstances regarding the former Santa Susana field Laboratory" as justification for this legislation. ER 295–96. These "unique circumstances" listed include: fires involving radioactive materials; four nuclear reactor accidents, including a partial core meltdown; and use of disposal procedures which consisted of workers disposing of barrels filled with highly toxic substances by shooting them with shotguns. ER 295–96. Given the history and location of the SSFL site, the Legislature rationally treated it as unique.

Second, the District Court found that SB 990's cleanup levels discriminated because they departed from the typical standard of the "reasonably foreseeable use of the land." *Boeing Co. v. Robinson*, 2011 WL 1748312 at *13. However, upon closer analysis, SB 990 incorporates well-established, presently existing standards for land use assumptions.

The principal federal cleanup statute is the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601–9675, which addresses cleanup of contaminated sites. In determining prospective land uses for cleanup purposes, standard practice under CERCLA is to rely on the property's current zoning and on the views of local officials. *See* EPA OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE (OSWER), DIRECTIVE NO. 9335.7-04, LAND USE IN THE CERCLA REMEDY SELECTION PROCESS 2, 4–5 (1995) (ASER 80). DTSC relies on zoning and general plans. ER 28. The land use chosen by SB

990—“rural residential/agricultural”— corresponds to the current zoning for most of the SSFL property. ER 28. Additionally, SB 990 relies on the views of local officials expressed in the legislative process. Both Ventura and Los Angeles Counties, the two most affected counties, supported SB 990—including its determination of prospective land use. ASER 91.

In rebuttal, Boeing points out that the Ventura County General Plan establishes “open space” as the permitted land use. According to Boeing, the “open space” use would somehow conflict with the current “rural residential/agricultural” zoning and should supersede it. However, under California law the open space designation *includes* agricultural uses. California Government Code section 65560 defines “open space” designations for General Plans as including “agricultural lands and areas of economic importance for the production of food or fiber.” Cal. Gov’t Code § 65560(b)(2); *see also* ASER 11 (Figure 3.2a from the Ventura County General Plan, showing that the Open Space land use designation is compatible with “AE” zoning—the Agriculture Exclusive Zone). Boeing also asserts that the zoning and views of the local governments should be ignored because Boeing intends to donate the land at some point for use as open space. However, the CERCLA guidance does not identify the purported intent of the current landowner as a factor in determining prospective land use. OSWER DIRECTIVE NO. 9335.7-04 at 5 (ASER 81). Otherwise, Responsible

Parties could avoid cleanup simply by declaring their "intent" to restrict future land uses. Boeing's "intent" is nonbinding. ASER 43.

The other provisions of SB 990 are equally rational. SB 990 utilizes the standard permissible cancer "risk range" of 10-6 to 10-4. Cal. Health & Safe. Code § 25359.20(d). This is the standard risk range for carcinogens found in EPA's Oil and Hazardous Substances Pollution Plan. *See* 40 C.F.R. § 300.430(e)(2)(i)(A)(2). Additionally, SB 990 requires the use of EPA's published Preliminary Remediation Goals for radioactivity, which are EPA's standardized values. ER 295.

Finally, the District Court found it significant that SB 990 prohibited transfer until the cleanup requirements are satisfied. *See* Cal. Health & Safe. Code § 25359.20(d). However, controlling the circumstances under which land transfers is traditionally and firmly within the ambit of state authority. *See Clemons v. City of Los Angeles*, 36 Cal. 2d 95, 105 (1950) ("The state has full control over the subject of the mode of transferring and establishing titles to property within its limits.") Moreover, CERCLA contains a similar provision. 42 U.S.C. § 9620(h).

In short, SB 990's provisions are grounded in preexisting cleanup law. SB 990 does not unfairly discriminate.

IV. SB 990 CAN BE APPLIED TO THE CLEANUP OF CHEMICAL WASTE EVEN IF THE ATOMIC ENERGY ACT PREEMPTS THE STATE'S ABILITY TO REGULATE RADIOACTIVE WASTE.

As noted above, the radioactive contamination at SSFL is found almost entirely in Area IV, which DOE has pledged to remediate. The remaining portions of the SSFL site are contaminated only with chemical wastes.

Indisputably, the State can regulate the cleanup of chemical contamination. RCRA governs that cleanup but allows the federal EPA to delegate its administration to states. 42 U.S.C. § 6926(b); *see, e.g., United States v. Manning*, 527 F.3d at 836 ("Unquestionably, the State has the authority to regulate nonradioactive hazardous materials . . . ."); *Legal Envtl. Assistance Found. v. Hodel*, 586 F. Supp. 1163, 1167–68 (E.D. Tenn. 1984) (RCRA governs Atomic Energy Act facilities for nonradioactive wastes). California received such a delegation twenty years ago. *See* California: Final Authorization of State Hazardous Waste Management Program, 57 Fed. Reg. 32,726 (July 23, 1992). Pursuant to that delegation, the State has regulated the cleanup of the chemical wastes at SSFL. *See NRDC v. DOE*, 2007 WL 1302498 at *6 (DOE's draft environmental document stated that chemical contamination at SSFL "will be considered" in the RCRA process.).

Whether the unconstitutional provisions of a law can be severed from the constitutional parts is a question of state law. *See, e.g., Leavitt v. Jane L.*, 518 U.S.

137, 139 (1996); *Valley Outdoor, Inc. v. County of Riverside*, 337 F.3d 1111, 1114 (9th Cir. 1993). In California to be severable a provision must be grammatically, functionally, and volitionally separable. *Calfarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805, 821 (1989); *see also Santa Barbara Sch. Dist. v. Superior Court*, 13 Cal.3d 315, 330 (1975) (severability "is possible and proper where the language of the statute is mechanically severable, that is, where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words") (quoting *In re Blaney*, 30 Cal.2d 643, 655 (1947)) (emphasis in original omitted).

Here, SB 990 is easily "grammatically, functionally, and volitionally separable" as a matter of simple geography. If preempted, SB 990 could not apply to radioactive waste—here, almost entirely in Area IV. By contrast, the Act can apply to the remainder of the SSFL site where there is chemical waste and no question of federal preemption.

The District Court's three reasons for rejecting severability are unconvincing. First, it found that "any private contamination at SSFL is inextricably intermixed with and indistinguishable from the federal contamination, and it is impossible to apply SB 990 to only the private contamination at the site." *Boeing Co. v. Robinson*, 2011 WL 1748312 at *15. But Boeing's facts aver that the radioactivity (whether private or federal) is overwhelmingly in Area IV; the

remainder outside that area is chemical waste, and *that* waste is not intermixed with radioactive waste.

Second, the Court found that, because SB 990 was based on historical factors relating to cleanup of federal contamination, no reason exists for applying these requirements to any private contamination. *Id*. at *16. But that rationale impermissibly "second guesses" the California Legislature's decision that SB 990 should apply to both federal and private contamination.

Finally, the Court found that SB 990 requires that "[i]n calculating the risk, the cumulative risk from radiological and chemical contaminants at the site shall be summed." Cal. Health & Safe. Code 25359.20(c). According to the Court, because SB 990 is preempted, it becomes impossible to "sum" the risks from the entire site. *Id*. at *16. The "summing," however, is not over the entire site; rather, it occurs for each individual soil sample, with no soil sample "to exceed" the cleanup standard. *See* ER 83 ("any constituent detected in a *soil sample*") (emphasis added); ER 87–88 (individual results compared to tables). With respect to chemical contamination in samples with no radioactive contamination, there simply would be no radioactivity to sum. Thus, preemption of the cleanup of radioactive contamination would not interfere with such "summing."

In short, SB 990 can apply only to the areas of SSFL with chemical contamination. If the Court finds preemption of State regulation over the

radioactive contamination, that preemption should not affect application of the law to chemical contamination on the SSFL site.

CONCLUSION

For these reasons, *Amici* respectfully request that this Court reverse the judgment.

STATEMENT OF NO RELATED CASES

There are no known related cases pending in this Court.

DATED: December 19, 2011 LAW OFFICES OF DANIEL P. SELMI

By: s/ Daniel P. Selmi
DANIEL P. SELMI

Attorneys for Amici Southern California Federation of Scientists, Los Angeles Chapter of Physicians for Social Responsibility, Rocketdyne Cleanup Coalition, and Committee to Bridge the Gap

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Date Dec 19, 2011

ADDENDUM

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§ 2014. Definitions

(e) The term “byproduct material” means--

(1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material;

(2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content;

(3)(A) any discrete source of radium-226 that is produced, extracted, or converted after extraction, before, on, or after August 8, 2005, for use for a commercial, medical, or research activity; or

(B) any material that--

(i) has been made radioactive by use of a particle accelerator; and

(ii) is produced, extracted, or converted after extraction, before, on, or after the date of enactment of this paragraph for use for a commercial, medical, or research activity; and

(4) any discrete source of naturally occurring radioactive material, other than source material, that--

(A) the Commission, in consultation with the Administrator of the Environmental Protection Agency, the Secretary of Energy, the Secretary of Homeland Security, and the head of any other appropriate Federal agency, determines would pose a threat similar to the threat posed by a discrete source of radium-226 to the public health and safety or the common defense and security; and

(B) before, on, or after August 8, 2005 is extracted or converted after extraction for use in a commercial, medical, or research activity.

42 U.S.C. § 2021

§ 2021. Cooperation with States

(a) Purpose
It is the purpose of this section--

(1) to recognize the interests of the States in the peaceful uses of atomic energy, and to clarify the respective responsibilities under this chapter of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials;

(2) to recognize the need, and establish programs for, cooperation between the States and the Commission with respect to control of radiation hazards associated with use of such materials;

(3) to promote an orderly regulatory pattern between the Commission and State governments with respect to nuclear development and use and regulation of byproduct, source, and special nuclear materials;

(4) to establish procedures and criteria for discontinuance of certain of the Commission's regulatory responsibilities with respect to byproduct, source, and special nuclear materials, and the assumption thereof by the States;

(5) to provide for coordination of the development of radiation standards for the guidance of Federal agencies and cooperation with the States; and

(6) to recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable.

(b) Agreements with States
Except as provided in subsection (c) of this section, the Commission is authorized to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission under subchapters V, VI, and VII of this division, and section 2201 of this title, with respect to any one or more of the following materials within the State:

(1) Byproduct materials (as defined in section 2014(e) of this title).

(2) Source materials.

(3) Special nuclear materials in quantities not sufficient to form a critical mass.

(4) Repealed. Pub.L. 109-58, Title VI, § 651(e)(2), Aug. 8, 2005, 119 Stat. 807.

During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.

(c) Commission regulation of certain activities
No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of--

(1) the construction and operation of any production or utilization facility or any uranium enrichment facility;

(2) the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;

(3) the disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;

(4) the disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

The Commission shall also retain authority under any such agreement to make a determination that all applicable standards and requirements have been met prior to termination of a license for byproduct material, as defined in section 2014(e)(2) of this title. Notwithstanding any agreement between the Commission and any State pursuant to subsection (b) of this section, the Commission is authorized by rule, regulation, or order to require that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of such product except pursuant to a license issued by the Commission.

(d) Conditions
The Commission shall enter into an agreement under subsection (b) of this section with any State if--

(1) The Governor of that State certifies that the State has a program for the control of radiation hazards adequate to protect the public health and safety with respect to the materials within the State covered by the proposed agreement, and that the State desires to assume regulatory responsibility for such materials; and

(2) the Commission finds that the State program is in accordance with the requirements of subsection (o) of this section and in all other respects compatible with the Commission's program for the regulation of such materials, and that the State program is adequate to protect the public health and safety with respect to the materials covered by the proposed agreement.

(e) Publication in Federal Register; comment of interested persons
(1) Before any agreement under subsection (b) of this section is signed by the Commission, the terms of the proposed agreement and of proposed exemptions pursuant to subsection (f) of this section shall be published once each week for four consecutive weeks in the Federal Register; and such opportunity for comment by interested persons on the proposed agreement and

exemptions shall be allowed as the Commission determines by regulation or order to be appropriate.

(2) Each proposed agreement shall include the proposed effective date of such proposed agreement or exemptions. The agreement and exemptions shall be published in the Federal Register within thirty days after signature by the Commission and the Governor.

(f) Exemptions
The Commission is authorized and directed, by regulation or order, to grant such exemptions from the licensing requirements contained in subchapters V, VI, and VII of this division, and from its regulations applicable to licensees as the Commission finds necessary or appropriate to carry out any agreement entered into pursuant to subsection (b) of this section.

(g) Compatible radiation standards
The Commission is authorized and directed to cooperate with the States in the formulation of standards for protection against hazards of radiation to assure that State and Commission programs for protection against hazards of radiation will be coordinated and compatible.

(h) Consultative, advisory, and miscellaneous functions of Administrator of Environmental Protection Agency
The Administrator of the Environmental Protection Agency shall consult qualified scientists and experts in radiation matters, including the President of the National Academy of Sciences, the Chairman of the National Committee on Radiation Protection and Measurement, and qualified experts in the field of biology and medicine and in the field of health physics. The Special Assistant to the President for Science and Technology, or his designee, is authorized to attend meetings with, participate in the deliberations of, and to advise the Administrator. The Administrator shall advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards and in the establishment and execution of programs of cooperation with States. The Administrator shall also perform such other functions as the President may assign to him by Executive order.

(i) Inspections and other functions; training and other assistance
The Commission in carrying out its licensing and regulatory responsibilities under this chapter is authorized to enter into agreements with any State, or group of States, to perform inspections or other functions on a cooperative basis as the Commission deems appropriate. The Commission is also authorized to provide training, with or without charge, to employees of, and such other assistance to, any State or political subdivision thereof or group of States as the Commission deems appropriate. Any such provision or assistance by the Commission shall take into account the additional expenses that may be incurred by a State as a consequence of the State's entering into an agreement with the Commission pursuant to subsection (b) of this section.

(j) Reserve power to terminate or suspend agreements; emergency situations; State nonaction on causes of danger; authority exercisable only during emergency and commensurate with danger
(1) The Commission, upon its own initiative after reasonable notice and opportunity for hearing to the State with which an agreement under subsection (b) of this section has become effective,

or upon request of the Governor of such State, may terminate or suspend all or part of its agreement with the State and reassert the licensing and regulatory authority vested in it under this chapter, if the Commission finds that (1) such termination or suspension is required to protect the public health and safety, or (2) the State has not complied with one or more of the requirements of this section. The Commission shall periodically review such agreements and actions taken by the States under the agreements to ensure compliance with the provisions of this section.

(2) The Commission, upon its own motion or upon request of the Governor of any State, may, after notifying the Governor, temporarily suspend all or part of its agreement with the State without notice or hearing if, in the judgment of the Commission:

(A) an emergency situation exists with respect to any material covered by such an agreement creating danger which requires immediate action to protect the health or safety of persons either within or outside the State, and

(B) the State has failed to take steps necessary to contain or eliminate the cause of the danger within a reasonable time after the situation arose.

A temporary suspension under this paragraph shall remain in effect only for such time as the emergency situation exists and shall authorize the Commission to exercise its authority only to the extent necessary to contain or eliminate the danger.

(k) State regulation of activities for certain purposes
Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards.

(l) Commission regulated activities; notice of filing; hearing
With respect to each application for Commission license authorizing an activity as to which the Commission's authority is continued pursuant to subsection (c) of this section, the Commission shall give prompt notice to the State or States in which the activity will be conducted of the filing of the license application; and shall afford reasonable opportunity for State representatives to offer evidence, interrogate witnesses, and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application.

(m) Limitation of agreements and exemptions
No agreement entered into under subsection (b) of this section, and no exemption granted pursuant to subsection (f) of this section, shall affect the authority of the Commission under section 2201(b) or (i) of this title to issue rules, regulations, or orders to protect the common defense and security, to protect restricted data or to guard against the loss or diversion of special nuclear material. For purposes of section 2201(i) of this title, activities covered by exemptions granted pursuant to subsection (f) of this section shall be deemed to constitute activities authorized pursuant to this chapter; and special nuclear material acquired by any person pursuant to such an exemption shall be deemed to have been acquired pursuant to section 2073 of this title.

(n) “State” and “agreement” defined
As used in this section, the term “State” means any State, Territory, or possession of the United States, the Canal Zone, Puerto Rico, and the District of Columbia. As used in this section, the term “agreement” includes any amendment to any agreement.

(o) State compliance requirements: compliance with section 2113(b) of this title and health and environmental protection standards; procedures for licenses, rulemaking, and license impact analysis; amendment of agreements for transfer of State collected funds; proceedings duplication restriction; alternative requirements
In the licensing and regulation of byproduct material, as defined in section 2014(e)(2) of this title, or of any activity which results in the production of byproduct material as so defined under an agreement entered into pursuant to subsection (b) of this section, a State shall require--

(1) compliance with the requirements of subsection (b) of section 2113 of this title (respecting ownership of byproduct material and land), and

(2) compliance with standards which shall be adopted by the State for the protection of the public health, safety, and the environment from hazards associated with such material which are equivalent, to the extent practicable, or more stringent than, standards adopted and enforced by the Commission for the same purpose, including requirements and standards promulgated by the Commission and the Administrator of the Environmental Protection Agency pursuant to sections 2113, 2114, and 2022 of this title, and

(3) procedures which--

(A) in the case of licenses, provide procedures under State law which include--

(i) an opportunity, after public notice, for written comments and a public hearing, with a transcript,

(ii) an opportunity for cross examination, and

(iii) a written determination which is based upon findings included in such determination and upon the evidence presented during the public comment period and which is subject to judicial review;

(B) in the case of rulemaking, provide an opportunity for public participation through written comments or a public hearing and provide for judicial review of the rule;

(C) require for each license which has a significant impact on the human environment a written analysis (which shall be available to the public before the commencement of any such proceedings) of the impact of such license, including any activities conducted pursuant thereto, on the environment, which analysis shall include--

(i) an assessment of the radiological and nonradiological impacts to the public health of the activities to be conducted pursuant to such license;

(ii) an assessment of any impact on any waterway and groundwater resulting from such activities;

(iii) consideration of alternatives, including alternative sites and engineering methods, to the activities to be conducted pursuant to such license; and

(iv) consideration of the long-term impacts, including decommissioning, decontamination, and reclamation impacts, associated with activities to be conducted pursuant to such license, including the management of any byproduct material, as defined by section 2014(e)(2) of this title; and

(D) prohibit any major construction activity with respect to such material prior to complying with the provisions of subparagraph (C).

If any State under such agreement imposes upon any licensee any requirement for the payment of funds to such State for the reclamation or long-term maintenance and monitoring of such material, and if transfer to the United States of such material is required in accordance with section 2113(b) of this title, such agreement shall be amended by the Commission to provide that such State shall transfer to the United States upon termination of the license issued to such licensee the total amount collected by such State from such licensee for such purpose. If such payments are required, they must be sufficient to ensure compliance with the standards established by the Commission pursuant to section 2201(x) of this title. No State shall be required under paragraph (3) to conduct proceedings concerning any license or regulation which would duplicate proceedings conducted by the Commission. In adopting requirements pursuant to paragraph (2) of this subsection with respect to sites at which ores are processed primarily for their source material content or which are used for the disposal of byproduct material as defined in section 2014(e)(2) of this title, the State may adopt alternatives (including, where appropriate, site-specific alternatives) to the requirements adopted and enforced by the Commission for the same purpose if, after notice and opportunity for public hearing, the Commission determines that such alternatives will achieve a level of stabilization and containment of the sites concerned, and a level of protection for public health, safety, and the environment from radiological and nonradiological hazards associated with such sites, which is equivalent to, to the extent practicable, or more stringent than the level which would be achieved by standards and requirements adopted and enforced by the Commission for the same purpose and any final standards promulgated by the Administrator of the Environmental Protection Agency in accordance with section 2022 of this title. Such alternative State requirements may take into account local or regional conditions, including geology, topography, hydrology and meteorology.

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42 U.S.C. § 6926(b)

§ 6926. Authorized State hazardous waste programs

(a) Federal guidelines
Not later than eighteen months after October 21, 1976, the Administrator, after consultation with State authorities, shall promulgate guidelines to assist States in the Development of State hazardous waste programs.

(b) Authorization of State program
Any State which seeks to administer and enforce a hazardous waste program pursuant to this subchapter may develop and, after notice and opportunity for public hearing, submit to the Administrator an application, in such form as he shall require, for authorization of such program. Within ninety days following submission of an application under this subsection, the Administrator shall issue a notice as to whether or not he expects such program to be authorized, and within ninety days following such notice (and after opportunity for public hearing) he shall publish his findings as to whether or not the conditions listed in items (1), (2), and (3) below have been met. Such State is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste (and to enforce permits deemed to have been issued under section 6935(d)(1) of this title) unless, within ninety days following submission of the application the Administrator notifies such State that such program may not be authorized and, within ninety days following such notice and after opportunity for public hearing, he finds that (1) such State program is not equivalent to the Federal program under this subchapter, (2) such program is not consistent with the Federal or State programs applicable in other States, or (3) such program does not provide adequate enforcement of compliance with the requirements of this subchapter. In authorizing a State program, the Administrator may base his findings on the Federal program in effect one year prior to submission of a State's application or in effect on January 26, 1983, whichever is later.

42 U.S.C. § 9620(h)

§ 9620. Federal facilities

(h) Property transferred by Federal agencies
(1) Notice

After the last day of the 6-month period beginning on the effective date of regulations under paragraph (2) of this subsection, whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, the head of such department, agency, or instrumentality shall include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent such information is available on the basis of a complete search of agency files.

(2) Form of notice; regulations

Notice under this subsection shall be provided in such form and manner as may be provided in regulations promulgated by the Administrator. As promptly as practicable after October 17, 1986, but not later than 18 months after October 17, 1986, and after consultation with the Administrator of the General Services Administration, the Administrator shall promulgate regulations regarding the notice required to be provided under this subsection.

(3) Contents of certain deeds

(A) In general

After the last day of the 6-month period beginning on the effective date of regulations under paragraph (2) of this subsection, in the case of any real property owned by the United States on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, each deed entered into for the transfer of such property by the United States to any other person or entity shall contain--

(i) to the extent such information is available on the basis of a complete search of agency files--

(I) a notice of the type and quantity of such hazardous substances,

(II) notice of the time at which such storage, release, or disposal took place, and

(III) a description of the remedial action taken, if any;

(ii) a covenant warranting that--

(I) all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer, and

(II) any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States; and

(iii) a clause granting the United States access to the property in any case in which remedial action or corrective action is found to be necessary after the date of such transfer.

(B) Covenant requirements

For purposes of subparagraphs (A)(ii)(I) and (C)(iii), all remedial action described in such subparagraph has been taken if the construction and installation of an approved remedial design has been completed, and the remedy has been demonstrated to the Administrator to be operating properly and successfully. The carrying out of long-term pumping and treating, or operation and maintenance, after the remedy has been demonstrated to the Administrator to be operating properly and successfully does not preclude the transfer of the property.

The requirements of subparagraph (A)(ii) shall not apply in any case in which the person or entity to whom the real property is transferred is a potentially responsible party with respect to such property. The requirements of subparagraph (A)(ii) shall not apply in any case in which the transfer of the property occurs or has occurred by means of a lease, without regard to whether the lessee has agreed to purchase the property or whether the duration of the lease is longer than 55 years. In the case of a lease entered into after September 30, 1995, with respect to real property located at an installation approved for closure or realignment under a base closure law, the agency leasing the property, in consultation with the Administrator, shall determine before leasing the property that the property is suitable for lease, that the uses contemplated for the lease are consistent with protection of human health and the environment, and that there are adequate assurances that the United States will take all remedial action referred to in subparagraph (A)(ii) that has not been taken on the date of the lease.

(C) Deferral

(i) In general

The Administrator, with the concurrence of the Governor of the State in which the facility is located (in the case of real property at a Federal facility that is listed on the National Priorities List), or the Governor of the State in which the facility is located (in the case of real property at a Federal facility not listed on the National Priorities List) may defer the requirement of subparagraph (A)(ii)(I) with respect to the property if the Administrator or the Governor, as the case may be, determines that the property is suitable for transfer, based on a finding that--

(I) the property is suitable for transfer for the use intended by the transferee, and the intended use is consistent with protection of human health and the environment;

(II) the deed or other agreement proposed to govern the transfer between the United States and the transferee of the property contains the assurances set forth in clause (ii);

(III) the Federal agency requesting deferral has provided notice, by publication in a newspaper of general circulation in the vicinity of the property, of the proposed transfer and of the opportunity for the public to submit, within a period of not less than 30 days after the date of the notice, written comments on the suitability of the property for transfer; and

(IV) the deferral and the transfer of the property will not substantially delay any necessary response action at the property.

(ii) Response action assurances

With regard to a release or threatened release of a hazardous substance for which a Federal agency is potentially responsible under this section, the deed or other agreement proposed to govern the transfer shall contain assurances that--

(I) provide for any necessary restrictions on the use of the property to ensure the protection of human health and the environment;

(II) provide that there will be restrictions on use necessary to ensure that required remedial investigations, response action, and oversight activities will not be disrupted;

(III) provide that all necessary response action will be taken and identify the schedules for investigation and completion of all necessary response action as approved by the appropriate regulatory agency; and

(IV) provide that the Federal agency responsible for the property subject to transfer will submit a budget request to the Director of the Office of Management and Budget that adequately addresses schedules for investigation and completion of all necessary response action, subject to congressional authorizations and appropriations.

(iii) Warranty

When all response action necessary to protect human health and the environment with respect to any substance remaining on the property on the date of transfer has been taken, the United States shall execute and deliver to the transferee an appropriate document containing a warranty that all such response action has been taken, and the making of the warranty shall be considered to satisfy the requirement of subparagraph (A)(ii)(I).

(iv) Federal responsibility

A deferral under this subparagraph shall not increase, diminish, or affect in any manner any rights or obligations of a Federal agency (including any rights or obligations under sections 9606, 9607 of this title, and this section existing prior to transfer) with respect to a property transferred under this subparagraph.

(4) Identification of uncontaminated property

(A) In the case of real property to which this paragraph applies (as set forth in subparagraph (E)), the head of the department, agency, or instrumentality of the United States with jurisdiction over the property shall identify the real property on which no hazardous substances and no petroleum products or their derivatives were known to have been released or disposed of. Such identification shall be based on an investigation of the real property to determine or discover the obviousness of the presence or likely presence of a release or threatened release of any hazardous substance or any petroleum product or its derivatives, including aviation fuel and motor oil, on the real property. The identification shall consist, at a minimum, of a review of each of the following sources of information concerning the current and previous uses of the real property:

(i) A detailed search of Federal Government records pertaining to the property.

(ii) Recorded chain of title documents regarding the real property.

(iii) Aerial photographs that may reflect prior uses of the real property and that are reasonably obtainable through State or local government agencies.

(iv) A visual inspection of the real property and any buildings, structures, equipment, pipe, pipeline, or other improvements on the real property, and a visual inspection of properties immediately adjacent to the real property.

(v) A physical inspection of property adjacent to the real property, to the extent permitted by owners or operators of such property.

(vi) Reasonably obtainable Federal, State, and local government records of each adjacent facility where there has been a release of any hazardous substance or any petroleum product or its derivatives, including aviation fuel and motor oil, and which is likely to cause or contribute to a release or threatened release of any hazardous substance or any petroleum product or its derivatives, including aviation fuel and motor oil, on the real property.

(vii) Interviews with current or former employees involved in operations on the real property.

Such identification shall also be based on sampling, if appropriate under the circumstances. The results of the identification shall be provided immediately to the Administrator and State and local government officials and made available to the public.

(B) The identification required under subparagraph (A) is not complete until concurrence in the results of the identification is obtained, in the case of real property that is part of a facility on the National Priorities List, from the Administrator, or, in the case of real property that is not part of a facility on the National Priorities List, from the appropriate State official. In the case of a concurrence which is required from a State official, the concurrence is deemed to be obtained if, within 90 days after receiving a request for the concurrence, the State official has not acted (by either concurring or declining to concur) on the request for concurrence.

(C)(i) Except as provided in clauses (ii), (iii), and (iv), the identification and concurrence required under subparagraphs (A) and (B), respectively, shall be made at least 6 months before the termination of operations on the real property.

(ii) In the case of real property described in subparagraph (E)(i)(II) on which operations have been closed or realigned or scheduled for closure or realignment pursuant to a base closure law described in subparagraph (E)(ii)(I) or (E)(ii)(II) by October 19, 1992, the identification and concurrence required under subparagraphs (A) and (B), respectively, shall be made not later than 18 months after October 19, 1992.

(iii) In the case of real property described in subparagraph (E)(i)(II) on which operations are closed or realigned or become scheduled for closure or realignment pursuant to the base closure law described in subparagraph (E)(ii)(II) after October 19, 1992, the identification and concurrence required under subparagraphs (A) and (B), respectively, shall be made not later than 18 months after the date by which a joint resolution disapproving the closure or realignment of the real property under section 2904(b) of such base closure law must be enacted, and such a joint resolution has not been enacted.

(iv) In the case of real property described in subparagraphs (E)(i)(II) on which operations are closed or realigned pursuant to a base closure law described in subparagraph (E)(ii)(III) or (E)(ii)(IV), the identification and concurrence required under subparagraphs (A) and (B), respectively, shall be made not later than 18 months after the date on which the real property is selected for closure or realignment pursuant to such a base closure law.

(D) In the case of the sale or other transfer of any parcel of real property identified under subparagraph (A), the deed entered into for the sale or transfer of such property by the United States to any other person or entity shall contain--

(i) a covenant warranting that any response action or corrective action found to be necessary after the date of such sale or transfer shall be conducted by the United States; and

(ii) a clause granting the United States access to the property in any case in which a response action or corrective action is found to be necessary after such date at such property, or such access is necessary to carry out a response action or corrective action on adjoining property.

(E)(i) This paragraph applies to--

(I) real property owned by the United States and on which the United States plans to terminate Federal Government operations, other than real property described in subclause (II); and

(II) real property that is or has been used as a military installation and on which the United States plans to close or realign military operations pursuant to a base closure law.

(ii) For purposes of this paragraph, the term “base closure law” includes the following:

(I) Title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526; 10 U.S.C. 2687 note).

(II) The Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note).

(III) Section 2687 of Title 10.

(IV) Any provision of law authorizing the closure or realignment of a military installation enacted on or after October 19, 1992.

(F) Nothing in this paragraph shall affect, preclude, or otherwise impair the termination of Federal Government operations on real property owned by the United States.

(5) Notification of States regarding certain leases

In the case of real property owned by the United States, on which any hazardous substance or any petroleum product or its derivatives (including aviation fuel and motor oil) was stored for one year or more, known to have been released, or disposed of, and on which the United States plans to terminate Federal Government operations, the head of the department, agency, or instrumentality of the United States with jurisdiction over the property shall notify the State in which the property is located of any lease entered into by the United States that will encumber the property beyond the date of termination of operations on the property. Such notification shall be made before entering into the lease and shall include the length of the lease, the name of person to whom the property is leased, and a description of the uses that will be allowed under the lease of the property and buildings and other structures on the property.

40 C.F.R. § 300.430(e)(2)(i)(A)(2)

(e) Feasibility study.

(1) The primary objective of the feasibility study (FS) is to ensure that appropriate remedial alternatives are developed and evaluated such that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected. The lead agency may develop a feasibility study to address a specific site problem or the entire site. The development and evaluation of alternatives shall reflect the scope and complexity of the remedial action under consideration and the site problems being addressed. Development of alternatives shall be fully integrated with the site characterization activities of the remedial investigation described in paragraph (d) of this section. The lead agency shall include an alternatives screening step, when needed, to select a reasonable number of alternatives for detailed analysis.

(2) Alternatives shall be developed that protect human health and the environment by recycling waste or by eliminating, reducing, and/or controlling risks posed through each pathway by a site. The number and type of alternatives to be analyzed shall be determined at each site, taking into account the scope, characteristics, and complexity of the site problem that is being addressed. In developing and, as appropriate, screening the alternatives, the lead agency shall:

(i) Establish remedial action objectives specifying contaminants and media of concern, potential exposure pathways, and remediation goals. Initially, preliminary remediation goals are developed based on readily available information, such as chemical-specific ARARs or other reliable information. Preliminary remediation goals should be modified, as necessary, as more information becomes available during the RI/FS. Final remediation goals will be determined when the remedy is selected. Remediation goals shall establish acceptable exposure levels that are protective of human health and the environment and shall be developed by considering the following:

(A) Applicable or relevant and appropriate requirements under federal environmental or state environmental or facility siting laws, if available, and the following factors:

(1) For systemic toxicants, acceptable exposure levels shall represent concentration levels to which the human population, including sensitive subgroups, may be exposed without adverse effect during a lifetime or part of a lifetime, incorporating an adequate margin of safety;

(2) For known or suspected carcinogens, acceptable exposure levels are generally concentration levels that represent an excess upper bound lifetime cancer risk to an individual of between 10−4 and 10−6 using information on the relationship between dose and response. The 10−6 risk level shall be used as the point of departure for determining remediation goals for alternatives when ARARs are not available or are not sufficiently protective because of the presence of multiple contaminants at a site or multiple pathways of exposure;

Cal. Gov't Code § 65560(b)(2)

(b) "Open-space land" is any parcel or area of land or water that is essentially unimproved and devoted to an open-space use as defined in this section, and that is designated on a local, regional or state open-space plan as any of the following:

(1) Open space for the preservation of natural resources including, but not limited to, areas required for the preservation of plant and animal life, including habitat for fish and wildlife species; areas required for ecologic and other scientific study purposes; rivers, streams, bays and estuaries; and coastal beaches, lakeshores, banks of rivers and streams, and watershed lands.

(2) Open space used for the managed production of resources, including but not limited to, forest lands, rangeland, agricultural lands and areas of economic importance for the production of food or fiber; areas required for recharge of groundwater basins; bays, estuaries, marshes, rivers and streams which are important for the management of commercial fisheries; and areas containing major mineral deposits, including those in short supply.

Cal. Health & Safety Code § 25359.20

§ 25359.20. Compelling action by responsible party; nature and requirements of response action; transfers of land

(a) Notwithstanding paragraph (1) of subdivision (b) of Section 25187 of the Health and Safety Code, the department may use any legal remedies available pursuant to Chapter 6.8 (commencing with Section 25300) or Chapter 6.5 (commencing with Section 25100) to compel a responsible party or parties to take or pay for appropriate removal or remedial action necessary to protect the public health and safety and the environment at the Santa Susana Field Laboratory site in Ventura County.

(b) A response action taken or approved at the Santa Susana Field Laboratory site shall be conducted in accordance with the provisions of this chapter.

(c) A response action taken or approved pursuant to this chapter for the Santa Susana Field Laboratory site shall be based upon, and be no less stringent than, the provisions of Section 25356.1.5. In calculating the risk, the cumulative risk from radiological and chemical contaminants at the site shall be summed, and the land use assumption shall be either suburban residential or rural residential (agricultural), whichever produces the lower permissible residual concentration for each contaminant. In the case of radioactive contamination, the department shall use as its risk range point of departure the concentrations in the Preliminary Remediation Goals issued by the Superfund Office of the United States Environmental Protection Agency in effect as of January 1, 2007.

(d) Notwithstanding any other provision of law regarding transfers of land, no person or entity shall sell, lease, sublease, or otherwise transfer land presently, or formerly occupied by the Santa Susana Field Laboratory, except as provided in subdivision (e).

(e) As a condition for a sale, lease, sublease, or transfer of land presently or formerly occupied by the Santa Susana Field Laboratory, the Director of the Department of Toxic Substances Control or his or her designee shall certify that the land has undergone complete remediation pursuant to the most protective standards in subdivisions (a) to (c), inclusive.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 19, 2011.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that the below-listed participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First Class Mail, postage prepaid, to the following non-CM/ECF participants:

Kamala D. Harris
Attorney General of California
Office of the California Attorney General
300 South Spring Street, Suite 1702
Los Angeles, California 90013

Attorneys for Defendant – Appellant Debbie Raphael, in her official capacity as the Acting Director of the California Department Of Toxic Substances Control

J. Steven Rogers
Steven E. Rusak
Steven W. Horton
The Boeing Company
P.O. Box 3707 MC 7A-XP
Seattle, WA 98124

Attorneys for Plaintiff – Appellee The Boeing Company

Damon K. Nagami
Natural Resources Defense Council
1314 Second Street
Santa Monica, CA 90401

s/ Sean P. Mulligan