

6 January 2009

Linda Adams  
Secretary  
California Environmental Protection Agency  
1001 "I" Street  
Sacramento, CA 95812-0806

Dear Secretary Adams:

As the time comes up for the State to reply to the inquiry by the U.S. Environmental Protection Agency (USEPA) whether California concurs or non-concurs with recommending listing the Santa Susana Field Laboratory (SSFL) on the National Priority List (NPL), i.e., making it a federal Superfund site, we wanted to write to you to give our views on the matter. In addition, since we are approaching the one-year anniversary of the Letter of Intent between you and community groups about SSFL, we thought it would be helpful to take stock of where we are now. Lastly, we wanted to make sure you knew how the DTSC decision about Dayton Canyon/Centex Homes had been received in the community.

#### Background

A bit of historical background to the listing matter may be in order.

For decades, the U.S. Department of Energy (DOE) and its predecessor agency, the Atomic Energy Commission (AEC), operated an archipelago of nuclear facilities across the nation. A culture of secrecy and indifference to the nation's environmental laws left a legacy of massive contamination of radioactive and chemically toxic materials at and leaking from these sites.

In the latter 1980s, the veil of secrecy was involuntarily lifted by a series of troubling revelations about environmental problems at the DOE nuclear sites. A new DOE Secretary, Admiral James Watkins, followed in the early 1990s by Hazel O'Leary, committed the Department to enter a new era of openness and compliance with all federal and state environmental requirements. They pledged to reverse the "DOE culture."

As part of this effort, in 1995, DOE and USEPA entered into a Joint Policy on Decommissioning DOE Facilities Under CERCLA, in which it was pledged that all DOE nuclear facilities, be they on the NPL or not, would be cleaned up consistent with USEPA's CERCLA guidance. However, when George W. Bush became President, this commitment was breached in the SSFL case, although the Policy remained nominally in force.

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In 2003 DOE published an Environmental Assessment –not an Environmental Impact Statement--in which it rejected cleaning the site up to CERCLA standards and chose instead a 15 millirem/year cleanup standard, using a suburban residential land use scenario. This standard was outside the acceptable risk range (the cancer risk from 15 mrem/yr is about  $5 \times 10^{-4}$ , using the official risk conversions) even for the suburban scenario, and about a one in a hundred (!) risk when using the rural residential/agricultural land use scenario. Because the site is zoned RA-5 (residential agriculture), and the surrounding land is used agriculturally, normal USEPA CERCLA guidance should require the rural residential scenario be used. Thus, DOE's cleanup standard for SSFL was grossly more lax than what should have been followed had DOE lived up to the Joint Policy and followed CERCLA. It would have involved leaving in place soil contaminated with radioactivity at levels at least hundreds of times higher than would have been the case had DOE diligently complied with the Joint Policy. USEPA claimed it was powerless to take action over DOE's breach of the DOE-USEPA Joint Policy, a position with which we disagreed; USEPA said if the site were on the NPL it would have sign-off authority on the cleanup, but otherwise couldn't force DOE to live up to its commitments.

The community undertook three parallel tracks to try to remedy this situation involving DOE's breach of cleanup promises: (1) The Committee to Bridge the Gap, along with the City of Los Angeles and the Natural Resources Defense Council, brought a lawsuit against DOE in U.S. District Court, challenging the Environmental Assessment. (2) USEPA's prior decision not to recommend listing the site was challenged, as it had looked at contamination at only one of the four Areas at SSFL and only addressed radioactivity, not chemically hazardous pollutants. And (3), reinvigorated efforts were pursued to pass state legislation that would require cleanup to the strictest of the USEPA standards.

To be candid, given the power of the forces arrayed against the community and the long, troubled history of these forces pushing safety considerations to the side, we thought we would be very lucky if even one of these three approaches led to fruition. Never did we anticipate that we would be victorious in all three. Yet that is what happened.

U.S. District Court Judge Conti ruled against DOE and ordered a full Environmental Impact Statement be prepared. The Legislature passed, and the Governor signed (with a few complications that were cleared up a few months later with your leadership) SB990. And USEPA, considering this time the full SSFL site and chemicals as well as radioactivity, recommended NPL listing and requested that the Governor inform USEPA whether he concurred or non-concurred with such an action.

#### The Pending NPL Concurrence/Non-Concurrence Decision

On its face, having SSFL placed on the federal Superfund list would seem like a positive step. But as has often been the case with SSFL, all is not as it seems.

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The clearest indication that listing might not be in the interests of the community affected by the site's contamination is the extraordinary set of actions undertaken in the last couple of months by DOE and NASA (which owns part of SSFL and has responsibility for some of the chemical pollution). DOE and NASA, two of the three Responsible Parties (Boeing being the third) for the contamination, requested that the outgoing Bush Administration list SSFL and do so immediately, before leaving office. This would entail breaching commitments USEPA had made to the Governor that he had until mid-January to decide whether to concur with such listing; other commitments USEPA had made that no listing recommendation would occur until spring; USEPA's normal process that listing recommendations are only published twice a year, with the next one being months after President-elect Obama takes office; and USEPA's historical practice that it does not list without a Governor's concurrence.

The midnight request to the outgoing Bush Administration was extraordinary. When was the last time one heard of Responsible Parties *begging* to be placed on the Superfund list? Normally, they vigorously resist such listing. And what could possibly be so urgent as to lead these Responsible Parties to demand *immediate* listing, within weeks, violating numerous pledges and standard processes by USEPA so the listing could be consummated before the Bush Administration departed Washington?

The answer is found in the DOE and NASA letters to USEPA themselves. In those letters, these agencies make clear that currently they are subject to various state and federal laws and regulatory bodies and assert that if USEPA were to enter the picture and declare the facility a Superfund site, it would reduce DOE and NASA's compliance burden. In other words, they believed that NPL listing would eliminate or at least defer having to comply with California state law and obey California regulatory authority exercised by CAL-EPA.

That this was an end-run on the state is made clear by the fact that neither the DOE nor the NASA letter was cc'd to the state. Despite asking USEPA to take action to frustrate state authority over the cleanup, DOE and NASA did not even have the courtesy to send copies to the state. It appears that DOE and NASA believe that NPL listing would at minimum delay any compliance requirement regarding SB990 until Superfund processes were completed – which could be decades. [It should be noted that the very fact DOE and NASA felt they needed NPL listing to even defer compliance with SB990 suggests they recognize they are in fact otherwise bound by it and that legal claims to the contrary are flimsy at best.] It of course makes no sense to have two cleanups, one under federal Superfund, followed by a second one under SB990; this would just waste resources and further drag out the cleanup process.

That DOE and NASA took this backdoor step to try to frustrate compliance with SB990 is made all the more troubling by the commitment DOE Deputy Assistant Secretary Frank Marcinowski made just a few weeks earlier in a hearing of the U.S. Senate Committee on Environment and Public Works, promising that DOE would rigorously comply with all state and federal laws. A few weeks later DOE broke that promise and tried to bypass SB990.

The central problem in NPL listing comes down to two messages USEPA has sent regarding how it would treat state law and state regulatory bodies if SSFL were to be added to the NPL. USEPA has stated that it would not treat SB990 as an “ARAR”—an Applicable and Relevant or Appropriate Requirement—because it applies only to SSFL, not to other sites. The best USEPA will commit to as of this date is that it would “consider” SB990 in the NPL process, but will not promise to follow it. Secondly, USEPA has said the State would lose significant authority it currently has over cleanup of chemically hazardous materials at SSFL. At times, USEPA has even indicated it would, if the site listed, use an “open space” land use scenario, rather than either the rural residential scenario required by SB990 or even the suburban residential DOE had claimed to use in its earlier Environmental Assessment. Because assumed land use drives exposure and cleanup levels, such an action by USEPA could result in no further cleanup of the site whatsoever.

We do not know if these positions would remain those of USEPA after the upcoming change in Administrations in Washington. We do know that USEPA has been notably unhelpful in its dealing with the State over SSFL during the current federal Administration.

So the decision facing the State is whether to concur with NPL listing that could, by USEPA’s own statements, result in the use of cleanup standards potentially far less protective than those required under state law, coupled with loss of significant state authority over the cleanup and. It is hard to see, under those circumstances, why the State should concur.

#### Our Recommendation Regarding Whether the State Should Concur with NPL Listing

Given the considerations identified above, we would support the State non-concurring with NPL listing at this time.

This is not an entirely easy decision, as there are some factors that cannot be readily foreseen at present that could potentially change such a calculation. For example, an Obama Administration could be—and we hope will be—far more cooperative than the soon-to-depart Bush Administration. A new USEPA might be willing to commit to an NPL listing that mandates following SB990 and does not take away existing state authority. New DOE and NASA leadership may stop their agencies’ past resistance to SB990 and start cooperating with the state.

And, at the same time, Governor Schwarzenegger has only two years left in office. Your presence as CAL-EPA Secretary has been, frankly, absolutely critical to renewed community confidence in the State’s commitment to cleaning up SSFL. What will happen to us when you are gone?

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And, while we trust that Senators Boxer and Feinstein and Congressmen Waxman and Gallegly will succeed in getting the new Obama Administration to have DOE live up to its commitment to the Senate Environment and Public Works Committee to rigorously comply with all state laws, including SB990, there remains the possibility that there will be continued resistance to SB990, including possible litigation. And while we are confident SB990 would withstand any such challenge, the unpredictable can occur. Therefore, keeping ones options open should circumstances change in the future would be worthwhile.

Therefore, we would recommend as follows:

1. The State non-concur with NPL listing at this time.
2. The State reserve the right to revisit the issue should circumstances change in the future.
3. That you and key representatives of the community begin a discussion as to how to provide assurance of continuity of the State's commitment and approach to SSFL cleanup in the long term.

We must be candid in saying that, while we far prefer at present State control of the cleanup to prospective control by EPA, DOE and/or NASA, we have not been entirely happy with all State actions taken recently. As we are sure you are aware, the recent decision about Dayton Canyon/Centex Homes caused considerable consternation in the community. The only reasons there wasn't a big outcry from the community in the news media was DTSC's strategy of emailing out its decision late on a Friday – not the step taken when an agency is proud of a decision -- and the massive fires that occurred immediately thereafter, drowning out all other media coverage. But that doesn't mean people were happy with what happened. To the contrary.

Much more importantly, there remain some anxiety in the community about what the Dayton matter portends for fundamental decisions about cleanup of SSFL itself. We are much pleased with the improved *process* for public input initiated in the last year or so by DTSC, but what matters most is *outcome*—the actual cleanup decisions. We hope you and we can engage in some discussion as to how to assure that the cleanup decisions themselves end up as ones protective of the community.

SB990 needs to be vigorously defended from attack; but beyond that, it needs to be vigorously carried out, in a way that results in actual cleanup that is truly protective of the community.

We are more grateful than we can say for your personal involvement, which has been the primary factor in providing hope to a community that has long had its hopes smashed. We look forward more than we can possibly say to finally have SSFL cleaned up and the community protected.

Sincerely,

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