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17 July 2008

Fran Diamond, Chair
and Board Members
Los Angeles Regional Water Quality Control Board
320 W. 4th Street, Suite 200
Los Angeles, CA 90013

Re: Response to 10 June Letter by "SSFL CDO Expert Panel"

Dear Chair Diamond and Board Members:

We respond here to a letter to the Board from Dr. Michael Stenstrom on behalf of the "SSFL CDO Expert Panel," which in turn replies to comments made by community groups and individuals at the 5 June Workshop convened by the Board to discuss the "White Paper" submitted by the Panel.

The Stenstrom letter is extraordinary. In its effort to deny the concerns expressed at the Workshop, it actually concedes them, and in a couple of instances, magnifies them. In particular, the Panel concedes it disagreed with its mandate as set down by the Regional Board in the Cease and Desist Order (CDO) and decided unilaterally to ignore it and go far beyond it; that despite the letter's claim that it is not recommending eliminating any numerical limits, the Panel is indeed pressing for the enforceable numeric limits in the Permit to be amended to become instead non-enforceable "benchmarks," violation of which would not result in fines or Notices of Violation; and that it does indeed support changing the Permit to create an "allowable frequency of exceedances" as opposed to requiring compliance. The Stenstrom letter also claims that the panel wasn't picked by Boeing but by Geosyntec, but fails to disclose that Geosyntec was hired by Boeing to assemble the Panel and that Boeing itself has said that the panel was "assembled by Boeing." We address these and related matters below, preceded by some background.

We want to make clear at the outset, however, that we believe the Panel's mandate as established by the Board in the CDO, if followed, would be a useful, albeit limited, contribution to reducing risks to the neighboring community from the leaking pollution from Boeing's Santa Susana Field Laboratory (SSFL), and the Panel members are generally well qualified to perform the task directed by the Board in the CDO (design of Engineered Natural Treatment Systems for

Outfalls 008 and 009 to meet the enforceable numeric limits in the permit). Our problem is that they have far exceeded that mandate, attacking the NPDES Permit itself and re-arguing all the claims made by Boeing over past years, claims repeatedly rejected by the Regional and State Boards, to push for elimination of fines and other enforcement actions when Boeing violates its limits. Those policy matters—whether Boeing is so small an entity that it shouldn't have to face fines when contamination for which it is responsible leaks offsite in unsafe levels—and the associated attacks on the Board's past decisions and the Permit itself are indeed beyond both the scope and expertise of the Panel and inappropriate.

I. Background

A. The Panel is Basically Just Trying to Relitigate Boeing's Past Efforts, Repeatedly Rebuffed by the Regional and State Boards, to Get Rid of Enforceable Numeric Limits in the Permit

When the Regional Board took up the renewed NPDES discharge permit for SSFL in 2004, and amended it in 2006, Boeing repeatedly made a series of arguments against the Permit's enforceable numeric limits for release of pollutants. Boeing variously urged:

- that the enforceable numeric limits should be replaced with non-enforceable "benchmarks," exceedance of which would result in no fine, notice of violation, or other enforcement action;
- that exceedances by grab samples not count as violations but Boeing instead be permitted to composite – or average – high readings with low ones;
- that dioxin and other contaminants are due to nature or background and so numeric limits should be waived or dramatically relaxed;
- that violations of permit limits should not count as violations nor be subject to enforcement action but instead be compared to releases of contaminants from other watersheds;
- that the numeric limits be waived for a period of many years because of the 2005 fire;
- that a "design storm" be established so that exceedance of numeric limits that occur during such a storm not be counted as violations or subject to enforcement action;
- that the proposed limits be found to be unattainable and "variations" that result in violations not count as violations; and so on.

At the heart of Boeing plea was a request that there be no enforceable numeric limits but instead non-enforceable "benchmarks." If the benchmark was exceeded, the Board would, under Boeing's repeatedly rebuffed proposals, be unable to issue a Notice of Violation or a fine. Instead, Boeing would, if benchmarks were repeatedly exceeded, merely analyze its BMPs further and see if there were any improvements it was willing to make. If that didn't solve the problem, it would analyze matters further, and on and on, without ever getting a fine or other enforcement action.

The Board rejected Boeing's requests, finding that the company had violated its permit innumerable times over many years without ever getting the matter under control and that only

with enforceable limits was there a chance that Boeing would get the message and clean up the situation sufficiently to protect public health and the environment.

Boeing appealed to the State Board, making the same arguments again, and the State Board rejected Boeing's positions. [It did remand two matters to the Regional Board, to eliminate two supposedly duplicative compliance points and to set the shortest possible compliance schedule for responding to the fire, while rejecting the request for many years of such relief.] Thus, as we shall see below, the assault on enforceable numeric limits found in the Panel's "White Paper" is largely a re-litigating of a laundry list of arguments made by Boeing in the past and rejected by both the Regional and State Boards.

B. The CDO Mandate for an Expert Panel With Narrow Scope

Upon remand on the two narrow matters identified by the State Board, the Regional Board last November issued a Cease and Desist Order. In the proceeding leading up to the CDO, Boeing asked the Board for permission to consider for two outfalls – 008 and 009 – alternatives to traditional Best Management Practices (BMPs). Boeing asked to be able to consider using instead Engineered Natural Treatment Systems (ENTS), sometimes referred to as natural BMPs. [In lay terms, regular BMPs are things like straw bales, ENTS things like ponds, both designed to reduce the amount of sediment that leaves the site in rainstorms, and thereby control pollutants that travel with the sediment.] The Board directed that an expert panel be established by Boeing *to design ENTSs for Outfalls 008 and 009 to meet the enforceable numeric limits in the permit*. The relevant sections of the CDO are attached hereto as Attachment I.

In the CDO, the Board noted that "The Permittee has proposed a conceptual natural BMP design study *as the mechanism to meet the final effluent limitations* proposed for discharges from [Outfalls 008 and 009]." (emphasis added) It went on, "An independent team of experts will be convened to evaluate site conditions including contaminants in the vicinity, evaluate the natural BMPs, their documented effectiveness and their performance under site conditions, to select the appropriate BMPs, the design and implementation. The goal of the natural BMPs is to meet the final effluent limitations included in Order R4-2007-0055."

Thus the CDO ordered the creation of "a workplan to evaluate, select and implement natural BMPs for Outfalls 008 and 009." As part of that workplan, there was directed, "Assembly of a panel to review site conditions, modeled flow, contaminants of concern, and evaluate the BMPs capable of providing the required treatment to meet the final effluent limits." Finally, the CDO directed that "Discharges from Outfalls 008 and 009 on June 10, 2009, and thereafter, shall comply with the final effluent limits that appeal in I.B.4. of Order R4-20070-0055."

Note the very narrow scope established by the Board's CDO for the Panel: it was limited to designing ENTSs, limited to Outfalls 008 and 009, and limited to designing them to meet the enforceable numeric limits in the permit. **The Panel's mandate did not include matters beyond those two outfalls, matters other than designing the ENTSs for those outfalls, or**

matters involving proposing elimination of the Board's enforcement powers for numeric limits and converting those limits instead into non-enforceable "benchmarks."[1]

C. Panel Issues 'White Paper' That Contradicts and Goes Far Beyond Its Mandate and Pushes Instead for Reopening of Permit and Elimination of Enforceable Numeric Limits; Boeing Submits Reopener Petition Based on White Paper

On 30 April, Geosyntec Consultants transmitted to Boeing the Panel's "White Paper," entitled "Expert Panel Final Consensus Recommendation on a Site Specific Design Storm for the SSFL." Geosyntec noted in its cover letter that "Boeing asked Geosyntec to assist in forming an Expert Panel ...."

The same day, unbeknownst to the community, Boeing submitted to the Board a petition to reopen its NPDES permit to make a number of changes regarding its enforceable numeric limits site-wide, based on the report "assembled by Boeing pursuant to Cease and Desist Order No. R4-2007-0056," which it appended to its petition. (Note, of course, that the CDO did not include in its mandate having the Panel propose relaxations of the permit limits; rather it was to propose measures to comply with those limits. Nor was it supposed to address sitewide matters, but had been restricted to Outfalls 008 and 009. At least Boeing was candid that it had assembled the Panel, a matter about which the Panel in its June 10 letter is less than forthright.)

On 2 May Regional Board staff emailed out invitations to members of the community to comment on the White Paper at a special Workshop called by the Board to discuss the White Paper. That Board Workshop was remarkable in that, for all intents and purposes, the Expert Panel's presentation did not address the White Paper's recommendations, which were the subject of the Workshop, but instead discussed the ENTSs, which is what was supposed to be the Panel's mandate. When members of the public and representatives of elected officials subsequently spoke – on the topic of the Workshop, the White Paper's recommendations -- there was such a 'disconnect' between the presentations that the Board could readily have been quite puzzled. But a reading of the White Paper discloses what the Panel declined to disclose – a series of recommendations to weaken and/or eliminate the enforceable numeric limits in the current permit. We discuss that White Paper below:

First of all, the document reads far more like something written by a Boeing attorney than a team of experts on ENTS. It makes the same arguments, often in similar language, which Boeing's attorney has made before this Board and the State Board in opposing enforcement provisions of the permit. The document contains a transmittal letter from Eric Strecker of Geosyntec Consultants, the firm hired by Boeing to assemble the Panel. The cover letter's language – "Each of the Panel members contributed to the development of this consensus recommendation and have agreed to its contents as the document was developed"—raises the

[1] In rejecting Boeing's request on the design storm matter, the Board indicated that Boeing could petition for reopening of the permit on that issue if it wished at a later date, while making no commitment that the Board would indeed grant such a request. It did *not*, however, in the CDO include that matter within the mandate of the expert panel.

obvious question as to who actually wrote the report. The language raises the specter that someone other than the Panel members actually wrote it and that they merely signed off on it.

Panel Key Finding 1: Proposal to Eliminate Enforceable Numeric Limits Sitewide for Annual Storms

The cover letter makes clear that it was Boeing that asked Geosyntec to form the Panel and asked that the Panel do more than just do what the CDO required ("oversee the selection and design of Engineered Natural Treatment Systems for the 008 and 009 outfall watersheds") but to also "make a recommendation regarding the design storm for the site." Indeed, the title of the White Paper is "Final Consensus Recommendation on a Site Specific Design Storm for the SSFL," and it makes clear that its purpose is primarily to address that issue, not the ETNS design for 008 and 009, which of course is the actual subject of their mandate.

Note that they are not even talking of a design storm for Outfalls 008 and 009, where the ENTSs are supposed to go, but a design storm for the entire site. Buried in an extraordinary footnote one finds the implications of this.

Whereas one might be able to argue that designing ENTSs for Outfalls 008 and 009 might require the establishment of a design storm, i.e., the largest storm one assumes is likely during the ENTSs design life, something like a 100-year storm, the footnote makes clear that the Panel isn't even considering a design storm for 008 and 009, but rather a *compliance assessment* storm, storms for which the polluter pays no penalty and faces no other enforcement action when it fails to comply with effluent limits, and for the whole site. The extraordinary footnote reads in full:

> The Panel believes that a distinction needs to be made between the term *design* storm (i.e., basis for specific treatment BMP sizing) and the term *compliance assessment* storm (i.e., basis for assessing compliance with numeric effluent limits in the NPDES permit). Regarding the term design storm, ENTSs in the Outfall 008 and 009 watersheds will individually be sized to treat storms larger or smaller than what in effect would be a site compliance assessment storm based upon site constraints and opportunities; therefore the actual "design storm" for each ENTS will vary. The compliance assessment storm would be used to determine when numerical limits would apply as enforceable limits or as benchmarks as described herein. For purposes of using the same language as the Board, the Panel is using the term design storm throughout this document.
>
> (emphasis in original)

Thus, even though the Panel recognizes that the term "design storm" actually means the technical basis for sizing of specific treatment BMPs, they were going to use it to instead apply to the "compliance assessment" storm, a proposed basis for determining when Boeing's violations of numeric effluents limits in its Permit will be ignored for enforcement purposes. Indeed, the Panel notes that for Outfalls 008 and 009—what the Board thought the Panel was

focused on—the actual design storm for those ENTSs would be smaller or larger than the site-wide compliance assessment storm they were proposing here. Nonetheless, they decided to call their proposal "design storm."

The key is the second to last sentence: "The compliance assessment storm would be used to determine *when numerical limits would apply as enforceable limits* or as benchmarks as described herein." (emphasis added) So, rather than coming up with a maximum storm the 008 and 009 ENTSs were likely to face and designing accordingly, or even the maximum storm reasonable ENTSs should be designed to handle, the Panel has punted completely on a design storm for 008 and 009, saying the design storm for them could be higher or lower than the compliance storm they are proposing. Instead it has entered into an area way outside its competence or scope -- the regulatory policy questions of whether the Regional Board should have its power to take enforcement action against Boeing for continuing violations of numeric limits taken away from it. In short, the Panel is weighing in on the question whether Boeing is so small a company and blameless in the contamination throughout its site that it shouldn't have to pay fines when that contamination leaks offsite in unsafe levels. These are matters quite inappropriate for the Panel.

[Note that the Panel on p. 1 restates its task in part to declare its purpose is to design ENTSs "designed to come as close as feasible to meeting the numerical effluent limits set by the Board," whereas the CDO states the purpose is to design natural BMPs "to meet the final effluent limitations included in Order R4-2007-0055."]

Under Key Findings, the very first one, regarding a site-specific design storm, is indeed key:

> This storm would be used to assess ***when numeric effluent limits, as specified in the NPDES Permit, will apply***. (The NPDES Permit does not currently specify *an allowable frequency of exceedances.)* For rainfall events less than or equal to the design storm, the NPDES limit will apply. However, the Panel recommends that when a rainfall event exceeds the design storm based on local gauge measurements, *the NPDES permit limits should become* ***non-enforceable*** *"benchmarks"....*
>
> (emphasis added)

One can readily see why it is so disingenuous when the Panel, in its June 10 letter to the Board, claims "The Expert Panel has not, is not, and will not recommend abandoning numeric limits." (emphasis in original). Yet, its very first recommendation is to establish a design storm above which numeric limits will not apply but instead become non-enforceable benchmarks.

Panel Key Finding #2: Proposal That Annual Storms Should be Exempted from Enforcement.

Rather than the standard 100-year design storm, the Panel instead recommends that the single site-wide compliance storm be the 1-year return interval storm event. In plain English, they are

saying they expect such a storm on average every year, and want Boeing to be able to routinely release pollutants at unsafe levels during such storms, in excess of the NPDES permit limits, without fine or notice of violation. This is extraordinary. It is the big storms that move the big amounts of pollutants, and Boeing's panel here recommends Boeing be permitted on average once a year to release pollutants offsite at levels in excess of its permit limits, without enforcement action.

Panel Key Finding 3: Bar Enforcement Action for Violations of Most Grab Samples as Currently Required by the Permit

Going far afield from even its own revision of its mandate, the Panel then proceeds to recommend, for *all* storm events and *all* outfalls, both above *and* below their proposed design storm, that Boeing's permit be revised so that the current enforceable numerical limits for most grab samples be eliminated. Whenever possible, the Panel asks, the grab sample requirement in the Permit should be removed and replaced with composite samples. In other words, they urge that high readings be averaged—composited -- with low readings so that the high individual readings not count as violations. This is precisely the request Boeing made during the earlier permit proceeding that was rejected by the Board. It is of course not a scientific matter related to design of ENTSs but a regulatory policy matter as to whether Boeing should be fined for exceedances or permitted to average exceedances away.

The Panel does recommend that a grab sample from the first hour or so of runoff from a storm be collected, BUT: "It is recommended that this additional sample *should not be subject to compliance assessment*, but be used to provide information to the Regional Board and Boeing." (emphasis added) Again, this sounds like something from Boeing's lawyer rather than from an independent scientific panel assigned with designing ENTS. Why is it any business of such a panel whether a big company like Boeing is subject to compliance actions by the Board? Why should it be recommending that the Board's enforcement authority be weakened or removed?

Panel Key Findings 4 and 5: Compliance Assessment With and Without Grab Sampling

In Key Findings #4 and 5, the Panel has the chutzpah to actually propose language for amending Boeing's NPDES permit to eliminate the Board's enforcement powers for violations that occur during storms equal to or greater than 2.5 inches in 24 hours or 0.6 inches in an hour, storms which they say occur annually. Again, sounding far more like it was written by Boeing's lawyers than any scientist member of a panel on ENTSs, legalese language is provided for two alternative passages proposed for Boeing's NPDES permit. Their import is clear. Both state that the permit effluent limit values

> will function as benchmarks (i.e., triggering BMP evaluation and upgrade, as necessary) *rather than enforceable numeric limits (where exceedances would be subject to a notice of violation and enforcement penalty).*

(emphasis added)

Why should Boeing's Panel—if it is truly independent of Boeing, as it claims—care if Boeing is subject to a notice of violation and enforcement penalty? Surely that is a policy matter, not science; and surely a company as big as Boeing can afford to pay fines. Given its history of failing to in a timely fashion clean up the contamination at its site, losing the ability to issue fines and notices of violation would hinder rather than help the Board gain compliance. And that of course is the entire purpose of the proposal – to eliminate compliance requirements.

[Furthermore, since the Panel has already proclaimed that its ENTSs and Boeing's BMPs are incapable of ensuring compliance *in the absence of effective cleanup of the contamination on the Boeing site*, the suggestion that if enforceable numeric limits were instead turned into non-enforceable benchmarks, as proposed, when exceeded Boeing could evaluate the BMPs and upgrade "as necessary" rings hollow. The Panel has already declared that upgrades won't be effective in observing the limits.]

Panel Key Finding 6: Additional Proposed Controls Include Removing/Covering Galvanized Metals and Treated Wood Upstream of BMPs But *Not* Removing the Radioactive and Chemical Contamination that is the Source of the Problem

The Panel states in its 10 June letter that it unilaterally decided to ignore the Board's mandate for the Panel because it disagreed with it. Given the extensive contamination on site, reliance on single BMPs or ENTSs without cleanup was unlikely to produce consistent compliance with the Board's enforceable numeric limits. In deciding on its own to alter the CDO mandate, without asking the Board's permission or proposing and obtaining a revision to the CDO, the Panel showed its clear bias and allegiance to Boeing which was paying them, directly or through its contractor Geosciences.

The Panel could have decided that it would alter its mandate to include true source control and reduction: making proposals for effective and timely cleanup of the Boeing contamination on the SSFL site that was being picked up by stormwater and resulting in exceedances at discharge points. If there had to be a change in scope, that change would have been good for the public interest if not so desirable for Boeing. Instead, the Panel declared that BMPs without effective cleanup were unlikely to produce compliance, *so it recommended the end of most compliance measures: just let Boeing continue to pollute, and don't fine them or issue notices of violation.* Is there a question why the affected community felt betrayed?

In Finding 6, the Panel betrays its hand. It proposes source controls, but limits those to covering or removing galvanized metals and treated wood! These trivial matters are of course not the central problem: it is the vast quantities of heavy metals, VOCs, semi-VOCs, PCBs, dioxins, other hazardous chemicals, and a witches' brew of radionuclides that were spilled, dumped, released, and otherwise allowed to pollute the site. Of course straw bales and small ponds can't effectively clean up runoff carrying large amounts of these pollutants—one has to remove the source. Twenty years after the chemical cleanup was supposed to commence, it still hasn't, aside from a handful of interim measures. Half a century since the SRE meltdown and other nuclear accidents, the site operators still haven't removed the vast majority of the radioactive contamination. Is it any wonder that when it rains, these contaminants in the soil are

carried at excessive levels offsite in the runoff? But the Panel is silent about that, talking instead merely of removing or covering some treated wood and galvanized metal.

Panel Key Finding 7: Eliminate Enforceable Numeric Limits for Many if Not All Contaminants for Storms That Are Smaller Than the Design Storm, as Well as Those That Are Larger

Although the Panel claimed its report was for establishing a design storm above which enforceable limits wouldn't apply, a matter beyond the CDO scope, it expanded even that expanded scope to now propose elimination of enforceable numeric limits under most circumstances for all storms, no matter of what size. Arguing that BMPs and ENTSs, in the absence of cleaning up the source contamination causing the problem, were insufficient alone to produce consistent compliance with the permit's numeric effluent limits, "including for storms smaller than the design storm," the Panel now boldly proposes eliminating enforceable limits for storms less than the design storm as well as those that are greater.

[The Panel does not explain then what the design storm concept can mean under these circumstances. If the design storm was the storm above which the ENTSs and BMPs might not be able to bring about compliance in the absence of cleaning up the contamination onsite, that becomes nonsensical when the Panel proceeds to argue that compliance for storms smaller than the design storm is also unlikely. The entire document thus appears to be a request for ending enforcement of virtually all numeric limits – for the big and the small storms, the grab and the composite samples.]

Item (a)—Panel Attacks the Board's numeric limits for dioxins

Here the Panel argues against the Board's specific limits on dioxins, both for the design storm and all other storms. This of course merely repeats Boeing's rejected arguments during the earlier permit proceedings.

Item (b)—Panel asserts Dioxins are largely from background, and one should compare to other watersheds rather than enforce numeric limits.

The Panel argues, as did Boeing in earlier proceedings, arguments rejected by this Board and the State Board, that its dioxin levels are similar to dioxin levels in other parts of LA. Contamination elsewhere is no defense for contamination here. The Panel repeats Boeing's earlier arguments about alleged dioxin background and argues for the repeal of the permit's dioxin limits.

Item (c)—Panel urges repeal of enforceable numeric limits in permit for mercury, lead, zinc, cadmium, iron, and copper

The Panel next expands its attack on the Board's numeric limits, adding six heavy metals to the dioxins for which it wants enforceable numeric limits removed.

The Panel concludes this section by recommending that dioxin, mercury, lead, zinc, cadmium, iron, and copper not have enforceable numeric limits – both for storms above and

below the design storm, i.e., for all occasions—but rather be relegated to unenforceable "benchmarks." It goes on, astonishingly, to say it intends to prepare another white paper, also going far beyond its mandate, this one to argue in more detail about enforceable numeric limits that should be voided, based on arguments about achievability by BMPs alone (without cleanup of site contamination) and background. As distressing as it is that the Panel should issue the current white paper, far outside its scope, it is now announcing it intends to go even farther afield in its effort to provide the polluter what it desires—arguments for the Board's enforcement powers of Boeing's violations to be curbed or eliminated.

Panel Key Finding 8 – "Allowable Exceedance Frequency" Recommended – Making the Impermissible Permissible

After arguing that enforceable numeric effluent limits not remain in place for even the smaller storms, as well as the larger storms, the Panel now argues in the alternative for an astonishing "allowable exceedance frequency." Saying directly, "*If the current enforceable numeric effluent limits remain in place for storms equal to or smaller than the design storm*"—a matter which they have just argued against—then Boeing should be allowed to exceed those numeric limits nonetheless. "This could be in the form of an allowable exceedance frequency, or comparison of discharge quality with one or more reference watersheds, or some other comparable mechanism in the NPDES permit." This is astonishing since clearly an allowable frequency of exceedance merely excuses behavior that may result in harm to the surrounding communities which is supposed to be the very purpose of the permit. Releasing pollutants at unsafe levels is, of course, a risk to life and health and central to the purpose of the permit itself.

The Panel also argues, as Boeing had previously, for having the company not fined for violating numeric limits but instead comparing its violations to levels in other watersheds. Why a scientific panel would want to suggest coddling a polluter is difficult to figure out, except that they are being paid by that polluter.

Panel Key Finding 9 – Waiving Numeric Limits for Extended Periods Due to Fires and Other Events

Boeing had argued, and the Regional and State Boards had rejected, that the numeric limits should be waived for many years because of the 2005 fire. The Panel now tries to relitigate that matter, arguing for automatic provisions in the Permit to waive the limits. The Panel also repeats Boeing's old arguments that fires are a significant source of dioxin.

Panel Key Finding 10—Current Enforceable Numeric Limits Should be Changed to Unenforceable Benchmarks for Annual Storms and for Burned Areas for All Storms

Here, the Panel both repeats itself and Boeing's prior arguments.

Summary of White Paper

The Panel argues for the deletion of the enforceable numeric limits in the current Boeing NPDES permit. It does so by proposing:

- For large storms (those occurring annually), *all* enforceable numeric limits be eliminated and replaced with non-enforceable "benchmarks"
- For smaller storms:
  - Enforceable numeric limits be eliminated for dioxins, mercury, lead, zinc, cadmium, iron, and copper
  - Alternatively, numeric limits be eliminated for everything and one merely compare contamination with other watersheds
  - Or, eliminate the requirement to comply with the numeric limits and substitute an "allowable frequency of exceedances"

These recommendations – indeed the entire paper – sounds strikingly similar to the presentations made by Boeing's lawyer, Sharon Rubacalva, before this Board and the State Board, during the permit adoption process, more than a paper by an independent scientific group, and indeed she made these arguments, in almost these words, when these arguments were rejected by the Boards before. These matters are not scientific, they are regulatory policy – essentially going to the question of when the huge company that hired the panel members, be it directly or through Boeing's contractor, should have to pay fines. It is unseemly.

Panel Went Far Beyond Scope Set by the Board

Among the concerns expressed at the Workshop was that the Panel appeared to have gone far beyond the mandate set for the Panel in the Board's Cease and Desist Order issued in November of last year. The CDO states that Boeing had requested to rely, for Outfalls 008 and 009, on natural BMPs rather than traditional engineered BMPs, to meet the effluent limits in the permit. The CDO directs Boeing to assemble a panel to design natural BMPs for Outfalls 008 and 009 "to meet the final effluent limits."

Note that the Board's charge to the Panel was very limited: limited to Outfalls 008 and 009, not the entire site with its nearly score of Outfalls; limited to designing natural BMPs for those two outfalls; and limited to designing them to meet the numeric limits in the permit. At the Workshop, we expressed concern that the Panel had ignored its mandate and gone way beyond the scope directed by the Board. The White Paper by the Panel amounted to an assault on the enforceable numeric limits in the permit, for the whole site, and a re-arguing of a wide range of claims Boeing had made to the Board during its adoption of the permit, claims rejected both by the Regional Board and, on appeal, by the State Board.

In the context of a Federal Grand Jury investigating—at least as of last public report—Boeing's violations of the water quality laws, such action by Boeing's panel is very troubling. If the Grand Jury is still in place, then action to push for the elimination of enforceable numeric limits based on those laws and replacement with non-enforceable benchmarks may be part of an effort to undercut the Federal Grand Jury investigation. By eliminating enforceable numeric limits, the Panel and Boeing would succeed in eliminating the very requirements that Boeing is apparently alleged to have violated.

II. The June 10, 2008 Panel Letter

We now turn to the Panel letter to the Board of June 10, responding to concerns raised at the Board Workshop of June 5.

The Stenstrom letter asserts in general terms that the public comments were "misconceptions." However, it then goes on, in the very first page, to confirm and expand those concerns.

A. Panel Concedes It Unilaterally Decided to Ignore Its Mandate Set Down by the Board in the CDO

While now calling itself the "CDO Expert Panel,"[2] and acknowledging that its mandate comes from the CDO, it concedes that the "Expert Panel's original task from the November 1, 2007 Cease and Desist Order was to identify natural best management practices (BMPs) or engineered natural treatment systems (ENTS) capable of achieving permit limits in Outfalls 008 and 009." *Then, surprisingly, the Stenstrom letter goes on to say that the Panel quickly decided that it disagreed with the Regional Board's mandate to it and decided to ignore that mandate.* Just as the community alleged, Stenstrom et al. now concede that they consciously decided to unilaterally change their Panel's mandate as established by the Board (i.e., design ENTS for 008 and 009 capable of meeting permit limits) and instead redirected the Panel's work to help Boeing push the Board to amend the permit so as to relax or eliminate its enforceable numeric limits or otherwise eliminate enforcement penalties if they are violated.

What is particularly remarkable is that after keeping this secret for so long, now that we have alleged the Panel went beyond its scope, in response the Panel now boldly concedes it and that this decision to ignore the mandate established by the Board was made **unilaterally** by them. They did not ask you, the Members of the Board who issued the CDO, to amend it to create a different mandate for the Panel. They didn't even inform you they had decided to ignore it. The community had to do that, at the Workshop on the White Paper that had gone so far afield from the scope established in the CDO. The Panel simply changed the mandate you had established, on their own, without so much as a request to do so or even any meaningful notification.

Determining that they didn't like their mandate should have been the end of the matter. The proposed Panel members should simply have declined to serve on the Panel because they disagreed with its mandate. End of story. Instead, they served; ignored the Board's mandate; and did instead what the polluter asked them to do—attack the permit issued by the Board and propose in various ways taking away the Board's authority to enforce it.

[2] It had originally called itself the "Independent Expert Panel," but after the public questioned its independence in light of having been assembled by the polluter, Boeing, and paid by Boeing, it has now changed its name to CDO Expert Panel. But as we see, it now concedes it ignored the CDO direction.

B. Panel's Failure to Be Candid With Board and Public About What It was Proposing

Part of the confusion at the 5 June Workshop before the Board was due to the fact that virtually none of what the Panel was proposing in its White Paper was discussed or disclosed by the Panel in its presentation to the Board. The PowerPoint presented was as though the Panel was indeed following the mandate set by the Board in the CDO. It was filled with photos and diagrams of the ENTS they were designed for Outfalls 008 and 009. Only one of the 46 slides even touched, in passing, upon the White Paper's recommendation about eliminating enforcement of numeric limits for annual storms and then the speaker instead said that Boeing "would have to meet the limit," which is of course is the opposite of the proposal that they become non-enforceable benchmarks. The vast majority of the White Paper's recommendations to eliminate enforceable limits were not even mentioned by the Panel, even though the Workshop was supposedly about the White Paper.

It is understandable that this could have produced some consternation among some Board members. Thinking that the Panel was indeed obeying the CDO mandate, the Panel presentation seemed to fit—it seemed to be about ENTS for Outfalls 008 and 009 to meet the permit limits. But that is only because the Panel hid any discussion of the matter the Workshop was noticed for – the Panel's White Paper. When the community (and legislative staff) commenced to comment on the noticed subject, it may have seemed as though they were responding to things not said by the Panel in its presentation. But that is precisely the problem: the Panel failed to discuss the subject of the Workshop, its White Paper and its recommendations for eliminating enforceable numeric limits. The community and legislative offices did so.

The Panel now concedes it is indeed proposing the very changes and weakening of the Boeing NPDES permit we had alleged. In its letter, the Panel, rather than deny it is proposing such steps, argues anew for eliminating enforcement action for violations during annual storms of 2.5 inches in 24 hours; for an "allowable frequency of exceedances" of the permit limits for all other storms; for not enforcing violations of grab samples (wanting to average them instead with lower values in a composite sample); etc.

C. Panel Now Claims On the One Hand That It is Not Proposing Eliminating Numeric Limits, and Then Proceeds to Do Precisely That.

If the June 10 letter were intended to repair the Panel's damaged credibility, it had the opposite effect. Rather than be candid, the letter makes the astonishing assertion, completely contradicted by the rest of the letter and its own White Paper: "The Expert Panel has not, is not, and will not recommending abandoning numeric limits." (emphasis in original) As seen above, the panel in its White Paper does precisely that.

The very first sentence of the first finding of the White Paper says the proposed design storm "would be used to assess *when numeric limits*, as specified in the NPDES Permit, *will apply*." (emphasis added) It goes on to say that over 2.5 inch rainfall in 24 hours, they propose the numeric limits not apply but instead "become non-enforceable 'benchmarks.'"

Finding 3 recommends that numeric limits not apply to most grab samples; in particular the first flush grab sample "not be subject to compliance assessment."

Findings 4 and 5 actually propose language for amending the permit to say that the effluent limit values in the Permit should "function as benchmarks...*rather than enforceable numeric limits*(where exceedances would be subject to a notice of violation and enforcement penalty.)" (emphasis added.

In Finding 7, they argue that—for all storms, above and below the design storm, the numeric effluent limits in the permit for dioxin, mercury, lead, zinc, cadmium, iron and copper be converted to non-enforceable benchmarks.

In Finding 8, they concede they had argued that "current enforceable numeric effluent limits" not remain in place for storms equal to or smaller than the design storm. But if these limits were to remain, they argue alternatively for "an allowable exceedance frequency" or comparison to other watersheds rather than require compliance with the numeric effluent limits.

And in Findings 9 and 10, they argue for the numeric limits to be converted to non-enforceable benchmarks for fires and storms larger than the design storm.

Moreover, the Panel concedes in the 10 June letter, this is what it is proposing. In paragraph 2 on the same page of the very same 10 June letter where they claim they are not proposing altering or abandoning any numeric limit, the Panel makes clear that it proposes that enforceable numeric limits be abandoned and replaced with non-enforceable benchmarks--"we recommend they apply as benchmarks." It makes the extraordinary statement: "There is almost no criterion if there are no changes in how the permit is enforced (e.g., benchmarks) when the design storm is exceeded."

And in paragraph 4, the letter, rather than disputing that the Panel proposed "allowable permit limit exceedances," goes on to defend at length its proposal. Numeric permit limits have no meaning if one is allowed to exceed them!

In paragraph 8, rather than disputing that it proposed ending enforcement of grab sample violations and replacing them with averaged—composite—samples, it goes on to defend again that proposal. It further discloses that it intends to produce two more white papers—both of which are far outside its mandate – to argue for weakening Boeing's permit regarding both the current grab sample requirement and weakening the dioxin requirements. This is really too much.

The Panel's denial of its connection to Boeing while at the same time praising it and breaching the CDO's mandate so as to help Boeing push for the elimination of Board (and potential Grand Jury) enforcement action seriously undermines any claims of independence.

The last item in the June 10 letter clearly demonstrates this lack of neutrality. The fundamental cause of the repeated violations of its NPDES permit is the massive contamination

at the SSFL site and the failure of Boeing to take timely steps to effectively clean it up. That is why continued enforcement power by the Board when violations recur is essential; it is the only prod one has to get Boeing to clean up its toxic mess and stop dangerous levels of radioactive and chemical contaminants from leaving the site in surface water runoff. BMP straw bales and ENTS small ponds cannot on their own solve the problem –as the Panel concedes.

Faced with that situation, the Panel should have gone back to the Board and asked for a revision to the CDO mandate. In any case, if it chose to go beyond the mandate, it should have chosen to do so in a scientifically defensible way that also aimed to enhance rather than reduce public protections. *It should have focused on what could be done to prod Boeing to actually clean up the source contamination.* This would have included *enhanced* enforcement actions against Boeing for violations.

Instead, it did Boeing's bidding – it proposed allowing Boeing to keep violating the current permit limits, but eliminate them as enforceable numeric limits—i.e., stop enforcement actions rather than enhance them. This was a great disservice.

We urge you to reject all proposals by Boeing and its panel to relax your enforcement powers and to allow violations of Boeing's currently enforceable numeric pollution discharge limits.

Sincerely,

Daniel Hirsch
Committee to Bridge the Gap

Christina Walsh
CleanupRocketdyne.org

Sheldon C. Plotkin, Ph.D, P.E.
S. California Federation of Scientists

Marie Mason
Rocketdyne Cleanup Coalition

William Bowling
Aerospace Cancer Museum of Education

Elizabeth Crawford
RocketdyneWatch.org

cc: Senator Sheila Kuehl
Assemblymember Julia Brownley
Supervisor Linda Parks

Expert Panel Scope as Established in the November 2007 Cease and Desist Order

from p. 8:

43. During discussions with the Permittee on February 23, 2007, there was a request to treat the discharges from Outfalls 008 and 009 differently from the other storm water only outfalls. Outfalls 008 and 009 are located in jurisdictional drainages where engineered BMP installation may be impractical. Historical data confirms that treatment is required to meet the effluent limitations included in the NPDES permit. The Permittee has proposed a conceptual natural BMP design study as the mechanism to meet the final effluent limitations proposed for discharges from these locations. The natural BMPs will be strategically located to control erosion and sediment from specific source areas, and RCRA RFI Sites throughout the subwatershed. The natural BMPs will include erosion and sediment controls (such as surface roughening and use of soil binders) and structural treatment devices (such as treatment wetlands and bioretention areas). An independent team of experts will be convened to evaluate site conditions including contaminants in the vicinity, evaluate the natural BMPs, their documented effectiveness and their performance under site conditions, to select the appropriate BMPs, the design and implementation. The goal of the natural BMPs implemented is to meet the final effluent limitations included in Order R4-2007-0055.

p. 10:

3. Submit for approval to the Executive Officer by December 15, 2007, a workplan to evaluate, select and implement natural BMPs for Outfalls 008 and 009. The workplan shall contain the following components:

   a. A time schedule that begins on November 1, 2007, and ends on June 10, 2009.

   b. Assembly of a panel to review site conditions, modeled flow, contaminants of concern, and evaluate the BMPs capable of providing the required treatment to meet the final effluent limits.

   c. A description of the BMPs to be utilized. Design the BMPs and develop a plan for BMP implementation. Purchase required materials.

   d. A schedule for the installation of the BMPs at Outfalls 008 and 009.

   e. A schedule to evaluate the BMPs' performance.

4. Discharges from Outfalls 008 and 009 on June 10, 2009, and thereafter, shall comply with the final effluent limits that appear in I.B.4. of Order R4-2007-0055.

(emphasis added)