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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE BOEING COMPANY,

Plaintiff,

v.

MAZIAR MOVASSAGHI, in his official capacity as the Acting Director of the California Department of Toxic Substances Control,

Defendant.

Case No. 09-CV-03165-GEB-KJN

DEFENDANT'S OPPOSITION TO THE BOEING COMPANY'S MOTION FOR SUMMARY JUDGMENT

Hearing Date: March 22, 2010
Time: 9:00 a.m.
Court: Hon. Garland E. Burrell, Jr

Action Filed: 11/13/2009

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INTRODUCTION

The Boeing Company's lawsuit to overturn California Health and Safety Code Section 25359.20 (SB 990) is a challenge to the State of California's efforts to protect future generations from the mistakes of the past at the Santa Susana Field Laboratory (SSFL) in Ventura County. *See* SB 990, Appendix ("App."), Tab 1. The Boeing Company (Boeing) seeks to have this Court invalidate a law, the primary focus of which is on appropriate land use. Regulation of land use is a traditional area reserved to the states and their subdivisions, and not for a private party, like Boeing, under the cover of a federal agency, to dictate. SB 990 was passed by the California Legislature in 2007, and requires a thorough investigation and cleanup of chemical and radiologic materials that have been left in the remaining buildings, soil and groundwater at the SSFL as a result of decades of nuclear research and rocket development by Boeing and its predecessors.[1]

As much as Boeing would like to convince the Court otherwise, this case is not about the United States Department of Energy (DOE), or about that agency's obligations under SB 990. In challenging SB 990, Boeing, a private company and landowner conducting radiological work, inappropriately relies on the rights and defenses of the DOE, a federal agency. While a small portion of the SSFL is owned by the federal government, most of the site is the property of Boeing. *Natural Resources Defense Council v. Department of Energy* (*NRDC*), 2007 WL 2349288, *2 (N.D.Cal. 2007), App., Tab 2.[2] Boeing also alleges that SB 990 treats the SSFL differently than federal facilities, ignoring the fact that this is the only facility in the country to have a partial meltdown of a nuclear reactor (*NRDC* 2007 WL 2349288, at *3, App., Tab 2), and the more important fact that land not owned or operated by the federal government is not a "federal facility."

[1] Throughout this Memorandum, references to "Boeing" should be understood to include its predecessors as the SSFL – *e.g.*, North American Aviation and Rockwell International.

[2] *See* Background, below, for a discussion of this significant decision.

Contrary to Boeing's assertions, it has long been recognized that there are certain powers to regulate nuclear health and safety issues that have been ceded to the states – *i.e.*, land use. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983). Moreover, beyond the traditional land use functions reserved to the States, the 1959 amendments to the Atomic Energy Act (AEA), 42 U.S.C. §§ 2021, *et seq*., established a process by which States are delegated some of the responsibilities of the Nuclear Regulatory Commission in regulating the radiological activities of private companies, such as Boeing, for health and safety purposes. 42 U.S.C. § 2021(b). States that assume these responsibilities, in agreement with the NRC, are known as "Agreement States." Pursuant to the AEA and its delegation from the NRC, California has been such an Agreement State since 1962 and as such, has licensed radiological activity at the SSFL since the 1960's. "Notice of Agreement with the State of California, 27 Fed.Reg. 3864 (Apr. 21, 1962), App., Tab 3.

Under the State's regulatory authority, Boeing was required to obtain licenses and approvals from the State to conduct certain radiological activities, to use certain radionuclides at the SSFL, and to decommission buildings from the facility.[3] Boeing may argue that there are undisputed facts entitling it to summary judgment, but there is one undisputed fact that tips the scales completely for the State – California can regulate Boeing's radiological activities because California is an "Agreement State," a fact which Boeing and its declarant, Philip Rutherford, have readily admitted. While the activities of DOE may have been exempt from state scrutiny and licensing, the activities of Boeing at SSFL have not been.

The cases cited by Boeing in support of preemption -- *United States v. Manning*, 527 F.3d 828 (9th Cir. 2008), and *United States v. Kentucky*, 252 F.3d 816 (6th Cir. 2001) -- are

[3] *See* Appendix, Tabs 4 (State Radiological Materials License) and Tabs 17-23 (an example of the breadth and scope of State regulation of the SSFL through the authority of the Agreement State program authorized by the AEA).

distinguishable from the instant matter in that those two cases involved state attempts to regulate DOE on DOE owned-property, and as to safety of the radiological component of mixed waste under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, *et seq*. Here the state is seeking to protect the safety of its citizens from radiological materials remaining on a site owned by a private company whose radiological activities have been subject to state regulation for over forty years under the delegated authority authorized by the AEA, and pursuant to standards the United States Environmental Protection Agency (USEPA) routinely uses to clean up hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601, *et seq*.

Finally, Boeing also asserts that the State has discriminated against Boeing as a federal contractor by applying rules that "uniquely burden activity of the federal government and its contractors." Boeing's Memo, at 2. In making this argument, Boeing does not mention that SB 990 merely requires it to conduct the kind of cleanup of radiological materials that are required of an owner of a facility from which hazardous substances (which include radioactive materials) have been released into the environment. The obligation of a landowner of contaminated property, as the SSFL surely is, has been recognized as a fundamental principle of California's Hazardous Substances Account Act (the "State Superfund Law"), Cal. Health & Safety Code §§ 25300, *et seq.*[4] As the principal landowner of SSFL, Boeing has liability as an "owner" under the State Superfund Law to address the release or threat of release of hazardous substances from the facility. SB 990 merely applies tried and true concepts that have been routinely used in State Superfund cleanups, as well as those conducted by the United States Environmental Protection Agency under CERCLA.

[4] The State Superfund Law (Chapter 6.8 of Division 20 of the California Health and Safety Code) is referred to in the opening paragraph of SB 990 as California's statutory authority for the cleanup of the SSFL.

BACKGROUND

Senate Bill 990 was passed by the California Legislature in reaction to a long history of unresolved environmental problems at the SSFL. At its peak, the SSFL was the site of ten nuclear reactors, seven criticality test facilities, the "Hot Laboratory," the "Nuclear Materials Development Facility," and various test and nuclear material storage areas. SB 990, App., Tab 1, Sec. 2(b). The SSFL has experienced accidents and bad waste management practices that have led to contamination of the soil at the SSFL by hazardous and radioactive materials. *NRDC*, 2007 WL 2349288, at *3, App., Tab 2. In July of 1959, the same year the AEA was amended, a serious accident occurred in a sodium reactor at the SSFL, where one-third of the fuel being used in the reactor experienced a "partial meltdown." SB 990, App., Tab 1, Sec. 2(e).[5] Radioactive gases were vented to the atmosphere over a period of weeks. SB 990, App., Tab 1, Sec. 2(e). The Hot Laboratory suffered a number of fires involving radioactive materials and at least four of the ten nuclear reactors suffered accidents. SB 990, App., Tab 1, Sec. 2(c). In addition, one of the methods of disposing of highly toxic substances consisted of workers shooting barrels of the material with a shotgun so that they would explode and burn, releasing some of their contents in the form of gases and particulates into the air; in the mid-1990s, a similar episode led to the death of two workers at the SSFL. SB 990, App., Tab 1, Sec. 2(f).

In 1996, after the discovery of widespread chemical and radiologic contamination at the SSFL, the decision was made to close the Energy Technology Engineering Center (ETEC), a complex of about 200 buildings in the "Area IV" portion of SSFL, where much of the activity by and on behalf of DOE was conducted. SB 990, App. Exh. 1, Sec. 2(h); *NRDC*, 2007 WL 2349288, at *3, App., Tab 2. Prior to the 1996 decision to close the ETEC, Boeing conducted a

[5] This partial meltdown of one of the nuclear reactors was documented in a March 2003, DOE Environmental Assessment for Cleanup and Closure of the Energy Technology Engineering Center (Final). App., Tab 5, at I-21.

survey of the contamination in Area IV; but because the process was categorically excluded from the application of the National Environmental Policy Act (NEPA), work to decontaminate the facility was performed without an environmental impact statement. *Id*. Boeing's survey was also seriously flawed *substantively*, however -- a fact the USEPA declared in writing ("[W]e do not believe that Rocketdyne's survey was sufficient to find potentially unknown areas of contamination."). *Id.*, at *4.

Then, an environmental assessment that had been initiated in 2000 was heavily criticized by the USEPA, the State, local government, and community groups, in part because it was based on Boeing's survey. *Id.*, at *7-10. On March 31, 2003, DOE issued a Finding of No Significant [Environmental] Impact, which was challenged in the United States District Court for the Northern District of California, Case No. C-04-04448. On May 2, 2007, the Honorable Samuel Conti issued a permanent injunction, enjoining the DOE from transferring ownership or possession, or otherwise relinquishing control over Area IV, until it has completed an Environmental Impact Statement (EIS) under NEPA. *Id.*, at *22.

In 2007, in response to the long history of inadequate characterization and remediation at SSFL, the California Legislature passed Senate Bill 990, and the California Governor signed the measure into law as California Health and Safety Code Section 25359.20.

ARGUMENT

I. CALIFORNIA'S AUTHORITY AS AN AGREEMENT STATE IS BROAD AND ENCOMPASSING, AND HAS BEEN EXPRESSLY RECOGNIZED BY CONGRESS.

A. The Authority of Agreement States Under the Atomic Energy Act.

The Atomic Energy Act is the primary federal law governing the handling of nuclear materials. In 1959, the AEA was amended, *inter alia*, to provide for partnership and joint responsibility between the States and the Atomic Energy Commission (now NRC) with respect to control of radiation hazards associated with specified nuclear materials 42 U.S.C. §§ 2021(a)(2)

and 2021(a)(4). In 1959, Public Law 86-373 amended the AEA by adding Section 274 to the Act, titled "Cooperation with States." 42. U.S.C. § 2021. As originally enacted, subdivision (b) of Section 274 provided the authority for the former Atomic Energy Commission "to enter into agreements with the Governor of any State providing for the discontinuance of the regulatory authority of the [Atomic Energy] Commission under Chapters 6, 7, and 8 and section 161 of the [Atomic Energy] Act," with respect to byproduct materials, source materials, and special nuclear materials in quantities not sufficient to form a critical mass. With the creation of the Nuclear Regulatory Commission (NRC), that agency acquired the authority to enter into these Section 274 agreements with States. Pursuant to the AEA, California and the former AEC entered into such an agreement in 1962. App., Tab 3. This Agreement continued in force upon the creation of the NRC – and California has regulated Boeing's use of radionuclides at SSFL since the 1960s pursuant to a State Radiologic Materials License, App., Tab 4.

This provision of the Atomic Energy Act with respect to the authority of Agreement States has remained essentially unchanged. 42 U.S.C. § 2021. For the purpose of the instant case, a provision of the original Section 274 which has remained in effect exactly as enacted in 1959 states that "[d]uring the duration of such an agreement [with the Governor of a State] it is recognized that the State shall have the authority to regulate the materials covered by the agreement *for the protection of the public health and safety from radiation hazards*. 42 U.S.C. § 2021(b) [Emphasis supplied]. As Boeing also acknowledges at page 16 of its Memorandum, the reorganization of the Atomic Energy Commission into the ERDA and the NRC in 1974, and then DOE's assumption of the ERDA's responsibilities in 1978, had no effect whatsoever on the scope of authority granted to Agreement States that had been negotiated under the aegis of the now-abolished Atomic Energy Commission.

B. California Has Clear and Express Authority to Regulate the Santa Susana Field Laboratory Through Its Role as an Agreement State.

Boeing asks that this Court accept the proposition that its challenge to the State of California's authority over the Santa Susana Field Laboratory implicates the Department of Energy's activities, the regulatory authority over which was not ceded to the State under the 1962 Agreement. Boeing would also like to create the impression that the State of California's authority as an Agreement State is *de minimis*. Neither of these assertions is correct. California's authority as an Agreement State is broad, and it encompasses a large portion of the work that had been carried on at the SSFL. This will be shown by an examination of the 1962 Agreement itself, as well as countless documents written by Boeing's predecessors – documents that had been often drafted or approved by Philip D. Rutherford, Boeing's declarant. Boeing has acknowledged that a large portion of the federal government's authority under the Atomic Energy Act has been transferred to the State of California, and it is this authority that provides the legal basis for the enactment of Senate Bill 990.

Contrary to the confusion Boeing would like to create, whether the State can enforce SB 990's provisions *against DOE*, or against Boeing for cleanup of contamination resulting *from its contractual work for DOE*, is not an issue before the Court. It is Boeing's liability as a landowner of most of Area IV, and indeed of most of the entire SSFL site, that provides the basis for the State's exercise of its jurisdiction. Boeing seeks to minimize the impact of its non-DOE radiological works at the SSFL, and to "will it out of existence." Boeing contends that the "vast majority" of its nuclear research work was under contract with DOE, and that "most" of the other radiological work at the SSFL was under an NRC license. Phrases such as "vast majority," and words like "most," imply that *some radiological work* was indeed done by Boeing on property not owned by DOE. Boeing has not contended, nor can it prove, that *all* of its radiological work at the SSFL was done by or on behalf of the DOE.

(1) The Provisions of the 1962 Agreement Between the AEC and California.

The 1962 Agreement (App., Tab 3) provides that –

> Subject to the exceptions provided in Articles II, III, and IV [of the Agreement], the Commission [then-Atomic Energy Commission] shall discontinue . . . the regulatory authority of the Commission in the State under Chapters 6, 7, and 8, and section 161 of the Act with respect to the following materials:
>
> A. Byproduct materials;
> B. Source materials; and
> C. Special nuclear materials in quantities not sufficient to form a critical mass.

"Byproduct materials" includes – as of 1962 and today – "any radioactive material (except special nuclear material) made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material . . . ."

The exceptions in Article II and III of the Agreement are not applicable here.

Article IV, however, is important because of the scope of regulation that is *not* subject to the exception in the 1962 Agreement, and is thereby ceded to California. Along with the delegation of regulatory authority with respect to byproduct materials, source materials, and below-critical mass special nuclear materials, the 1962 Agreement relinquishes the AEC's (now the NRC's) regulatory authority in section 161 of the Atomic Energy. Section 161 is a lengthy list of functions of the NRC that is now within the regulatory domain of the State of California --

> [to] establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable . . . to protect health or to minimize danger to life or property; . . . .[6]

Therefore, because California is an Agreement State, its enactment of rules, regulations or orders to "protect health or to minimize danger to life or property" resulting from byproduct, source or special nuclear material contamination represents an area of enforcement not preempted by the

[6] Section 161b carves out an exception for the regulation of "common defense and security," which is retained by the Commission and not affected by SB 990.

Atomic Energy Act. Senate Bill 990 falls squarely within the delegated function.

(2) Boeing Has Acknowledged that California Has Had an Extensive Role in Overseeing the Decommissioning and Release of Boeing's Buildings and Facilities as the SSFL.

Boeing has acknowledged in numerous documents that the State of California exercised a significant role in the approval of the decommissioning and release of certain buildings in Area IV of the SSFL, including structures that are within the former DOE-controlled ETEC facility. A review of Mr. Rutherford's declaration, however, would give an entirely different – and incomplete – statement of the State's role in the radiological cleanup of the ETEC and the remainder of Area IV. In paragraph 24 of his declaration, Mr. Rutherford briefly states that "a small percentage of the commercial [*i.e.*, Boeing's non-DOE] activity was subject to a state license for the handling of what are referred to as 'miscellaneous radioisotope sources.'" Mr. Rutherford does not mention anything about the State's role in decommissioning radiologically-contaminated buildings within and outside of the ETEC and approving the sites for unrestricted use. Yet, a review of Boeing documents, authored or reviewed by Mr. Rutherford, paints a much different picture of the extent of the State's authority at the SSFL.

In September 2007, Mr. Rutherford authored a document for Boeing entitled "Radiological Release Process; Process for Release of Land and Facilities for (Radiologically) Unrestricted Use." App., Tab 9. This document begins with the statement that "[f]acilities that have been utilized for radiological operations and/or research, are required to be remediated prior to being released for unrestricted use." App., Tab 9, at 2. Mr. Rutherford further explains, at page 6, that, for Boeing-owned buildings, the State-issued Radioactive Materials License requires that the State approve remediation of such facilities before they can be released for unrestricted use. *See* App., Tab 9, at 6.

In May 2005, Boeing stated in writing that the State of California Department of Health

Services (DHS-RHB) as being "responsible for executing the NRC's delegated authority. The DHS-RHB licensed AI [Atomics International] and Boeing for the commercial use of by-product radiological material at specific facilities within Area IV." In the same document, Boeing stated that allowable residual radioactive contamination standards are jointly approved by DOE and the State. "Historical Site Assessment of Area IV" (HSA), App., Tab 10, at 3-2, 3-3. The State DHS was listed in the HSA as being involved in whether to release at least 17 areas of the SSFL that were "impacted" by excess radiation levels. HAS, App., Tab 10, at 4-1, 4-16 through 4-22, and ES-1.

In a document entitled "Nuclear Operations at Rockwell's Santa Susana Field Laboratory – A Factual Perspective" ("Nuclear Operations Report"), dated December 20, 1989, which was reviewed by numerous Rockwell personnel, including Mr. Rutherford, Area IV of the SSFL was divided between "Gov't" owned property, and "ESG" owned property ("ESG" meaning Rockwell's privately-owned Energy Systems Group. App., Tab 11, at 19 and 20. There are several facilities *outside* the DOE-owned ETEC facility that utilized radiological materials throughout the long history of Area IV.[7]

The "Nuclear Operations Report" (App., Tab. 11, at 37) also contains a timeline showing State regulation beginning in 1962 and continuing to the present. At page 39 of the document, California's authority to regulate portions of the SSFL (including Area IV) is explained:

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[7] These Rockwell-owned facilities included: the Fast Critical Experiment Laboratory (p. 63); the Organic Moderated Reactor and the Sodium Graphite Reactor (pp. 62-63); the Sodium Disposal Facility, also known as the "sodium burn pit" (pp. 32-33, 63, 67); the SNAP Critical Facility, which housed one of the ten nuclear reactors (pp. 22, 63); the Nuclear Materials Development Facility, a plutonium manufacturing facility (p.19); the Hot Laboratory, where reactor fuel was handled, examined and cut up (pp. 27-28, 65); and the Conservation Yard, an outdoor disposal area contaminated with radioactive materials (pp. 32-33). All of these facilities were located outside of the DOE ETEC facility and were owned by Rockwell. *See* "Nuclear Operations Report," App., Tab 11, at 18-19. Rockwell's ownership of the specific buildings and facilities at the SSFL is acknowledged in Rockwell International's "CERCLA Program Phase I Installation Assessment for DOE Facilities at SSFL, dated April 25, 1986, App., Tab 12, Figure 3, at 9 (showing that 75 of the 160 buildings or structures in Area IV were Rockwell-owned).

> California became an "Agreement State" in 1962. Since then, the California Department of Health Services has had the responsibility for regulating the use and disposal of byproduct material (low-level waste and radioisotopes) from the SSFL [see Timeline, p. 37]. *Rockwell has had a California license for its activities at the SSFL since California became an Agreement State. In 1969, the Radiologic Health Section of the California Department of Health Services issued a broad radioactive materials license to Rocketdyne covering activities at the SSFL.*

App., Tab 11, at 39 [emphasis added]. At page 42, the Nuclear Operations Report explains that:

> *[O]nly prime contractor operations on government-owned facilities were exempt from licensing. . . . Rockwell has operated its corporate-owned nuclear facilities as licensed facilities since then.* A separate license was obtained for the L-85 reactor in 1972, after ownership was transferred from the AEC to Rockwell.

App., Tab 11, at 42 [emphasis added].

The long and extensive involvement of the State of California in licensing and regulating numerous buildings, structures, and nuclear materials used at the SSFL for radiological purposes is also documented in a sampling of the correspondence between Boeing's predecessors and the State. Beginning in 1969, as noted above, the State issued a broad Radioactive Materials License "RML" to Atomics International (a Division of North American Rockwell), which is astounding for the quantity of radioactive materials regulated by the State at the SSFL -- both in size and potential lethality. A few examples from the RML (Tab 4) belie the assertion in Boeing's memorandum that the state license at the SSFL only authorized "small" or trivial quantities of radioactive materials – quantities Mr. Rutherford represented might be employed in a "smoke detector."[8] For example, the State RML covered Boeing's use of 10 million curies of "mixed fission products," 10,000 curies of tritium, 1000 pounds of thorium, 20,000 pounds of uranium, an additional 50,000 pounds of "natural or depleted" uranium, and 150,000 curies of Prometheum-147.

In the 1986 Amendment to the State RML (effective through 1993) -- App., Tab 14 -- the State regulated as much as 10,000 curies of any radionuclide with atomic numbers 3 to 83. Tab

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[8] The amount of radiation in the average smoke detector is one-millionth of a curie, or one microcurie. *http://epa.gov/rpdweb00/sources/smoke_alarm.html*, attached at App., Tab 13.

14, at 2, Item M. The RML continued to cover 10 million curies of "mixed fission products," as did the 1969 license, and authorized this amount through 1993. Items P and Q on page 2 of Tab 14, covered 20,000 pounds and 60,000 pounds of source materials, respectively. The 1986-1993 State RML regulated Cesium-137 in an amount of "15 sources, not to exceed 70,000 curies each, Total not to exceed one million Curies." App., Tab 14, Item S. The largest reactor at the SSFL, the Sodium Reactor Experiment (SRE), and the reactor that experienced a partial meltdown in 1959, had an inventory of 8700 curies of Cesium-137 in its fuel.[9] Consequently, the State RML issued to Boeing's predecessors covered more than 100 times the Cesium-137 found in the SRE reactor that had experienced a partial meltdown.[10]

Boeing is expected to respond that much of the radioactive materials used at the SSFL were in "sealed" form. A cursory review of the 1969 and 1986 licenses reveals just the opposite, however. Much of the radioactive materials were permitted *in any form* -- *i.e.*, not required to be sealed. Moreover, the fact that certain of the radioactive materials were "sealed" is irrelevant, as the fuel in the SRE reactor, which experienced the partial meltdown in 1959, was solid fuel in sealed form. The State licenses also show that a significant portion of the work at the SSFL under State regulation involved the fabrication of sealed containers from *unsealed* radioactive materials. *See* paragraph above, concerning Prometheum-147, which was used to *fabricate* sealed sources. Tab 4, pp. 2-3.

Additional documents from the 1990s demonstrate that the State continued to play a major role in the decommissioning and release of numerous buildings at the SSFL. *See, e.g.* App., Tabs

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[9] Atomics International, "Distribution of Fission Product Contamination in the SRE." Available at *http://etec.energy.gov/library/SRE_Historical_Library/Doc._No._3_Distribution_of_Fission_Product_ Contamination_in_the_SRE_March_1_1962.pdf*, at 11. App., Tab 15.

[10] The 1986-1993 State RML indicates that this amount of Cesium-137 would be in the form of "WESF capsules." Tab 14, at p. 2. Among the documents attached to a March 14, 1985 RML amendment is a study, prepared by Sandia National Laboratories for the Department of Energy, and titled "WESF ^{137}Cs Gamma Ray Sources." App., Tab 16. At page 18, this study includes a chart showing the potential lethal nature of a single WESF capsule.

17-23. Consequently, the fact that Rockwell (or Boeing's earlier predecessors) may have been performing prime contractor work for the Atomic Energy Commission (and later the Department of Energy) is of no significance on the question of whether licensure and regulation by the State of California was required. As to all facilities in Area IV owned by Rockwell, including those activities involving radiological materials not otherwise exempt (only special nuclear materials), the State of California has had a major role in approving the decommissioning of buildings, the cleanup of affected soil, and the determination whether the area could be released for unrestricted use. In short, Boeing's claim that the State's role in regulating the cleanup of Area IV, not to mention the entire SSFL site, is *de minimis* is contradicted by the long history of State involvement in ensuring that its citizens are protected from the hazards of radioactivity.

II. SENATE BILL 990 IS A PROPER EXERCISE OF THE STATE'S LAND USE AUTHORITY AND DOES NOT IMPINGE ON AN AREA OF REGULATION TOTALLY OCCUPIED BY THE FEDERAL GOVERNMENT.

A. The State of California's Authority Over Boeing Is Not Preempted by the AEA.

The Supreme Court has "never assumed lightly that Congress has derogated state regulation, but instead [has] addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conference of Blue Cross and Blue Shield Plans, et al. v. Travelers Insurance Company, et al.*, 514 U.S. 645, 654 (1995). This principle has been firmly implanted in federal jurisprudence especially in cases where a plaintiff alleges that a federal law "bars state action in fields of traditional state regulation." *Id.*, at 655. Any analysis of whether Senate Bill 990, enacted into law as California Health and Safety Code Section 25359.20, has been preempted by the Atomic Energy Act must begin with the basic principle that --

> [t]hroughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are "primarily, and historically, . . . matter[s] of local concern," the "States traditionally have had great

latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."

Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996), quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985), and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). Therefore, the fundamental principle that historic police powers of the States should be accorded respect by Congress and the Courts is engrained in federal jurisprudence, and should not be disregarded if there is any basis to uphold a particular state statute.

Boeing has cited a line of cases beginning with *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983) to support its claim that Senate Bill 990 regulates in a federal occupied field. Reliance upon *Pacific Gas* and its progeny to find SB 990 unconstitutional cannot be reconciled, however, with the principle that an exercise of the states' historic police powers must not be overturned unless there is no other alternative that would operate to uphold a state's legislative power to protect its citizens. Defendant does not in any way seek to challenge the holding in *Pacific Gas* -- a decision that, like the case at bar, concerns a facial challenge to the constitutionality of a California statute. Rather, it will be shown that *Pacific Gas* supports the California's position that SB 990 legislates in precisely an area reserved to the States.

Pacific Gas concerned two portions of the 1976 amendments to the Warren-Alquist State Energy Resources Conservation and Development Act, Cal. Pub. Res. Code §§ 25000-25986. The amendments at issue required a case-by-case determination that adequate capacity will exist for storage of a proposed nuclear plant's spent fuel rods prior to the construction of the plant. The second portion of the amendments challenged by the plaintiff imposed a moratorium on the certification of new nuclear plants until "'there exists a demonstrated technology or means for the disposal of high-level nuclear waste.'" *Pacific Gas*, 461 U.S. at 198, quoting Cal. Pub. Res. Code

§ 25524.2. Although both California laws were upheld, the Supreme Court laid down the rule that the federal government has occupied the entire field of nuclear safety concerns. *Pacific Gas*, 461 U.S. at 212. This principle, which Boeing has made the centerpiece of its opposition, is not absolute, however. The Supreme Court added the phrase "except the limited powers expressly ceded to the states." *Id.* On the basis of that proviso, the Supreme Court upheld both California laws because their purpose was "economic" rather than "nuclear safety concerns. *Pacific Gas*, 461 U.S. at 222. It will be abundantly clear that SB 990 constitutes a legally-permissible exercise of powers expressly ceded and recognized by the Atomic Energy Act and the Supreme Court.

It has already been shown above that the Atomic Energy Act itself has "expressly ceded" powers to the State "to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards." 42 U.S.C. § 2021(b). Since 1962, California's status as an Agreement State has constituted an "express" delegation to allow the State to regulate source, byproduct, and certain special nuclear materials. California has exercised this function over the last 40 years, and Boeing has acknowledged California's authority to do so. Moreover, as the documents referred to in Argument I above demonstrate that the radioactive materials regulated by California as an Agreement State were hardly *de minimis*.

B. The *Pacific Gas* Decision Has Carved Out an Exception for California's Exercise of Its Land Use Authority Through the Enactment of SB 990.

Initially, it bears repeating, and emphasizing, that this case is about Boeing's responsibilities as an owner of most of the SSFL property, and the appropriate land use assumptions that should apply to a radiological and chemical risk assessment of that property. It is not about DOE's activities at the SSFL, nor about certain DOE-contracted activities performed by Boeing on DOE-leased property. Boeing would prefer that the Court see only the DOE-aspect of its activities at the SSFL. Yet, there is another aspect to Boeing's radiological activities at the SSFL: the private commercial work undertaken by Boeing's predecessors, such as the promotion

and sale of nuclear reactors to private parties -- commercial activities that were not done under the cover of the AEC. *See* App., Tab 24 (an advertisement by Atomics International from the 1950s). This other story involves the numerous activities undertaken by Boeing and its predecessors that were under State licensure and regulation, and continue to be so. And this untold story involves Boeing's status as a landowner on 2308 acres of the 2850-acre Santa Susana facility – more than 80% of the site.[11] Boeing Memo, at 11.

It is because of Boeing's status as a landowner of more than 80% of the SSFL that the holding in *Pacific Gas* does not apply to this case. One of the areas of State power expressly recognized by the Supreme Court is its traditional authority to regulate land use, a principle that is notably, but for obvious reasons, ignored by Boeing in its memorandum. After citing the portions of the legislative history of the 1965 amendments to the Atomic Energy Act, the Supreme Court said --

> This account indicates that from the passage of the Atomic Energy Act in 1954, through several revisions, and to the present day, Congress has preserved the dual regulation of nuclear-powered electricity generation; the federal government maintains complete control of the safety and 'nuclear' aspects of energy generation; *the states exercise their traditional authority* over the need for additional generating capacity, the type of generating facilities to be licensed, *land use*, ratemaking, and the like.

Pacific Gas, 461 U.S. at 211-12 [emphasis supplied].

Boeing devotes most of its memorandum to broad statements concerning DOE authority over AEA materials. When the memorandum focuses on the asserted "unconstitutional" aspect of SB 990, however, there is only a single objection advanced. And it relates to land use. *See* Boeing's Memo., at 15-18. Phrases like "drastic departure" and words like "unprecedented" are used to characterize the California Legislature's determination that the "land use assumption" for calculating the radiological and chemical risk "shall be either suburban residential or rural

[11] The 2308 acres does not include the 90 acres owned by Boeing that had been used by DOE as the ETEC facility.

residential (agricultural), whichever produces the lower permissible residual concentration for each contaminant." Cal. Health & Safety Code § 25359.20(1)(c). There is nothing in Boeing's memorandum, or in Mr. Rutherford's declaration, that supports Boeing's claim of unconstitutionality other than this legislative determination with respect to land use. And, most importantly, Boeing appears to believe that it was improper for the State Legislature to say anything about the future land use of Boeing's -- *i.e.*, privately-owned -- property.

Boeing does not claim that SB 990 imposes any stricter requirements with respect to the cleanup of radiological materials than would ordinarily apply for "rural residential (agricultural)" property. Instead, it argues that the California Legislature could not constitutionally require the cleanup of land to an "agricultural" risk assessment standard -- land that had been used, only in small part, for DOE activities. Mr. Rutherford states that, as far as he is aware, "no state official or anyone with control over the land has ever suggested that the SSFL might some day be used for farmland." Rutherford Decl., ¶ 39. Of course, with the California Legislature's enactment of SB 990, and the Governor's signature of that bill into law, the highest elected state officials have made such a determination. More importantly, however, *Boeing does not mention that virtually all the land currently bordering the SSFL is zoned "agricultural*." Declaration of Rick Brausch, at ¶ 5.

Reduced to its essence, Boeing believes that it should determine the anticipated future land use of the entire 2850 acres, not the California Legislature and its Governor. In its Statement of Undisputed Facts, Boeing declares that it has "publicly committed permanently to restrict and dedicate its property at the SSFL to public use as open space . . . a restriction [that] would prevent residential development or agricultural use upon completion of the cleanup." Boeing's Statement of Undisputed Facts, at 5. While it may have made this public commitment, it is not Boeing's place to determine the *permanent* land use of property which it may eventually sell to a private

party or public entity. The State of California, through its Department of Toxic Substances Control, is responsible for determining whether residual radioactive contamination should be allowed to remain on property, and whether land use restrictions are appropriate.

In *Pacific Gas*, the Supreme Court addressed the argument that one of the California statutes at issue in that case "frustrates the Atomic Energy Act's purpose to develop the commercial use of nuclear power," and for that reason is preempted because it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Pacific Gas*, 461 U.S. at 220 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The Court rejected this argument because "the legal reality remains that Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons." *Id*., at 222. The same rationale should be applied to the California Legislature's determination that the future land use of the predominantly Boeing-owned property should be one of two possible scenarios -- suburban residential or rural residential. Boeing does not explain how this land use determination would "frustrate the Atomic Energy Act's purpose to develop the commercial use of nuclear power." The property at issue is not being considered for a potential nuclear facility; it is not currently being used for a nuclear facility of any sort; and it has not been so used for decades. Indeed, the California statutes considered by the Supreme Court in *Pacific Gas* had a more direct impact on potential nuclear energy development, and even that consideration was not sufficient to strike down the law as unconstitutional.

C. The Other Decisions Cited by Boeing are Inapposite to this Case.

Boeing also cites certain lower court decisions, beginning with *United States v. Manning* , 527 F.3d 828 (9th Cir. 2008), in support of its argument that Senate Bill 990 impermissibly intrudes into a field of regulation occupied by the federal government. While the principle of federal supremacy under the Atomic Energy Act is upheld in these cases, the particular facts in

those decisions are manifestly different than the facts before this Court. Any analysis must begin with California's status as an Agreement State for more than 40 years, and its extensive regulation of radiological activities at the Santa Susana Field Laboratory. Secondly, in SB 990, the California Legislature has declared that any risk assessment at the SSFL must assume one of two particular land use scenarios, both of which can be justified by existing use in the area. This is Boeing's only contention with respect to SB 990's asserted unconstitutionality -- that it, an aerospace company and federal contractor, and the Department of Energy are the only entities that can legally declare the foreseeable *land use* on a parcel of property in California. Thirdly, there are no nuclear reactors, radioactive waste disposal sites, or radiological facilities of any sort existing on the SSFL property. Indeed, virtually all of the property is privately-owned, practically vacant land, and only a small part leased by the DOE. SB 990 does not affect the operations of any DOE facility or any private facility under DOE contract. This case involves California's determination of the foreseeable land use in the area. If that is a proper exercise of state power, then Boeing can show no different or more stringent requirements being applied. Moreover, if the California Legislature has determined to impose a standard or residual radioactivity in the soil at the SSFL parcel that is more protective of human health and the environment, it is entitled as an Agreement State to do so. None of the cases cited by Boeing present the same unique set of circumstances.

In *United States v. Manning*, 527 F.3d 828 (9th Cir. 2008), Initiative 297, the Cleanup Priority Act, was a direct attempt to control the licensing, operation and closure of the Hanford Nuclear Reservation, "one of the largest sites in the country for the treatment, storage and disposal of radioactive waste, currently storing over 53 million gallons of mixed radioactive and nonradioactive waste." *Id.*, at 830-31. The facility had been constructed by the United States, and utilized by the DOE for the disposal of approximately 450 billion gallons of contaminated

water and mixed liquid waste. Washington voters were attempting to regulate DOE's operations at Hanford through the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, a statutory scheme that excludes radiological materials from the definition of "solid waste." The Ninth Circuit relied on the Washington Supreme Court's opinion that the mixed wastes subject to the initiative were not regulated either under RCRA or the Washington Hazardous Waste Management Act. Moreover, the Ninth Circuit expressly found that Hanford "figure[d] prominently in the DOE's waste management plan . . . [because] it is the only federal facility that can accept off-site mixed low-level waste for disposal." *Id.*, at 839. None of these factors applies to the SSFL, which is not a federal facility critical to DOE's waste management plan. Indeed, with the exception of a small amount of acreage that had formerly been used for some DOE operations (and a 41.7-acre portion of Area IV and the 409.5 acres in Area II, both owned by NASA), the SSFL is privately-owned, by Boeing.

In *United States v. Kentucky*, 252 F.3d 816 (6th Cir. 2001), the State was attempting to control the disposal of waste at an active DOE-owned uranium enrichment facility. Like *Manning*, Kentucky was attempting to utilize its authority under RCRA, a statutory scheme in which radioactive waste is specifically excluded from regulation. The SSFL is not an operating facility, and it is not owned by the DOE. Nor has the United States Government had any ownership interest or operating responsibility for 80% of the land.

In *State of Missouri v.Westinghouse Electric, LLC*, 487 F.Supp.2d 1076 (E.D.Mo. 2007), the Nuclear Regulatory Commission was one of the parties challenging a consent decree between the Missouri and Westinghouse. The district court did discuss the question of whether Missouri could rely on its authority under CERCLA. This was rejected, but on the basis that Missouri has not entered into a CERCLA "cooperative agreement," that would be a requirement prior to conducting response actions at a site that was contaminated with radiological materials. *Id.*, at

1081. Missouri, however, was in a completely different relationship to the federal government than an Agreement State like California. In its discussion of the Atomic Energy Act and the question of preemption, the District Court explained the nature of the federal-state partnership when a State is authorized as an Agreement State. The court then pointed out that "[i]t is undisputed that Missouri has not entered into such an agreement with the NRC." *Id.*, at 1083, n.4. California's status as an Agreement State under the express terms of the AEA gives it the authority to set the land use standards for the radiological cleanup of the SSFL property, and this is precisely what SB 990 has done.

Unlike California, which has regulatory authority as an Agreement State under the AEA, the states involved in the other cases cited by Boeing in support of preemption either did not have agreement state status, or did not raise that argument. *See Brown v. Kerr-McGee Chemical Corporation*, 767 F.2d 1234 (7th Cir. 1985); *Kerr-McGee Chemical Corporation v. City of West Chicago*, 914 F.2d 820 (1990); and *Skull Valley Band of Goshute Indians v. Nielson*, 215 F.Supp.2d 1232 (D.Utah 2002). Similarly, in a recently-decided case, *Commonwealth of Pennsylvania v. Lockheed Martin Corporation*, 2010 U.S.Dist. LEXIS 8052 (M.D.Pa. 2010), the district court upheld state laws against a claim of AEA preemption because the State was not attempting to impose remediation standards on the nuclear site in question. Because the state law was upheld on this ground, there was no discussion as to whether Pennsylvania's status as an agreement state could also support its argument against preemption.

Consequently, the lower court decisions cited by Boeing do not apply here, where California's status as an Agreement State under the AEA provides ample justification for the passage of SB 990.

D. SB 990 Is Not More Stringent Than the Typical Cleanup Conducted Under State or Federal Law.

Boeing's "undisputed fact" to the effect that SB 990 "creates more stringent cleanup

procedures than those that apply elsewhere in the State under state or federal law" is manifestly incorrect. The cleanup standards required by SB 990 are based, in part, on the cumulative risk from the radiologic and chemical contamination at the SSFL. For the purposes of the risk assessment, it provides for the use of the suburban residential or rural residential scenario, whichever results in the lower permissible concentration to remain in the soil. These procedures are the same as all other cleanups, because SB 990 is placed within the State Superfund Law, Chapter 6.8 of Division 20 of the California Health and Safety Code. *See* Declaration of Rick Brausch, ¶ 5. As the typical land use assumption is based on the reasonably anticipated land use for a particular site, the State Department of Toxic Substances Control (DTSC), the state agency that implements the State Superfund Law, looks to local government designations, including general plans and zoning. *Id*. Contrary to what Boeing seeks to establish, SB 990 is not inconsistent with the local zoning because *the zoning for the majority of the SSFL site is RA-5, which is an "agricultural" designation. Id.*

Boeing's declarant, Philip Rutherford, also incorrectly suggests that SB 990 might require a cleanup below background levels of radioactive contamination. In fact, in its implementation of the SB 990 standards, DTSC has *not* required Boeing, or any other responsible party, to perform a cleanup of radiologic contamination at the SSFL to a level below background concentrations. Brausch Decl., at ¶ 6. Moreover, DTSC has not required Boeing, or any other responsible party, to bring the level of residual contamination at the SSFL site any lower than what would apply under the land use scenarios specified in SB 990. *Id.*

E. As an Agreement State, California Could Elect to Implement More Stringent Cleanup Standards Than the NRC Might Require.

Even if Boeing could make a credible argument that SB 990's cleanup requirements are more stringent than would be applied by the NRC, they would still be in compliance with the AEA because of California's Agreement State authority. States that have entered into AEA

Agreements with the AEC (now the NRC), as California has done, are permitted to have "more restrictive standards" than the NRC might itself enforce "to protect health and minimize danger to life or property" from radiological hazards. For example, an NRC regulation sets forth that the radiological criteria for considering a site (such as the SSFL) is "acceptable for unrestricted use if the residual radioactivity . . . has been reduced to levels that are as low as reasonably achievable . . . ." 10 C.F.R. § 20.1402. The NRC has put Section 20.1402 into what is referred to as Compatibility Category C. *See* http://nrc-stp.ornl.gov/regulationtoolbox/10cfr20.pdf, App., Tab 6, which is an excerpt from the NRC internet site, explaining which specific "Compatibility Category" is assigned to a specific NRC regulation. Compatibility Category C permits Agreement States "to adopt a different, or more stringent requirements, but does not allow Agreement States the option to adopt requirements that are substantively less stringent." *See* NRC Directive 5.9, Adequacy and Compatibility of Agreement State Programs, App., Tab 7, at 14.[12] Accordingly, the NRC has made it expressly clear that agreement states can utilize a more stringent standard for releasing radiologically-contaminated sites for unrestricted use than the NRC would apply.

Thus, by virtue of its Agreement State status, California has the authority under the Atomic Energy Act to impose more stringent radiological cleanup requirements. Directive 5.9 of the Nuclear Regulatory Commission (App., Tab 7, at 14) provides that Agreement States have "the latitude to adopt essential objectives that are more stringent" than what the NRC would impose. This principle has been reiterated on numerous occasions. In a Government Accounting Office (GAO) Report entitled "Nuclear Regulation: NRC's Assurances of Decommissioning Funding During Utility Restructuring Could Be Improved," dated December 2001, states -- "Plants decommissioned in compliance with NRC's requirements may, under certain conditions,

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[12] *See*, *also*, NRC document entitled "Frequently Asked Questions." App., Tab 8.

also have to meet, at higher cost, more stringent EPA or state standards." App., Tab 25, at 4. Later in the Report, the GAO explains:

> In fact, in part because of the uncertainty over the scientific basis supporting radiation protection standards and the dispute between EPA and NRC, several states have established, or are in the process of establishing, their own radiation protection standards. Because most of these proposed or existing state standards are more stringent than either EPA's or NRC's standards, implementation of the states' standards could increase decommissioning costs.

GAO Report, App., Tab 25, at 39. The GAO Report gives several examples:

> For example, in April 2000, the state of Maine imposed a standard limiting the total effective dose from residual contamination at the Maine Yankee nuclear plant site to 10 millirems, with a separate 4-millirem dose standard for groundwater.

GAO Report, App., Tab 25, at 39. The standards adopted by Maine were more stringent than NRC's or EPA's, and would result in increased decommissioning costs.

> Similarly, Massachusetts has set its own total effective dose equivalent standard of 10-millirem for decommissioned sites and New York has set a soil cleanup standard of 10-millirem for radioactive materials. New Jersey has set a 15-millirem residual radiation exposure standard, and the State of Connecticut is presently developing its own cleanup standards for commercial nuclear facilities.

Id. Because these states are Agreement States, they have been permitted to adopt stricter cleanup standards, including residual radiation exposure standards, than either the NRC or the USEPA. California is similarly an Agreement State, and should be treated no differently than the federal government has treated other Agreement States.

III. SENATE BILL 990 DOES NOT VIOLATE THE DOCTRINE OF INTERGOVERNMENTAL IMMUNITY.

A. SB 990 Does Not Directly and Discriminatorily Regulate Federal Activity at the Santa Susana Field Laboratory.

Boeing asserts that SB 990 violates the Supremacy Clause because it singles out the SSFL for discriminatory treatment as to how the cleanup of the site by Boeing should proceed. Boeing Memo, at 29. Boeing claims that it is entitled to make this argument, which is usually limited to federal government agencies, because some of the radiological contamination at the SSFL for which it is responsible occurred while it was performing work under contract with DOE. While

there are instances where courts have permitted federal contractors to claim the intergovernmental immunity defense, those cases are inapposite to the case here. See *North Dakota v. United States*, 495 U.S. 423, 436 (1990).

First, as noted above, Boeing admits that its predecessors were engaged in radiological activity at the SSFL above and beyond the work they performed under federal contract. Boeing is required to comply with SB 990 not because it is a federal contractor, but because it is a landowner of most of the property at the SSFL, including radiologically-contaminated parcels, and because it holds a radioactive materials license from the State of California for its non-DOE radiological activity at SSFL.

Second, there has been no discriminatory treatment, because the remedy selection process set out in SB 990 uses the same process that is applied to cleanups performed elsewhere under California cleanup law, the Hazardous Substances Response Act. Cal. Health & Saf. Code §§ 25300 et. seq. Further, the doctrine of intergovernmental immunity is not violated merely because SB 990 only applies to the SSFL. A "[s]tate does not discriminate against the Federal Government and those with whom it deals unless it treats someone else better than it treats them." *Washington v. United States*, 460 U.S. 536, 544, n. 10 (1983). State regulation does not violate the doctrine of intergovernmental immunity as long as it imposes equally on all similarly situated constituents of a state and not on the basis of the constituent's status as a government contractor. See *United States v. County of Fresno*, 429 U.S. 452, 462-464 (1977).

Most importantly, a State does not unlawfully discriminate merely because it treats the federal government, or one of its contractors, differently. In *North Dakota, supra*, 495 U.S. 423, the state statutory scheme taxed the sale of non-federal projects to the landowners, but taxed the sale of materials to federal contractors, so that the legal incidence of the tax fell on the contractor rather than the landowner. The United States sued, alleging discriminatory treatment. The

United States Supreme Court upheld the state tax, holding that merely because a state regulation, when viewed at a specific level of analysis, may appear to treat the federal government or its contractor differently, this fact does not render the statute discriminatory when examined in the broader regulatory context. *North Dakota v. U.S.*, 495 U.S. at 438.

Boeing has presented no evidence that the State of California has treated a similarly-situated party in any state-mandated cleanup of radiological materials differently than it -- Boeing -- has been treated. In fact, as noted in the Background, above, SB 990 attempts to address a unique history of contamination at the SSFL site that involved a partial meltdown in 1959, but utilizing the same cleanup standards applied by the federal government when implementing CERCLA, and the State, when it enforces the State Superfund Law. Indeed, while SB 990 addresses one specific site, in the broader regulatory context, it seeks to have the SSFL site cleaned up using the same risk analysis used elsewhere by both State Department of Toxic Substances Control and USEPA based on foreseeable land use, and the same would be expected in addressing any other site that include both radiological and chemical contamination.

Boeing cites to *Goodyear Atomic Corp v. Miller*, 486 U.S. 174 (1988), and *Hancock v. Train*, 426 U.S. 167 (1976), in further support of its argument that the doctrine of intergovernmental immunity has been violated. Boeing Memo, at 31. Assuming, arguendo, that all of Boeing's activity at the SSFL was performed as a federal contractor, both of the cited cases clearly hold that a state regulation of federal activity violates the intergovernmental immunity doctrine only when the regulation has not been authorized by Congress. *Goodyear Atomic Corp v. Miller*, 486 U.S. 174, 181, and *Hancock v. Train*, 426 U.S. 167, 181, (1976). In the Atomic Energy Act, Congress has specifically authorized Agreement States like California to oversee all aspects of the health and safety of nuclear materials subject to its authority. The AEA states that:

> During the duration of such an agreement it is recognized that the States have authority to regulate the materials covered by the agreement for the protection of

the public health and safety from radiation hazards.

42 U.S.C. § 2021(b).

SB 990, which seeks to protect the health and safety of workers and the residents living in nearby communities, is a proper exercise of that federally-permitted authority.

B. SB 990 Does Not Discriminate Against Federal Activity, and Is Encompassed Within the CERCLA Waiver of Sovereign Immunity.

In furtherance of its intergovernmental immunity argument, Boeing also claims that SB 990 is not authorized by CERCLA. Boeing Memo, at 32. Since SB 990 is authorized by the AEA, it is not necessary to determine if SB 990 is also authorized by CERCLA. The AEA permits Agreement States, like California, to impose cleanup standards like SB 990, and Boeing, a private landowner, has been under the regulatory control of the State from the time its Radioactive Materials License was issued in the 1960s. But even if the AEA did not authorize the California Legislature's enactment of SB 990, California could still pursue the cleanup of the SSFL under its State Superfund Law, which incorporates CERCLA cleanup standards. *See* Calif. Health & Safety Code § 25356.1.5(a)(1) (note 12 below).

Boeing cites *U. S. v. Kentucky*, 252 F.3d 816 (6th Cir. 2001), in support of its argument that CERCLA does not authorize the State of California to regulate radiological waste. *U. S. v. Kentucky* is not a CERCLA case, however. Instead, in *Kentucky*, the State attempted to regulate radiological activity at a facility owned by the DOE under a hazardous waste permit subject to its delegated authority under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 *et seq*. Specifically, the State of Kentucky attempted to regulate "mixed waste" – that is, the mixture of chemical and radioactive waste. *U.S. v. Kentucky,* 252 F.3d at 823. The Court found that, although the federal government had waived sovereign immunity as to the non-radioactive component of solid waste, it has not waived sovereign immunity to state regulation of radioactive waste, because under RCRA, "solid waste" excludes materials covered by the AEA. *Id.* at 825.

1 The *U.S. v. Kentucky* case is completely inapposite to Boeing's intergovernmental
2 immunity argument. First, unlike the facts in *Kentucky*, it is Boeing, a landowner and state
3 licensee, and not the DOE, that is before the court in this action and seeks to assert this immunity.
4 Second, in contradiction to RCRA, CERCLA does include radionuclides within its definition of
5 hazardous substances. 40 C.F.R. Part 302, Table 302.4.[13] In fact, the California Legislature
6 specifically recited that SB 990 is an exercise of the State's authority under the State Superfund
7 Law, incorporates which appropriates the CERCLA standards.[14] Boeing presents no evidence
8 that the State has treated another landowner more advantageously than Boeing, or that the State
9 has not provided standards consistent with CERCLA. Therefore, the doctrine of
10 intergovernmental immunity does not operate to invalidate SB 990.
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13 **IV. BOEING CANNOT MEET THE RIGOROUS STANDARDS FOR GRANTING SUMMARY JUDGMENT.**
14 A plaintiff seeking summary judgment bears the heavy burden of establishing that each
15 material fact upon which it has the burden of persuasion at trial is undisputed. *Southern Calif.*
16 *Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003). Boeing has not met this burden
17 because the material facts upon which it relies are disputed. Competent evidence has been
18 presented herein: (1) that certain of Boeing's radiological activities at the SSFL were non-DOE
19 activities that could be regulated by California under its Agreement State authority; (2) that
20 California has a major role under the AEA to regulate contamination at the SSFL, particularly
21 contamination caused by Boeing's non-DOE work; (3) that SB 990 does not impose more
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23
24 [13] The California State Superfund Law has incorporated the definition of "hazardous substance" used in CERCLA and its regulations. Cal. Health & Saf. Code § 25316(b).
25 [14] SB 990 provides that "[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
26 provisions of [California Health and Safety Code] Section 25356.1.5." Section 25356.1.5
27 incorporates the requirements of the CERCLA regulations – Subpart E of the National Oil and Hazardous Substances Contingency Plan (40 C.F.R. 300.400 et seq.) as amended." Cal. Health &
28 Saf. Code § 25356.1.5(a)(1).

stringent standards than would ordinarily apply to a cleanup under state and federal law; and (4) that California could indeed impose more stringent standards in any event, because of its status as an Agreement State. Boeing's failure to meet its heavy burden of demonstrating undisputed material facts compels the conclusion that summary judgment must be denied.

V. BOEING CANNOT SATISFY THE BASIC REQUIREMENTS OF JUSTICIABILITY.

Additionally, a necessary element of Boeing's claim of preemption is to establish, through undisputed facts, that it meets the basic requirements of justiciability – ripeness and standing. As to ripeness, Boeing must demonstrate that it faces the threat of "suffering 'injury in fact' that is concrete and particularized" and that such a "threat" is "actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Institute*, 129 U.S. 1142, 1149 (2009) (citing *Friends of Earth, Inc. v. Laidlaw Envt'l Services, Inc.*, 528 U.S. 167, 180-181 (2000)). In the *Pacific Gas* decision, upon which Boeing places much reliance, the Supreme Court concluded that a preemption argument against one of the California statutes in question was not ripe for adjudication – because it was unknown "whether the [State] Energy Commission will ever find a nuclear plant's storage capacity to be inadequate." *Pacific Gas*, 461 U.S. at 199.

Similarly, Boeing's challenge to SB 990 is premised, in significant part, upon the outcome of a risk assessment that has not yet been initiated and a remedy that has not been chosen. Indeed, Boeing has not shown any facts demonstrating that the ultimate remedy under SB 990 would be a dramatic departure from traditional environmental cleanup remedies -- for the obvious reason that neither the background radiological study of the SSFL facility, nor the site characterization of the SSFL, has been fully performed. Indeed, the DOE is in the midst of performing the environmental impact statement ordered by Judge Conti, and consequently no remedy has been selected for the Area IV portion of the SSFL. *See* 73 Fed.Reg. 28437 (May 16, 2008). The hypothetical scenario that an amount of soil sufficient to fill three Rose Bowls will be

the selected remedy is purely speculative, and does not approach the requirement of an "actual and imminent" threat.

Moreover, Boeing lacks the standing to assert claims on behalf of the DOE. Whether DOE could assert arguments against SB 990's validity is not before the Court. The issue presented by Boeing's motion is whether SB 990 is a lawful exercise of the State's land use authority and its Agreement State status *as against Boeing*, the landowner of over 80% of the SSFL site. Boeing cannot show, with undisputed facts, that the radiological contamination which SB 990 seeks to redress was *entirely* the result of activities which it performed on behalf of DOE, thereby entitling it – Boeing – to an asserted "prime contractor" immunity. Significant areas of the SSFL, including radiological facilities within Area IV, were owned and controlled by Boeing's predecessors. A recitation of the DOE's extensive involvement at the SSFL does not release Boeing, the landowner and State licensee, from its obligations under SB 990.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court find that Boeing has failed to satisfy the rigorous burden for granting summary judgment at this stage of the proceedings. Plaintiff has failed to demonstrate that Senate Bill 990 has been preempted by the Atomic Energy Act, or has run afoul of the intergovernmental immunity doctrine. Moreover, numerous factual issues – issues regarding the nature the radiological activities at the SSFL site; the scope of the State's authority as an Agreement State; the question of whether SB 990's

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cleanup standards are more stringent than would typically apply under state and federal law; the outcome of the site characterization and remedial decision process at the Santa Susana Field Laboratory; and the justiciability of Boeing's claims – all compel the conclusion that Boeing's summary judgment motion must be denied.

Dated: February 19, 2010

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Case Name: **The Boeing Company v. DTSC, et al.** No. **09-CV-03165-GEB-KJM**

I hereby certify that on *February 19, 2010*, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANT'S OPPOSITION TO THE BOEING COMPANY'S MOTION FOR SUMMARY JUDGMENT

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on *February 19, 2010*, at Los Angeles, California.

Tina M. Houston	
Declarant	Signature

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