

**From:** Daniel O Hirsch <cbghirsch@aol.com>  
**To:** Linda Adams <ladams@calepa.ca.gov>, Maziar Movassaghi <Maziar@dtsc.ca.gov>  
**CC:** Rick Brausch <RBrausch@dtsc.ca.gov>, Patty Zwarts <PattyZ@calepa.ca.gov>  
**Date:** 6/2/2009 8:36 PM  
**Subject:** Consent Order

Dear Linda and Maziar,

I understand that what is planned to be the last negotiating session among Boeing, NASA, DOE, and the state before tentatively approving the draft Consent Order, subject to a public comment period, is to occur June 9. Not having been able to see the text, I am unable to provide any informed suggestions, but I did want to call to your attention three key issues that may or may not be issues in the draft.

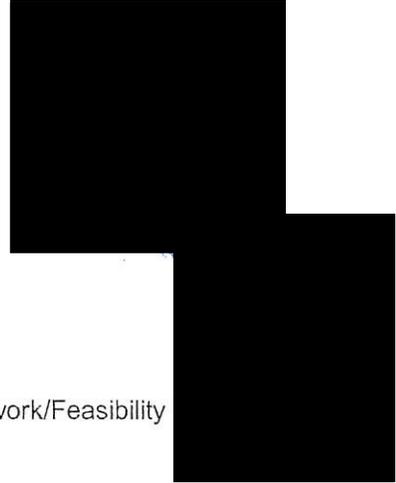
1. We have been assured that the Consent Order binds the RPs (Boeing, NASA, DOE) to comply fully with SB990. However, the RPs submitted to DTSC in April a "Feasibility Study (FS) Work Plan" that they assert reflects the upcoming revised Consent Order and which in fact appears to suggest that they believe they do not have to comply with 990. In that FS Work Plan, [http://www.dtsc-ssfl.com/files/lib\\_feasibilitystudy/feasibilitystudywork/FeasibilityStudyWorkPlanApril2009.pdf](http://www.dtsc-ssfl.com/files/lib_feasibilitystudy/feasibilitystudywork/FeasibilityStudyWorkPlanApril2009.pdf), the RPs list the laws and regulations that they must comply with. SB990 is not included. (see in particular p. 3-9)

Instead, they cite to other provisions in Chapter 6.8 of the Health & Safety Code, section 25356.1.5, which generally references following standards at least as strict as the federal National Contingency Plan (federal Superfund). They call out in particular 25356.1, without describing it; it states that cleanup standards will be based upon expected land use. SB990, however, is explicit: for SSFL, the land use scenario must be either the rural residential (agricultural) or suburban residential, whichever is more protective (almost always the ag scenario). They ignore that requirement.

You will recall that in the fall the RPs tried to get SSFL placed on the federal Superfund list before Bush left office, in the belief that so doing would result in a less protective land use scenario being used and less cleanup being required. That effort was unsuccessful. It would appear from the FS study that they are trying to argue that the Consent Order merely requires them to follow federal Superfund requirements, not SB990's specific requirements for SSFL. (see also p. 3-14)

This evasion of SB990's requirements is reinforced on p. 2-2, in which they say the exposure scenarios include only a current trespasser, industrial worker, and future hypothetical resident and recreator, leaving out the ag scenario required by SB990. Similarly, on p. 4-1, they say the response actions they will consider for the contaminated soil includes institutional controls such as "access restrictions, monitoring, and land use restrictions." This is barred by SB990, which does not permit avoiding cleanup to the ag standards simply by declaring the land will not be used for ag/rural residential purposes.

I would urge that the Consent Order be carefully reviewed to see if indeed the RPs have managed to insert language that they can point to



as requiring consistency with federal Superfund guidance even if it conflicts with SB990; that cites to section 25356.1 rather than 990 itself (commencing with 25359.20); or that somehow implies land use restrictions can negate 990's cleanup requirements. I am particularly concerned that references may be purposely oblique in the Consent Order, but upon deeper scrutiny turn out to imply not having to use the land use scenario, EPA's defaults, and other requirements in 990.

These concerns are reinforced by the "Fact Sheet" submitted by GSA on behalf of itself, DOE, and NASA to Congressional staff a few weeks ago, that claims 990 is pre-empted by the feds and they don't have to comply; have notified Justice Dept.; and will sue to overturn 990 if they don't get their way in the Consent Order. This is at great variance to DOE's commitment to Senator Boxer in September testimony to strictly comply with all state laws and NASA's similar promise to fully comply with 990 made as recently as last week. If the Consent Order binds the RPs to full compliance with SB990, we should not be seeing either the claims made in the FS Work Plan or the "Fact Sheet." Since the latter documents contradict the promises made about strict compliance, there is a question about good faith negotiation over the Consent Order, and very careful scrutiny of all of its language is in order.

2. I understand that there may be citations in the Consent Order draft requiring the state to follow certain specified guidance documents and even computer models. One has to be very careful here. Some guidance that the RPs have previously cited turned out to be long-discarded EPA guidance overridden and contradicted by EPA's preliminary remediation goals (PRGs) as cited in SB990. For example, some guidance or computer programs that the RPs have previously cited include land use assumptions that contradict the default assumptions in EPA's PRGs and the requirements of SB990. Citing to that guidance would arguably put the state in the position of being said by the RPs to have agreed to negate 990.

The RPs may also have inserted references to documents that suggest permitting averaging contamination over wide areas. This would be troubling, as it could permit high levels of contamination be left in place at one location because other locations significant distance away were clean.

There is no reason to cite to specific guidance, or guidance at all. Guidance is just that, guidance; it is not regulation or law, and regulators are free to depart from it if they have reason to do so. And most of what the RPs referred to in the past as guidance is not even guidance (e.g., instead are computer programs) and not in effect (e.g., having been replaced by newer guidance such as EPA's PRG documentation cited in 990.) Nor should the state want to bind itself in a Consent Order to any particular guidance, which can change and evolve over time. But mostly I am concerned that by referencing certain guidance, the RPs may feel they have succeeded in contradicting requirements in 990 which with the guidance conflicts. Law trumps guidance, not the other way around.

3. And of course there is the tolling matter. An agreement to comply

with SB990--even if the Consent Order makes that crystal clear without contradiction, a matter I worry about--is essentially worthless if the parties insist on the right to break out of the agreement at any moment they wish, and even to challenge the state law beyond the expiration of the statute of limitations. That is no agreement at all. And it would leave a gun perpetually to the head of the DTSC Director, so that every single directive given to remove any particular contaminated , revise a report, take a measurements, etc. would be subject to the RPs saying "No," and threatening to break out of the Consent Order and challenge 990, no matter how long after the passing of the statute of limitations.

A commitment to comply with SB990 must be a binding commitment, not a promise today that can be broken with impunity tomorrow.

I continue to believe, given the behavior of the RPs in the FS Work Plan and the "Fact Sheet," raising questions about their promises to Congress and others to comply with state law and their good faith in the Consent Order negotiations, coupled by their resistance to permitting consultation by the Secretary with whomever she wished during these negotiations, indicates it is likely the issue may need to be escalated to Congressional representatives and senior Obama Administration officials to get DOE and NASA to live up to their commitments and to comply with the recent Obama directive to not claim pre-emption in any but the rarest of cases. The lower level people at DOE and NASA may need to hear from people considerably higher up in order to get these matters resolved.

Best wishes,

Dan

## Focus on next steps

### Intent of document

- Summary analyses of SB 990 issues - 3 scenarios
  - ① Cleanup values & volumes for residential
  - ② " " " " for strict SB990
  - ③ Brings recommendation proposal to use site specific parameters, in rural residential & values & volumes estimates

Original thought <sup>was</sup> that eliminating potential for residential development would make cleanup decisions much easier

Thought Superfund approaches would allow interp. of SB 990 to come close to original sub. residential estimates

$10^{-4}$  rural resid. using default parameters is .

- Claim that they've always had concern about all chemicals, but that they focused on  $\Phi$  as examples

Hope there is room to come to resolution on these issues that does not

Want State to take lead in discussion of issues to get outcome on chemicals closer to sub residential

Who is Dan's expert?  
Sept. 25  
Can he be there?  
Grant?

## Listing on NPL

Concerns - schedule impact  
SB 990 as ARAR kicked/deferred

Benefits: Rad characterization/DOE

→ Document: impact/analysis of different approaches

180K	v.	280K	v.	700K
3 yrs		3+ yrs		10 yrs

?? Remedy selection - is removal the only option?

Avail. Options as compared to letter of SB 990  
cap & cover  
default sub residential  $10^{-4}$

Need certainty - cannot give because CERCLA  
doesn't give it early

Chem is biggest driver - rad issues not so much.  
for cost & cleanup

Need to talk to Dan about Chem issues prior to  
Sept 25 meeting in Chatsworth  
Committed to no residential use of site - willing to execute  
land use covenants

10/7/08 Meeting

Still hopeful for land transfer

Cindy

However, regardless, SB 990 must be implemented  
Believe negotiations are important to continue

Boeing remains committed to cleanup - to "safe" level

Steve Shestak

Need certainty in process

Boeing Submittal

Norm

- from PRG to final remedial goals

"Normal" approach is to use site specific factors  
in risk assessment

SB 990 - forecloses site specific factors in risk assessment  
Makes no sense to use two different approaches  
for rad v. chem.

Approach does allow consideration of balancing criteria

Technical limitations - background, Detection limits

Certainty cannot be provided prior to process running  
its course

Technical memo does not meet prerequisite requirements

Memo proposes methods to consider ag scenario in different ways -

Boeng believes memo lays out an approach that is compliant w/ SB 990

Why is DTSC interpreting SB 990 as requiring/eliminating flexibility for

Norm Doesn't make "sense" to use two different risk assessment scenarios -  
SB 990 calls for using rural ag for land use assumption for both rad & chem

## Specifics

GW - Irrigation of fruits/vegs  
- livestock watering/feeding }  
Need to build it into risk assessment - limitations could be built into remedy selection

Base case underestimates

Default case overestimates (but not sufficiently)

Alternative case underestimates

Area averaging

- may be available but needs to be better discussed & understood before acceding

Fish consumption

Pork

Beef/livestock

Milk

} needs inclusion

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Purpose of technical memo

- not intended to be full risk characterization
- intended to focus on soil only

Fish - did not include because focused only on soil for comparison purposes

- would include in places where sustained fish population could be maintained

Timeliness - have been working vigorously to research & crunch numbers

\* Originally thought that Ag  $10^{-4}$  and Res  $10^{-6}$  were substantially similar -  
in crunching it's found that that's not the case

Would like the rest of comments in written form -

Dan -

Dissatisfied that this isn't what Boeing  
committed to

Understood

Boeing could meet rad stds from 990  
Could do chemicals except for certain cases (4 chems)

Using 4 chemicals as surrogates, but all  
chemicals create problem

For chemicals must clean up to background  
& detectability

What areas of flexibility is Boeing looking for

- site specific parameters instead of defaults
- area averaging  $\rightarrow$  not all pathways pertinent

### Alternatives Chart

Alt III - Assumes  $10^{-4}$  cleanup std, & removal of key ag

Alt II - Assumes  $10^{-6}$  background & DL

Alt I - Assumes  $10^{-4}$

Boeing wanted certainty to get back to residential w/  
eco-risk as cleanup goal  
- the only way to get to land deal

Bob L

Where did the states flexibility go?

States response appears to eliminate what Boeing's thought was for areas of flexibility

★ Boeing thought they were trying to get back to residential cleanup standard.

NRDC - Interested in site being cleaned up  
SB 990 cannot be "set aside"

Bob L Believe SB 990 is not "clear" and is open to interpretation w/respect to chemicals

Dan Concern that Boeing may be eliminating its flexibility

- Need realistic estimation of costs/

Soil movement costs may be significant, but there are other costs that proposal doesn't capture.

Alternatives to consider

Leave in place (cap & cover)

Soil treatment

Removal (scoop & haul)

SB990 - very clear on risk assessment

= open discretion on remedy selection

Other costs - timing/schedule

streamlining risk assessment/characterization

Timely/Effective/Protective Cleanup as goal

\* Getting appropriation from Congress for rad work/survey & cleanup could save money for Boeing  
- funding needs of DOE likely slows process

\* Acceleration of cleanup could save money

\* Cleanup/removal assists in surface water concerns/costs

\* Early involvement to build consensus & expedite decisions

Flexibility w/in SB 990 ?

Next Steps ?

Reaction to State's position :

State's position is very clear now

Need to capture these views in consent order  
or revision to existing order.  
SRAM amendments

Negotiations to amend, or unilateral order

Order would be issued to Boeing, DOE & NASA  
if unilateral

Preference to first speak w/ NASA & DOE  
before committing to negotiating new order

Proposed revisions to order early would  
help accelerate process

April white paper → September memo deals w/  
only risk assessment methods

Additional technical discussions:

area averaging - meeting to be proposed for later  
detection limits - October  
background

- Averaged over RFI area - not acceptable
- Toxicologists will be involved
- in Chatsworth -

Zoned 5 acre - not acceptable

Area to be discussed in line w/ assumed  
land use

Open to discussing conditions where averaging  
would be acceptable -

★ Vertical/uninhabitable topography

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10/21 next meeting on background/detection limits  
possible piggy back

Schedule next large group

TABLE 4

ENVIRONMENTAL IMPACT ANALYSIS SUMMARY FOR REMEDIAL CLEANUP ALTERNATIVES  
 SANTA SUSANA FIELD LABORATORY  
 (PAGE 1 OF 1)

10-4 10-6 10-4

	Alternative I: Base Case	Alternative II: Default SB990	Alternative III: SSFL SB990	Units
<b>Project Metrics</b>				
Soil Excavated	180,000	720,000	207,000	cy
Truckloads Hauled	12,000	48,000	13,800	loads
Estimated Project Duration	750 / 3	3,000 / 10	860 / 3½	workdays / years
<b>Emissions Footprint</b>				
CO <sub>2</sub>	24,000,000	97,000,000	28,000,000	lb
CO	240,000	961,000	276,000	lb
VOC	47,000	188,000	54,000	lb
NO <sub>x</sub>	504,000	2,017,000	580,000	lb
SO <sub>x</sub>	8,000	31,000	9,000	lb
PM-10 Dust	106,000	426,000	122,000	lb
GHG Units <sup>1</sup>	24,000,000	97,000,000	28,000,000	lb of CO <sub>2</sub> Equivalents
<b>Fuel Consumption</b>				
Diesel	1,070,000	4,270,000	1,230,000	gallons
Gasoline	33,000	133,000	38,000	gallons
Sustainability Score	17	6.2	16.3	Out of 20

No way to understand these #'s and whether the assumptions stand if rad is considered

<sup>1</sup> Note that one pound of greenhouse gas (GHG) unit is equivalent to one lb of CO<sub>2</sub> or 1/8 lb of methane spanning the lifetime of the gas. Also referred to as greenhouse gas potential.