
November 16, 2020
Sent via Email

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Subject: SB 990 (2007) and Health and Safety Code 25359.20

On February 23, 2007, then State Senator Sheila Kuehl introduced a bill, SB 990, titled Santa Susana Field Laboratory. Although opposed by Boeing, SB 990 subsequently passed the Senate and Assembly and was ultimately signed into law by Governor Schwarzenegger.¹ SB 990 required the addition of Article 5.5 (commencing with Section 25359.20) to Chapter 6.8 of Division 20 of the Health and Safety Code. This law became effective January 1, 2008.

On November 13, 2009, The Boeing Company sued the Acting Director of the California Department of Toxic Substances Control, and by proxy, the State of California, over SB 990 in United States District Court (Eastern District of California).²

On April 26, 2011, the Honorable Judge John Walter of the United States District Court (Central District of California) issued an order granting plaintiff, The Boeing Company's motion for summary judgement, in which he concluded that SB 990 violated the supremacy clause, is pre-empted by the Atomic Energy Act of 1954, violates the doctrine of intergovernmental immunity, and that SB 990 is invalid in its entirety.³

On May 5, 2011, the Honorable Judge John Walter of the United States District Court (Central District of California) issued a judgement in which he stated,

1. Judgment is entered in favor of Plaintiff, The Boeing Company, as to Counts One, Two, and Three of the Amended Complaint.

¹ Senate Bill 990 (2007) Kuehl

http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0951-1000/sb_990_bill_20071014_chaptered.pdf

² Case 2:09-cv-03165-GEB-KJM.

https://www.dtsc-ssfl.com/files/lib_boeinglawsuit/legaldocs/64509_BoeingComplaint11-13-2009.pdf

³ Case 2:10-cv-04839-JFW-MAN.

https://www.dtsc-ssfl.com/files/lib_boeinglawsuit/legaldocs/64928_show_tempCA4R335S.pdf

2. California Senate Bill 990 (“SB 990”), codified at Cal. Health & Safety Code § 25359.20, is declared invalid and unconstitutional in its entirety under the Supremacy Clause of the United States Constitution.

3. Defendant in his official capacity as Acting Director of the California Department of Toxic Substances Control (“DTSC”) and any successors, as well as any officers, agents, servants, employees, or attorneys acting for or on behalf of DTSC, or persons in active concert or participation with any such person or DTSC, are hereby enjoined from enforcing or implementing SB 990.⁴

On June 3, 2011, defendants appealed.

On September 19, 2014, the United States Court of Appeals (Ninth Circuit) affirmed the judgement of the United States District Court.⁵

SB 990 and its consequential law, HSC § 25359.20, have been “declared invalid and unconstitutional in their entirety”, and DTSC has been “enjoined from enforcing or implementing SB 990.” It is therefore puzzling how DTSC’s website continues the pretense that SB 990 still guides cleanup.

On a DTSC web page called “SSFL SB 990 and California Superfund”⁶, DTSC states,

SB 990, effective on January 1, 2008, allows DTSC to clean up the site under the requirements and procedures of the California Superfund Law, and to be enforced under the authority of either the California Superfund Law or the Resource Conservation and Recovery Act (RCRA). The new law gives DTSC the authority to oversee all aspects of the cleanup including both chemical and radioactive wastes and allows the use of the **State Superfund’s risk assessment process** for both the radiological and toxic contamination. It also requires DTSC to use the **highest and most protective cleanup standards provided under the “rural residential (agricultural)” land use designation**.

Under the State Superfund, DTSC will continue to use information contained within the RCRA Facility Investigations (RFI) Reports. However, additional sampling and characterization may be necessary, and, as mentioned, **risk assessment becomes a key factor in determining the method of cleanup**. The Remedial Investigation called for under this law will identify the areas and concentrations of contamination in a way that is similar to the RFI.

⁴ Case 2:10-cv-04839-JFW-MAN.

https://www.dtsc-ssfl.com/files/lib_boeinglawsuit/legaldocs/64933_DTSCvTheBoeingCoJudgement05-05-2011.pdf

⁵ Case 2:10-cv-04839-JFW-MAN.

https://www.dtsc-ssfl.com/files/lib_boeinglawsuit/legaldocs/66462_11-55903.pdf

⁶ https://dtsc.ca.gov/sitecleanup/santa_susana_field_lab/ssfl_regulatory_oversight_sb990_ca_superfund/

Upon completion of the Remedial Investigation, a Feasibility Study will be developed. This study examines and compares cleanup options and determines the best way to clean up contamination. **The study looks at risks**, cleanup methods, and costs. **A risk assessment will also be prepared**. The risk assessment involves evaluating the effects of contaminants and their potential exposure to humans. In addition, the toxicity parameters of contaminants are evaluated to make sure that the latest scientific knowledge is used. These evaluations are based on sound scientific knowledge and fact, and **comply with Department and U.S. EPA risk assessment guidance**, and policy. (Emphasis added).

There are two major errors in these statements. Firstly, SB 990 was overturned and subsequently any HSC § 25359.20 verbiage is null and void. Secondly, the continued references to risk assessment are meaningless for DOE and NASA since the 2010 AOCs expressly eliminates risk assessment from the cleanup process and replaces it with a “cleanup-to-background” mandate. Consequently, it would be appropriate to delete references to SB 990 and risk assessment (for NASA and DOE). In addition, reference to SB 990 on the web page, “SSFL Other Agencies”, should be deleted.

Sincerely,



Phil Rutherford