From: Riley, Norm
To: [redacted] Hirsch
Subject: Re: GSA "Fact Sheet"
Date: Thursday, May 21, 2009 3:45:18 PM

Dan,

The RPs are very much aware of the fact that they will not be required to clean to a level below background, even if a PRG or RBSL is below background. [For what it's worth, our back-of-the-envelope calculations suggest that background will be the 990 cleanup level for virtually all constituents of concern.] In fact, the draft consent order explicitly states that "cleanup of chemicals and radionuclides below background concentrations shall not be required."

It is true that DOE does not consider itself subject to 990. I am sure you've heard at least the contours of their argument that because of their Atomic Energy Act authority, no State can order them about with regard to nuclear materials. I think they're right about that and would prevail in a court fight if we were to have one. Nevertheless, DOE is agreeing in this consent order to a 990-compliant cleanup. Yes, I know it is difficult for you to accept this because I am saying it and because they have such a long and sad history of misbehavior. But it is true. They do not want a fight with any State, especially California, now that Mr. Obama is President and others representing occupy hold powerful positions in Washington, D.C..

NASA also asserts that it is not subject to 990, but their theory is much more attenuated and, as best as I can understand it, rests on issues about property rights because they have no AEA cover like DOE. Nevertheless, they too are prepared to sign the order and give us a 990-compliant cleanup. So is Boeing.

There is only one issue I know of that threatens to scuttle this deal and it concerns a desire to preserve certain rights to challenge the constitutionality of the law if they decide they want to do that. While some litigious-minded people affiliated with each of the affected organizations appear anxious to have that fight, those at the negotiating table are not interested in going to court. I am sure of it. If that were they case, they would have done so a long time ago.

The statements about not having to consider the ag scenario in the FS make no sense to me. The section of the order that deals with the FS says nothing whatsoever about land use scenarios, ag or otherwise. The section that deals with the revised SRAM says that it "shall include evaluation procedures for suburban residential, rural residential (agricultural) and open space (recreational) land use scenarios, and methods to be used to estimate cumulative risk, as required by Health and Safety Code sections 25356.1.5(d) and 25359.20(c). The SRAM (Rev.3) and corresponding workplan shall be subject to public review and comment before they are approved by DTSC."

Regarding the remedy and land use restrictions, the order says that the RPs "shall record, or cause to have recorded, a prohibition, to run with the land, on the use of groundwater underlying the facility for all purposes including, but not limited to, domestic, residential, and agricultural uses such as drinking, bathing and showering, food preparation, plant irrigation,and cleaning," and elsewhere states that DTSC shall choose the GW remedy. We have told them countless times that we are not accepting their matrix diffusion theory and that they should look forward to GW cleanup. The order is appropriately detailed about GW work and cleanup. In their last counterproposal, the RPs struck language by DTSC which said that institutional controls for GW shall not be sole justification for limiting [GW] cleanup. We have asked them to explain the proposed deletion and if we are not satisfied with their response due by COB tomorrow we will insist that the language be put back in the order because it makes perfect sense that they should not be allowed to use institutional controls as a remedy. If that were our policy, no one would ever clean up contaminated property.

Contrary to what we have seen from GSA, which is not a party in the negotiations, or what you may have heard from others, Boeing, DOE, and NASA have suffered greatly in this process. The Secretary once asked me if I needed reinforcements and I answered that if anyone needed reinforcements it was Boeing. (They've actually brought in a good lawyer who tried to get the stipulated penalty provision changed. He wanted to tie it to a provision in the existing 22 CCR regulations regarding administrative penalties that would have dropped the penalty for recurrent violations to 2% of the initial penalty. In other words, $15K for the first day and then $300 for

every subsequent continuing day. He didn't realize, however, that he was talking to the author of those regulations and, of course, I refused the proposal on the spot, much to his surprise and the dismay of others around the table.) I have been very tough on them. We have given on some points (that is the nature of a "negotiation process") but we have not given very much and we have not given one millimeter on 990 compliance. The order will either collapse soon for reasons alluded to above, or it will be out soon for public review and comment. I can't say which because I am no longer in control of the process. Assuming it gets out, I am sure you will question some of the things in the order, and I expect you will not like some things, but I think on the whole that you will be satisfied.

I do not think I will be with you much longer. I think we both know the reason why. I am sorry about that because I would like to remain to the end of this Administration to make sure these guys stay on the track we've put them on [we should want this order precisely because: (1) it takes us beyond the end of the current Administration; and (2) makes a court challenge very difficult]. Please know that I did not set out to disappoint the community or undermine 990. I have tried to do what is right and I do believe that I have had a positive and beneficial impact on the project.

Norm

>>> Daniel O Hirsch [redacted] 5/21/2009 2:07 PM >>>
Norm,
Thanks.
I am afraid I don't read it as being as benign as do you.
It states in part,

"The ultimate cleanup standard that results from this risk assessment process may be lower than background levels for some constituents and may preclude replacement fill at the site because of the unavailability of “clean” fill that meets SB 990 standards. In meetings with DTSC, lawyers for DOE, NASA and GSA have expressed concerns about the applicability of SB 990 to site cleanup and the transfer of federal land. The Department of Justice is aware of the matter. In the meantime, DTSC, DOE, Boeing and NASA are attempting to negotiate a revision of the existing Consent Order that may satisfy SB 990 without litigation." (Footnotes omitted; they make claims that NASA, DOE, and GSA are exempt from SB990.)

The ultimate cleanup standard however WILL NOT be lower than background and they have been told that innumerable times. This is the same lie that has been used by the RPs since the beginning, that 990 is technically feasible in that it requires a cleanup standard that is below background, something they know is simply not true. Furthermore, they will not have to use fill that is below background; they know that as well.

What is more worrisome, however, is the statement that they have taken the position that SB990 is not applicable to DOE, NASA, and GSA, that they have informed Justice of their position that they are exempt from 990, and that they will litigate if the State doesn't give it what it wants in the Consent Order.

This is reinforced by the recent Feasibility Study Work Plan submitted

by all 3 RPs, which they say reflects the new Consent Order, and which leaves 990 out of the list of laws that must be complied with; argues all they must do is use a land use scenario based on likely future use, not the ag scenario required in the law; says they only have to consider residential, not ag, in risk assessment; and that the remedy can be land use restrictions rather than cleanup, all of which violates 990.

I hope you are right about their intentions. But what they have recently submitted to the Congress and to DTSC raises serious questions about their intentions.

With best wishes,

Dan

> Dan,
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> I don't think this reflects an attempt to thwart SB 990. As I
> explained to Maziar and others when asked about this, "I think what
> they are trying to say is that some PRGs and RBSLs will be below
> background. That much is true. What's missing from their outline
> is a clear statement that we are not requiring respondents to clean
> up to levels below background. This poorly drafted and therefore
> potentially misleading statement does not surprise me at all: GSA
> has not been involved in the day-to-day discussions about the site
> and they probably have no expertise in the science. I'm sure they'd
> correct the document if the error were pointed out to them."
>
> Norm
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> From: "Douglas Sheeks" < DSheeks1@dtsc.ca.gov >
> Date: May 21, 2009 1:14:05 PM PDT
> To: "Jim Pappas" < JPappas@dtsc.ca.gov >, "Norm Riley" < NRiley@dtsc.ca.gov
> >
> Cc: "Gerard Abrams" < GAbrams@dtsc.ca.gov >
> Subject: Fwd: [BULK] GSA "Fact Sheet"
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> All:
>
> FYI -
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> This is the document that Dan mentioned to me, raising the matter of
> possible clean-up below background levels, over which his ire is
> also raised considerably.
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> He said that higher-ups within the DTSC already have this document.
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> He complained that no one is suggesting that clean-up will be below
> background and that this is an attempt to thwart SB990.
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> I am preparing a summary of my full conversation with Dan this
> morning - to be shared with you.
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> Although he is now pondering the matter of DTSC not participating in

> the sampling at the DTLs (we will speak again next Tuesday), he said
> that he is favorably disposed to agreeing on this point and, upon
> reaching that position, will run interference for us with the
> community.
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> Thanks,
> Doug
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> From: Daniel O Hirsch [redacted]
> Date: May 21, 2009 12:57:02 PM PDT
> To: Doug Sheeks < DSheeks1@dtsc.ca.gov >
> Subject: [BULK] GSA "Fact Sheet"
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>
> attached
> <Santa Susana Overview - 5.11.pdf>
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