



U.S. Department of Energy



National Aeronautics and Space Administration

November 13, 2009

Mr. Rick Brausch  
Santa Susana Project Director  
California Department of Toxic Substances Control  
1001 I Street  
Sacramento, CA 95814

RE: Draft Amended Consent Order

Dear Mr. Brausch:

This letter responds to your request for comments on the November 3, 2009, Draft DTSC Consent Order for cleanup of the Santa Susana Field Laboratory (SSFL) in Simi Hills, California.

First and foremost, we want to stress that DOE and NASA remain committed to continuing our ongoing cleanup activities at SSFL. Although we are disappointed that DTSC chose to issue the Draft Consent Order without first reaching a consensus among the parties on the terms and conditions of the Order, DOE and NASA will remain focused on our primary objective of protecting human health and the environment by continuing and completing the cleanup of SSFL.

Moreover, DOE and NASA remain committed to working in appropriate ways, and within the legal context in which Federal agencies must act, toward a mutually acceptable, negotiated agreement with DTSC on a new consent order. DOE and NASA have been working with DTSC and Boeing in good faith for nearly eleven months to craft a new consent order that would establish a process to continue the SSFL cleanup in a manner compatible with SB 990 insofar as it is within the limits of our authorities and obligations as Federal agencies. DOE and NASA believed that we had reached that goal with DTSC with version 2.0 of the Order, sent to DTSC on August 13, 2009, and DOE and NASA expected to recommend approval of the draft to their senior management and help DTSC present and explain our collectively proposed solution for public review and comment.

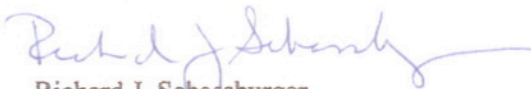
Although DTSC's approach to soliciting public review and comment has, in our view, made the path toward consensual agreement more challenging, DOE and NASA have

continued good faith support of this effort. Even prior to the release of the DTSC draft order, DOE, NASA, Boeing and DTSC had been meeting to discuss the public comments submitted to DTSC and had addressed some of the key issues raised in these comments. And, since the release of the November 3 draft, DOE and NASA have agreed to continue to meet with DTSC representatives.


One of the areas where we have been unable to reach agreement has concerned reservations of rights and statements of authorities. Reservations of rights provisions of one form or another are typically included in all of our federal facility cleanup agreements with EPA and the States under CERCLA and RCRA. The 2007 SSFL RCRA Consent Order contained just such a reservation of rights in Section 4.17. Such provisions have been included in our cleanup agreements at least since the early 1990s. We believe all disputes arising under these agreements have been resolved either through informal dispute resolution procedures or under the formal dispute resolution provisions of the agreements; they rarely, if ever, require court intervention. In the case of this Order, the provisions are specifically needed because of the issues associated with SB 990. As DOE and NASA have explained to DTSC during our direct discussions of this matter, we have not accepted the reservation of rights and authorities provisions DTSC has included in its most recent public version because those provisions are not consistent with the legal context in which Federal agencies must act.

In sum, DOE and NASA stand ready to move forward in appropriate ways toward a negotiated agreement. Toward that end, we attach a series of questions that DOE and NASA would like to raise with DTSC. Although this list is not exclusive and does not reflect all the concerns that DOE and NASA have with the current draft, the answers to these questions will greatly assist DOE and NASA in future negotiations. Moreover, we remain willing to consider creative mechanisms and solutions to resolve the issues facing all of us at SSFL.

Sincerely,



Richard J. Schassburger  
Federal Project Director  
Oakland Projects Office  
U.S. Department of Energy



Allen Elliott  
Project Manager  
National Aeronautics and  
Space Administration

Attachment: "Questions for DTSC from DOE and NASA on the Draft Consent Order released November 3, 2009."

cc: Electronically

Maziar Movassaghi, DTSC

Nancy Long, DTSC  
James Leatherwood, NASA  
Mark Batkin, NASA  
Merrilee Fellows, NASA  
Tania Smith, DOE  
William Backous, DOE  
Stephanie Jennings, DOE  
Sean Lev, DOE  
Bruce Diamond, DOE  
Steven Miller, DOE  
Mell Roy, DOE  
Simon Lipstein, DOE



Attachment

QUESTIONS FOR DTSC FROM  
THE U.S. DEPARTMENT OF ENERGY AND  
THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION  
ON THE DRAFT CONSENT ORDER RELEASED ON NOVEMBER 3, 2009

1. DOE and NASA are concerned about how SB 990, the balancing criteria in the Comprehensive Environmental Response Compensation, and Liability Act (CERCLA) National Contingency Plan, and the requirements of the State's CERCLA law will interact. The explanatory material released with the November 3, 2009, draft order stresses that DTSC intends to require strict compliance with SB 990 and states, for example, that DTSC would not allow "resource impacts [to be] used as a means of avoiding compliance with SB 990 cleanup standards."  
(Explanation of section 3.6.1.)
  - a. Are there any circumstances under which NCP evaluation criteria could modify the result otherwise dictated by the land use assumptions and other specific criteria of SB 990? For example, if analysis of remedy alternatives were to demonstrate that strict application of SB 990 were to cause harm to cleanup workers and local residents disproportionate to any health or environmental benefits (such as by requiring heavy truck traffic for an extended period of time through residential neighborhoods and on mountain roads), would DTSC nevertheless select the remedy made necessary by the assumption of rural agricultural (or suburban residential) use?
  - b. Would a remedy that would cause severe ecological harm nevertheless be selected?
  - c. We would also like to understand how DTSC intends to balance the various environmental laws, such as the Endangered Species Act, with the requirements of SB990. For example, the rewrite in section 3.5.5 doesn't address this issue.
  - d. If very large amounts of taxpayer money would be needed to implement a remedy that is unnecessary to protect health and the environment under actual conditions of use of the site, would taxpayers nevertheless be required to make such expenditures?
2. Does DTSC intend to amend the draft order to include consideration of public comments that were previously submitted, but that are not reflected in the current draft?

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3. Please provide a description of the public process that DTSC expects to conduct throughout the published timetable.
  - a. Does DTSC expect to receive public comments based upon its release of November 3, 2009?
  - b. What will DTSC do with the public comments that it receives?
  - c. Will the public comments and any DTSC response be shared with the responsible parties?
  - d. Will DTSC prepare a responsiveness summary to address all comments?
  - e. What are DTSC's expectations for participation by DOE and NASA in responding to all comments received?
4. The change in section 3.5.4.1 and 3.5.2 does not provide any alternative than to find backfill that meets the SB 990 standards. How does DTSC define a "reasonable effort" to locate and acquire the soils to meet these standards? What alternative options does the State anticipate if the respondents are unable to find such backfill after reasonable efforts?
5. In the revised section 1.3.3, mention is made of the unique nature of the radioactive contamination at the site, which is cited as a justification for the proposed requirement that DOE agree to be bound by the terms and conditions of the order, and, in conjunction with the revised section 1.6, the proposed agreement that it would not challenge the constitutionality of SB 990 at this site. What distinguishes this site as unique? In particular, how does the SSFL site differ from other DOE sites in California and elsewhere where radioactive and chemical contamination was caused by research activities?
6. DOE and NASA have consistently communicated their concerns that the agencies lack legal authority to waive the sovereign immunity of the federal government. What legal authority does DTSC believe authorizes DOE and NASA to waive the sovereign immunity of the United States of America for purposes of this Amended Consent Order?
7. DTSC and Boeing reached agreement on a schedule for proceeding over the next four months in the Interim Tolling Agreement dated October 6, 2009. DOE and NASA were not included in the negotiation of that Agreement and are not parties to it. What are DTSC's expectations of DOE and NASA with respect to meeting the deadlines? If DOE and NASA are not able to meet the deadlines in the Interim Tolling Agreement, what are DTSC's views as to the consequences to DOE and NASA?