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**UNITED STATES DISTRICT COURT  
CENTRAL 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. CV 10-04839-JFW (MANx)

**JOINT SCHEDULING REPORT**

Judge: Hon. John F. Walter  
Courtroom: 16  
Date: August 2, 2010  
Time: 8:30 a.m.

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1 Plaintiff The Boeing Company (“Boeing”) and Defendant Maziar  
2 Movassaghi, in his capacity as Acting Director of the California Department of  
3 Toxic Substances Control (“DTSC”), jointly submit this report in accordance with  
4 the Court’s Order of July 8, 2010, Fed. R. Civ. P. 26(f), and Local Rule 26-1.

5 Boeing commenced this action on November 13, 2009, by filing a Complaint  
6 in the U.S. District Court for the Eastern District of California challenging the  
7 constitutionality of a California state law, Senate Bill 990 (“SB 990”), Cal. Health &  
8 Safety Code § 25359.20. Boeing filed an Amended Complaint on December 28,  
9 2009, and DTSC filed its Answer on January 8, 2010. Dkt. Nos. 22, 25. The  
10 pleadings raise the following issues: (1) whether SB 990 is invalid because, as Boeing  
11 alleges, the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011, *et seq.*, preempts the  
12 entire field of nuclear safety; (2) whether SB 990 conflicts with, and is thus preempted  
13 by, federal law; (3) whether SB 990 violates the doctrine of intergovernmental  
14 immunity; (4) whether SB 990 violates the Equal Protection Clause of the Fourteenth  
15 Amendment; and (5) whether SB 990 violates the Due Process Clause of the  
16 Fourteenth Amendment. Dkt. No. 22. DTSC denies each asserted allegation of  
17 invalidity. Dkt. No. 25.

18 On January 22, 2010, Boeing filed a Motion for Summary Judgment on its field  
19 preemption and intergovernmental immunity claims, which DTSC opposed on  
20 February 19, 2010. Dkt. Nos. 27, 29. On March 2, 2010, the Southern California  
21 Federation of Scientists, Los Angeles Chapter of Physicians for Social Responsibility,  
22 Rocketdyne Cleanup Coalition, and Committee to Bridge the Gap filed an amicus  
23 brief in opposition to summary judgment. Dkt. No. 33. Boeing filed its reply on May  
24 7, 2010. Dkt. No. 40. On March 5, 2010, and May 10, 2010, Judge Garland E.  
25 Burrell approved the parties’ stipulations postponing proceedings to permit time for  
26 discussions with the United States and, ultimately, scheduled oral argument on the  
27 Motion for Summary Judgment for June 21, 2010. Dkt. Nos. 36, 42.

28 Before hearing argument on Boeing’s Motion for Summary Judgment, on May

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1 25, 2010, Judge Burrell ordered the parties to show cause why venue should not be  
2 transferred to the Central District of California, and on June 18, 2010, Judge Burrell  
3 ordered this case transferred to the Central District. Dkt. Nos. 44, 50.

4 **I. Jurisdiction, Venue, And Parties**

5 This Court’s subject-matter jurisdiction is based on 28 U.S.C. § 1331 and §  
6 1343(a)(3). Venue under 28 U.S.C. § 1391(b) and personal jurisdiction are proper.  
7 No additional parties remain to be served.

8 **II. Factual Background**

9 This case is a challenge to the constitutionality of SB 990, a state law that was  
10 enacted in October 2007 to specifically address the cleanup of the Santa Susana Field  
11 Laboratory (“SSFL”). Cal. Health & Safety Code § 25359.20(1)(a). “Founded in the  
12 late 1940s, [SSFL] was a facility dedicated to the development and testing of nuclear  
13 reactors, rockets, missiles and munitions.” *Id.* § 25359.20(2)(a). SSFL is located in  
14 the Simi Hills area of Ventura County, California, and Boeing (or one of its  
15 predecessors) has owned property at SSFL since the late 1940s. The federal  
16 government has owned property at the site since the 1950s, which it currently  
17 administers through the National Aeronautics and Space Administration (“NASA”),  
18 and has leased from Boeing approximately 90 acres at the site, which the Department  
19 of Energy (“DOE”) administers.

20 Activity at SSFL included, among other things: a nuclear research and  
21 development program, conducted by DOE (or one of its predecessors) under the  
22 authority of the Atomic Energy Act, 42 U.S.C. §§ 2011, *et seq.*, and performed by  
23 Boeing (or one of its predecessors) under a prime contract with DOE; other non-DOE  
24 work conducted by Boeing (or one of its predecessors); and rocket and munitions  
25 testing conducted by NASA and other federal agencies, including work performed by  
26 Boeing (or one of its predecessors) on behalf of the federal government.

27 Before SB 990 was enacted, regulation of the cleanup of the SSFL site was  
28 allocated between state and federal authorities based on the nature of the

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1 contamination. DTSC supervised the cleanup of non-radiological contamination  
2 pursuant to the State’s generally applicable hazardous waste management laws, Cal.  
3 Health & Safety Code ch. 6.5. Those laws apply to the federal government and its  
4 contractors pursuant to a waiver of federal immunity for state laws governing the  
5 cleanup of non-radiological material that regulate the government “in the same  
6 manner, and to the same extent, as any person is subject to such requirements.” 42  
7 U.S.C. § 6961(a)(2). In contrast, DOE supervised the cleanup of radiological  
8 contamination at SSFL pursuant to various federal rules.

9 In SB 990, the California Legislature declared that the enactment of a statute  
10 specifically addressing the cleanup of contamination at the SSFL site was supported  
11 by certain “unique circumstances,” which are set forth in Section 2 of SB 990,  
12 including DOE’s reliance on what the Legislature believed were “less protective  
13 cleanup standards.” The specific portions of SB 990 that are at issue in this action  
14 also include: the enactment of a special statute dealing with the SSFL site rather than  
15 a statute of general application; DTSC’s regulation of the investigation,  
16 characterization, and cleanup of radiological material at the site; and certain  
17 substantive cleanup requirements, including a requirement that DTSC sum “the  
18 cumulative risk from radiological and chemical contaminants at the site,” and that it  
19 assume that the site will be used in the future for “either suburban residential or rural  
20 residential (agricultural)” purposes, “whichever produces the lower permissible  
21 residual concentration for each contaminant.” Cal. Health & Safety Code § 25359.20  
22 (a), (c). It is Boeing’s position, disputed by DTSC, that these requirements do not  
23 exist under generally applicable state law. In addition, SB 990 makes it illegal for  
24 Boeing to “sell, lease, sublease or otherwise transfer” its land at SSFL until DTSC  
25 certifies “that the land has undergone complete remediation pursuant to the most  
26 protective standards.” *Id.* § 25359.20(1)(d), (e).

27 Boeing submits that no facts material to its field preemption or  
28 intergovernmental immunity claims are disputed. *See* Dkt. Nos. 27, 40.

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1 DTSC, however, submits that the following facts, which Boeing disputes, are  
2 among those material to a resolution of these issues: “that California has a major role  
3 under the Atomic Energy Act to regulate contamination at the SSFL, particularly  
4 contamination caused by Boeing’s non-DOE work”; the extent of Boeing’s non-DOE  
5 work at the SSFL site; “that SB 990 does not impose more stringent standards than  
6 would ordinarily apply to a cleanup under state and federal law”; and “that California  
7 could indeed impose requirements regarding cleanup of radiological contamination,  
8 including more stringent standards, in any event, because of its status as an  
9 Agreement State”—a written delegation of certain authority to California under  
10 provisions of the Atomic Energy Act. Dkt. No. 29 at 28-29. Boeing disputes that  
11 such delegation is applicable here.

### 12 **III. Points Of Law**

13 The following points of law are disputed and were the subject of Boeing’s  
14 Motion for Summary Judgment: (1) whether SB 990 is invalid in its entirety because it  
15 is preempted by the Atomic Energy Act, 42 U.S.C. §§ 2011, *et seq.*, because it seeks to  
16 regulate for safety purposes certain radiological materials subject to exclusive federal  
17 regulation under the Atomic Energy Act’s pervasive regulatory scheme, *see, e.g.*,  
18 *Silkwood v. Kerr-McGee*, 464 U.S. 238, 249, 78 L.Ed.2d 443, 104 S.Ct. 615 (1984);  
19 *U.S. v. Manning*, 527 F.3d 828, 831 (9th Cir. 2008); *U.S. v. Kentucky*, 252 F.3d 816,  
20 823 (6th Cir. 2001); and (2) whether SB 990 is invalid in its entirety because it singles  
21 out and seeks to regulate directly the federal government, its contractor, and its facilities  
22 in a manner that violates the doctrine of intergovernmental immunity, *see North Dakota*  
23 *v. U.S.*, 495 U.S. 423, 437, 109 L.Ed.2d 420, 110 S.Ct. 1986 (1990) (plurality); *Moses*  
24 *Lake Homes v. Grant Cnty.*, 365 U.S. 744, 751, 6 L. Ed.2d 66, 81 S.Ct. 870 (1961).

25 In its opposition brief, DTSC raised the following disputed points of law: (1)  
26 whether SB 990 is valid because Boeing has not overcome the presumption that  
27 Congress does not intend to supplant state law, especially in the areas of traditional state  
28 regulation, such as land use, public health and safety, and environmental protection, *see*

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1 *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645,  
2 654, 131 L.Ed.2d 695, 115 S.Ct. 1671 (1995); (2) whether SB 990 is valid, and has not  
3 been preempted by the Atomic Energy Act, because federal law has reserved to the  
4 States certain aspects of the regulation of radiological safety, which DTSC alleges  
5 includes “land use” determinations related to radiological cleanup, *see Pac. Gas &*  
6 *Elec. Co. v. State Energy Res. Cons. & Dev. Comm’n*, 461 U.S. 190, 211-12, 75  
7 L.Ed.2d 752, 103 S.Ct. 1713 (1983); and (3) whether SB 990 is a valid exercise of  
8 California’s authority under the 1962 Agreement between the then-Atomic Energy  
9 Commission and the State, which remains in effect and which delegates to the State  
10 “the authority to regulate the materials covered by the agreement for the protection of  
11 the public health and safety from radiations hazards,” *see* 42 U.S.C. § 2021.

12 In addition, the following points of law are disputed, but were *not* the subject of  
13 Boeing’s Motion for Summary Judgment: (1) whether SB 990 is preempted by federal  
14 law because it conflicts with and stands as an obstacle to the accomplishment and  
15 execution of the full purposes and objectives of Congress and DOE, *see Jones v. Rath*  
16 *Packing*, 430 U.S. 519, 526, 51 L.Ed.2d 604, 97 S.Ct. 1305 (1977); *Nevada v.*  
17 *Watkins*, 914 F.2d 1545, 1561 (9th Cir. 1990); (2) whether SB 990, which is directed  
18 specifically and exclusively at the SSFL site, singles out Boeing for disparate  
19 treatment without justification, thus depriving Boeing of its rights, privileges, or  
20 immunities secured by the Fourteenth Amendment of the Constitution of the United  
21 States, *see Village of Willowbrook v. Olech*, 528 U.S. 562, 563-566, 145 L.Ed.2d  
22 1060, 120 S.Ct. 1073 (2000) (per curiam); and (3) whether SB 990 violates the Due  
23 Process Clause of the Fourteenth Amendment to the United States Constitution  
24 because it irrationally and arbitrarily deprives Boeing of a substantial property right,  
25 *see Village of Euclid v. Ambler Realty*, 272 U.S. 365, 395, 71 L.Ed. 303, 47 S.Ct. 114  
26 (1926). DTSC disputes Boeing’s contentions on these issues based, in part, on the  
27 principles set forth in the above paragraph—*i.e.*, that the State’s authority to regulate in  
28 the traditional areas of land use, public health and safety, and environmental



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1 protection are paramount to any alleged claims of field or conflict preemption,  
2 disparate treatment, or deprivation of property rights. DTSC reserves the right to  
3 provide additional authorities at the time such issues are heard by motion or otherwise.

4 **IV. Prior And Pending Motions**

5 On January 22, 2010, Boeing filed a Motion for Summary Judgment on its field  
6 preemption and intergovernmental immunity claims (Counts 1-3 of its Amended  
7 Complaint). That Motion was fully briefed and scheduled for oral argument in the  
8 Eastern District of California on June 21. Dkt. No. 42. This case was transferred to  
9 this Court on June 18, 2010, and on July 9, 2010, this Court denied that Motion  
10 without prejudice to re-filing in accordance with the Court's Scheduling and Case  
11 Management Order. Dkt. Nos. 50, 79. The parties respectfully request that this Court  
12 treat their previously filed summary judgment papers as filed consistent with the local  
13 rules and this Court's Standing Order. The parties request that the Court schedule a  
14 hearing on the Motion for Summary Judgment on September 20, 2010, or at such later  
15 time as convenient for the Court.

16 Other than scheduling stipulations, no other motions have been filed in this  
17 case, and the parties do not currently anticipate filing any other motions prior to the  
18 resolution of Boeing's Motion for Summary Judgment.

19 **V. Amendment Of Pleadings**

20 No addition or dismissal of parties, claims, or defenses is contemplated at this  
21 time. The parties propose a 30-day time period following the resolution of Boeing's  
22 Motion for Summary Judgment for amendment of the pleadings.

23 **VI. Initial Disclosures Pursuant To Fed. R. Civ. P. 26**

24 The parties have stipulated, with the approval of Magistrate Judge Nagle, to  
25 dispense with initial disclosures. Dkt. No. 86.

26 **VII. Discovery Taken To Date And Proposed Discovery Plan**

27 No discovery has been taken to date. Boeing respectfully submits that  
28 discovery is unnecessary because this case can be resolved on pure issues of law. It is

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1 DTSC’s position that discovery will be necessary should Boeing’s Motion for  
 2 Summary Judgment be denied. The parties have agreed that discovery should be  
 3 stayed pending the disposition of Boeing’s Motion for Summary Judgment, but DTSC  
 4 reserves the right, at the hearing, to request that the Court withhold determination of  
 5 the motion until after a limited period of discovery.

6 In the event, however, that discovery is required, the parties propose the  
 7 following discovery plan:

8 *A. Changes Regarding Disclosures Under Rule 26(a).* As noted above, the  
 9 parties have stipulated, and the Magistrate Judge has ordered, that they may dispense  
 10 with the initial-disclosure requirement.

11 *B. Subjects On Which Discovery May Be Needed And Schedule.* If discovery  
 12 is needed, the parties propose the following schedule. The parties anticipate that fact  
 13 discovery will not be extensive. Subjects of potential discovery include aspects of the  
 14 operational, regulatory, and contamination histories of SSFL and other sites in the  
 15 State and the background of the adoption of SB 990. Dates herein are based on an  
 16 assumption that this Court rules on Boeing’s Motion by November 22, 2010:

|                                |  |
|--------------------------------|--|
| 17 Fact Discovery Cut-Off      | four months after disposition of Boeing’s<br>motion for summary judgment<br>(March 22, 2011) |
| 18 Initial Expert Reports      | one month after fact discovery cut-off<br>(April 22, 2011)                                   |
| 19 Close of Expert Depositions | three weeks after initial expert reports<br>(May 13, 2011)                                   |
| 20 Rebuttal Expert Reports     | two weeks after close of expert depositions<br>(May 27, 2011)                                |
| 21 Rebuttal Expert Depositions | three weeks after rebuttal reports<br>(June 17, 2011)  |

22 *C. Electronically Stored Information.* The parties do not anticipate issues  
 23 arising with regard to electronically stored information, such as the need to produce  
 24 electronic records in a particular electronic format.

25 *D. Claims Of Privilege Or Protection.* If privileged material is inadvertently  
 26  
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1 produced, the party in receipt of such material shall promptly return it, and privilege  
2 shall not be considered waived.

3 *E. Changes That Should Be Made In Limitations On Discovery.* None.

4 *F. Any Other Orders Pursuant To Rule 26(c) Or Rule 16(b) Or (c).* Certain  
5 documents or information that may be produced in discovery in this proceeding may  
6 contain confidential information. Accordingly, the parties are negotiating, and expect  
7 to stipulate to, a protective order that will be submitted to the Magistrate Judge. In  
8 addition, because aspects of this case involve the government's nuclear research  
9 program, issues may arise over material that may be classified, subject to export  
10 controls, or otherwise restricted by federal law. Should any discovery requests seek  
11 the production of documents containing such material, the parties will confer  
12 regarding an appropriate resolution consistent with their obligations under federal law.

### 13 **VIII. Related Cases Or Proceedings**

14 No related cases or proceedings are pending before another judge of this Court  
15 or any administrative agency. In 2007, the U.S. District Court for the Northern  
16 District of California decided a case addressing issues related to DOE's compliance  
17 with the National Environmental Policy Act in connection with its remediation  
18 activity at SSFL. *See NRDC v. DOE*, 2007 WL 1302498 (N.D. Cal. May 2, 2007).  
19 The court has retained jurisdiction pending DOE's compliance with its order to  
20 prepare an Environmental Impact Statement. Neither Boeing nor DTSC was a party,  
21 but the State was an amicus curiae in support of NRDC and the other plaintiffs.

### 22 **IX. Relief Sought**

23 Boeing seeks a declaration that SB 990 is invalid and unconstitutional in its  
24 entirety, an injunction preventing DTSC from enforcing or taking any action against  
25 Boeing based on SB 990, and other such relief as may be just and proper. Boeing has  
26 not sought damages or attorney's fees.

### 27 **X. Interested Parties Or Persons**

28 Boeing filed the required Certification as to Interested Parties on July 14, 2010.

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Dkt. No. 83. Boeing has a financial interest in the outcome of this case. State Street Bank and Trust Company, a wholly owned subsidiary of State Street Corporation, which is a publicly traded company, owns more than 10% of the outstanding Boeing stock. Boeing has no parent company. *See also* Dkt. No. 1-4. Other than federal agencies including DOE and NASA, and amici herein, the parties are currently unaware of any other persons, firms, partnerships, corporations, or other entities that have a financial interest or any other interest in the outcome of this proceeding.

As a governmental party, DTSC is exempt from Local Rule 7.1-1.

**XI. Proposed Dates For Discovery, Motions, Pretrial, And Trial**

It is Boeing’s position that this case should be decided on summary judgment, but in the event a trial becomes necessary, the parties propose the following schedule. Dates included herein are based on an assumption that this Court rules on Boeing’s Motion for Summary Judgment by November 22, 2010:

|   |   |
|---|---|
| Completion of Discovery                               | seven months after disposition of Boeing’s summary judgment motion (May 17, 2011)   |
| Last Date for Hearing of Motions for Summary Judgment | three months after completion of discovery (September 19, 2011)                     |
| Final Pretrial Conference                             | three months after last date for hearing of substantive motions (December 19, 2011) |
| Trial Date  | one month after final pretrial conference (January 16, 2012)                        |

**XII. Jury Demand**

Neither party has demanded a jury trial. It is Boeing’s position that two weeks should be reserved for trial. DTSC submits that two to three weeks should be reserved for trial. The parties will meet and confer in advance of trial to narrow the issues of fact and propose procedures to streamline the proceedings.

**XIII. Settlement Efforts**

The parties have been in negotiations regarding the interpretation and application of SB 990 since shortly after its passage in October 2007, including

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1 attempting to reach agreement on technical application of SB 990 throughout 2008,  
2 followed by a more than ten-month effort in 2009 seeking to negotiate a consent order  
3 to resolve the dispute. While the parties remain open to pursuing further settlement  
4 discussions, the inability to reach consensus despite significant time spent to date and  
5 the potential for impacts on cost and the remediation schedule if resolution of the  
6 dispute is further delayed, support moving forward with the litigation schedule.

7 **XIV. Complexity Of Case**

8 The parties agree that this case is not complex and reference to the *Manual on*  
9 *Complex Litigation* is unnecessary.

10 **XV. Dispositive Motions**

11 Boeing filed a Motion for Summary Judgment on January 22, 2010. That  
12 Motion was fully briefed and awaiting oral argument when this case was transferred  
13 on June 18, 2010. On July 9, 2010, this Court denied that Motion without prejudice to  
14 refiling in accordance with the Court's Scheduling and Case Management Order that  
15 will be issued after the Scheduling Conference. The parties have not filed any other  
16 dispositive or partially dispositive motions, nor do they anticipate filing any other  
17 such motions at this time, except as set forth above.

18 **XVI. Unusual Legal Issues**

19 None.

20 **XVII. Severance, Bifurcation, Or Other Ordering Of Proof**

21 None.

22 **XVIII. ECF**

23 Randolph D. Moss, lead counsel for The Boeing Company, is a registered ECF  
24 user. His e-mail address of record is randolph.moss@wilmerhale.com.

25 Likewise, Donald Robinson, lead counsel for DTSC, is a registered ECF user.  
26 His e-mail address of record is donald.robinson@doj.ca.gov.

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Dated: July 23, 2010

Respectfully submitted,

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/s/ Donald Robinson  
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