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11  
 12 **UNITED STATES DISTRICT COURT**  
 13 **CENTRAL DISTRICT OF CALIFORNIA**  
 14

15 LAWRENCE O'CONNOR, et al.,

16 Plaintiffs,

17 v.

18 BOEING NORTH AMERICAN,  
19 INC., et al.,

20 Defendants.

21  
22 **AND RELATED ACTIONS**  
23

Cases No. CV 97-1554 DT (RCx);

**PLAINTIFFS' MEMORANDUM  
IN SUPPORT OF MOTION FOR  
SUMMARY ADJUDICATION OF  
STRICT LIABILITY FOR ULTRA  
HAZARDOUS ACTIVITIES**

Date: August 8, 2005

Time: 10:00 a.m.

Place: Courtroom 880  
(Roybal Bldg.)

Judge: Hon. Dickran Tevrizian

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## I. INTRODUCTION

1  
2  
3 Like the law in virtually every American jurisdiction, California law imposes  
4 strict liability on actors whose ultrahazardous activities or abnormally dangerous  
5 conduct causes harm. Defendants' ultrahazardous conduct at issue here is the  
6 following: (1) Defendants' operation of experimental nuclear reactors at the Santa  
7 Susana Field Laboratory ("SSFL"), specifically the 1959 nuclear incident there;  
8 (2) Defendants' open air burning of toxic materials as a means of disposal in the  
9 Area 1 Burn Pit at SSFL; and (3) Defendants' cooling of rocket engines with water  
10 contaminated with deadly toxins. Plaintiffs seek to summarily adjudicate the issue  
11 of Defendants' strict liability for claims arising from these three specific types of  
12 ultrahazardous activities conducted by Defendants.

13 As a result of these abnormally dangerous activities, massive quantities of  
14 radioactive and chemical carcinogens were released over a vast geographic area in  
15 the San Fernando and Simi valleys of Southern California. While Defendants  
16 themselves understood at the time that the health hazards from human exposure to  
17 these radioactive and chemical materials were grave, Plaintiffs were unaware of  
18 these hazardous releases, but Plaintiffs are not addressing the issues of exposure,  
19 causation or damages in the instant motion. Rather, Plaintiffs' motion only  
20 addresses the ultrahazardous nature of Defendants' conduct in conducting nuclear  
21 power experiments, in burning hazardous chemicals and carcinogens in open pits,  
22 and in pouring a cocktail of hazardous contaminated water onto hot rocket engines  
23 in order to cool them. The facts of this case resoundingly satisfy all the settled  
24 criteria for strict liability of an abnormally dangerous activity, and California law  
25 supports that conclusion.

26 Plaintiffs respectfully request partial summary judgment on this issue of  
27 liability, clearing the way for what Defendants have long said they wanted – an  
28 adjudication of whether their releases caused Plaintiffs' injuries.

## II. STATEMENT OF FACTS

Defendants admit that their operations at the "Rocketdyne Facilities" (defined to include the SSFL, the Canoga Facility and De Soto Facility) included the use or production of volatile organic compounds, dioxin compounds, various rocket and jet fuels and propellants, known carcinogens and spent rocket engine fuel. (Fact No. 1 to Plaintiffs' Statement of Uncontroverted Facts and Conclusions of Law in Support of Motion for Summary Adjudication of Strict Liability for Ultra Hazardous Activities ("PSUF").) The three areas of Defendants' conduct set forth below are the basis of Plaintiffs' claim for strict liability based upon ultrahazardous activities at issue here.

### A. Nuclear Activity at SSFL

Between the 1950's and 1980's, nuclear activities at SSFL involved the use, storage, generation, and/or disposal of radioactive materials, and they included the operation of experimental nuclear reactors, the staging and storage of nuclear fuel and the operation of a Hot Laboratory to disassemble and to inspect irradiated fuel at SSFL. (PSUF No. 2 through 12.)

During the planning stages of the Sodium Reactor Experiment ("SRE") at SSFL, the emergency exposure program regarding the Analysis of the Body Deposition of Presumed Aerosols Resultant from a Nuclear Incident recognized that the emergency exposure adopted may be exceeded with fair probability under certain meteorological conditions. (PSUF No. 24.) In 1958, although referenced as a "remote possibility," it was recognized that "[i]n the case of an uncontrolled withdrawal of the safety rods and a malfunction of all other safety devices, a condition which cannot be proved impossible, fuel rod temperatures would start to rise, thus increasing the coolant temperature and decreasing the coolant heat transfer capabilities. An increasingly rapid rise in fuel temperature could then cause melting



1 of fuel." (PSUF No. 25.) That all risks could not be eliminated from the operation  
2 of the SRE was recognized at that time.

3 Defendants admit that on July 13, 1959, the SRE had a "power excursion"  
4 and that in July 1959, some of the reactor fuel assemblies of the SRE reactor  
5 partially melted. (PSUF No. 15.) During Power Run 14 of SRE, which took place  
6 between July 12 and July 26, 1959, an incident occurred in which 13 of 43 fuel  
7 channels were damaged; severe overheating of some of the fuel elements is known  
8 to have existed; many of the fuel slugs were badly swollen, cracked and spongy; and  
9 ten of the thirteen fuel assemblies were found to be broken and separated into  
10 multiple pieces. (PSUF No. 16-20.) As to the consequences of this nuclear  
11 incident at SRE, the investigations into the causes conducted concluded that "5,000  
12 to 10,000 curies of fission product activity were unexpectedly released to the  
13 primary sodium system." (PSUF No. 21.)

14 In addition, Defendants admit that a Tetralin Explosion occurred at SSFL in  
15 1959, that a release of fission gas occurred within the AE-6 reactor in March of  
16 1959, that radioactively contaminated water was leaked in the 1960's and 1970's,  
17 and that radiological contamination was found in a leach field at SSFL in 1976.  
18 (PSUF No. 13, 14, 22, 23.)

19 As further discussed below, these nuclear operations at SSFL constituted an  
20 ultrahazardous activity.

## 21 **B. Area 1 Burn Pit at SSFL**

### 22 **1. Defendants burned numerous hazardous substances at an** 23 **open air burn pit at SSFL.**

24 At least through the early 1970's, an open air burn pit was located in the  
25 Southwest corner of Area 1, bordering the SSFL buffer zone at SSFL ("Area 1 Burn  
26 Pit"). (PSUF No. 28.) Even though the legal burning of combustible refuse was  
27 essentially eliminated in the Los Angeles Basin on or before September 1955,  
28

1 Defendants burned hazardous wastes and chemicals in the Area 1 Burn Pit,  
2 including propellant waste chemicals, JP4, RP1 fuel (kerosene), triethyl aluminum,  
3 triethyl boron, hydrazine, unsymmetrical dimethyl hydrazine (UDMH), nitrogen  
4 tetroxide (NTO), oils, trichloroethylenes, hydrazine and magnesium chips, along  
5 with materials that were contained in unmarked and unlabeled barrels. (PSUF No.  
6 30, 32, 33, 44.)

7 **2. The burnings were conducted under cover of night and**  
8 **produced heavy smoke that drifted to the surrounding**  
9 **neighborhoods.**

10 Employees conducting the burnings in the Area 1 Burn Pit were instructed to  
11 burn them at night. (PSUF No. 37, 38.) The materials burned produced dense  
12 heavy smoke of various colors, and a large plume of smoke would rise up into the  
13 air and be carried off with the wind, which was witnessed to drift towards the  
14 populated surrounding areas. (PSUF No. 39, 40.) Later, the highest levels of  
15 dioxins at SSFL were found in the vicinity of the Area 1 Burn Pit. (PSUF No. 31.)

16 **3. Defendants used high-powered rifles to puncture containers**  
17 **and release deadly toxins.**

18 NTO presented the firemen at SSFL with additional problems when it was  
19 pressurized and contained in a "K" bottle, which is a metal cylinder about four and a  
20 half to five feet tall, similar to the oxygen tanks used in hospitals. The firemen  
21 would place the K bottles in holes they dug in the hillside and then from a distance  
22 shoot at them with a high-powered rifle to puncture the containers. The vaporized  
23 NTO would then rise up into the air forming a yellowish-orange cloud that would  
24 drift away depending on the direction the wind was blowing. (PSUF No. 41.)

25 **4. SSFL firemen were tasked with collecting body parts after a**  
26 **deadly explosion.**

27 Several explosions and accidents occurred at SSFL which resulted in  
28 fatalities. One such explosion killed a number of employees. SSFL Firemen were

1 responsible for conducting a head count of casualties. Human remains were spread  
2 over a large area where the explosion took place and the fireman had to collect the  
3 body parts for removal. (PSUF No. 42.)

4 **5. Defendants officially characterized the Burn Pit as a "waste**  
5 **pile," yet continued their ultrahazardous conduct there.**

6 In an EPA application, Defendants improperly characterized the Burn Pit as a  
7 "waste pile" and failed to disclose that the Burn Pit would be used for open pit  
8 burning of hazardous waste. They also failed to comply with certain requirements  
9 and were not authorized to store or destroy hazardous waste at the Burn Pit. Despite  
10 never having been issued the requisite permit, Defendants routinely utilized the  
11 Burn Pit to detonate gaseous propellants in cylinders and advanced scrap  
12 propellants, and unlawfully stored numerous drums of radioactive hazardous waste.  
13 (PSUF No. 43.)

14 As further discussed below, the burning of propellant waste and chemicals in  
15 the Area 1 Burn Pit at SSFL constituted an ultrahazardous activity.

16  
17 **C. Reclaimed Contaminated Water to Cool Rocket Test Stands**

18 **1. Defendants used contaminated water to cool rocket engine**  
19 **test stands as a cost saving mechanism.**

20 Starting in 1957, "reclaimed" water was used at SSFL. (PSUF No. 47.) The  
21 contaminants released into the reservoir of the "reclaimed" water included, but was  
22 not limited to, the following: Kerosene, alcohol, nitric acid, sulphuric acid,  
23 hydrochloric acid, caustic soda, residual fuel oil, engine fuel and solvents, including  
24 kerosene and trichloroethylene, lubricating oils, and hydrochloric acid. (PSUF No.  
25 48, 49.) In 1958, after passing from a common reservoir at SSFL where the  
26 effluents were mixed together, a "reclamation system [had] been constructed at the  
27 location which recycled the water to the two large engine test facilities for reuse as  
28 coolant water." (PSUF No. 52.)

1 SSFL employees present during rocket engine test firings at SSFL witnessed  
2 excess coolant, fuel and chemicals used to flush the rocket engines being allowed to  
3 flow downhill into collection ponds, along with water, and the resulting mix from  
4 these collection ponds was used to fill the large tanks located near the rocket test  
5 stands, to be reused in subsequent coolings. (PSUF No. 53.) The primary  
6 justification for using reclaimed water for cooling the rocket test stands was cost  
7 savings. (PSUF No. 50.)

8 **2. The cooling process produced toxic clouds that drifted to the**  
9 **surrounding neighborhoods and burned employees.**

10 When the water was poured into the deflectors at the base of the test stands,  
11 the cloud rose skywards and was carried off by the wind in the direction of the  
12 nearby neighborhoods. (PSUF No. 54, 56.)

13 When the cloud from the rocket engine test firing did not move away but  
14 instead rained down on top of the SSFL, the firemen experienced burning sensations  
15 on their arms and neck and required medical treatment. In addition, their uniforms  
16 were burned by the particulates falling from the sky, and the vehicles in the parking  
17 lots at SSFL were covered with film. (PSUF No. 57.)

18 **3. Defendants burned excess rocket fuel and other waste in**  
19 **catch ponds at SSFL.**

20 Defendants also burned, at night, excess rocket fuel and other waste that had  
21 accumulated on the surface of the various catch ponds located at SSFL. The rocket  
22 fuel and other waste in the catch ponds resulted from the rocket engine test firings.  
23 After they burned off the excess fuel from the surface of the pond, the water was  
24 recycled back into the cooler tanks to be used again to cool the rocket engines when  
25 they were test fired the next time. The firemen assigned to do the burning were not  
26 given any specialized training in how to handle such assignment, other than being  
27 told it could only be done at night. (PSUF No. 58.)

28 ///

1 On the nights when assigned the duty to burn the catch ponds, the fireman  
2 would check the ponds at SSFL to see how much rocket fuel had accumulated on  
3 the surface. The rocket fuel would not burn on its own, so they would pour gasoline  
4 on the rocket fuel stain to get it started and then stand back and wait for it to burn  
5 out. The fire produced heavy black smoke which rose into the air and was carried  
6 off by the wind currents. On the few occasions when the cloud of smoke did not  
7 move away from overhead, the firemen would feel particulates rain back down on  
8 them. (PSUF No. 59.)

9 As further discussed below, the use of contaminated water to cool the rocket  
10 engines at SSFL constituted an ultrahazardous activity.

### 11 12 III. APPLICABLE LEGAL STANDARDS

13 Under Fed. R. Civ. P. 56(c), a district court may award a partial summary  
14 judgment that decides only the issue of liability. *White v. Lee*, 227 F.3d 1214, 1240  
15 (9th Cir. 2000). The district court, of course, must determine whether there are any  
16 genuine issues of material fact for trial. *Guebara v. Allstate Ins. Co.*, 237 F.3d 987,  
17 992 (9th Cir. 2001). The availability of summary judgment turns on whether a jury  
18 question is presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

19 No jury question is presented here. The determination whether a particular  
20 activity is ultrahazardous and subject to strict liability is a question of law to be  
21 determined by the Court. *Luthringer v. Moore*, 31 Cal.2d 489, 496 (1948). Further,  
22 the substantive rules for decision in a Price-Anderson action are derived from state  
23 law. 42 U.S.C. § 2014(hh).

24 Because no potential jury question is at issue regarding the nature of the  
25 ultrahazardous activity, the Court is not required to weigh the evidence in the light  
26 most favorable to the nonmoving party. Rather, the Court may grant this motion if  
27 its evaluation of the evidence supports strict liability in light of California law. *Cf.*  
28 *Fisher v. Dees*, 794 F.2d 432, 436 (9th Cir. 1986) ("because . . . these judgments are

1 legal in nature, we can make them without usurping the role of the jury”).  
2 Furthermore, the core facts on which the Court’s determination depends are not in  
3 genuine dispute.  
4

#### 5 IV. ARGUMENT

##### 6 A. California imposes strict liability for ultrahazardous activities.

7 Under California law, certain activities under certain conditions are so  
8 hazardous to the public generally and occur so infrequently that liability is imposed  
9 on persons who carry on these activities even in the absence of negligence.  
10 *Luthringer v. Moore, supra*, 31 Cal.2d at 498-500 (fumigation of building with  
11 poisonous gas is ultrahazardous activity); *Balding v. Stutsman*, 246 Cal.App.2d 559,  
12 564 (1966) (use of explosives in or near residential area is ultrahazardous activity);  
13 see also *Chavez v. Southern Pacific Transp. Co.*, 413 F.Supp. 1203 (E.D. Cal. 1976)  
14 (transportation of bombs by common carrier is ultrahazardous activity).  
15

16 “The doctrine of ultrahazardous activity provides that one who undertakes an  
17 ultrahazardous activity is liable to every person who is injured as a proximate result  
18 of that activity, regardless of the amount of care he uses.” *Pierce v. Pacific Gas &*  
19 *Electric Co.*, 166 Cal.App.3d 68, 85 (1985).

20 “An activity is ultrahazardous if it (a) necessarily involves a risk of serious  
21 harm to the person, land or chattels of others which cannot be eliminated by the  
22 exercise of the utmost care, and (b) is not a matter of common usage . . .”  
23 *Luthringer v. Moore, supra*, 31 Cal.2d at 498; see also, *Edwards v. Post*  
24 *Transportation Co.*, 228 Cal.App.3d 980 (1991), *Moore v. R.G. Industries, Inc.*, 789  
25 F.2d 1326, 1328 (9th Cir. 1986), citing *Hulsey v. Elsinore Parachute Center*, 168  
26 Cal. App. 3d 333, 345 (1985).

27 An activity is a matter of common usage if it is customarily carried on by the  
28 great mass of mankind or by many people in the community; it does not cease to be

1 so because it is carried on for a purpose peculiar to the individual who carries it on.  
2 Certain activities may be so generally carried on as to be regarded as customary,  
3 such as the driving of an automobile, and so are considered a matter of customary  
4 usage and not ultrahazardous. *Luthringer v. Moore, supra*, 31 Cal.2d 489 at 498.

5 Section 519 of the *Restatement (Second)* of Torts provides strict liability for  
6 damages resulting from an abnormally dangerous activity. Section 520 sets forth  
7 six factors to be considered in determining whether an activity is abnormally  
8 dangerous:

- 9 1. Existence of a high degree of risk of some harm to the person,  
10 land or chattels of others;
- 11 2. Likelihood that the harm that results from it will be great;
- 12 3. Inability to eliminate the risk by the exercise of reasonable care;
- 13 4. Extent to which the activity is not a matter of common usage;
- 14 5. Inappropriateness of the activity to the place where it is carried  
15 on;
- 16 6. Extent to which its value to the community is outweighed by its  
17 dangerous attributes.

18 *Ahrens v. Superior Court*, 197 Cal. App. 3d 1134, 1142-1143 fn. 5 (1988). See,  
19 also, *Edwards v. Post Transportation Co., supra*, 228 Cal.App.3d at 983-984  
20 (applying criteria under California law); *SKF Farms v. Superior Court*, 153  
21 Cal.App.3d 902 (1984); *Travelers Indemnity Co. v. City of Redondo Beach*, 28  
22 Cal.App.4th 1432, 1444 (1994) (determining *Restatement (Second)* of Torts § 520  
23 applies to ultrahazardous question but cannot be determined on demurrer);  
24 *Fallowfield v. Strunk*, 23 *Envtl.L.Rep. (Envtl.L.Inst.)* 20, 119 (E.D.Pa., 1992)  
25 (applying these criteria to hazardous waste case under Pennsylvania law).

26 "Under the *Restatement* view, it is not necessary that all of the factors be  
27 present in a particular case." *Ahrens v. Superior Court, supra*, 197 Cal. App. 3d at  
28 1143. "Whether California has completely adopted the *Restatement* view of

1 abnormally dangerous activities has been the subject of scholarly comment. (See 1  
2 Levy et al., Cal. Torts (1987) § 7.04[1][b], pp. 7-25.) However, some courts have  
3 treated the Restatement factors as relevant to a finding that an activity is abnormally  
4 dangerous." *Ahrens v. Superior Court, supra*, 197 Cal. App. 3d at 1143, fn. 6,  
5 citing *Goodwin v. Reilley*, 176 Cal.App.3d 86, 91 (1985), *SKF Farms v. Superior*  
6 *Court*, 153 Cal.App.3d 902, 906 (1984), and *Luthringer v. Moore, supra*, 31 Cal.2d  
7 489.

8 Plaintiffs separately address whether Defendants' nuclear related conduct  
9 and non-nuclear conduct constitute ultrahazardous activities below.

10  
11 **B. The business of nuclear energy constitutes an ultrahazardous**  
12 **activity.**

13 Words such as "radiation," "nuclear fission," or "the atom bomb," may send  
14 shivers down a person's spine. The grave and unimaginable devastation which can  
15 and has accompanied nuclear incidents are incomprehensible to most, and even  
16 minor nuclear incidents can cause devastating injury to humans. Not surprisingly,  
17 courts have generally recognized that the business of nuclear energy is an  
18 ultrahazardous activity, and when nuclear materials cause personal injury, liability  
19 should be imposed on manufacturers of such products without proof of fault.  
20 Defendants' nuclear activities in the 1950's, which were admittedly experimental in  
21 nature, fall even more squarely within the definition of an ultrahazardous activity.

22 **1. An analysis of defendants' nuclear operations under**  
23 **California law necessitates a conclusion that they are strictly**  
24 **liable for the 1959 nuclear incident.**

25 Nuclear operations, particularly in the 1950's which is at issue here, involved  
26 a risk of serious harm to the person, land or chattels of others which cannot be  
27 eliminated by exercise of utmost care; and nuclear operations cannot be considered  
28 a matter of common usage by any twist of reason. California law and common



1 sense necessitate a finding that Defendants' nuclear operations constitute an  
2 ultrahazardous activity, making them strictly liable for an damaged to Plaintiffs  
3 caused by the 1959 nuclear incident.

4 As to the first of the six factors in Section 520, that a high degree of risk of  
5 harm exist, Comment g to *Restatement (Second) of Torts* § 520 states:

6 An activity that is abnormally dangerous ordinarily involves a  
7 high degree of risk of serious harm to the person, land or chattels  
8 of others . . . If the potential harm is sufficiently great, however,  
9 as in the case of a nuclear explosion, the likelihood that it will  
10 take place may be comparatively slight and yet the activity be  
11 regarded as abnormally dangerous.

12 The release of radioactive substances manifestly poses a grave threat to  
13 human health. Nor are the health dangers posed by Defendants' releases of  
14 radioactive iodine from SSFL evident only in hindsight. Defendants even knew at  
15 the time that their nuclear operations posed extreme hazards, which they could not  
16 completely eliminated. (PSUF No. 24, 25.) Defendants were acutely conscious,  
17 before operations at SSFL were even underway, of the high risk of serious bodily  
18 harm that would be created by exposures to radioactive substances, and science had  
19 already evolved sufficiently to have witnessed Hiroshima and to have studied its  
20 health effects for more than a decade.

21 Regardless, no California case holds that a defendant must have actual  
22 knowledge of the true extent of the danger involved in proceeding with an  
23 ultrahazardous activity. To the contrary, as stated in *Luthringer v. Moore, supra*, 31  
24 Cal.2d at 498, one who carries on an ultrahazardous activity is liable for injuries to a  
25 person whom the actor reasonably should recognize as likely to be harmed by a  
26 miscarriage of the ultrahazardous activity, even though "the utmost care is exercised  
27 to prevent the harm."

28 ///

1 As to the second factor, the likelihood that harm will be great, Comment g to  
2 section 520 notes, “[s]ome activities, such as the use of atomic energy, necessarily  
3 and inevitably involve major risks of harm to others.” The nature of these risks is  
4 no mystery. “Radiation is capable of causing a broad range of illnesses, even at the  
5 lowest doses. This has been recognized by scientific and legal authority.” *In re*  
6 *Hanford Nuclear Reservation Litig.*, 292 F.3d 1124, 1127 (9th Cir. 2002).

7 The authors of the *Restatement* comment on the third factor from section 520,  
8 the inability to eliminate risk through reasonable care, as follows:

9 There is probably no activity, unless it is perhaps the use of  
10 atomic energy, from which all risks of harm could not be  
11 eliminated by the taking of all conceivable precautions, and the  
12 exercise of the utmost care, particularly as to the place where it is  
13 carried on.

14 *Restatement (Second)* § 520, comment h. The authors of Section 520 cannot  
15 conceive of an argument by which atomic energy would not fulfill the requirement  
16 of an inability to eliminate all risks through reasonable care, nor can Plaintiffs.

17 While Defendants may attempt to vociferously maintain that they operated  
18 the nuclear facilities at SSFL with the greatest care possible under the circumstances  
19 (as Plaintiffs suspect they will), that argument is misplaced. This contention that  
20 they were not negligent, yet the nuclear accident occurred in 1959, actually supports  
21 Plaintiffs’ position. If in fact Defendants were really as careful as they are bound to  
22 contend and the accident still occurred, then that is the exact scenario for which the  
23 doctrine of ultrahazardous activities was created. Defendants cannot maintain that  
24 SSFL was operated with all reasonable care and simultaneously argue that the  
25 radioactive releases from SSFL could have been prevented through reasonable  
26 precautions. All that is required under the third factor of section 520 is the inability  
27 of eliminating the relevant risk through reasonable care – a condition amply  
28 satisfied here.

1 As to the fourth factor, that the conduct in question not be a matter of  
2 common usage, common sense once again necessitates this finding. Plaintiffs need  
3 not dwell on whether the operation of a nuclear reactor is a matter of common  
4 usage. It certainly was not during the time periods at issue in this litigation, and the  
5 1959 nuclear incident even occurred in the Sodium Reactor Experiment, emphasis  
6 on experiment. (PSUF No. 7.) No one could reasonably argue that any nuclear  
7 experiment is a matter of common usage.

8 As to the fifth factor, inappropriateness of operation to the location, this  
9 factor also weighs in Plaintiffs' favor. While the western border of the San  
10 Fernando Valley in which SSFL was situated (PSUF No. 1) may not have been an  
11 urban center in the 1950's, it was a populated area and was not a remote wilderness  
12 or desert area. Defendants are expected to assert that the SSFL site was selected  
13 partly for its remoteness, prior to the plant's construction and operation, from major  
14 urban centers. Few locations may exist where releases from a nuclear site would  
15 have fallen entirely on unpopulated areas, but SSFL did not lie in the "middle of  
16 nowhere." Safer locations existed.

17 Regardless, the question is not whether Defendants should be exempted from  
18 strict liability for carrying on an activity which posed such vast dangers that no safer  
19 location could readily be found in the entire continental United States. The choice  
20 of an unsafe location for an abnormally dangerous activity should argue in favor of  
21 strict liability in circumstances where significantly safer locations might have been  
22 chosen. If an activity, however, will inherently pose grave health risks to persons  
23 residing in a large geographic area regardless of the location, then the pertinent  
24 question should be whether the enterprise ought to bear the costs, when those health  
25 risks materialize if the activity is undertaken anyway.

26 Factor six of Section 520 is the value to community versus dangerous  
27 attributes of conduct, and Comment h to section 520 notes, "[t]he utility of [an  
28 actor's] conduct may be such that he is socially justified in proceeding with his

1 activity, but the unavoidable risk of harm that is inherent in it [may] require[] that it  
2 be carried on at his peril, rather than at the expense of the innocent person who  
3 suffers harm as a result of it." Plaintiffs expect that Defendants will emphasize their  
4 contribution to nuclear experimentation and development, but Plaintiffs also suspect  
5 that Defendants will not point out that their purpose in the business of nuclear  
6 operations was profits. Their purpose in carrying out these experiments was purely  
7 for business reasons. While some benefits to society generally may have occurred,  
8 the entire national community was not subjected to the health risks created by  
9 Defendants' radioactive release in 1959. That sacrifice was limited to citizens  
10 residing downwind of SSFL, who did not knowingly or voluntarily take on that risk.  
11 If injury to some was the necessary price for a some benefit to the many, the proper  
12 course is to be glad of the benefit while compensating the injured.

13 **2. Other authorities also conclude that nuclear operations are**  
14 **unquestionably ultrahazardous activities.**

15 Courts from around the country have held that industrial operations and other  
16 activities posing the risk of human exposure to radioactive materials are abnormally  
17 dangerous and warrant the imposition of strict liability.

18 One court succinctly stated, "Plaintiffs are correct in pointing out that the  
19 business of nuclear energy has been held to be 'an intrinsically ultrahazardous  
20 activity.'" *Cincinnati Gas & Electric Co. v. General Elec. Co.*, 656 F.Supp. 49, 59  
21 (S.D. Ohio 1986), citing *Carolina Environmental Study Group v. United States*, 431  
22 F.Supp. 203, 223 (W.D.N.C. 1977), rev'd on other grounds, 438 U.S. 59, 98 S.Ct.  
23 2620, 57 L.Ed.2d 595 (1978). See, also, *Crawford v. National Lead Co.*, 784  
24 F.Supp. 439, 442 (S.D. Ohio 1989) ["We have little difficulty in concluding that the  
25 operation . . . is an abnormally dangerous activity."]

26 Professor Prosser explains that nuclear energy is an area "in which no court  
27 will, at last, refuse to recognize and apply the principle of strict liability." W.  
28 Prosser, *The Law of Torts*, §78, at 516 (4th ed. 1971).

1 In the landmark case of *Silkwood v. Kerr-McGee Corp.*, 667 F.2d 908 (10th  
2 Cir. 1981), *rev'd in part on other grounds*, 464 U.S. 238 (1984), the Tenth Circuit  
3 did not hesitate to conclude that Oklahoma would apply strict liability doctrine to  
4 releases of radioactive materials. *Id.*, 667 F.2d at 921 ("We have no doubt  
5 Oklahoma courts would apply strict liability to this case of escape of plutonium, a  
6 highly toxic and dangerous substance. . . . Nuclear energy is surely an area 'in  
7 which no court will, at last, refuse to recognize and apply the principle of strict  
8 liability,'" quoting W. Prosser, *The Law of Torts* § 78, at 516 (4th ed. 1971)).

9 The United States District Court for the Western District of North Carolina  
10 reached the same conclusion in *Carolina Environmental Study Group v. United*  
11 *States*, 431 F. Supp. 203, 223 (W.D.N.C. 1977) ("The courts of North Carolina have  
12 not yet had the chance to apply the rule of strict liability to nuclear power plants.  
13 However, the considerations that have led to the application of strict liability are all  
14 present in the generation of nuclear energy. It is an intrinsically ultrahazardous  
15 activity and, when done near large population centers, it is impossible to predict  
16 with certainty the extent or severity of its consequences."), *rev'd on other grounds*,  
17 438 U.S. 59 (1978).

18 In *T & E Indus., Inc. v. Safety Light Corp.*, 587 A.2d 1249 (N.J. 1991), the  
19 New Jersey Supreme Court held that the burial and disposal of radium tailings was  
20 subject to strict liability based on an abnormally dangerous activity. *See* 587 A.2d at  
21 1261 ("Radium has always been and continues to be an extraordinarily dangerous  
22 substance. Although radium process has never been a common activity, the  
23 injudicious handling, processing, and disposal of radium has for decades caused  
24 concern; it has long been suspected of posing a serious threat to the health of those  
25 who are exposed to it.")

26 Even the Supreme Court of Missouri, which applies a very narrow rule of  
27 strict liability, has held that radiation contamination escaping from a nuclear facility  
28 is an abnormally dangerous activity and that claims arising from nuclear-related

1 injuries warrant the application of strict liability. "Theories of liability other than  
2 strict liability may serve society better in resolving issues between parties when  
3 normal danger is involved. These theories are not equally effective in the nuclear  
4 industry." *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 868 (1985), *cert. denied*,  
5 476 U.S. 1176 (1986). The *Bennett* court explained its reasoning as follows:

6 The nuclear industry is unique in its inherent and, at present,  
7 unrectifiable danger. It is regulated by the federal government.  
8 Numerous safety standards have been set to ensure the public welfare,  
9 but even with these precautions taken, the potential danger is still  
10 enormous. Moreover, as previously noted, the safety standards are not  
11 guarantees of absolute safety. Federal emission standards are only  
12 guidelines which are based upon an inherently inexact balancing of  
13 human and environmental risks against social benefits. *See Silkwood*,  
14 485 F.Supp. at 581-82; *Keyes v. Howarth, supra*, at 541, 568. *See also*  
15 10 C.F.R. § 20.1(c). Each licensee is therefore requested to make every  
16 reasonable effort to maintain radiation exposures and releases as low as  
17 reasonably achievable. 10 C.F.R. § 20.1(c). The value of the nuclear  
18 industry to society may be great, but the use of nuclear material is not  
19 yet so common that strict liability should not be applied at this time.  
20 This is the basis for the Restatement and Prosser recognizing the  
21 nuclear industry is particularly suited for the application of strict  
22 liability. *See Restatement (Second of Torts § 520, comments g, h*  
23 *(1977); Prosser, supra, § 78, at 516.* In short, the nuclear industry  
24 creates dangers as great as blasting operations, if not more so, and,  
25 thus, if it fits the criteria established for strict liability, it should be  
26 governed by those legal liabilities imposed upon blasting operations  
27 because of its danger.

28 *Id.*, 698 S.W.2d at 868-869.

1 Congress, for its part, has long assumed that the operations of the nuclear  
2 weapons complex were sufficiently fraught with risk as to virtually assure the  
3 imposition of strict liability under state law in case of a nuclear incident. See S.  
4 Rep. No. 89-1605 (1966), *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS  
5 3201, 3206-07 (conscious policy decision not to establish statutory standard of  
6 liability in Price-Anderson Act was based on knowledge of strict liability doctrine  
7 and belief that courts would "ignore legal niceties and impose liabilities upon  
8 someone on one ground or another in the event of a nuclear incident"); *id.* at 3209  
9 ("existing Price-Anderson system rests on assumption" that courts would apply  
10 "legal principles akin to those of strict liability in the event of a serious nuclear  
11 incident"); *see also* 42 U.S.C. § 7384(a)(1) ("Since World War II, Federal nuclear  
12 activities have been explicitly recognized under Federal law as activities that are  
13 ultrahazardous. Nuclear weapons production and testing have involved unique  
14 dangers, including potential catastrophic nuclear accidents that private insurance  
15 carriers have not covered and recurring exposures to radioactive substances and  
16 beryllium that, even in small amounts, can cause medical harm").

17 California law and other authorities leave little room for any conclusion other  
18 than that Defendants should be held strictly liable for any damages caused by their  
19 nuclear activities, including the exposure to the 1959 nuclear incident at SSFL.  
20 Plaintiffs have no doubt that Defendants will find some way to minimize this broad  
21 and widespread belief that personal injuries arising from nuclear operations are  
22 appropriately subject to a rule of strict liability. What nevertheless appears to unite  
23 most neutral observers is the belief that the technologies of atomic power and  
24 atomic weaponry, though they have conferred benefits on society, are also  
25 inherently fraught with the grave danger of bodily harm. That grave danger  
26 requires that the law should not be unduly grudging about affording compensation  
27 to persons injured along the way, when things go less well than might have been  
28 wished, but no better than feared.

**C. The use of contaminated water to cool rocket engines and the burning of dangerous chemicals in open pits constitute ultrahazardous activities.**

Defendants' acts of burning a broad spectrum of hazardous wastes in the open air Area 1 Burn Pit and of using a cocktail of water contaminated with hazardous chemicals to cool rocket engine test stands constituted an obvious and extreme health risk to those in the surrounding areas. These activities posed serious risks to persons in the area through their exposure to these airborne carcinogens and hazardous chemicals. The practices of burning chemicals and cooling with contaminants were unsafe, and the dangers posed could only be eliminated by desisting in these dangerous activities altogether, which Defendants chose not to do. Further, burning dangerous chemicals and cooling hot engine test stands with contaminated water was not a common use at the time, as the burning was even prohibited by law and the cooling caused clouds of contaminated steam to form. (PSUF No. 41, 51, 53.) Consequently, both of these activities qualify as ultrahazardous activities, for which Defendants should be held strictly liable for any resulting damages caused to Plaintiffs.

An analysis of the six criteria set forth in Section 520 reaches the same result, that Plaintiffs' claim for strict liability based on ultrahazardous activity for the Defendants' acts of burning hazardous wastes in open air pits and of using a hazardous cocktail of contaminated water to cool rocket engine blocks is proper. These practices constituted a high degree of risk with a high likelihood that the harm would be great to those nearby due to the nature of the toxins. These practices were also inappropriate to the location as a community resided nearby. Defendants' dangerous burning of chemicals and cooling with the use of contaminated water did not benefit the community, and in fact, these activities have required environmental remediation and oversight of the governmental agencies in recent years, and they have harmed the general population, as well as the Plaintiffs here.



1 As to the first of the six factors in Section 520, that a high degree of risk of  
2 harm exist, Comment g to section 520 states:

3 An activity that is abnormally dangerous ordinarily involves a  
4 high degree of risk of serious harm to the person, land or chattels  
5 of others. The harm threatened must be major in degree, and  
6 sufficiently serious in its possible consequences to justify  
7 holding the defendant strictly responsible for subjecting others to  
8 an unusual risk. It is not enough that there is a recognizable risk  
9 of some relatively slight harm, even though that risk might be  
10 sufficient to make the actor's conduct negligent if the utility of  
11 his conduct did not outweigh it, or if he did not exercise  
12 reasonable care in conducting it.

13 This factor was addressed in *Garcia v. Estate of Norton*, 183 Cal.App.3d 413,  
14 418 (1986), where the defendant reprocessed waste oil to sell to refineries and  
15 obtained a used tanker truck to refurbish and use for his business. The defendant  
16 did not have the tank of the truck adequately cleaned before he asked the plaintiff to  
17 climb on the truck while the defendant cut a hole in the tank. When the defendant  
18 lit a welding torch to make the cut, the tank exploded because of waste oil that  
19 remained inside. The court held that "the activity of welding on a waste oil tanker  
20 with a blowtorch was ultrahazardous . . . [because] waste oil contains gasoline and  
21 solvents and is therefore highly combustible and potentially extremely explosive. . .  
22 . The danger of explosion would not be completely eliminated by steam cleaning."  
23 *Id.* at p. 419. The court noted that the "activity in which [defendant] was engaged  
24 was incredibly dangerous not only to Norton but to anyone else within a relatively  
25 large area." *Id.* at p. 420.

26 Accordingly, the mere welding of any tanker would not be ultrahazardous,  
27 but the welding of an oil tanker is dangerous due to the high degree of risks posed.  
28 Similarly, burning non hazardous materials may not pose a risk, and cooling hot

1 engine blocks with plain water may not pose a high degree of risk. Adding a  
2 hazardous chemical to the burning and adding a dangerous contaminant to the  
3 cooling water, however, turns this activity into an "incredibly dangerous" activity to  
4 those in the surrounding area, as with the welding of an oil tanker.

5 The second factor of Section 520 is that the likelihood that harm will be great.  
6 Defendants' releasing toxic chemicals into the air by burning and through a steam  
7 cloud posed great harm to its nearby neighbors. The toxins released at the Area 1  
8 Burn Pit at SSFL included propellant waste chemicals, JP4, RP1 fuel (kerosene),  
9 triethyl aluminum, triethyl boron, hydrazine, unsymmetrical dimethyl hydrazine  
10 (UDMH), nitrogen tetroxide (NTO), oils, trichloroethylenes, hydrazine and  
11 magnesium chips. Toxins released in the contaminated water used for cooling the  
12 engine test stands, at minimum, included kerosene, nitric acid, sulphuric acid,  
13 hydrochloric acid, caustic soda, engine fuel and solvents, and trichloroethylene.  
14 (PSUF No. 32, 47, 50.) Once again, the harm posed here is rather apparent.  
15 Inhalation of toxic and carcinogenic chemicals is generally the most dangerous  
16 method of exposure, and these two practices were supplying toxins for neighbors to  
17 breathe. The likelihood of harm from this conduct was great.

18 The authors of the *Restatement* address that third factor from section 520 as  
19 follows:

20 There is probably no activity, [. . .] from which all risks of harm  
21 could not be eliminated by the taking of all conceivable  
22 precautions, and the exercise of the utmost care, particularly as  
23 to the place where it is carried on. Thus almost any other  
24 activity, no matter how dangerous, in the center of the Antarctic  
25 continent, might be expected to involve no possible risk to any  
26 one except those who engage in it. It is not necessary, for the  
27 factor stated in Clause (c) to apply, that the risk be one that no  
28 conceivable precautions or care could eliminate. What is

1 referred to here is the unavoidable risk remaining in the activity,  
2 even though the actor has taken all reasonable precautions in  
3 advance and has exercised all reasonable care in his operation, so  
4 that he is not negligent.

5 *See Restatement (Second) § 520, comment h.*

6 In this matter, the actual burning of these toxic chemicals and utilizing them  
7 in water to cause clouds of contaminants is the activity at issue and is hazardous in  
8 and of itself. Unless eliminated altogether, this practice of using contaminated  
9 water and improper burning poses a risk in and of itself. The original use of the  
10 toxic chemicals is not at issue as the basis for strict liability. Rather, it is this  
11 dangerous and improper use implemented by Defendants which is at issue here.  
12 By comparison, the health risks of harm related to the mere transport and use of  
13 toxic chemicals in an industrial setting may be high, but often the controls in place  
14 may allow them to be performed in less hazardous manner. (*See Hook v. Lockheed*  
15 *Martin Corp. (In re Burbank Envtl. Litig.)*, 42 F. Supp. 2d 976, 1998 U.S. Dist.  
16 Lexis 21969 (C.D.Cal. 1998).

17 The doctrine of ultrahazardous activity "focuses not on a product and its  
18 defects but upon an activity intentionally undertaken by the Defendant, which by its  
19 nature is very dangerous." *Pierce v. Pacific Gas & Electric Co.*, *supra*, 166  
20 Cal.App.3d at 85. "The doctrine scrutinizes not the accident itself but the activity  
21 which led up to the accident." *Id.* Here, the activity which led to the toxic releases  
22 (the burning of hazardous wastes and the cooling with contaminated water)  
23 constitutes the ultrahazardous activity at issue, not the mere use of the chemicals  
24 originally.

25 Applying these criteria, courts have found that the use and disposal of  
26 hazardous industrial wastes can be abnormally dangerous. For example, in *Potter v.*  
27 *Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 977 (1993), the trial court found that  
28 Firestone engaged in ultrahazardous or abnormally dangerous activities by dumping

1 toxic substances in a landfill not suited for such chemicals and therefore was strictly  
2 liable for the consequences of its activity. The California Supreme Court did not  
3 reach defendant's contention that the trial court erred in finding that its disposal  
4 activities were ultrahazardous. See also, *Prospect Industries Corp. v. Singer Co.*,  
5 569 A.2d 908 (N.J. 1989) (former owners of a manufacturing plant contaminated  
6 property with PCBs); *Updike v. Browning-Ferris, Inc.*, 808 F.Supp. 538, 543  
7 (W.D.La. 1992) (Louisiana law) ("the storage of hazardous waste in [open] pits is  
8 an ultrahazardous activity").

9 In *Ahrens v. Superior Court*, 197 Cal.App.3d 1134 (1988), plaintiffs sued  
10 PG&E and others for injuries allegedly caused by exposure to PCBs and other toxic  
11 substances following a fire in a downtown San Francisco office building. At issue  
12 was PG&E's placement of electrical transformers which contained PCBs in areas of  
13 dense population. Without making a finding, the appellate the court remanded the  
14 case to the trial court to determine whether PG&E's use of these transformers  
15 constituted an ultrahazardous or abnormally dangerous activity, using the criteria in  
16 Section 520 of the *Restatement (Second)* of Torts. *Id.* at 1149. See also, *Daigle v.*  
17 *Shell Oil Co.*, 972 F.2d 1527 (10th cir. 1992) (remanding case to the district court to  
18 determine if, under Colorado law and applying § 520 of the *Restatement (Second)* of  
19 Torts, cleaning up a hazardous waste site was an ultrahazardous or abnormally  
20 dangerous activity to which strict liability principles apply).

21 Consequently, the manner in which the contaminated water was used and the  
22 hazardous waste was burned is the conduct at issue. The elimination of the practice  
23 altogether would have alleviated the risk, but that is not the criterion at issue.  
24 Rather, as long as Defendants performed this conduct is posed a threat to their  
25 neighbors.

26 As to the fourth factor of Section 520, as discussed above, burning dangerous  
27 chemicals and cooling hot engine test stands with contaminated water was not a  
28 matter of common usage at the time. The burning was even prohibited by law and

1 the cooling caused clouds of contaminated steam to form. (PSUF No. 41, 51, 53.)  
2 Even the mere possession of contaminated water and hazardous waste was not a  
3 matter of common usage in the 1950's through the early 1970's, so certainly their  
4 dangerous use was not common. This fourth factor also supports the imposition of  
5 strict liability against Defendants for this conduct.

6 Defendants' dangerous burning of hazardous wastes and cooling with  
7 contaminated water were activities conducted in an inappropriate location, thereby  
8 satisfying the fifth factor of Section 520. Explaining the factor of inappropriate of  
9 activity to location, one court explains, "[b]lasting in populated surroundings, in the  
10 vicinity of dwelling places or places of business is considered an ultrahazardous  
11 activity for the miscarriage of which the actor is held strictly liable in damages  
12 regardless of the degree of care with which the blasting is performed," while in  
13 isolated areas it may not be. *Alonso v. Hills*, 95 Cal. App. 2d 778, 783 (1950),  
14 citing *McGrath v. Basich Bros. Constr. Co.*, 7 Cal.App.2d 573 (1935); *McKenna v.*  
15 *Pacific E. R. Co.*, 104 Cal.App. 538 (1930).

16 Similarly, Defendants' burning of toxins and cooling with contaminated  
17 water may have been appropriate in a completely remote area (although many would  
18 argue the environment also suffers), but these activities were not proper near  
19 Plaintiffs' residences. The SSFL employees performing these functions could even  
20 see the clouds emitted drifting toward the residences populated nearby. (PSUF No.  
21 39, 40, 54, 56.)

22 As to the fifth criterium of Section 520, the value to the community of the  
23 dangerous activities was also outweighed by its dangerous attributes. The choice to  
24 burn hazardous waste provided no benefit to the community – the toxins went into  
25 the air versus into a proper waste facility. Admittedly this system used to cool the  
26 engine test stands had some value by recycling water rather than taking from the  
27 freshwater supply, but that was greatly outweighed by the dangers posed by

28 ///

1 releasing hazardous chemicals into the air in the process. Further, these specific  
2 dangerous activities were not necessary to the overall operation of the SSFL.

3 Finding that the firing of solid fuel rocket motor constituted an ultrahazardous  
4 activity, in *Smith v. Lockheed Propulsion Co.*, 247 Cal.App.2d 774, 785 (1967), one  
5 court explained:

6 In our opinion, defendant's activity must be classed as  
7 ultrahazardous. The solid fuel rocket motor was the largest ever  
8 tested to that date. Test firing such a device is not a matter of  
9 common occurrence. The fact that defendant found it necessary  
10 to acquire 9,100 acres for its purposes, and at one time told  
11 plaintiffs it needed their property in order to conduct the test, is  
12 evidence of its recognition of the risk inherent in the undertaking  
13 despite the exercise of due care. In these circumstances, public  
14 policy calls for strict liability. (*Luthringer v. Moore, supra*, 31  
15 Cal.2d 489, 500; *Rest.*, Torts, § 520). There is no basis, either in  
16 reason or justice, for requiring the innocent neighboring  
17 landowner to bear the loss. Defendant, who is engaged in the  
18 enterprise for profit, is in a position best able to administer the  
19 loss so that it will ultimately be borne by the public. As  
20 Professor Prosser summarizes the rationale for the imposition of  
21 strict liability: 'The problem is dealt with as one of allocating a  
22 more or less inevitable loss to be charged against a complex and  
23 dangerous civilization, and liability is placed upon the party best  
24 able to shoulder it.' (Prosser, *Law of Torts*, (2d ed. 1955) page  
25 318).

26 Similarly, the contaminated water used to cool the rocket test stands and burning of  
27 toxic materials exposed SSFL's innocent neighbors to toxins with no benefit to the  
28 community and should be allocated to Defendants.

1 Under California law, while the Court should consider all of the criteria of  
2 Section 520 of the *Restatement*, they need not be present in a particular case for an  
3 ultrahazardous condition to exist, and Defendants' operations at SSFL satisfy the  
4 analysis prescribed in Section 520. If Defendants argue that the releases occurred  
5 despite their best efforts to prevent them and that no alternative measures were  
6 available to reduce or eliminate the risk, then this argument further supports that the  
7 criteria necessary to find an ultrahazardous condition exist. No one can contend,  
8 meanwhile, that Defendants' practices were accepted as a matter of common usage,  
9 as Defendants made sure they were only performed at night. The scope of the  
10 danger was such that their location was not safe for this conduct and the exposure of  
11 nearby residents to toxic chemicals was not a justified price for Defendants to  
12 conduct their business. The just result is that the injured should not have to prove  
13 Defendants' negligence, when Defendants chose to undertake the dangerous  
14 activities which resulted in their injuries, as strict liability applies.

#### 15 16 V. CONCLUSION

17 For the reasons given above, Plaintiffs respectfully request that the Court  
18 award partial summary judgment to Plaintiffs, holding that Defendants are strictly  
19 liable for injuries to plaintiffs flowing from their ultrahazardous activity in  
20 operating experimental nuclear reactors, burning toxic materials at the Area 1 Burn  
21 Pit, and cooling rocket engines with water contaminated with deadly toxins.

22  
23 Dated: May 27, 2005

CAPPELLO & NOËL LLP

24  
25 By: 

26 A. Barry Cappello  
27 Attorneys for Plaintiffs  
28

**Lawrence O'Connor v. Boeing North American, Inc.**  
**U.S.D.C. Case No. CV 97-1554 DT (RCx)**

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 831 State Street, Santa Barbara, California 93101.

On May 27, 2005, I served the foregoing document described as **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY ADJUDICATION OF STRICT LIABILITY FOR ULTRA HAZARDOUS ACTIVITIES** on the interested parties in this action

by placing  the original  a true copy thereof enclosed in a sealed envelope addressed as follows:

William W. Schofield, Esq.  
PAUL, HASTINGS, JANOFSKY & WALKER LLP  
55 2nd Street, 24th Floor  
San Francisco, California 94105-3441

by California Overnight. I am readily familiar with the firm's practice of collection and processing correspondence on the same day with this courier service, for overnight delivery. The delivery fees are provided for in accordance with this firm's ordinary business practices.

and

by placing  the original  a true copy thereof enclosed in a sealed envelope addressed as follows:

Tina B. Nieves, Esq.  
GANCEDO & NIEVES LLP  
144 W. Colorado Boulevard  
Pasadena, California 91105

by U. S. Mail. I am readily familiar with the firm's practice of collection and processing correspondence on the same day with postage thereon fully prepaid at Santa Barbara, California, in the ordinary course of business.

(FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed at Santa Barbara, California, on May 27, 2005.

Lane Y. Ortiz  
TYPE OR PRINT NAME

  
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 8 144 West Colorado Boulevard  
 Pasadena, California 91105  
 9 Telephone: (626) 685-9800  
 Facsimile: (626) 685-9808

10 Attorneys for Plaintiffs

11  
 12 **UNITED STATES DISTRICT COURT**  
 13 **CENTRAL DISTRICT OF CALIFORNIA**  
 14 **WESTERN DIVISION**  
 15

16 LAWRENCE O'CONNOR, et al.,  
 17 Plaintiffs,

18 v.

19 BOEING NORTH AMERICAN, INC.,  
 20 et al.,  
 21 Defendants.

Case No. CV 97-1554 DT (RCx)

DECLARATION OF MICHAEL  
 D. PRIMAK IN SUPPORT OF  
 PLAINTIFFS' MOTION FOR  
 SUMMARY ADJUDICATION OF  
 STRICT LIABILITY FOR ULTRA  
 HAZARDOUS ACTIVITIES

Date: August 8, 2005  
 Time: 10:00 a.m.  
 Place: Courtroom 880  
 (Roybal Bldg.)  
 Judge: Hon. Dickran Tevrizian

22 \_\_\_\_\_  
 23 AND RELATED ACTIONS  
 24 \_\_\_\_\_  
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**DECLARATION OF MICHAEL D. PRIMAK**

I, MICHAEL D. PRIMAK, declare as follows:

1. I have personal knowledge of the matters stated herein. If called as a witness, I could and would testify truthfully and competently thereto under oath.

2. I submit this declaration in support of Plaintiffs' Motion for Summary Adjudication of Strict Liability for Ultrahazardous Activities.

3. I was hired by Rocketdyne in September 1962, and received orientation training at the main facility located at 6633 Canoga Avenue. I was then assigned to the Santa Susana Field Laboratory (SSFL) to work as a fireman, where I worked all three shifts: days (0800 - 1600), evenings (1600 - 2400), and graveyard (2400 - 0800), until I left in 1970.

4. When I worked the graveyard shift at SSFL, I was often required to burn off a variety of hazardous waste chemical materials that had accumulated at the 'burn pit' area. The burn pit area was located in the Southwest corner of Area 1, bordering the SSFL buffer zone. These materials were brought to the burn pit area from other parts of the SSFL site and also brought by flatbed truck from the manufacturing plant at Canoga Avenue.

5. The materials I burned in the pits included oils, trichloroethylenes, hydrazine and magnesium chips. I also burned a large amount of other materials that were contained in unmarked and unlabeled barrels. In all my time at SSFL, I never once saw an inventory of the materials that I was responsible for burning.

6. I was told not to conduct any burnings if it was raining or if the wind would blow the smoke and odors back over SSFL. I usually started burning the hazardous waste materials around 0100 hours and always concluded before daylight. The materials I burned produced dense heavy smoke of various colors that were difficult to identify because of the darkness. I witnessed the large plumes of smoke rise up into the air and be carried off with the wind. Many times I saw the smoke cloud drift towards populated areas.

1 7. I was aware of a Rocketdyne offsite disposal plant in Sparks, Nevada,  
2 but I do not remember seeing any hazardous materials being sent there. If I could  
3 not burn all of the material at the burn area pits before daylight, I would leave it  
4 there until the next burn.

5 8. While I worked at SSFL I witnessed many rocket engine test firings.  
6 The test stands were located on elevated terrain and were named Alpha, Bravo,  
7 Coco, and Delta. I saw multi-engine configurations tested at the largest stand  
8 which was Coco. At a lower elevation from the test stands I observed ponds into  
9 which the runoff excess rocket fuel and coolants flowed. Water from these  
10 collection ponds was used to fill the tanks, and the water in those tanks, located  
11 near the test stands, was used to cool the rockets every time they were test fired.  
12 When the water was poured into the deflectors at the base of the test stands, I  
13 observed a large cloud form. I witnessed the cloud rise into the air and be carried  
14 off depending on the strength and direction of the wind.

15 9. I was never instructed, or given any specific training by Rocketdyne to  
16 show me how to dispose of hazardous materials at SSFL. In the first week of my  
17 training program at SSFL my shift lieutenant told me that as a fireman I was there  
18 to protect the industrial competitiveness of the company. When Atomics  
19 International and Rocketdyne consolidated their fire and security departments, I  
20 was cross trained in the use of weapons and was given assigned patrols. After my

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1 initial orientation I was only given training on first aid and security issues. I was  
 2 told that security was the top priority of my job and I felt that fire and hazardous  
 3 material safety was being neglected.

4 I declare under penalty of perjury, under the laws of the United States of  
 5 America, that the foregoing is true and correct.

6 Executed this 26 day of May 2005, at Banning, California.

7  
 8  
 9 By: Michael D. Primm  
 10 Michael D. Primm

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1 Lawrence O'Connor v. Boeing North American, Inc.  
 2 U.S.D.C. Case No. CV 97-1554 DT (RCx)

3 **PROOF OF SERVICE**

4 STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA

5 I am employed in the County of Santa Barbara, State of California. I am over  
 6 the age of 18 and not a party to the within action; my business address is: 831 State  
 Street, Santa Barbara, California 93101.

7 On May 27, 2005, I served the foregoing document described as  
 8 **DECLARATION OF MICHAEL D. PRIMAK IN SUPPORT OF**  
 9 **PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION OF STRICT**  
**LIABILITY FOR ULTRA HAZARDOUS ACTIVITIES** on the interested  
 parties in this action

10  by placing  the original  a true copy thereof enclosed in a sealed  
 envelope addressed as follows:

11 William W. Schofield, Esq.  
 12 PAUL, HASTINGS, JANOFSKY & WALKER LLP  
 13 55 2nd Street, 24th Floor  
 San Francisco, California 94105-3441

14  by California Overnight. I am readily familiar with the firm's practice of  
 15 collection and processing correspondence on the same day with this courier  
 16 service, for overnight delivery. The delivery fees are provided for in  
 accordance with this firm's ordinary business practices.

17 and

18  by placing  the original  a true copy thereof enclosed in a sealed  
 envelope addressed as follows:

19 Tina B. Nieves, Esq.  
 20 GANCEDO & NIEVES LLP  
 21 144 W. Colorado Boulevard  
 Pasadena, California 91105

22  by U. S. Mail. I am readily familiar with the firm's practice of collection and  
 23 processing correspondence on the same day with postage thereon fully  
 prepaid at Santa Barbara, California, in the ordinary course of business.

24  (**FEDERAL**) I declare that I am employed in the office of a member of the  
 25 bar of this court at whose direction the service was made.

26 Executed at Santa Barbara, California, on May 27, 2005.

27 Jane Y. Ortiz  
 28 TYPE OR PRINT NAME

  
 SIGNATURE

1 A. Barry Cappello, CSB 037835  
 Leila J. Noel, CSB 114307  
 2 Troy A. Thielemann, CSB 174276  
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 7 James M. Kenna, CSB 209961  
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10 Attorneys for Plaintiffs

11  
 12 **UNITED STATES DISTRICT COURT**  
 13 **CENTRAL DISTRICT OF CALIFORNIA**  
 14 **WESTERN DIVISION**

15  
 16 **LAWRENCE O'CONNOR, et al.,**  
 17 **Plaintiffs,**

18 v.

19 **BOEING NORTH AMERICAN, INC.,**  
 20 **et al.,**  
 21 **Defendants.**

Case No. CV 97-1554 DT (RCx)

DECLARATION OF DONALD R.  
 CARR IN SUPPORT OF  
 PLAINTIFFS' MOTION FOR  
 SUMMARY ADJUDICATION OF  
 STRICT LIABILITY FOR ULTRA  
 HAZARDOUS ACTIVITIES

22 \_\_\_\_\_  
 23 **AND RELATED ACTIONS**  
 24 \_\_\_\_\_

Date: August 8, 2005  
 Time: 10:00 a.m.  
 Place: Courtroom 880  
 (Roybal Bldg.)  
 Judge: Hon. Dickran Tevrizian

**DECLARATION OF DONALD R. CARR**

I, DONALD R. CARR, declare as follows:

1. I have personal knowledge of the matters stated herein. If called as a witness, I could and would testify truthfully and competently thereto under oath.

2. I submit this declaration in support of Plaintiffs' Motion for Summary Adjudication of Strict Liability for Ultrahazardous Activities.

3. I was employed as a fireman at the Santa Susana Field Laboratory (SSFL), in Ventura County, California, from 1957 until 1967, and again from 1968 to 1979.

4. One of my duties as a fireman involved burning propellant waste and chemicals including JP4, RP1 fuel (kerosene), triethyl aluminum, triethyl boron, hydrazine, unsymmetrical dimethyl hydrazine (UDMH) and nitrogen tetroxide (NTO), in what we called a 'burn pit' at SSFL. The 'burn pit' was located in the Southwest corner of Area 1, bordering the SSFL buffer zone.

5. I was not aware of any special disposal teams identified among the fireman. Waste burning was included among the duties I was expected to perform similar to fire prevention, fire suppression and responding to emergency calls. There were three different shifts at SSFL that I worked on as a fireman, but all the burnings I conducted were only ever scheduled for the third shift which was midnight to eight in the morning. When I reported for my shift I was informed whether I was responsible for burning waste on that particular night.

6. Management at SSFL made it clear to me that security was the highest priority at SSFL and I received specialized training in that area. I was cross-trained in the use of weapons such as rifles, shotguns, and pistols. I was also given additional training on first aid techniques, but I never received any special training on how to properly handle and dispose of chemicals. While conducting the burnings at SSFL I was not required to wear any additional or specialized protective clothing other than my fire suit.

1           7. Most of the time the containers containing the material to be burned  
2 were clearly labeled as to the contents, but sometimes the material was already  
3 dumped in the pit and I could not identify it. The NTO presented myself and the  
4 other firemen with an additional problem because it was pressurized and contained  
5 in a 'K' bottle, which is a metal cylinder about four and a half to five feet tall,  
6 similar to the oxygen tanks used in hospitals. We would place the K bottles in  
7 holes we dug in the hillside and then from a distance shoot at them with a high  
8 powered rifle to puncture the containers. The vaporized NTO would then rise up  
9 into the air forming a yellowish-orange cloud that would drift away depending on  
10 the direction the wind was blowing.

11           8. The other chemicals and propellants that I burned in the pit produced  
12 columns of smoke that resembled a rainbow of colors. I witnessed this  
13 multicolored cloud rise above the burn area and then move away corresponding to  
14 the wind flow. Depending on the direction the wind was blowing I saw these  
15 clouds drift towards populated areas of Simi Valley and the San Fernando Valley.

16           9. I was also present at SSFL during many rocket engine test firings,  
17 which I witnessed. Excess coolant, fuel, emissions and chemicals used to flush the  
18 rocket engines were allowed to flow downhill into collection ponds, along with  
19 water. Water from these collection ponds was used to fill the large tanks located  
20 near the rocket test stands. I saw the water from these large tanks being applied to  
21 the rocket engine test stands to cool them during rocket engine testing. Excess  
22 water from this cooling was also allowed to flow downhill into the collection ponds  
23 with the other chemicals, to be re-used in this cooling process. This cooling  
24 process of the rocket engine test stands produced a huge cloud. I watched as this  
25 cloud rose skywards and was carried off by the wind currents.

26           10. A few times I was present when the cloud from the rocket engine test  
27 firing did not move away but instead rained down on top of the SSFL. On those  
28 occasions, I experienced burning sensations on my arms and neck requiring medical



1 treatment. In addition, I observed that my uniform was burnt from the particulates  
 2 falling from the sky, and I observed that the vehicles in the parking lots at SSFL  
 3 were covered with films of dust.

4 I declare under penalty of perjury, under the laws of the United States of  
 5 America, that the foregoing is true and correct.

6  
 7 Executed this 26 day of May 2005, at Cuyahoga Falls, Ohio.

8  
 9 By: Donald R. Carr  
 10 Donald R. Carr

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**Lawrence O'Connor v. Boeing North American, Inc.**  
**U.S.D.C. Case No. CV 97-1554 DT (RCx)**

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 831 State Street, Santa Barbara, California 93101.

On May 27, 2005, I served the foregoing document described as **DECLARATION OF DONALD R. CARR IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION OF STRICT LIABILITY FOR ULTRA HAZARDOUS ACTIVITIES** on the interested parties in this action

by placing  the original  a true copy thereof enclosed in a sealed envelope addressed as follows:

William W. Schofield, Esq.  
PAUL, HASTINGS, JANOFSKY & WALKER LLP  
55 2nd Street, 24th Floor  
San Francisco, California 94105-3441

by California Overnight. I am readily familiar with the firm's practice of collection and processing correspondence on the same day with this courier service, for overnight delivery. The delivery fees are provided for in accordance with this firm's ordinary business practices.

and

by placing  the original  a true copy thereof enclosed in a sealed envelope addressed as follows:

Tina B. Nieves, Esq.  
GANCEDO & NIEVES LLP  
144 W. Colorado Boulevard  
Pasadena, California 91105

by U. S. Mail. I am readily familiar with the firm's practice of collection and processing correspondence on the same day with postage thereon fully prepaid at Santa Barbara, California, in the ordinary course of business.

(**FEDERAL**) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed at Santa Barbara, California, on May 27, 2005.

Jane Y. Ortiz  
TYPE OR PRINT NAME

  
SIGNATURE

1 A. Barry Cappello, CSB 037835  
 2 Leila J. Noel, CSB 114307  
 3 Troy A. Thielemann, CSB 174276  
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6 Tina B. Nieves, CSB 134384  
 7 Hector G. Gancedo, CSB 132139  
 8 James M. Kenna, CSB 209961  
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 11 Pasadena, California 91105  
 12 Telephone: (626) 685-9800  
 13 Facsimile: (626) 685-9808

Attorneys for Plaintiffs

12 **UNITED STATES DISTRICT COURT**  
 13 **CENTRAL DISTRICT OF CALIFORNIA**  
 14 **WESTERN DIVISION**

16 LAWRENCE O'CONNOR, et al.,

17 Plaintiffs,

18 v.

19 BOEING NORTH AMERICAN, INC.,  
20 et al.,

21 Defendants.

22 AND RELATED ACTIONS  
23

Case No. CV 97-1554 DT (RCx)

DECLARATION OF WILLIAM R.  
 MUELLER IN SUPPORT OF  
 PLAINTIFFS' MOTION FOR  
 SUMMARY ADJUDICATION OF  
 STRICT LIABILITY FOR ULTRA  
 HAZARDOUS ACTIVITIES

Date: August 8, 2005  
 Time: 10:00 a.m.  
 Place: Courtroom 880  
 (Roybal Bldg.)  
 Judge: Hon. Dickran Tevrizian

1                                    **DECLARATION OF WILLIAM R. MUELLER**

2            I, WILLIAM R. MUELLER, declare as follows:

3            1.     I have personal knowledge of the matters stated herein. If called as a  
4            witness, I could and would testify truthfully and competently thereto under oath.

5            2.     I submit this declaration in support of Plaintiffs' Motion for Summary  
6            Adjudication of Strict Liability for Ultrahazardous Activities.

7            3.     I was hired by Rocketdyne in 1958 and worked for a few months at the  
8            Canoga Park facility on the corner of Canoga and Vanowen, before transferring to  
9            the facility known as the Santa Susana Field Laboratory (SSFL) where I remained  
10           until 1967. At SSFL, I worked as a fireman and was primarily assigned to the  
11           graveyard shift (2400 - 0800 hours) and swing shift (1600 - 2400 hours).

12           4.     While working the graveyard shift, one of my responsibilities was to  
13           burn the excess rocket fuel (JP4), and other waste, that had accumulated on the  
14           surface of the various catch ponds located at SSFL. I understood that the rocket  
15           fuel and other waste in the catch ponds resulted from the rocket engine test firings  
16           conducted by Rocketdyne. After I burned off the excess fuel from the surface of the  
17           pond, the water was recycled back into the cooler tanks to be used again to cool the  
18           rocket engines when they were test fired the next time. I was not given any  
19           specialized training in how to handle this assignment, other than I was told it could  
20           only be done at night.

21           5.     On the nights I was assigned this duty, myself and one other fireman  
22           would check the five or six catch ponds at SSFL to see how much rocket fuel had  
23           accumulated on the surface. I could see the filmy stains of the rocket fuel on the  
24           surface of the water. The rocket fuel would not burn on its own, so I would pour  
25           gasoline on the rocket fuel stain to get it started and then stand back and wait for it  
26           to burn out. I watched as the fire produced heavy black smoke which rose into the  
27           air and was carried off by the wind currents. Because all the burnings were  
28           conducted at night I could not always see in what direction the smoke was carried

1 by the wind. On the few occasions when the cloud of smoke did not move away  
2 from overhead I felt particulates rain back down on me.

3 6. Another part of my duty as a fireman at SSFL consisted of standing by  
4 when the rocket engines were being prepared for test firings. The water that was  
5 used for the cooling process came from tanks located near the test stands. The  
6 excess coolant, fuel and chemicals used to flush the engines flowed along with the  
7 water into catch ponds located at a lower elevation. I saw the water from the large  
8 tanks located near the test stands poured into the deflector buckets to cool them  
9 during the engine testing process. This cooling process produced a huge cloud  
10 which rose up into the air and was carried away with the wind.

11 7. During the nine years that I worked at SSFL, I recall several explosions  
12 and accidents resulting in fatalities that occurred on the site. One incident that I  
13 cannot forget occurred after an explosion killed a number of employees. I was  
14 responsible along with my supervisor Jim Jones to conduct a head count of  
15 casualties. Human remains were spread over a large area where the explosion took  
16 place and myself and the other fireman had to collect the body parts for removal.

17 I declare under penalty of perjury, under the laws of the United States of  
18 America, that the foregoing is true and correct.

19 Executed this 25 day of May 2005, at Roseville, California.

20  
21  
22 By: William R. Mueller  
23 William R. Mueller  
24  
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26  
27  
28

**Lawrence O'Connor v. Boeing North American, Inc.**  
**U.S.D.C. Case No. CV 97-1554 DT (RCY)**

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA

I am employed in the County of Santa Barbara, State of California. I am over the age of 18 and not a party to the within action; my business address is: 831 State Street, Santa Barbara, California 93101.

On May 27, 2005, I served the foregoing document described as **DECLARATION OF WILLIAM R. MUELLER IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION OF STRICT LIABILITY FOR ULTRA HAZARDOUS ACTIVITIES** on the interested parties in this action

by placing  the original  a true copy thereof enclosed in a sealed envelope addressed as follows:

William W. Schofield, Esq.  
 PAUL, HASTINGS, JANOFSKY & WALKER LLP  
 55 2nd Street, 24th Floor  
 San Francisco, California 94105-3441

by California Overnight. I am readily familiar with the firm's practice of collection and processing correspondence on the same day with this courier service, for overnight delivery. The delivery fees are provided for in accordance with this firm's ordinary business practices.

and

by placing  the original  a true copy thereof enclosed in a sealed envelope addressed as follows:

Tina B. Nieves, Esq.  
 GANCEDO & NIEVES LLP  
 144 W. Colorado Boulevard  
 Pasadena, California 91105

by U. S. Mail. I am readily familiar with the firm's practice of collection and processing correspondence on the same day with postage thereon fully prepaid at Santa Barbara, California, in the ordinary course of business.

(**FEDERAL**) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed at Santa Barbara, California, on May 27, 2005.

Jane Y. Ortiz  
 TYPE OR PRINT NAME

  
 SIGNATURE