Response to the PSR-LA Appeal

This is a review and response to Appellants' Opening Brief (Court of Appeal Case Number C088821, California Superior Court Case Number 34-2013-80001589).[1]

This is, by necessity, a brief summary response that frequently cites prior more detailed papers dealing with the original petition and the broader background of nuclear decommissioning in California and at Boeing's Santa Susana Field Laboratory.

- "Response to PSR-LA Petition & Complaint." Originally issued November 20, 2013. Revised and updated February 20, 2022. https://philrutherford.com/SSFL/boeing_building_demolition/Response_to_PSR-LA_Petition.pdf

- "Nuclear Decommissioning in California: 20+ Years of Politics vs. Science." June 9, 2022.[2] https://philrutherford.com/SSFL/Nuclear_Decommissioning_in_California.pdf

There is little new material in the appeal. Detailed point-by-point rebuttals of specific opinions and allegations in the original petition and the accompanying "Hirsch Report" are provided in "Response to PSR-LA Petition & Complaint."

The appeal focuses on four major issues.

- Definition and implications of "project"
- DTSC's "approval" of Boeing's building demolition program
- Relevance of the 2010 AOC
- Guidance documents

Project Definition

Appellants spend excessive time arguing the regulatory definition of "project" and what the implications of that definition are relative to CEQA. I will leave it to others to argue what is and what is not a "project" and why this is irrelevant to the real agenda of the petitioners/appellants.

[1] Appellants' Opening Brief. Appeals Case No. C088821. June 28, 2022. https://www.dtsc-ssfl.com/files/lib_physocrespvsdtsc/courtdocuments/69832_Appellants_Opening_Brief_Final.pdf

[2] Initially, this document was titled "Nuclear Decommissioning in California", since the sources of the legislation, litigation and regulatory abuse/inaction were all California-based entities. Subsequently, the title of the document was changed to "Nuclear Decommissioning at the Santa Susana Field Laboratory" since the target of the legislation, litigation and regulatory abuse/inaction was predominantly SSFL.

DTSC's Approval

DTSC does not have regulatory authority to approve demolition of former radiological and/or nuclear facilities that have completed the decommissioning process and that have been "released for unrestricted use" by appropriate state or federal agencies (DPH, NRC or DOE). Indeed, DTSC does not have any regulatory authority over Boeing's radiological/nuclear decommissioning program[3] or radiological remediation in general.[4]

Petitioners/appellants are correct that DTSC clearly claimed an "approval" authority over Boeing's building demolition program. It is laughable that DTSC attempts to revise history and claim that it was not "approving" Boeing's demolition program. Sections IB, IC and ID of the appeal clearly demonstrate this "approval." Indeed the subsequent DOE building demolition program of 2020-2021, based on the 2020 Amendment to Order on Consent is evidence that DTSC continued to claim "approval" authority over another SSFL responsible party, the Department of Energy, seven years later.[5]

2010 AOC

Boeing did not sign the 2010 Administrative Order on Consent therefore no 2010 AOC requirements apply to Boeing. It should not be necessary to state this.

The 2010 AOC imposed requirements that are in conflict with EPA CERCLA risk assessment guidance and MARSSIM guidance.[6,7]

Guidance Documents

Petitioners/appellants allege Boeing uses "underground regulations" as release criteria for surface contamination.[8]

Section IIB of the PSR-LA appeal does an excellent job of clearly demonstrating the cited guidance documents are not "underground" guidance but very much "aboveground" guidance. In addition to Boeing's SSFL Radioactive Materials License, the subject guidance documents have been commonly imposed by DPH and implemented by licensees in California for decades. These include General Atomics, UC Berkeley, Stanford, and Hunters Point Naval Station. If petitioners had expanded their research to include the rest of the US, they would have not

[3] Nuclear Decommissioning in California, Section 19.2
[4] Nuclear Decommissioning in California, Section 16.0 and 16.1
[5] Nuclear Decommissioning in California, Section 23.0 and 23.1
[6] Nuclear Decommissioning in California, Section 17.0 and 26.0
[7] Letter to Steven Becker (DTSC), "Zoom Meeting on the Amendment to Order on Consent", November 19, 2020. https://philrutherford.com/Personal_Communication/Letter_to_Becker_2020-11-29.pdf#page=9-10
[8] Response to PSR-LA Petition & Complaint, Sections 1.1, 1.2, 2.19 and Appendices A, B and C

been surprised to find that all state regulatory agencies impose the same guidance.

Therefore, what is the issue? Why do petitioners characterize these generally applicable standards as "underground?" They are clearly not underground. Should petitioners broaden their complaint to apply to all licensees in California … or the US. Why is it focused on SSFL? Petitioners/appellants have clearly shot themselves in the foot.

At one point in the appeal, the appellants claim that guidance documents are not regulations. That is true and not exactly a profound statement. The hierarchical system of laws, regulations and guidance in the US is …

- **Laws** such as the Atomic Energy Act (Federal) and the Health & Safety Code - Radiation Control Law (California) prescribe top level laws passed by Congress or the California Legislature.
- **Regulations**, such as 10 CFR 20 (Federal) and 17 CCR (California) are written by agencies (NRC or DPH) and expand on and clarify the general language of the applicable law.
- **Guidance documents** written by agencies describe in detail how licensees can comply with regulations. Guidance documents provide road map of processes and procedures by which a licensee can demonstrate to a regulatory agency how it has complied with regulations. Licensees are free to employ alternative methods and procedures to regulatory guidance, but it is incumbent on licensees to demonstrate that its procedures are either equivalent to, or superior to, the guidance documents. In general it is far easier and practical for licensees to follow guidance documents.

It is preposterous to argue that since guidance documents are not regulations (a true statement), then guidance documents are "underground", illegal, or otherwise irrelevant (an incorrect conclusion). Guidance documents are the foundation of the regulatory, hierarchical framework, without which both regulators and licensees could not effectively communicate.

Typical federal guidance documents related to the subject at hand include MARSSIM, MARSAME, MARLAP, NRC Regulatory Guides, NRC NUREG documents, DOE Orders, DOE Guides, DOE Technical Standards. Typical industry standards used by regulators also include ANSI standards.

The reason why appellants attempt to muddy the waters by referring to the four guidance documents (RG 1.86, DOE Order 5400, DECON-1 and IPM 88-2) as "underground regulations" is because allegedly "the APA defines regulation very broadly" (Appeal Section IIB Supreme Court Tidewater).

It is notable that the consequence of the 2002 litigation against DPH, left DPH bereft of

numerical guidance documents or standards for decommissioning.[9,10]

An example may serve to illustrate the distinction between regulation and guidance. California Code of Regulations 17 CCR 30256(k)(3) states *"A radiation survey has been performed which demonstrates that the premises are suitable for release for unrestricted use …"* The regulation is silent on how to conduct such a survey. Until the judgement following the 2002 litigation, DPH could use DECON-1 and IPM 88-2 as guidance for DPH staff and licensees to conduct the radiation survey required by regulation. Now DPH cannot do that because it has rescinded all its internal guidance documents. Of course, the Multi-Agency Radiation Survey and Site Investigation Manual (MARSSIM) could be followed, though DPH would be in violation of the judge's order if it did that!!![11]

Much is made by appellants of the previous statement in 17 CCR 30256(k)(2) that says, *"Reasonable effort has been made to eliminate residual contamination if present …"* Appellants focus on the word "eliminate" with the faulty logical jump that it implies "clean to zero contamination." They ignore the phrase *"reasonable effort."* An earlier section on "non-renewal of a license" describes an identical objective but uses different wording. 17 CCR 30256(c)(2) states *"Remove radioactive contamination to the extent practicable …"* Notice the objective is the same, but the word "eliminate" is missing. This is an example of sloppy, inconsistent language by the regulation writer. Both sentences implicitly refer to the principal of ALARA … as low as reasonably achievable. ALARA is a process not a numerical goal and certainly not a goal of zero. But more importantly, all data for the facilities at issue in the current PSR-LA litigation and also the buildings surveyed in the 2010-2013 demolition program were demonstrably far less than the surface contamination limits in the guidance documents.[12] Indeed, most all measurements were indistinguishable from background showing that decontamination efforts in the former radiological/nuclear facilities were indeed ALARA and certainly met the letter and intent of 17 CCR 30256.

Recall that the subject buildings, 4005, 4009, 4011, 4055 and 4100 have variously been surveyed by Rockwell, Boeing, DPH, NRC (ANL) and EPA, all of whom verified that guidance document limits were met and that facilities could be released for unrestricted use.[13]

[9] Nuclear Decommissioning in California, Sections 4.0 and 19.1
[10] Response to PSR-LA Petition & Complaint, Appendix C
[11] Response to PSR-LA Petition & Complaint, Appendix C
[12] Response to PSR-LA Petition & Complaint, Sections 1.12, 1.13, 1.14, 1.15, 2.22, 2.24, 2.25 and 2.26
[13] Nuclear Decommissioning in California, Section 18.0

Conclusions

The conclusion of the appeal is somewhat anticlimactic. The appeal does not allege or prove any of the allegations in the original petition, that:

- the guidance documents are not protective,
- Boeing's survey data indicate unsafe levels of contamination, or
- disposal of demolition debris will harm the public and/or environment.

The appeal simply asks for an EIR, which of course is the appellants' standard procedure for imposing further delays in remediation progress at SSFL. Boeing building demolition has been appropriately addressed in DTSC's draft program EIR.[14]

[14] Nuclear Decommissioning in California, Section 20.0