Response to the PSR-LA Petition to the California Supreme Court

This is a review and response to the PSR-LA Petition to the California Supreme Court, "Petition for Review" (Superior Court Case Number S280480. 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, the subsequent appeal, and the broader background of nuclear decommissioning in California and at Boeing's Santa Susana Field Laboratory.

- "Response to PSR-LA Appeal." Originally issued August 5, 2022. Revised June 11, 2023. https://philrutherford.com/SSFL/boeing_building_demolition/Response_to_PSR-LA_Appeal.pdf

- "Response to PSR-LA Petition & Complaint." Originally issued November 20, 2013. Revised and updated May 20, 2023. https://philrutherford.com/SSFL/boeing_building_demolition/Response_to_PSR-LA_Petition.pdf

- "Nuclear Decommissioning in the Santa Susana Field Laboratory: 20+ Years of Politics vs. Science." Originally issued June 9, 2022. Revised August 1, 2023.[2] https://philrutherford.com/SSFL/Nuclear_Decommissioning_at_SSFL.pdf

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

The "Petition for Review" to the California Supreme Court focuses on just one major issue.

- Allegation that federal and State guidance documents dealing with acceptable surface contamination limits are "underground regulations" and are therefore invalid for the purposes of decommissioning.

[1] "Petition for Review." In the Supreme Court of the State of California. Appeals Case No. C088821. California Superior Court Case No. 34-2013-80001589. June 12, 2023. https://www.dtsc-ssfl.com/files/lib_physocrespvsdtsc/courtdocuments/70032_2023-06-12_Petition_for_Review-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.

Guidance Documents

Petitioners/appellants allege Boeing uses "underground regulations" as release criteria for surface contamination.[3]

Page 9 of the PSR-LA "Petition for Review" 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 not have 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 Petition for Review, the petitioners 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 a 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

[3] Response to PSR-LA Petition & Complaint, Sections 1.1, 1.2, 2.19 and Appendices A, B and C

Guides, DOE Technical Standards. Typical industry standards used by regulators also include ANSI standards (e.g. ANSI/HPS N13.12-2013). Seeking public approval via an APA process for the plethora of nuclear related guidance documents and standards, designed to provide foundation for regulations, would be impractical and unworkable.

The reason why petitioners attempt to muddy the waters by referring to the four guidance documents (Regulatory Guide 1.86, DOE Order 5400, DPH DECON-1 and DPH IPM 88-2) as "underground regulations" is because allegedly "the APA defines regulation overly broadly."

It is notable that the consequence of the 2002 litigation against DPH, left DPH bereft of numerical guidance documents or standards for decommissioning.[4,5]

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 or what numerical goals to achieve. 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!!![6]

Much is made by petitioners 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 of 17 CCR 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.[7] Indeed, most all measurements were indistinguishable from background showing that decontamination efforts in the former radiological/nuclear facilities were indeed ALARA and

[4] Nuclear Decommissioning at SSFL, Sections 4.0 and 19.1

[5] Response to PSR-LA Petition & Complaint, Appendix C

[6] Response to PSR-LA Petition & Complaint, Appendix C

[7] Response to PSR-LA Petition & Complaint, Sections 1.12, 1.13, 1.14, 1.15, 2.22, 2.24, 2.25 and 2.26

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.[8]

Annotated Comments on the "Petition for Review"

In addition, to the preceding general comments, specific annotated comments on the "Petition for Review" can be found at …

- Rutherford, Annotated Comments on Petition for Review, August 26, 2023. https://philrutherford.com/SSFL/boeing_building_demolition/70032_2023-06-12_Petition_for_Review-Final_PDR_Comments.pdf

These comments are repeated below.

Petition for Review - Page	Petition Statement	Response
5	Reflecting a policy that no amount of residual radiation can be considered safe …	Nowhere in federal or state laws, regulations, or guidance documents, is this "policy" stated. Neither is it stated in any National Academy of Sciences BEIR reports. It is a repetition of activists' favorite phrase, "there is no safe level of radiation."
7	… an issue with grave public health and environmental consequences.	Hyperbole that is not supported by the data.
7	… there is no safe level of exposure to radiation …	Nowhere in federal or state laws, regulations, or guidance documents, is this "policy" stated. Neither is it stated in any National Academy of Sciences BEIR reports. It is a repetition of activists' favorite phrase, "there is no safe level of radiation."
7	… numerical maxima contained in four documents (the Guidance Documents) …	Petitioners refer to the subject surface contamination limits as "maxima." In reality, Boeing utilizes the "average" limits as the appropriate applicable standards.

[8] Nuclear Decommissioning at SSFL, Section 18.0

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8	… technically and legally incapable of receiving radioactive waste.	Petitioners define (low-level) radioactive waste as any material that exceeds background, i.e. with residual radioactivity that exceeds zero. No federal or state law or regulation defines LLRW in this way.* Indeed, nuclear regulations are replete with non-zero, low dose, low risk standards that are applied throughout the nuclear industry. *The 2010 AOC is the only non-regulation that defines LLRW as zero tolerance.
8	(See DTSC6655 [showing tons of asphalt, concrete, and metals from SSFL Area IV demolition going to recycling].)	There was zero recycling from decommissioned former radiological facilities.
9	… these structures previously used for nuclear weapons research …	All nuclear research was devoted to the peaceful use of nuclear energy for the generation of electricity. No nuclear weapons production or research was conducted at SSFL. To allege so, is typical of the loose, hyperbolic, disinformation touted by petitioners.
9	DPH licenses a wide variety of facilities, and the record contains numerous examples of other sites around the state where DPH relied on the Guidance Documents	Petitioners do a good job in demonstrating that the subject guidance documents and standards are used state-wide and are therefore not "underground regulations.". Indeed they could go one step further and show that the "underground standards" are used nationwide by the NRC, DOE and DOD and all other agreement states in the U.S..
10	… urgent health and safety issues …	More hyperbole not supported by the data.
10	… some of the most dangerous substances on earth.	More hyperbole.

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11	… 10 years of litigation to date.	Illustrative of activist-led litigation that courts adjudicate at glacial speed and is intended to delay/halt all progress in SSFL remediation.
11	Twenty-one years ago, three of the four Petitioners here raised a related legal challenge against DPH's adoption of a numerical dose-based standard.	CDPH had notified the public of its intent to adopt the NRC's 10 CFR 20 Subpart E, establishing a license termination rule of <25 mrem/y plus ALARA. As an "agreement state", California's radiation safety regulations (CCR Title 17) are required to be consistent with (or exceed) NRC's Title 10 CFR. Before adopting 10 CFR 20 Subpart E, the NRC conducted a nation-wide public rule-making exercise in compliance with NEPA, the federal equivalent of CEQA, and in so doing, met what Petitioners asked for in California in 2002.

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11 to 12	Governor Davis then issued an Executive Order directing DPH to "adopt regulations establishing dose standards for the decommissioning of radioactive materials by its licensees"	Of course D-62-02 was issued only after Governor Davis vetoed Senate Bill 1970 (2002) that had attempted to do just what the current litigation is doing, namely, to require all decommissioned material that had met the subject decommissioning standards to be sent to a licensed LLRW disposal site. In vetoing SB 1970, Governor Davis stated in a press release, "This bill redefines the term 'radioactive waste' to include any discarded decommissioned material with the slightest trace of detectable radioactivity not attributable to background sources and prohibits all such material from being disposed of at all existing hazardous or solid waste disposal facilities in the State of California. As written, this bill is overly broad, unworkable and would do little to significantly enhance protection of the public health."
12	Twenty-one years later, no APA rulemaking has been commenced, no regulations have been adopted, and no environmental assessment of any numerical remediation standards has been conducted.	Petitioners are correct in accusing the CDPH of failing to adopt dose-based decommissioning standards. This is the reason why activists can ride rough-shod over the decommissioning process in 10-year litigation such as this.

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15	Indeed, not once in the over 10 years of this litigation have Respondents offered a single example of a case where either agency has required any further cleanup once it was shown the property would satisfy the Guidance Documents.	Inspection of measured data demonstrated that the acceptable contamination standards were not only met, but that the vast percentage of measurements were non-detect, demonstrating ALARA. Furthermore comparison of the acceptable contamination standards were shown to be equal or less than 1 mrem/y when compared to more current dose-based surface contamination standards.
16	The Court of Appeal ruled against Petitioners' CEQA claim, however Petitioners are not seeking this Court's review of that ruling because it has suddenly become moot.	In the Final PEIR, DTSC has not said it will deviate from its prior "concurrence" with the 2010-2013 Boeing Building Demolition Program.
17	There can be no doubt that an agency may not "issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule" that has not been formally "adopted as a regulation . . . pursuant to this chapter."	Disagree. See earlier section on Guidance Documents, discussing law-regulation-guidance hierarchy, and the distinct difference between a regulation and a guidance document. Gov. Code 11340.5 and 11342.600 use an overly broad definition of "regulation" by including any lower-level standard as a "regulation." The proliferation of guidance documents that prescribe how regulations may be implemented would make "public approval" to be completely impractical and unworkable.
18	Guidance documents are not legally binding but are intended to provide guidance to the public and the agency staff.	Agree.

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18	A guidance document adopted without APA compliance is invalid …	Disagree.
20	Reg. Guide 1.86 declares the maximum “Surface Contamination Levels” of uranium and associated decay particles to be 15,000 decays per minute per 100 square centimeters.	Respondents utilize the "average" limits of the guidance documents as generally applicable goals, not the "maximum" limits, as demonstrated by Boeing Radiation Survey reports (732A). Survey reports inarguably demonstrate that measurements fall well below these "average" limits and prove that residual contamination (if any) is usually non-detect and always ALARA.
21	Respondents argued and, again, the Opinion holds, that because licensees propose clean-up standards to Respondents DPH and DTSC, the Guidance Documents are not Respondents’ standards but rather are the licensees’ standards.	Guidance documents are promulgated and enforced by NRC, DOE, CDPH and most all other States. Boeing, the licensee, appropriately proposed using these same federal and state acceptable contamination limits and in compliance with its own license. What is so hard to understand here? Why do plaintiffs believe that SSFL should be held to a different standard? DTSC does not have equivalent surface contamination standards because it does not have the authority (or the knowledgeable staff) to regulate radioactive material, nuclear decommissioning, or building demolition in general..
22	A regulated entity satisfying the government’s radiological standards does not transmute those standards into the applicant’s rule	Agree.

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25	The consequence of these factual and legal missteps is unmistakable: DPH (together with DTSC by deeming DPH release from the license to be conclusive certification that there is no remaining radiation) has deregulated residual radiation greater than background but less than the Guidance Documents' numerical standards.	Exceeding background has never been the criteria in law or regulation that defines "regulated radioactive material" or "radioactive waste." Rather than respondents deregulating the subject "decommissioned material", the petitioners are instead attempting to re-regulate "decommissioned material." The veto of SB 1970 (2002) and the implementation of D-62-02 supports respondents' position in this litigation.
25	… potentially catastrophic consequences of mismanaged risks of radioactive contamination adds urgency to the need for this Court's review.	More hyperbole unsupported by data.

Related Department of Energy (DOE) Clearance Standards

Although the PSR-LA litigation relates to Boeing-owned, and formally DPH- and NRC-licensed buildings, recent action by the Department of Energy who funded much of the nuclear programs in the subject buildings has general relevance to the preceding discussion.

In March 2023, DOE issued technical standard, DOE-STD-1241-2023, "Implementing Release and Clearance of Property Requirements."[9] This standard is designed to assist DOE and DOE contractors meet release and clearance of property requirements provided in DOE Order O 458.1, "Radiation Protection of the Public and the Environment", Change 4 (2020).

DOE-STD-1241-2023 adopts …

- 25 mrem/y plus ALARA for **real property** based on NRC 10 CFR 20.1402 Subpart E (Section 3.3 and 4.7 of the standard).

[9] DOE Technical Standard, DOE-STD-1241-2023, "Implementing Release and Clearance of Property Requirements." March 2023. https://www.standards.doe.gov/standards-documents/1200/1241-AStd-2023/@@images/file

- 1 mrem/y for **personal property** (Sections 4.4 and 4.5 of the standard).

- Total and removable **surface contamination** limits for **personal property** are identical to NRC Regulatory Guide 1.86 and NUREG 1556, Vol. 9, Rev. 3 (Section 4.4 and Table 1 of the standard).

- **Volumetric contamination** limits for **personal property** based on ANSI/HPS N13.12-2013 (Section 4.5 and Table 2 of the standard)

- 5 pCi/g of radium-226 in soil based on EPA UMTRCA regulations (Section 4.2 of the standard).

***"Real property** is defined as **land** and anything permanently affixed to the land such as **buildings**, fences, and **those things attached to buildings** such as light fixtures, plumbing and heating fixtures, or other such items, that would be personal property if not attached."*

***"Personal property** is property of any kind, **except for real property.** For the purposes of DOE O 458.1 and this Standard, examples of personal property include consumable items (e.g., wood, containers, lab equipment and paper); personal items (e.g., clothing, brief cases, respirators and gloves); office items (e.g., computers, unused office supplies, and furniture); tools and equipment (e.g. hand tools, power tools, construction machinery, vehicles, tool boxes, ladders, and scales); and **debris** (e.g. **removed soil, rubble**, sludge, **wood**, tanks, **scrap metal**, **concrete**, wiring, doors, and windows)."*

Conclusions

Other than numerous instances of unjustified hyperbole, the "Petition for Review" does NOT allege or prove any of the allegations in the original petition and complaint related to "underground regulations", namely 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.

Petitioners acknowledge that the subject guidance documents have been, and still are, in wide use in California. The same is true of the rest of the U.S. Indeed, the Department of Energy issued a new standard in March 2023 (see above), that included the very same numerical acceptable surface contamination limits as has been litigated for the past 10 years.

On July 26, 2023, the California Supreme Court denied PSR-LA's "Petition for Review."