August 8, 2022

Committee to Bridge the Gap
Parents Against SSFL
Public Employees for Environmental Responsibility
Physicians for Social Responsibility-Los Angeles
Rocketdyne Cleanup Coalition

Comments on Proposed Memorandum of Understanding Between the Boeing Company and the Los Angeles Regional Water Quality Control Board Regarding the Contaminated Santa Susana Field Laboratory

VOTE "NO"

The Santa Susana Field Laboratory (SSFL) is one of the most contaminated sites in the nation, and arguably the most polluted facility within the Regional Board's jurisdiction. SSFL is the headwaters of the LA River and also drains to significant waterways in Ventura County; surface water picks up contamination from the SSFL soil and carries it offsite. More than 700,000 people live within 10 miles of the site.

The proposed deal with Boeing reached in closed-door negotiations – with key stakeholders such as representatives from the affected Cities and Counties and organizations working on behalf of impacted residents who were frozen out – **may be the most consequential decision, in terms of protecting, or harming, public health and the environment, that Board Members will make during their time on the Board.** A thorough and rigorous examination of the troubling provisions buried in the hundreds of pages embodying the Boeing deal, and the criticisms thereof, is essential and should lead to a decision **not to approve the deeply troubling Memorandum of Understanding (MOU) with Boeing**. Were the Regional Board to do otherwise, the harmful effects on public health and the environment would be substantial.

Overview

The proposed MOU would have the Regional Board agree *now* to a glide path for lifting the NPDES permit regulating releases of surface water carrying pollution from the site. The MOU is thus inextricably linked to the cleanup, or lack thereof, of the source of the contamination polluting surface water discharges. In fact, the MOU declares:

> "The remediation of contaminated soil, specifically, is pertinent to this MOU."[1]

In reviewing the MOU, we make several key points:

I. The MOU is Based on the False Premise of a Full Soil Clean-Up, So That No Contamination Would Remain to Pollute Stormwater Runoff

The entire premise of the MOU rests on this claim, as posted on the home page of the Regional Board: **"Following the cleanup, stormwater runoff from the Boeing areas will not be polluted."**[2]

And as the preamble of the MOU states:

> After Boeing completes its soil remediation on the Boeing Area pursuant to DTSC's regulatory oversight, Boeing intends to seek to terminate the NPDES Permit or withdraw from its obligations under the NPDES Permit for stormwater discharges from Industrial Activity on the basis that Significant Materials from past Industrial Activity in the Boeing Area **will no longer be exposed to stormwater**.[3]

The Board has no factual basis for agreeing to such statements, which, as shown below and in the supporting documentation, are false.

II. The Boeing Deal Instead **Weakens** Cleanup Requirements by Factors of **Hundreds** and Allows Boeing to Leave **~90-95% of its Contaminated Soil Not Cleaned Up**, and Thus Available to Continue to Pollute Stormwater Runoff

On May 9, 2022, the Water Board, the California Environmental Protection Agency (CalEPA), and the Department of Toxic Substances Control (DTSC) held a press conference and issued a

[1] MOU, pdf p. 2.
[2] https://www.waterboards.ca.gov/losangeles/, last accessed August 7, 2022, (emphasis added).
[3] MOU pdf p. 2, emphasis added. Note that the term "Significant Materials" is defined in the MOU's Appendix A ("Defined Terms") as referring to those materials identified in 40 CFR 122.26(b)(12), which includes, e.g., all hazardous materials under CERCLA. It is not based on the nature, not the quantity, of the materials.

news release announcing and lauding the Boeing deal.[4] **It is, of course, deeply troubling that the Water Board would be involved in such an action promoting the pact with Being, coming as it did *before* the Board itself holds its hearing, considers public input, decides whether to support or oppose it, and votes one way or the other based on the record before it on August 11**.

The very first sentence of the joint Water Board/CalEPA/DTSC news release asserts that the deal worked out secretly with Boeing is "a major development to **strengthen** the cleanup of contaminated soil, groundwater, and stormwater runoff at the Santa Susana Field Laboratory (SSFL)...." (emphasis added). In fact, as shown in detail in Appendix A, the deal with Boeing **weakens** soil cleanup standards **by factors of ~100 to 2000**, resulting in allowing Boeing to leave **~90-95% or more** of its contaminated soil not cleaned up. Groundwater cleanup requirements are also relaxed. As we discuss below, if the MOU were approved by the Board, surface water releases of pollutants likely will increase. In no fashion would the toxic releases into water end, as asserted on the Board's website and in the MOU itself.

III. The Boeing MOU is Highly Unusual, and There is No Basis Why the Board Should Surrender Its Normal Process for Protecting Waters

Under standard practice, an NPDES permit for a site with contamination from past industrial activity would remain in effect until completion of cleanup of the site covered by the permit. Then there would have to be at least several years of data showing zero releases in excess of permit limits at the outfalls. If Best Management Practices (BMPs) such as treatment systems and straw bale filters had been required, there would presumably need to be, after their removal, several additional years of monitoring at the outfalls to demonstrate that the cleanup had succeeded in protecting stormwater without need for any controls, and the NPDES permit could then be lifted. The process would be data-driven: cleanup of the full site completed, followed by actual measurements at the outfalls proving that pollution is no longer being picked up by the stormwater leaving the site at levels in excess of permit limits.

But the deal Boeing negotiated completely turns those normal practices upside down. The decision to eliminate the NPDES permit would be made long before the full site that is covered by the permit is cleaned up. And the decision to vacate the NPDES permit would *not* be made by actual data from monitoring of discharges at the outfalls, the NPDES points of compliance, demonstrating no further potential for violations. Instead, Boeing – the polluter – would prepare "modeling" purporting to show that the minimal amount of cleanup it has done (a small percentage of its contaminated soil, with the rest remaining not cleaned up) on a portion of the site would theoretically result in no pollution being picked up by stormwater. It is axiomatic that a polluter putting forward modeling can produce the results desired by repeatedly tweaking the inputs until one gets the answer desired. That is why actual measurements are instead required.

[4] "California holds Boeing accountable for cleanup at toxic Santa Susana Field Laboratory: Comprehensive framework sets stage for stringent cleanup of Boeing's areas of responsibility at the site," https://www.waterboards.ca.gov/press_room/press_releases/2022/pr05092022-dtsc-calepa-swrcb-ssfl.pdf .

The deal would also have Boeing do a paper "risk assessment," with the same fundamental problem described above for the modeling.

Some "monitoring" is contemplated under the MOU, but buried in the text is the revelation that the monitoring would *not* be at the outfalls, the NPDES points of compliance, but at points yet to be identified in the interior of the Boeing areas[5], i.e., at locations Boeing thinks would have the highest possibility of being clean. In fact, the major purpose of the deal is for Boeing to be relieved of any obligation to monitor the outfalls and control the releases therefrom.

There are huge other problems with the proposed modeling, risk assessment, and "monitoring" – among them not even including ~90% of the contaminants detected at SSFL; comparing those few that are considered against bogus "background" and "non-industrial thresholds" rather than lower NPDES permit limits; inflating background and detection limits; the risk assessment being restricted to recreational exposures while ignoring such other pathways of infiltrating into and contaminating groundwater used for drinking water sources; and much more.

The fundamental question remains – why on earth would the Regional Board even consider such a deal demanded by the polluter, to jettison the Board's normal process and instead relieve Boeing of its NPDES permit not based on actual measurements at the outfalls but on theoretical models and risk assessments and some self-selected interior measurements by the polluter? What is in it for the Board, whose duty is to protect water and public health, by abandoning the normal data-driven process of requiring cleanup of a site to be completed and then be demonstrated by years of compliance at the outfalls? What is in it for Boeing, the polluter, is clear. But what is in it for protecting public health and the environment? Nothing.

IV. The Board Surrenders Its Independent Judgment

The MOU provides that:

> "the Los Angeles Water Board agrees to utilize the processes, methodologies and standards as specified in this MOU…"[6]

And agrees:

> "to utilize technical stormwater reports that have been and will be prepared by the Surface Water Expert Panel ("Expert Panel")…[maintained] at Boeing's sole expense."[7]

This Boeing-appointed and financed panel will determine:

- "background values"[8]

[5] MOU Exhibit C, pdf p. 25.
[6] MOU, pdf p. 5-6.
[7] MOU, pdf p. 5.
[8] MOU, pdf p. 6.

- "Post-cleanup scenario modeling" to determine that "past Industrial Activity that occurred on the Boeing Area will not Pollute stormwater runoff…"[9]

- "post-cleanup confirmation stormwater monitoring" [as indicated above, not at the Outfalls][10]
- The "Post-Soil Cleanup Stormwater Human Health Risk Assessment" to show "no unacceptable risk to human receptors from exposure to stormwater from the Boeing Area post-cleanup."

By its terms, the MOU does not specify what, if any, discretion the Board will retain to act contrary to the Boeing panel findings or even to rely upon data not approved by the Boeing Panel.

Section 6 of the MOU on the topic of "Board Authority and Discretion" merely recites that the MOU does not override the public notice and hearing requirements of state law for any final decision. That is not much of a concession, since no MOU can override state law. Yet, the MOU clearly purports to bind the factual findings upon which any final decision will rest.

Thus, for all practical purposes, this MOU places the polluter in charge of determining its own compliance and the need for any further corrective measures – even if independent data show the continuation of actual toxic runoff.

In short, the Board is being asked through this MOU to abdicate its responsibilities to administer the Clean Water Act.

We have not been able to find another instance in which a permit holder demands to control the fact-finding capacity and discretion of this Board.

V. Permit Hot Potato

Since the NPDES permit was first issued, it has been a single permit for all of SSFL, and Boeing is the permit-holder. Boeing, however, now proposes through this MOU that the entire NPDES permit be voided once Boeing cleans up a small fraction of the contamination on about half of the operational areas of SSFL.

SSFL is 2850 acres, all but 446 of which are owned by Boeing. The U.S. Government owns the 446 remaining acres, for NASA.[11] 409 acres of the land owned by Boeing are subject to an Administrative Order on Consent (AOC) between DOE and DTSC as to cleanup of soil, but which doesn't cover surface water.[12]

[9] Ibid.
[10] Ibid.
[11] Boeing and its predecessors were the operators of that area too.
[12] Boeing owns Area IV and it and its predecessors were operators of industrial activity there as well.

SSFL has four operational areas (Areas I, II, III, and IV) and the bulk of the contamination is located in those areas. (There are also northern and southern buffer zones, all of which are owned by Boeing.) **Boeing proposes to clean up 5-10% of the contaminated soil in its operational areas (Area III and a portion of Area I) and then have the NPDES permit lifted for the entire site, even though cleanup of the other areas would not be done by that time.**

The MOU states as its objective to eliminate the NPDES permit for Boeing and instead have Boeing make its "best efforts" to "persuade" DOE and NASA, the federal parties, to apply for NPDES permits. "Best efforts" are defined in the MOU Appendix A as making an oral request, followed by a letter if that doesn't work, followed by another letter, and then an email and phone call. If these efforts are unsuccessful, Boeing is to document its failed efforts to persuade DOE and NASA to apply for an NPDES permit.

The Agreement and MOU do not apply to NASA and DOE -- only to Boeing. Yet, as the MOU concedes:

> Due to the topography of SSFL, stormwater can carry Pollutants from one area of the Site to other areas and, therefore, impacts the quality of stormwater discharged from the Boeing Area, NASA Area, and DOE Area. [13]

There is some language in the MOU suggesting that Boeing's NPDES permit won't be lifted until DOE and NASA have obtained a permit. HOWEVER, buried deep in the MOU (Section 4.2) is the get-out-of-jail-free card: DOE and NASA must apply "to the Los Angeles Water Board to obtain NPDES permit coverage for stormwater discharges associated with past Industrial Activity **and/<u>or</u>** stormwater discharges associated with construction activity, which includes excavation and grading associated with remediation…." (emphasis added) "Or" is the operative term.

In other words, the existing site-wide NPDES permit for stormwater discharges associated with *contamination from past Industrial Activity* can occur if NASA and DOE merely apply for coverage for stormwater discharges associated with *construction* (e.g., control of mudflows from construction and excavation activities.). Indeed, the MOU indicates DOE and NASA have already applied for coverage under the State Board's Construction General Storm Water Permit.[14] Construction Stormwater Permit is defined in the MOU as coverage under the General Permit for construction, NPDES No. CAS000002.[15]

Why would the Regional Board possibly entertain an MOU that sets in motion lifting the existing NPDES discharge permit for industrial contamination, a permit that covers the whole SSFL site, before the whole site has been cleaned up and actual data from all the outfalls shows no further risk of continued violations? Why would the Board even contemplate lifting pollution discharge monitoring and control requirements under such circumstances?

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[13] MOU, pdf p. 2.
[14] MOU, pdf p. 4.
[15] MOU, pdf p. 15.

[It should be noted that the great majority of outfalls covered by the NPDES permit are on Boeing-owned land; the remaining couple are fed in part by runoff from Boeing land. It is not even clear how voiding the current permit and hoping that DOE and NASA will agree to coverage for industrial pollution discharges could work, in that the outfalls are by and large not on their land.]

VI. Memorandum of Misunderstanding

If this were truly a Memorandum of *Understanding*, there would be no need for a dispute resolution process, because the parties are just saying they will do their best to work together. If they cannot agree, there should be no need to have a formal dispute resolution process.

Yet, this MOU provides for not only a formal dispute resolution process but also for Boeing to be able to appeal to the State Water Board and, ultimately, to the courts for judicial review.

These appeal mechanisms suggest that this is no mere MOU, but that Boeing believes it to be in fact a Memorandum of *Agreement*, an agreement that confers enforceable rights that Boeing can impose on the Board through appeal to a higher authority or the courts.

The MOU, for this and other reasons, is of questionable legality. The generalized assertion that the Board has not given up its discretion by the MOU is contradicted by numerous other provisions whereby Boeing can readily assert that the Board has and is thus legally bound. Rather than entering into the MOU, largely drafted by Boeing, eliminating the risk of legal challenge by Boeing, it places the Board in substantial jeopardy of such action

VII. The MOU Indicates that the Best Management Practices (BMP) Would Be Eliminated; Thus It Could Result in Increased Pollution Releases

The MOU states, "… BMPs are anticipated to be removed following soil cleanup…."[16] Thus, if the MOU were to be approved, instead of eliminating pollution leaving the site, it could readily increase. Only a small fraction of the contaminated soil would be cleaned up, and the measures to prevent or reduce surface water leaving the site carrying pollution would be eliminated.

VIII. The Principal Argument Given for Approving the MOU is That the Companion Boeing-DTSC Agreement Cannot Otherwise Take Effect. That in Fact is a Critical Reason to Oppose the MOU.

The Regional Board's Frequently Asked Questions (FAQs) about the MOU provides as a central argument for approving the Boeing-Regional Board MOU:

5. What happens if the Los Angeles Water Board does not approve the MOU?

[16] MOU, Exhibit C, pdf p. 7

> If the Los Angeles Water Board fails to approve the draft MOU, then the settlement agreement that Boeing has reached with DTSC will *not* go into effect.… Perhaps most importantly, however, the path established in the DTSC/Boeing settlement agreement for a stringent soil cleanup and the potential for a cleanup standard that allows people to live on-site and consume produce from a backyard garden would likely be contested by Boeing in court, causing both delay in the cleanup and uncertainty as to whether the same range of cleanup standards, including a potential residential with backyard garden cleanup standard, would be achieved.[17]

First of all, caving to the demands of a powerful polluter to weaken public protections because of implicit threats to sue would be the opposite of the duties of the Board.

Secondly, and critically important, the FAQ and news release assertions of a stringent soil cleanup and a standard based on a residential garden are false. In fact, the Boeing Agreement would *redefine* the residential garden standard by *weakening it by factors of hundreds or thousands*.

We have detailed these matters in the attached Appendices, which we strongly urge Board Members to review with care. **There is information contained therein that has been withheld from the Board to date in the material presented to it in support of the MOU and Agreement, which are inextricably linked.**

Approving the MOU would indeed make possible the deeply troubling companion Agreement, and allow the vast majority of contamination to never be cleaned up, forever migrating offsite and placing the public at risk. The Regional Board's fundamental job is to protect public health and the environment, by protecting water supplies. Approving this MOU would in fact be a fundamental violation of that mission. We strongly urge a "No" vote.

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[17] FAQs for Memorandum of Understanding (MOU) Between the California Regional Water Quality Control Board, Los Angeles Region (Los Angeles Water Board) and The Boeing Company (Boeing).