No. 11-55903

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE BOEING COMPANY,
Plaintiff-Appellee,
v.

DEBBIE RAPHAEL, IN HER OFFICIAL CAPACITY AS THE DIRECTOR OF THE CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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The United States respectfully submits this brief as amicus curiae pursuant to the Court's orders of January 24, 2013 and February 4, 2013, and Federal Rule of Appellate Procedure 29(a).

## STATEMENT OF INTEREST

This case concerns whether a California statute that sets a standard for the cleanup of nuclear and chemical contamination at the Santa Susana Field Laboratory (SSFL), a site where federal agencies carried out significant nuclear energy research and rocket engine testing, conflicts with the Supremacy Clause of the United States Constitution. The United States has a strong interest in the proper application of preemption principles, particularly with regard to nuclear materials regulated under the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2011, *et seq.* (AEA), as well as the legal principles governing the scope of the federal government's immunity from state regulation. The decision in this case will not simply resolve the dispute between the California Department of Toxic Substances Control (DTSC) and Boeing, but will likely establish Circuit precedent governing the scope and limits of states' authority to regulate federal agencies and their

contractors who perform nuclear operational and cleanup activities, a matter of significant concern to the United States.

As described below, the two federal agencies that have carried out activities at SSFL have entered into Administrative Orders on Consent (AOCs) that govern the ongoing cleanup of soils at the site. This Court's ruling on the constitutionality of the challenged statute will not affect the cleanup efforts and commitments of the federal agencies pursuant to these AOCs. The federal government nevertheless retains a strong interest in the proper interpretation generally of the limits of state authority to regulate the efforts of federal agencies and their contractors to clean up contamination at sites like SSFL.

## ISSUES PRESENTED

This amicus brief addresses the following issues:

1. Does California Senate Bill 990 (SB990) violate the Supremacy Clause because it regulates within the field of radiation safety preempted by the AEA, or is it authorized by the delegation of regulatory authority to states that have entered into agreements with the Nuclear Regulatory Commission (NRC) or its predecessor pursuant to AEA §274(b), 42 U.S.C. §2021(b), or by any other statute?

2. Does SB990 violate the doctrine of intergovernmental immunity by discriminating against a federal facility and a federal contractor by imposing a more stringent standard for the cleanup at SSFL than is required at other comparable sites in California?

## STATEMENT

### I. STATUTORY FRAMEWORK

#### A. The Atomic Energy Act.

The AEA, originally enacted in 1946 and substantially amended in 1954, "'established a comprehensive regulatory scheme for military and domestic nuclear energy.'" *United States v. Manning*, 527 F.3d 828, 832 (9th Cir. 2008) (*Manning*), *quoting from Natural Res. Def. Council v. Abraham,* 388 F.3d 701, 704 (9th Cir. 2004). Among other things, it authorized the Atomic Energy Commission (AEC) to establish standards, by regulation or order, governing possession and use of "special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the

common defense and security or to protect health or to minimize danger to life or property * * *." 42 U.S.C. §2201(b).[1]

The AEC was abolished in 1974, and its remaining functions were transferred to the Energy Research and Development Administration (ERDA) and to the NRC. *See* Energy Reorganization Act of 1974, 88 Stat. 1233, codified at 42 U.S.C. §5801, et seq. NRC was given commercial licensing and related regulatory functions, see 42 U.S.C. §§5841 – 53. ERDA was organized to "bring together and direct federal activities relating to research and development on the various sources of energy, to increase the efficiency and reliability in the use of energy, and to carry out the performance of other functions, including but not limited to the Atomic Energy Commission's military and production activities and its general basic research activities." 42 U.S.C. §5801(b).

[1] The function of establishing generally applicable environmental standards for the protection of the general environment from radioactive material was transferred to the Environmental Protection Agency (EPA) by Reorganization Plan No. 3 of 1970, §2(a)(6), reprinted in 84 Stat. 2086 (1970). Relying on this authority, EPA promulgated standards to protect the public from exposure to radiation from the uranium fuel cycle at 40 C.F.R. Part 190, "Environmental Radiation Protection Standards for Nuclear Power Operations." In addition, EPA issues Preliminary Remediation Goals for the cleanup of radiation contamination at CERCLA sites. *See e.g.* OSWER Publication 9355.01-83A, http://www.epa.gov/superfund/health/contaminants/radiation/pdfs/rad.pdf (last checked 3/18/13).

In 1977, Congress abolished ERDA and transferred its functions to the Department of Energy (DOE). *See* 91 Stat. 565, 577-78 (1977), codified at 42 U.S.C. §7151(a). This left control over existing government facilities and defense nuclear waste in DOE. *See* 42 U.S.C. §7133(a)(8)(A), (B), (C), and (E).

The AEA covers three general classes of radioactive material: source material, special nuclear material, and byproduct material. *See, e.g.*, 42 U.S.C. §2014(e), (z), (aa). Except in certain narrowly defined circumstances, DOE is granted exclusive regulatory authority over its nuclear material activities. 42 U.S.C. §2140(a), 42 U.S.C. §5842. DOE is also charged with "provid[ing] for safe storage, processing, transportation, and disposal of hazardous waste (including radioactive waste) resulting from nuclear materials production, weapons production and surveillance programs, and naval nuclear propulsion programs." 42 U.S.C. §2121(a)(3).

**B. Other Federal Statutes.**

Two other federal statutes have a bearing on federal agency efforts to deal with remediation of contamination at various sites: the Comprehensive Environmental Response, Compensation, and Liability

Act (CERCLA), 42 U.S.C. §9601 *et seq.*, and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6901 *et seq*. CERCLA is a comprehensive mechanism for the cleanup of releases or threatened releases of hazardous substances. Sites meeting defined criteria are placed on the National Priorities List (NPL) by EPA. 42 U.S.C. §9605(a)(8). Section 120(a)(4) of CERCLA provides that "State laws concerning removal and remedial action" shall apply to federal facilities that "are not included on the [NPL]," but this provision "shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality." 42 U.S.C. §9620(a)(4).

RCRA addresses environmental and health dangers associated with the management of solid and hazardous waste. RCRA subtitle C creates a "cradle-to-grave" regulatory scheme for solid wastes identified or listed as "hazardous" by regulation. 42 U.S.C. §§6921-6939e. In addition, EPA may authorize states to implement state hazardous waste regulations "in lieu of" the federal RCRA hazardous waste

regulations. 42 U.S.C. §6926.[2] Once authorized, the state hazardous waste regulations become federally enforceable under RCRA Subtitle C. By definition, "solid waste * * * does not include * * * source, special nuclear, or byproduct material as defined by the [AEA]." 42 U.S.C. §6903(27). In addition, RCRA Section 1006(a) provides that "[n]othing in this chapter shall be construed to apply to (or authorize any State * * * to regulate) any activity or substance which is subject to * * * the [AEA] * * * except to the extent that such application (or regulation) is not inconsistent with the requirements of the [AEA]." 42 U.S.C. §6905(a).

RCRA defines "mixed waste" as waste that "contains both hazardous waste and source, special nuclear, or byproduct material subject to the [AEA]." 42 U.S.C. §6903(41). Mixed waste is regulated under multiple authorities. Pursuant to the AEA, DOE exclusively regulates the component of mixed waste that consists of source, special nuclear, or byproduct material under the AEA, while pursuant to RCRA, EPA and authorized states – such as California – regulate the hazardous component. *See United States v. Commonwealth of*

[2] SB 990 is not a part of California's RCRA-authorized hazardous waste program.

*Kentucky,* 252 F.3d 816, 823 (6th Cir. 2001). RCRA and RCRA-authorized state hazardous waste requirements yield to AEA requirements where RCRA's requirements are inconsistent with the AEA requirements. 42 U.S.C. §6905(a); *see also Final Rule, Radioactive Waste – Byproduct Material*, 52 Fed. Reg. 15297, 15940 (1987).

## II. Factual Background[3]

Since the late 1940s, DOE and its predecessors have carried out research at SSFL to develop new nuclear energy sources. A DOE administered complex known as the Energy Technology Engineering Center (ETEC) has included as many as 16 DOE owned and operated experimental nuclear reactors. DOE leases the land on which these facilities are located from Boeing. Boeing (including its predecessors) has also been the DOE prime contractor at the site. Various activities have resulted in radiological contamination in soil, groundwater, and bedrock at SSFL. ER8. Boeing has also conducted radiological work for commercial customers at SSFL. ER9.

[3] As *amicus curiae*, the United States takes the factual record as it finds it, without necessarily conceding the correctness of particular facts found therein.

The United States Air Force and the National Aeronautics and Space Administration (NASA), with Boeing as prime contractor, conducted rocket engine testing from the 1950s to 2006 in other areas of SSFL, including a 452-acre area owned by the United States. ER9-10. As a result of rocket engine testing and support operations, the soil, bedrock, and groundwater at SSFL became contaminated with chemicals, particularly the solvent trichloroethylene (TCE). ER10.

In the 1970s, DOE began decommissioning and decontaminating reactors, and assessing the contamination at SSFL. ER11. In 1996, DOE approved procedures governing cleanup of radiological contamination, including a cleanup standard based on suburban-residential, recreational, or industrial (but not agricultural) uses, under which future users of the site would be exposed to a dose of no more than 15 millirem of radiation per year. *Id.*

NASA has also worked for many years to assess the extent and nature of non-radiological contamination at SSFL. This has been supervised by DTSC pursuant to California's applicable hazardous waste management laws and RCRA's waiver of sovereign immunity for non-discriminatory state laws at federal facilities, 42 U.S.C.

§6961(a)(2). In August 2007, DTSC, Boeing, NASA and DOE entered into a Consent Order for Corrective Action that requires the parties to clean up non-radiological chemical contamination in soils and groundwater at pertinent areas of SSFL to a level that assumes the site will be used for suburban residential purposes. ER12.

### A. Senate Bill 990

Concerned about the pace of the cleanup, the California legislature enacted SB990 in October 2007 to prescribe cleanup requirements for both radiological and chemical contamination at SSFL. Section 1 of SB990 provides that DTSC can compel responsible parties to take or pay for appropriate removal or remedial action at SSFL, and that the response action at SSFL shall meet a risk-based standard calculated as follows:

> In calculating the risk, the cumulative risk from radiological and chemical contaminants at the site shall be summed, and the land use assumption shall be either suburban residential or rural residential (agricultural), whichever produces the lower permissible residual concentration for each contaminant.

SB990, §1(c), codified at California Health & Safety Code §25359.20(c). SB990 further provides that "no person or entity shall sell, lease,

sublease, or otherwise transfer land presently, or formerly occupied by the Santa Susana Field Laboratory," unless and until DTSC has certified "that the land has undergone complete remediation pursuant to the most protective standards" of the statute. *Id*. at §1(e), §25359.20(e).

Section 2 of SB990 describes the "unique circumstances" that prompted the legislature to act with regard to SSFL, including that "more than 150,000 people live within five miles of the facility," the presence of "radioactive contamination" from incidents including the 1959 reactor accident, and DOE's alleged unwillingness to adopt an adequately protective cleanup standard. Section 2, Stats. 2007, c. 729 (SB990).

**B. Boeing's Lawsuit.**

In November 2009, Boeing filed this suit in the U.S. District Court for the Eastern District of California. In December 2009, Boeing filed an amended complaint alleging that SB990 is preempted because it regulates in a federally occupied field (Counts 1 and 2); violates intergovernmental immunity (Count 3); conflicts with federal law (Counts 4 and 5); violates equal protection (Count 6 and 7); and violates

due process (Counts 8 and 9). In June 2010, venue was transferred to the Central District of California. After discovery, Boeing moved for summary judgment on Counts 1-3 and 6-9 of the amended complaint.

### C. The 2010 Administrative Orders on Consent.

In 2010, DOE and NASA entered into negotiations with DTSC that resulted in agreements embodied in Administrative Orders on Consent (AOCs). The 2010 AOC for DOE defines its obligations with respect to cleanup of radioactive and other contamination in soils at SSFL Area IV and "the Northern Buffer Zone."[4] ER38-39, ¶¶1.2, 1.5.1. The AOC sets a standard for cleanup of soils – "at the completion of the cleanup, no contaminants shall remain in the soil above the local background levels." ER42, ¶2.1. While that standard is different from the "rural residential (agricultural)" standard stated in SB990, the AOC nevertheless stipulates that DTSC agrees that compliance with the AOC constitutes "full and complete" compliance with all applicable provisions of state law, including SB990. ER40, ¶1.6. The 2010 AOC for DOE does not set a standard for cleanup of groundwater, but instead

[4] SSFL is divided into four administrative areas. Area IV was primarily used for DOE activities, while Area II was primarily used for NASA activities.

provides that "utilizing the authority of this Order, the procedures of the 2007 Order will be applied to the investigation, characterization and remediation of any radiological contaminants that may have impacted groundwater." ER40 ¶1.5.2. The 2010 AOC also does not set a standard with respect to DOE's cleanup obligations for bedrock.

The 2010 AOC entered into by NASA and DTSC is similar, focusing on cleanup of soil contamination of specific areas within NASA's responsibility to "background levels," and providing that this will constitute compliance with applicable laws, including SB990. ER94, 96, ¶¶1.5, 2.1. Like the DOE Order, the NASA AOC provides that groundwater cleanup will proceed in accord with the 2007 Order (ER40 ¶1.5.2), and does not set a standard with respect to bedrock.

Neither the DOE nor the NASA AOC purports to be authorized by SB990; each cites other provisions of the California Health and Safety Code as the basis for DTSC's authority to issue these orders. ER39 (¶1.3); ER93 (¶1.3). In the United States' view, invalidation of SB990 would not affect the enforceability of the AOCs, and as noted *supra* at 2, the federal agencies are committed to the cleanup described therein.

### D. The District Court Decision.

On April 26, 2011, the district court granted Boeing's motion for summary judgment on Counts 1-3 (AEA preemption and intergovernmental immunity). The court found that SB990, by attempting to regulate the cleanup of DOE-related radiological material for health and safety reasons, regulated within a field preempted by the AEA. ER16-18. The court rejected DTSC's argument that SB990 is a land use statute within the scope of State authority, noting that "[t]he statute's language and legislative history demonstrate that SB 990 is a cleanup statute focused on public health and safety," that "does not regulate how SSFL can or should be used in the future." ER18. The court found that authority for SB990 had not been ceded to California through a 1962 agreement entered into by the AEC and the State pursuant to Section 274(b) of the AEA, 42 U.S.C. §2021(b), finding that neither Section 274(b) nor the agreement itself covers DOE activities involving nuclear materials (ER19-20), or covers materials that "result from the operation of nuclear reactors[,]" regulation of which resides exclusively with the federal government (ER19 n.11, citing 42 U.S.C. §2021(c)(1)).

The court found that SB990 also violates the doctrine of intergovernmental immunity, which prohibits States, without congressional approval, from "'discriminat[ing] against the Federal Government or those with whom it deals.'" ER21, *quoting from North Dakota v. United States*, 495 U.S. 423, 437 (1990). The court found that SB990 treated Boeing, as a federal contractor and lessor at SSFL, "far less favorably" than other responsible parties at other sites needing cleanup, because Boeing must meet the strict cleanup standards that the State has imposed at SSFL but apparently nowhere else in California. ER22.

The court found that the invalid portions of SB990 could not be severed from any potentially valid portions, and struck down SB990 in its entirety. ER24. The court did not rule on Boeing's conflict preemption, equal protection or due process claims. It found that there was no just reason for delay, and entered final judgment as to Counts 1-3 pursuant to F.R.C.P. 54(b). ER25.

## ARGUMENT

### I. SB990 Is Preempted By The AEA Because It Addresses Radiation Hazards Of AEA Nuclear Materials.

The Supremacy Clause of the Constitution mandates that "the Laws of the United States * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby * * *." U.S. Const. art. VI, cl. 2. Under this provision, preemption of a state law can occur either because it enters a field of regulation that Congress has reserved exclusively for the federal government or where state law conflicts with federal law. *See English v. General Electric Co.*, 496 U.S. 72, 79 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (*Silkwood*); *Manning*, 527 F.3d at 836.

The United States agrees with the district court that SB990 is preempted because it enters a field comprehensively regulated by the AEA. Virtually every aspect of the handling of AEA materials falls within the exclusive authority of the federal government. The Supreme Court has noted that "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." *Pacific Gas & Elec. v. State Energy Res. Conserv.*

*& Dev. Comm'n*, 461 U.S. 190, 212 (1983) (*Pacific Gas*). Thus, states are "precluded from regulating the safety aspects of" AEA materials and any state law that attempts to do so is preempted. *Silkwood,* 464 U.S. at 250; *see also Manning*, 527 F.3d at 838 (state regulation of the treatment, storage, and disposal of radioactive materials in order to protect health and safety "invades the province of the AEA"). Regulation of the safety aspects of AEA materials has never been a traditional state function because the federal government has exercised a virtual monopoly over such regulation from the beginning of nuclear activities during World War II. *Pacific Gas*, 461 U.S. at 206-211.

### A. AEA Preemption Is Not Limited To Operating Facilities, And Extends To AEA Materials Released To The Environment.

DTSC contends that SB990 is not preempted because SSFL "is not currently being used for a nuclear facility of any sort * * *" (Br. 18), and because "nothing in the AEA provides clear authority over the cleanup of radionuclides (or set the standards for cleanup) that have dispersed into the environment from nuclear facilities or nuclear-related activities, affecting soil, groundwater, and surrounding communities" (Br. 29). These attempts to limit the scope of AEA preemption to

operating nuclear facilities and to unreleased nuclear materials were properly rejected.

The scope of regulation under the AEA is defined by the type of nuclear material, not whether such material is currently used as fuel, is in storage, or has been released into the environment. The AEA gave the AEC and its successor agencies regulatory authority over "possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property * * *." 42 U.S.C. §2201(b). The terms "special nuclear material, source material, and byproduct material" are defined by the Act in a way that includes wastes, and in a manner not limited to material at an operating facility. *See, e.g.*, 42 U.S.C. §2014(e)(1) & (2) ("[t]he term 'byproduct material means * * * any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material; * * * [and] the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material").

The AEA also specifically charges DOE with "provid[ing] for safe storage, processing, transportation, and disposal of hazardous waste (including radioactive waste) resulting from nuclear materials production, weapons production and surveillance programs, and naval nuclear propulsion programs." 42 U.S.C. §2121(a)(3). DOE has implemented its authority under these various provisions of the AEA by issuing Orders that, *inter alia*, establish health and safety limits for radioactive releases including at sites like SSFL where AEA materials have been released to the environment. *See, e.g.,* DOE Orders 251; 450.2; 435.1, Chg.1; 458.1, Chg.2. (available at https://www.directives.doe.gov/directives/).[5] DOE's authority and responsibility over the safety of AEA nuclear materials plainly does not end when a particular facility ceases operation or when such materials are released to the environment.

[5] DOE Order 435.1 and its accompanying manual, for instance, establish requirements for managing low-level radioactive waste, including characterization, treatment, disposal, and environmental monitoring designed to ensure that the public, workers, and environment are not exposed to radiation levels exceeding specified standards.

DTSC's arguments conflict with *Manning*, where this Court invalidated a Washington statute known as the Cleanup Priority Act (CPA) that similarly tried to regulate the disposal and cleanup of radioactive wastes that DOE was handling. The Court explained that, under pertinent Supreme Court authority, "'the test * * * is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.'" 527 F.3d at 836, quoting from *Pacific Gas*, 461 U.S. at 212. *Manning* found that the CPA was preempted because it was evident that it was intended to "regulate the treatment, storage, and disposal of radioactive materials, among other materials, in order to protect the health and safety of Washington residents and the environment," and therefore "invades the province of the AEA." 527 F.3d at 838. Among other improper provisions, this Court pointed to a requirement for the State's Department of Ecology to "'consider releases * * * of radioactive substances or radionuclides as hazardous substances' and to 'require corrective action for, or remediation of, such releases,'" based on a risk-based standard for cleanup of radionuclides, much like SB990. 527 F.3d at 837, quoting from RCW 70.105E.050(1). *Manning* confirms that the preemptive

effect of the AEA on state regulation extends to the safe remediation of radioactive substances that have been released to the environment at a DOE nuclear site, and that SB990 is accordingly invalid. *See also* 527 F.3d at 840 n.10 (agreeing with district court that the CPA was preempted because it had the effect of "trumping DOE decision-making with respect to the cleanup and disposal of AEA radionuclides").

Other courts have reached similar conclusions regarding the scope of AEA preemption. *Manning* relied, *inter alia*, on *United States v. Commonwealth of Kentucky,* 252 F.3d 816 (6th Cir. 2001), which found that the AEA preempted state solid waste permit conditions on the disposal of radioactive waste in a landfill operated by DOE. *See Manning,* 527 F.3d at 838. Other cases have found that AEA preemption applies to state or local attempts to regulate the safety of nuclear materials where they are no longer being used for some operational purpose but instead have been disposed of or released to the environment. *See Brown v. Kerr-McGee*, 767 F.2d 1234 (7th Cir. 1985) (AEA preemption applicable to wastes at a thorium processing site that was no longer in operation); *Skull Valley Band Of Goshute Indians v. Nielson*, 376 F.3d 1223, 1239-54 (10th Cir. 2004) (AEA preempts State's

attempt to regulate safety aspects of spent nuclear fuel storage site); *Missouri v. Westinghouse Elec., LLC,* 487 F. Supp. 2d 1076, 1087 (E.D. Mo. 2007) (AEA preempts state regulation of nuclear safety issues at non-operational nuclear facilities); *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220, 1229-32 (D.R.I. 1982) (AEA preempts state regulation of decontamination of the area surrounding a nuclear facility). Any limitation of AEA preemption to unreleased nuclear materials at operational reactors would conflict with this consistent line of cases.

### B. SB990 Is Concerned With Radiation Safety, Not Land Use.

The district court correctly found that SB990 is an attempt to regulate regarding the safety aspects of nuclear materials, not an exercise of the State's authority over land use. ER18. SB990 does not specify the ways in which the land at SSFL may or may not be used, either now or when the cleanup has been completed. Thus, it neither requires nor forbids that the land actually be used for "rural residential (agricultural)" or other use. Rather, SB990 refers to an agricultural use of the tract only for the purpose of establishing a (particularly demanding) standard governing the cleanup of "radiological and chemical contaminants" at the facility. DTSC itself (Br. 19) recognizes

that SB990 was "enacted by the California Legislature to protect the health and safety of its citizens posed by contaminated soil and groundwater resulting from nuclear-related operations and activities." Accordingly, SB 990 falls within the field preempted by the AEA.

### C. Authority To Regulate The Cleanup Of AEA Materials At SSFL Has Not Been Ceded To California Under AEA §274.

An exception to AEA preemption occurs where authority to regulate AEA materials has been "expressly ceded to the states." *Pacific Gas,* 461 U.S. at 212. DTSC argues (Br. 21-23) that a 1962 agreement between the AEC and California gives the State "express authority" to enact laws to protect health or to minimize dangers resulting from nuclear materials. That agreement (ER148-151) was entered into pursuant to a 1959 amendment to the AEA that attempted "to clarify the respective responsibilities under this chapter of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials," and provided limited authority for the AEC to enter into agreements with states ceding specified authority over nuclear materials. AEA §274, 42 U.S.C. §2021.[6]

[6] The NRC now administers this provision of the AEA.

The district court correctly concluded that the delegation of authority to states under Section 274 does not cede regulatory power over federal agencies generally, and also does not cede authority over the storage and handling of radioactive wastes generated by production and utilization facilities. ER13-14 & n.11. AEA Section 274(b) provides that, with certain exceptions, "the Commission is authorized to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission" under pertinent provisions of the AEA, with respect to byproduct materials, source materials, and "special nuclear materials in quantities not sufficient to form a critical mass." 42 U.S.C. §2021(b). In February 1962, the AEC promulgated regulations to implement Section 274, *see* 27 Fed. Reg. 1352 (1962) (codified at 10 C.F.R. Part 150), and those regulations were specifically referenced in the Agreement with California. *See* ER148. These regulations provided, with certain exceptions, that "any person in an Agreement State who manufactures, produces, receives, possesses, uses, or transfers byproduct material, source material, or special nuclear material in quantities not sufficient to form a critical mass is exempt" from the Commission's regulatory

authority under relevant provisions of the AEA, but made clear that "[t]he exemptions [from Commission authority] in this section do not apply to agencies of the Federal government as defined in §150.3." *See* 27 Fed. Reg. at 1353, §150.3.[7] Thus, only non-governmental entities can be exempted from federal regulation pursuant to an Agreement under AEA Section 274; federal agencies remain subject to the federal government's exclusive regulatory authority over nuclear materials.[8]

As the district court recognized (ER19, n.11), AEA §274 also makes clear that authority over the storage and handling of radioactive wastes generated by nuclear reactors cannot be ceded to states. Section 274(c)(1) provides that "[n]o agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of (1) the construction and operation of any

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[7] This regulation has remained essentially unchanged, except for addition of some additional exceptions, and is currently found in NRC's regulations at 10 C.F.R. §150.10.

[8] Consistent with this limitation, NRC has provided guidance making clear that "[p]rime contractors performing work for the DOE at U.S. Government-owned or controlled sites" also fall outside the scope of state regulation in Agreement States. *See* NRC, "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement," 46 Fed. Reg. 7540, 7543 (1981).

production or utilization facility * * *." 42 U.S.C. §2021(c)(1). The Commission was also to retain exclusive regulatory authority over "the disposal of such * * * byproduct, source, or special nuclear material as the Commission determines * * * should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission." 42 U.S.C. §2021(c)(4).

Consistent with these statutory limitations, the 1962 regulations made clear that the federal government's exclusive authority would continue to extend to the storage and handling of radioactive wastes generated by production and utilization facilities. Section 150.15(a)(1)[9] of those regulations explained that:

> Persons in agreement States are not exempt from the Commission's licensing and regulatory requirements with respect to the following activities:
>
> (1) The construction and operation of any production or utilization facility. As used in this subparagraph, operation of a facility includes, but is not limited to (i) the storage and handling of radioactive wastes at the facility site by the person licensed to operate the facility, and (ii) the discharge of radioactive effluents from the facility site.

[9] This regulation has remained unchanged since 1962, and is currently found in NRC's regulations at 10 C.F.R. §150.15(a)(1).

The preamble to the 1962 regulations explained that "[c]ontrol over the handling and storage of waste at the site of a reactor, including effluent discharge, will be retained by the Commission as a part of the control of reactor operation." 27 Fed. Reg. at 1351. This further confirms that California could not have obtained authority over the handling of radioactive wastes from the nuclear facilities at SSFL. Consistent with the clear thrust of the statute and regulations, nothing in the agreement with California indicated that the AEC was ceding authority to regulate with respect to a federal agency's cleanup of radioactive wastes stemming from its reactors. Accordingly, DTSC's reliance (Br. 25) on the fact that the federal reactors at SSFL have been shut down is no more persuasive in this context than in the context of AEA preemption generally (*see supra* at 17-22).[10]

[10] As the district court correctly noted (ER20), DTSC is not the state agency through which the NRC administers the agreement state provision of the AEA in California; instead, that agency is the California Department of Public Health (CDPH). The fact that the CDPH does not administer SB990 further undercuts any contention that SB990 falls under the authority transferred to California pursuant to AEA §274.

### D. CERCLA Does Not Narrow the Scope of AEA Preemption of SB990.

DTSC contends (Br. 29-31) that provisions of CERCLA "confirm" that AEA preemption does not extend to the cleanup of AEA materials that have spilled into the environment. This is incorrect.

Several provisions of CERCLA address nuclear materials. *See* CERCLA Section 101(22)(C), 42 U.S.C. §9601(22)(C) (definition of "release" includes releases of source, special nuclear or byproduct material except in certain defined situations); *see also* 40 C.F.R. Part 302, Table 302.4 (pursuant to authority under Section 102 of CERCLA, 42 U.S.C. §9602, EPA includes radionuclides within the list of hazardous substances subject to CERCLA). However, the fact that Congress, since enacting the AEA, has created new statutory authority that addresses radioactive material does not indirectly contract the preempted field of safety regulation or authorize an expansion of state authority over AEA materials. These CERCLA provisions indicate that covered releases of radionuclides are subject to response and cost recovery provisions of CERCLA, but they do not narrow the scope of

AEA preemption of states' regulatory power regarding the safety of AEA materials.

DTSC's contention (Br. 30) that CERCLA Section 120(a)(4), 42 U.S.C. §9620(a)(4), ceded authority to California regarding cleanup standards for nuclear materials at SSFL is unpersuasive. This waiver of federal immunity to non-discriminatory state laws concerning removal and remedial actions at federal facilities not included on the National Priorities List must be strictly construed in favor of the United States and cannot be applied "beyond what the language requires." *United States Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992). The Supreme Court has stressed that, "the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides clear and unambiguous authorization for such regulation," *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) (citations and quote marks omitted). As the district court in *Manning* found when rejecting Washington's attempt to impose a cleanup standard on nuclear waste at a DOE facility, "§9620(a)(4) does not provide an unequivocal, clear, or unambiguous authorization for States to regulate AEA materials released at federal facilities." *United States*

*v. Manning*, 434 F. Supp. 2d 988, 997 (E.D. Wash. 2006), *aff'd*, 527 F.3d 828 (9th Cir. 2008).

Moreover, CERCLA Section 120(a)(4) by its terms does "not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated" by federal agencies or instrumentalities. 42 U.S.C. §9620(a)(4). As explained in the legislative history, the last sentence of this section precludes states from "singl[ing] out only Federal facilities by creating special rules for them that are not otherwise applicable to similar situations at private sites, and then expect these rules to be enforceable under Superfund." 132 Cong. Rec. 28,413 (1986). As the district court found, SB990 does single out a federal facility for a special rule not otherwise applicable to similar situations, and thus would not fall within Section 120 even if this provision were otherwise sufficient to cede authority over nuclear materials. ER22.

## II. SB990 Violates The Doctrine Of Intergovernmental Immunity.

The doctrine of intergovernmental immunity was first articulated in *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819), which held that, under the Supremacy Clause, "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *Id.* at 436. While the majority of cases dealing with the intergovernmental immunity doctrine since *M'Culloch* have involved the imposition of taxes on those employed by or doing business with the federal government, the Supreme Court's cases also make clear that state attempts to regulate the activities of the federal government violate the intergovernmental immunity doctrine if they either obstruct federal activities and the achievement of federal policy or discriminate against the federal government. *North Dakota v. United States*, 495 U.S. 423, 435 (1986) (state regulation is invalid if it "regulates the United States directly or discriminates against the Federal Government or those with whom it deals"). Applying these precedents, this Court in *United States v. City of Arcata*, 629 F.3d 986 (9th Cir. 2010), found that municipal

ordinances restricting military recruiters violated intergovernmental immunity because: 1) "the ordinances seek to directly regulate the conduct of agents of the federal government"; and 2) "the ordinances also discriminate against the United States." *Id.* at 991. The Court found that the ordinances were unconstitutional because they "specifically target and restrict the conduct of military recruiters," while they did not apply the same restrictions to others. *Id.*

The district court here correctly found that SB990 violates the doctrine of intergovernmental immunity. SB990 specifically targets the conduct of federal agencies and imposes burdens on those agencies that would not be required by federal law. *See, e.g.,* Section 2(h) of SB990 (challenging adequacy of DOE's approach to cleanup) and subsections 1(c) – (e) (forbidding sale or other transfer of land at SSFL until DTSC certifies complete remediation pursuant to stringent "rural residential (agricultural)" standard). A state or local law discriminates against the federal government if "it treats someone else better than it treats" the government. *North Dakota*, 495 U.S. at 438. The district court here found that "it is undisputed that SB990 singles out Boeing, DOE, NASA, and the SSFL site for a cleanup scheme that applies solely to

SSFL, is the most restrictive in California, and is more stringent than that required for park use or suburban-residential use under generally applicable law." ER22. California treats responsible parties at other comparable sites "better than it treats" the federal agencies and their contractor at SSFL, *North Dakota*, 495 U.S. at 438, thus violating the intergovernmental immunity doctrine.[11]

DTSC's contention (Br. 40) that DOE's and NASA's agreement to enter into the 2010 AOCs (*see supra* at 12-13) shows that SB990 does not interfere with federal activity is unpersuasive. These AOCs demonstrate simply that DTSC and the federal agencies negotiated a compromise under which the agencies agreed to meet a cleanup standard for soils that is different from the standard imposed by SB990, but will be accepted by DTSC as compliance with SB990. *See supra* at

[11] The district court rejected DTSC's argument that the federal facilities provisions of CERCLA and RCRA showed that Congress had waived intergovernmental immunity for cleanups like that required in SB990, because those provisions on their face only waive immunity to non-discriminatory enactments. ER22-23. DTSC has not directly challenged that ruling on appeal. DTSC suggests in its reply at 16, n.7, that SB990 does not improperly single out DOE because it also applies to Boeing's activities at SSFL. Merely showing that SB990 applies to another entity at this single site falls far short of showing that this State regulation imposes standards and requirements that apply generally to comparable non-federal sites.

12. Moreover, the 2010 AOCs do not set standards for the cleanup of contamination in groundwater (which the 2010 AOCs leave to provisions of the 2007 Order) or to contamination in bedrock, and they apply only to specified portions of SSFL. The AOCs do not diminish the interference with federal choices regarding appropriate cleanup standards at SSFL. *See Blackburn v. United States*, 100 F.3d 1426, 1435 (9th Cir. 1996) (finding that applying California statute to National Park Service would be "a direct and intrusive regulation by the State of the Federal Government's operation of its property at Yosemite," and hence forbidden).

DTSC (Br. 31-40) also contends that Boeing as a contractor subject to SB990 is not entitled to the protection of the doctrine of intergovernmental immunity. But a state regulation can violate intergovernmental immunity "if it regulates the United States directly or discriminates against the Federal Government *or those with whom it deals*." *North Dakota*, 495 U.S. at 435 (emphasis added); *see also Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 751 (1961)

(invalidating state law that discriminated against federal lessees).[12] While SB990 may have some direct application to Boeing due to the nongovernmental work it carried out at SSFL, the findings in Section 2 of SB990 make clear that the statute is primarily aimed at contamination associated with the federal nuclear and rocket research and development activities that took place at SSFL over a 40-year period. During that period, Boeing was closely involved with all the federal work at SSFL, either as prime contractor for DOE and NASA or as DOE's lessor, and Boeing is the prime contractor for the ongoing cleanup. As such, Boeing is a proper party to assert the government's immunity to unconsented state regulation.[13]

In sum, the district court's finding of a violation of intergovernmental immunity is well supported and should be upheld.

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[12] DTSC cites a number of cases finding that contractors were not instrumentalities of the federal government for purposes of raising a claim of intergovernmental immunity. But those cases involved generally applicable and non-discriminatory state taxes, not regulations targeted at one particular federal site. *See e.g., United States v. Boyd*, 378 U.S. 39, 47-48 (1964); *City of Detroit v. Murray Corp.*, 355 U.S. 489, 492-494 (1958).

[13] This appeal is not the appropriate forum for making any determinations about the respective responsibilities of the federal agencies and Boeing for contamination at SSFL.

## CONCLUSION

For the foregoing reasons, the district court's findings that SB990 is preempted by the AEA because it attempts to regulate for radiation safety purposes the cleanup of nuclear materials at SSFL, and in addition contravenes the doctrine of governmental immunity by discriminating against a federal facility and federal agency contractor, are correct, and should be affirmed.[14]

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[14] There are other significant questions regarding the validity of SB990. For instance, any attempt by the State to invoke SB990 to prevent or interfere with the exercise of the federal government's ability to sell or transfer land at SSFL would conflict with federal law pertaining to federally owned or leased property, and would be preempted. *See Kleppe v. New Mexico,* 426 U.S. 529, 543 (1976) (when Congress legislates pursuant to the Property Clauses, "the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause"). We recognize, however, that this and other potential questions regarding different aspects of SB990's validity are not presented in this appeal.

## STATEMENT OF RELATED CASES

The United States is not aware of any related cases pending before this Court.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March, 2013, I electronically filed the foregoing Brief for the United States as Amicus Curiae with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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CERTIFICATE PURSUANT TO CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 29(d), I certify that the foregoing brief is proportionally spaced, has a typeface of 14 points or more and contains 6,884 words.

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