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10 Attorneys for Petitioners PARENTS AGAINST
11 SANTA SUSANA FIELD LAB PHYSICIANS
12 FOR SOCIAL RESPONSIBILITY/
13 LOS ANGELES CHAPTER, INC.,
14 PUBLIC EMPLOYEES FOR ENVIRONMENTAL
15 RESPONSIBILITY, INC.

16 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
17 IN AND FOR THE COUNTY OF VENTURA

18 PARENTS AGAINST SANTA SUSANA)
19 FIELD LAB, an association; PHYSICIANS)
20 FOR SOCIAL RESPONSIBILITY/LOS)
21 ANGELES CHAPTER, INC., a non-profit)
22 public benefit corporation; PUBLIC)
23 EMPLOYEES FOR ENVIRONMENTAL)
24 RESPONSIBILITY, INC., a District of)
25 Columbia non-profit corporation,)

26 Petitioners,)

27 v.)

28 CALIFORNIA DEPARTMENT OF TOXIC)
SUBSTANCES CONTROL, an agency of the)
State of California, CALIFORNIA)
REGIONAL WATER QUALITY CONTROL)
BOARD, LOS ANGELES REGION, an)
agency of the State of California,)
LAWRENCE HAFETZ, in his official)
capacity,)

Respondents,)

THE BOEING COMPANY, a Delaware)
corporation, and ROES I – X, inclusive,)

Real Party in Interest.)

Case No.:

Filed Under the California Environmental
Quality Act (“CEQA”)

**PETITIONERS’ OPENING BRIEF IN
SUPPORT OF ALTERNATIVE WRIT**

(CEQA, Pub. Res. Code § 21000, *et seq.*; Code
Civ. Proc. §§ 1085, 1087 (alternatively §
1094.5))

1 **I. INTRODUCTION**

2 Petitioners Parents Against Santa Susana Field Lab (“Parents Against SSFL”), Physicians
3 for Social Responsibility/Los Angeles Chapter, Inc. (“PSR”), and Public Employees for
4 Environmental Responsibility, Inc. (“PEER”) (collectively, “Petitioners”) petition the Court for
5 an alternative and peremptory writ of mandate to (1) vacate the agreement reached between the
6 Department of Toxic Substances Control (“DTSC”) and The Boeing Company (“Boeing”) on
7 May 9, 2022 which commits DTSC to forego considering more aggressive soil cleanup and
8 remediation alternatives by Boeing at the Santa Susana Field Laboratory (“SSFL”) (“SSFL
9 Agreement”) by significantly weakening human health risk-based cleanup levels prior to
10 DTSC’s compliance with the California Environmental Quality Act (“CEQA”) (Pub. Res. Code
11 [“PRC”] § § 21000 *et seq.*), and (2) vacate the Memorandum of Understanding entered into by
12 the California Regional Water Quality Control Board, Los Angeles Region (“Regional Board”) and Boeing on August 12, 2022 (“Water Board Agreement”), which triggered the effectiveness
13 of the SSFL Agreement.

14 SSFL is a site that was used from the 1940s through 2006 primarily for rocket engine and
15 nuclear reactor testing. ([Exhibit E](#), Ch. 1, PE001104¹ [Draft Program Environmental Impact
16 Report for the Santa Susana Field Laboratory; Sept. 2017].) Those operations left a legacy of
17 contamination and the site remains highly contaminated with hazardous chemicals and toxic
18 waste. (*Id.* at PE001105, PE001202.) In 2007, DTSC issued an order requiring Boeing to clean-
19 up contaminated soils at SSFL to what has been described by DTSC as cleaning up soils to
20 background levels. ([Exhibit J](#), PE002247 – PE002248, PE002250, PE002257 [DTSC Response
21 to Comments, Agreements in Principle, State of California and the Department of Energy, State
22 of California and the National Aeronautics and Space Administration, Volume 1; October 26,
23 2010]. *See* [Exhibit C](#), Ex. 2, PE000042 – PE000115 [SSFL Settlement Agreement; May 9,
24 2022].) In furtherance of that effort, in 2014, DTSC approved Human Health Risk-Based
25 Screening Levels (“Human Health RBSL’s”) for Boeing’s soil cleanup in its areas of
26 responsibility at SSFL. ([Exhibit K](#), App. A, PE002337 – PE002349 [Final Standardized Risk
27 Assessment Methodology, Revision 2 Addendum for the SSFL].)

28 _____
¹ Petitioners’ Exhibits shall be cited using the following format: Exhibit __, PE [Bates #].

1 The 2007 Order and 2014 clean-up levels formed the basis for a Draft Program
2 Environmental Impact Report (“Draft PEIR”) released by DTSC in 2017 for the overall soil and
3 groundwater remediation project at SSFL. ([Exhibit E](#), Ch. 1, PE001112; *Id.* at App. B, PE001370
4 – PE001373.) The Draft PEIR identifies a range of alternative soil clean-up plans and evaluates
5 their potential environmental impacts in order to inform DTSC’s selection of a final soil cleanup
6 plan for Boeing. (*Id.* at Ch. 1, PE001102, PE001110; *Id.* at Ch. 3, PE001242.) Petitioners and
7 others have been actively participating in that EIR process, criticizing the range of alternatives
8 and advocating for an alternative including robust clean-up levels, the excavation and disposal of
9 contaminated soils by Boeing to achieve prior background levels at SSFL, and eliminating the
10 health risks to themselves and other residents of the neighboring communities. ([Exhibit G](#), Att.
11 A, PE001927 [PSR-LA Comments on DTSC’s Draft PEIR for the SSFL Cleanup Draft Program
12 Management Plan; Dec. 14, 2017]; [Exhibit H](#) [Parents Against SSFL Comments and
13 accompanying Change.Org Petition on DTSC’s Draft PEIR for the SSFL Cleanup]; [Exhibit M](#),
14 PE002365 – PE002366 [City of Los Angeles, et al. Comments on the Draft PEIR and the Draft
15 Program Management Plan for the SSFL; Dec. 7, 2017]; [Exhibit F](#), PE001739 – PE001758
16 [Supplemental Detailed Comments on Draft PEIR on Cleanup of the SSFL by the Committee to
17 Bridge the Gap and the Natural Resources Defense Council; Dec. 14, 2017].)

17 However, this past June, 2022, Petitioners and the public were surprised to learn that,
18 from January 22, 2022 through May 9, 2022, DTSC, Boeing and the Regional Board had been
19 engaged in confidential negotiations. ([Exhibit O](#) [DTSC News Release: “California holds Boeing
20 Accountable for Cleanup at Toxic Santa Susana Field Laboratory”; May 9, 2022].) Those
21 negotiations resulted in the SSFL Agreement between DTSC and Boeing that severely weakened
22 the cleanup levels the public previously had been informed would apply to Boeing’s soil
23 cleanup. ([Exhibit C](#).) DTSC and Boeing negotiated, in private, 1) a dramatic weakening of
24 previous DTSC approved human health risk-based screening levels for the vast majority of
25 chemicals contaminating soil in Boeing’s areas of responsibility; 2) multipliers of 5 times and
26 100 times further weakening those screening levels throughout Boeing’s soil clean-up areas; 3) a
27 cap on the volume of contaminated soil that could be excavated from Boeing’s contaminated soil
28 areas; and 4) a commitment by DTSC not to consider a clean-up that would allow future
residential/agricultural use in Boeing’s cleanup areas. (*Id.*)

1 Instead of letting the CEQA process run its course, including responding to alternatives
2 proposed by the public and addressing comments criticizing alternatives discussed in the Draft
3 PEIR, DTSC’s and Boeing’s secretly negotiated SSFL Agreement forecloses DTSC’s
4 consideration of alternatives and associated mitigation measures prior to the completion of
5 DTSC’s CEQA review, in violation of CEQA. (14 Cal. Admin Code § 15004(b)(4); *see Save*
6 *Tara v. City of West Hollywood* (2008) 45 Cal.4th 116.) Likewise, the Regional Board’s approval
7 of the Water Board Agreement triggering the effectiveness of the SSFL Agreement also
8 foreclosed DTSC’s review of feasible alternatives for Boeing’s soil cleanup. In order to restore
9 DTSC’s compliance with CEQA in evaluating Boeing’s portion of soil cleanup at SSFL,
10 Petitioners respectfully request the Court to issue an alternative writ of mandate ordering that the
11 SSFL Agreement and Water Board Agreement be vacated or, alternatively, ordering DTSC, the
12 Regional Board and Boeing to appear at a hearing in the near future to show cause why the SSFL
13 Agreement and Water Board Agreement should not be vacated.

13 **II. FACTUAL BACKGROUND**

14 **a. Overview of site**

15 Starting around 1948, SSFL became a sprawling site for “research development, and
16 testing of liquid-propellant rocket engines, water jet pumps, lasers, liquid-metal heat exchanger
17 components, nuclear energy, and related technologies.” ([Exhibit E](#), Ch. 1, PE001104.) The site
18 was intended to be a “remote field lab for work too dangerous to conduct near populated areas.”
19 ([Exhibit F](#), PE001717.) Now, however, over 150,000 people live within 5 miles of the site and
20 more than half a million people live within 10 miles. (*Id.* at PE001711.) Located in the southeast
21 corner of Ventura County along the eastern border of Los Angeles County, the approximately
22 2,850 acre SSFL site is one mile south of the city of Simi Valley, adjacent to the community of
23 Bell Canyon directly south of the site, and immediately west of Canoga Park, West Hills, and
24 Chatsworth within the City of Los Angeles. ([Exhibit E](#), Ch. 1, PE001111.)

25 The parties which conducted testing at the site were The Boeing Company (“Boeing”),
26 the Department of Energy (“DOE”), and the National Aeronautics and Space Administration
27 (“NASA”). ([Exhibit E](#), Ch. 1, PE001104.) This brief and petition only concern Boeing’s areas of
28 responsibility at SSFL. The site has been divided into four administrative areas - Areas I through
IV. ([Exhibit E](#), Ch. 1, PE001112.) Boeing is responsible for soil cleanup in 672 acres of Area I
(which totals about 714 acres) in the northeastern section of SSFL. (*Id.*) Boeing is also

1 responsible for the 119 acres within Area III. (*Id.*) The third area for which Boeing is responsible
2 is the Southern Buffer Zone, a 1,143 acre site located south of Areas 1 through IV. (*Id.*) Toxic
3 chemicals released at SSFL include solvents such as trichloroethene, petroleum fuel
4 hydrocarbons, chlorinated solvents, 1,1,1-trichloroethane containing 1,4-dioxane, solid
5 propellants including perchlorate compounds, and polychlorinated biphenyls. (*Id.* at PE001105.)

6 **b. 2007 Consent Order**

7 In 2007, DTSC and the three parties who used the site, including Boeing, entered into a
8 Consent Order for Corrective Action which defined the parameters of investigation and cleanup
9 of soil and groundwater at the SSFL.

10 The 2007 Consent Order established a deadline for the “[r]emediation of chemically
11 contaminated soils by June 30, 2017 or earlier, utilizing the Standardized Risk Assessment
12 Methodology (SRAM) Workplan (Rev. 2) [“SRAM2”]....” ([Exhibit C](#), Ex. 2, PE000051; *see*
13 [Exhibit K](#).) In 2010, DTSC confirmed that the clean-up standards to be achieved by the 2007
14 Consent Order would require clean-up levels that protect residential with garden uses and would
15 be comparable to a cleanup to background levels. ([Exhibit J](#), PE002247 – PE002248, PE002250,
16 PE002257.) Also, in August 2014, DTSC approved an update to the SRAM incorporating a list
17 of Human Health Risk-Based Screening Level thresholds for hundreds of toxic contaminants
18 potentially present in contaminated soils at SSFL. ([Exhibit K](#), App. A, PE002337 – PE002349.)
19 To achieve the site cleanup, the Consent Order required Boeing to prepare a workplan to provide
20 details of the methodology for developing and evaluating potential corrective measures to
21 remedy chemical contamination at the Facility ([Exhibit C](#), Ex. 2, PE000060 - PE000061.) Based
22 on that workplan, DTSC was to prepare a proposed cleanup decision for Boeing’s areas of
23 responsibility. (*Id.* at PE000061.)

24 **c. Ongoing EIR Process Reviewing the SSFL Remediation Project**

25 An EIR evaluating the potential clean up decision alternatives for the site must be
26 prepared. That EIR is underway. (*See* [Exhibit C](#), Ex. 2, PE000064; [Exhibit E](#), App. C,
27 PE001411.) On November 22, 2013, DTSC issued a Notice of Preparation (“NOP”) announcing
28 the agency’s intent to prepare a Program Environmental Impact Report (“Draft PEIR”) for
contaminated soil and groundwater remediation projects at SSFL. ([Exhibit E](#), App. C,
PE001411.) The Draft PEIR was released in 2017. ([Exhibit E](#).) The purpose of the Draft PEIR is
to “evaluate the environmental impacts and to identify and minimize, to the extent feasible,

1 potentially significant environmental effects associated with soil and groundwater remediation
2 activities” at SSFL. (*Id.* at Ch. 1, PE001102.) The Draft PEIR states that investigation and
3 cleanup of the site relevant to Boeing is defined by the 2007 Consent Order. It provides that the
4 2007 Consent Order “establish[es] the requirements for the investigation and cleanup of soil and
5 groundwater at the project site.” (*Id.* at Ch. 1, PE001108).

6 The Draft PEIR contemplates a number of cleanup scenarios, which are subject to public
7 comment and review by DTSC. One scenario is an alternative which would clean up Boeing
8 Areas I and III for use as residential property assuming that all of the residents consume 100
9 percent of produce grown onsite and in soil after remediation. ([Exhibit E](#), Ch. 6, PE001319.) The
10 Draft PEIR proposes to reject this alternative, and as part of the EIR process, Petitioner PSR-LA
11 has objected to DTSC’s planned rejection and commenters proposed corrections to this
12 alternative to be considered by the agency. ([Exhibit G](#); [Exhibit F](#), PE001747.) Another
13 alternative reviewed in the Draft PEIR is to base the soil remediation on less stringent clean-up
14 levels assuming that future residents would not eat any homegrown produce from residential
15 gardens, an alternative which is also subject to public comment and further review. ([Exhibit E](#),
16 Ch. 6, PE001319; [Exhibit G](#), Att. G, PE001957; [Exhibit H](#); *see also* [Exhibit M](#), PE002365 –
PE002366.)

17 The Draft PEIR’s preferred alternative relies on estimated soil cleanup volumes and
18 acreage for the Boeing areas of responsibility that are based on a future use of suburban
19 residential with a garden from which the residents would eat 25 percent of their total diet.
20 ([Exhibit E](#), Ch. 1, PE001115.) According to the Draft PEIR, this alternative would require that
21 921,000 cubic yards of contaminated soil be remediated in areas for which Boeing is responsible,
22 but only assumes that 390,000 cubic yards would be excavated and shipped to a disposal site.
23 (*Id.* at PE001243.) Petitioner PSR-LA and other interested parties have criticized this preferred
24 alternative as misapplying the applicable risk calculations and have requested that DTSC
25 consider soil cleanup standards that would remove more soil and be more protective of human
26 health and the neighboring communities. ([Exhibit G](#), Att. A, PE001928; [Exhibit H](#); [Exhibit F](#),
PE001757.)

27 PSR-LA and others also commented that the Draft PEIR should include an alternative
28 which requires soil clean-up to levels consistent with background concentrations of
contaminants, and an alternative which applies the soil remediation thresholds for rural

1 residential/agricultural uses at the site. ([Exhibit G](#), Att. G, PE001956; [Exhibit M](#), PE002365 –
2 PE002366. *See also* [Exhibit F](#), PE001741.) Commenters further requested that DTSC include an
3 alternative based on DTSC-approved inputs found in the 2014 SRAM, pointing out that the Draft
4 PEIR made several errors in its calculation of SRAM-based clean-up levels. ([Exhibit G](#), Att. A,
5 PE001928; [Exhibit F](#), PE001742, PE001747 – PE001758.) PSR-LA’s comments explained that
6 in order for nearby residents to be safe, the site should be cleaned up “such that it would be safe
7 to live on site, eat produce grown on it, and drink from wells,” as was previously promised by
8 DTSC and Boeing. ([Exhibit G](#), Att. A, PE001868.) Additionally, Parents Against SSFL
9 submitted comments on the Draft PEIR, which advocate for an alternative cleanup to background
10 levels and objects to the Draft PEIR’s alternatives that would leave any toxic chemical
11 contaminants in place “where they could continue to migrate offsite and place neighboring
12 communities at risk.” ([Exhibit H](#) at PE001968.) Alternatives which would require more
13 contaminated soil to be removed and more stringent clean-up levels could still be considered in
14 the EIR process.

14 **d. The SSFL Agreement and Commitments Made by DTSC.**

15 On May 9, 2022, despite the ongoing Draft PEIR process in which the public was
16 actively engaged, DTSC and Boeing entered into the SSFL Agreement, which severely
17 weakened the cleanup levels the public previously had been informed would apply to Boeing’s
18 soil cleanup, thereby foreclosing DTSC’s consideration of alternatives remediating the site to
19 achieve background levels of contaminants and levels protective of agricultural and residential
20 uses. ([Exhibit C](#).) Negotiation of the SSFL Agreement was conducted in complete secrecy
21 without the public’s knowledge, and DTSC did not provide an opportunity for public comments
22 on the agreement. (*See* [Exhibit N](#) [DTSC Letter to Boeing on Confidential Mediation of Dispute;
23 Jan. 22, 2021].)

24 The secret negotiations began on January 22, 2022 when DTSC sent Boeing an “Offer to
25 Enter Into Non-Binding, Confidential Mediation With Boeing to Resolve the Santa Susana Field
26 Laboratory Formal Dispute Dated December 6, 2019.” ([Exhibit N](#).) DTSC also extended an offer
27 to the Regional Board to participate in the confidential mediation. (*Id.*) The SSFL Agreement
28 was completed and signed on May 9, 2022. ([Exhibit C](#).) Subsequently, on May 9, 2022, DTSC
issued a Community Update indicating that the SSFL Agreement had selected new clean-up
standards to be applied by Boeing. ([Exhibit O](#) [DTSC News Release: “California holds Boeing

1 Accountable for Cleanup at Toxic Santa Susana Field Laboratory”].) And on June 2, 2022, after
2 the SSFL Agreement had already been fully executed, DTSC held a public meeting to announce
3 that the SSFL Agreement had been signed, and to present the agreement’s terms to the public.
4 ([Exhibit P](#) [DTSC Community Meeting Powerpoint Presentation Update; June 2, 2022].) In that
5 public meeting, DTSC presented a PowerPoint which emphasized that the cleanup required
6 under the 2007 Order had been changed, and any alternatives more stringent than the new
7 screening levels dictated by the SSFL Agreement would not be in the range of possible cleanups
8 of the site. (*Id.* at PE002387, PE002392.) DTSC’s PowerPoint also stated that the five times
9 multiplier method was established as part of the SSFL Agreement, and that there are “exception
10 areas” where up to a 100 times multiplier could be applied, precluding alternatives requiring
11 more stringent cleanup in those areas. (*Id.* at PE002394 – PE002395.)

12 The commitments made by DTSC and Boeing in the SSFL Agreement foreclose DTSC’s
13 consideration of alternatives, including those proposed by DTSC themselves in the Draft PEIR
14 and those proposed, or to be proposed, by Petitioners and other members of the public in public
15 comments.

16 **e. The Regional Board MOU Triggered the Effectiveness of the SSFL
17 Agreement.**

18 At the same time DTSC negotiated the SSFL Agreement, the Regional Board negotiated
19 a memorandum of understanding regarding Boeing’s obligations under the California regulations
20 and permit addressing industrial storm water pollution. ([Exhibit D](#) [MOU Between Boeing and
21 the Regional Board Regarding the Contaminated Santa Susana Field Laboratory].) Relevant to
22 this Petition, the DTSC SSFL Agreement makes the Regional Board’s adoption of the Water
23 Board Agreement a condition precedent to the effectiveness of the Settlement Agreement.
24 ([Exhibit C](#), PE000029.) The SSFL Agreement states that “[t]he Effective Date of this Agreement
25 is the later of the following after both have occurred: (a) the day it is signed by the last signatory,
26 and (b) the Effective Date of Water Board Agreement.” (*Id.*)

27 **III. LEGAL BACKGROUND AND STANDARD OF REVIEW.**

28 The purpose of CEQA is to “[e]nsure that the long-term protection of the environment ...
be the guiding criterion in public decisions.” (PRC § 21001(d)). To that end, CEQA requires that
a public agency prepare an environmental impact report (“EIR”) for “any project that they intend
to carry out or approve which may have a significant effect on the environment.” (PRC §

1 21151(a)). “‘Project’ means the whole of an action, which has a potential for resulting in either a
2 direct physical change in the environment, or a reasonably foreseeable indirect physical change
3 in the environment . . .” (14 CCR § 15378(a)).

4 “Before conducting CEQA review, agencies must not ‘take any action’ that significantly
5 furthers a project ‘in a manner that forecloses alternatives or mitigation measures that would
6 ordinarily be part of CEQA review of that public project.’” (*Save Tara v. City of West Hollywood*
7 (2008) 45 Cal.4th 116, 138). In *Save Tara*, the California Supreme Court considered the question
8 of what types of project approvals could be done only after the completion of environmental
9 review under CEQA. (*Id.*). The Court found that an agency violates CEQA by failing to prepare
10 a CEQA document prior to entering an agreement with a project’s developer which facilitated
11 and guaranteed the developer’s implementation of the project. (*Id.* at 124).

12 The Supreme Court reasoned that, “at a minimum an EIR must be performed before
13 a project is approved, for if post-approval environmental review were allowed, EIR’s would
14 likely become nothing more than *post hoc* rationalizations to support action already taken.” (*Save*
15 *Tara*, 45 Cal.4th at 130 (citation omitted).) “Just as CEQA itself requires environmental review
16 before a project’s approval, not necessarily its *final* approval [citation omitted], so the guideline
17 defines ‘approval’ as occurring when the agency *first* exercises its discretion to execute a
18 contract or grant financial assistance, not when the *last* such discretionary decision is made.” (*Id.*
19 at 134 [emphasis supplied].) CEQA’s regulatory guidelines mirror the Court’s ruling: “While
20 mere interest in, or inclination to support, a project does not constitute approval, a public agency
21 entering into preliminary agreements regarding a project prior to approval shall not, as a practical
22 matter, commit the agency to the project. (14 Cal. Admin Code § 15004(b)(4).) “[A]ny such pre-
23 approval agreement should, for example: ... (B) Not bind any party, or commit to any definite
24 course of action, prior to CEQA compliance; [and] (C) Not restrict the lead agency from
25 considering any feasible mitigation measures and alternatives,” (*Id.*)

26 Although the city in *Save Tara* provided a condition precedent in the agreement reserving
27 the city’s discretion to perform CEQA review, the Court found that “[a] CEQA compliance
28 condition can be a legitimate ingredient in a preliminary public-private agreement for exploration
of a proposed project, but if the agreement, viewed in light of all the surrounding circumstances,
commits the public agency as a practical matter to the project, the simple insertion of a CEQA
compliance condition will not save the agreement from being considered an approval requiring

1 prior environmental review.” (*Id.* at 132). “[P]ostponing environmental analysis can permit
2 ‘bureaucratic and financial momentum’ to build irresistibly behind a proposed project, ‘thus
3 providing a strong incentive to ignore environmental concerns.’” (*Save Tara*, 45 Cal.4th at 135,
4 quoting *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal.3d 376,
5 395.)

6 The Court’s review of an EIR’s compliance with CEQA “shall extend only to whether
7 there was a prejudicial abuse of discretion.” (Pub. Resources Code § 21168.5.) “Abuse of
8 discretion is established if the agency has not proceeded in a manner required by law or if the
9 determination or decision is not supported by substantial evidence.” *Laurel Heights Improvement*
10 *Assn. v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 392, quoting Pub. Resources Code,
11 § 21168.5. A claim that a lead agency approved a project with potentially significant
12 environmental impacts before preparing and considering an EIR for the project is a question of
13 law, reviewed de novo by the court. (*Save Tara*, 45 Cal.4th at 131.)

13 **IV. ARGUMENT**

14 **a. The 2022 SSFL Agreement Forecloses Alternatives and Mitigation Measures**

15 By contractually mandating the use of weakened soil clean-up screening levels, the SSFL
16 Agreement limits DTSC’s choice of cleanup alternatives before completion of the agency’s
17 CEQA compliance. (14 Cal. Admin Code § 15004(b)(2) & (4)). As a practical matter, DTSC has
18 committed itself to a version of the clean-up Project that Boeing preapproves. The SSFL
19 Agreement has superseded the 2014 Human Health RBSLs with weakened RBSLs. The
20 Agreement further dilutes the weakened screening levels by requiring 5 and 100 time multipliers
21 to those weakened levels. The SSFL Agreement also restricts DTSC from considering
22 alternatives by agreeing to a cap on the total volume of contaminated soil that can be excavated
23 and removed from Boeing’s areas of responsibility. Lastly, the Agreement expressly precludes
24 consideration of an alternative that would clean the Boeing areas up sufficiently to allow a
25 residential/agricultural use, as is currently authorized by the County’s zoning. For each of these
26 reasons, by entering into the SSFL Agreement, DTSC has taken an “action which gives impetus
27 to a planned or foreseeable project in a manner that forecloses alternatives or mitigation
28 measures that would ordinarily be part of CEQA review of that public project[.]” in violation of
CEQA. (14 Cal. Admin Code § 15004(b)(2).); *See Save Tara*, 45 Cal.4th at 138.)

1 Addendum (2014)... [including] *All methods and parameters will be consistent with those used*
2 *in the approved 2022 Human Health Risk-Based Screening Levels. Approved RBSLs are*
3 *provided in Attachment 3 to this procedure.*” ([Exhibit C](#), Ex. 5, PE000124.)

4 In committing to new RBSLs which supersede and weaken the RBSLs approved by
5 DTSC in 2014, DTSC has foreclosed consideration of alternative clean-up plans relying on those
6 current screening levels which require more stringent and/or background levels of cleanup of
7 onsite contamination. That alternative was a primary focus of many of the comments thus far
8 submitted on the DEIR. (*See infra*, pp. 5-7.) The comments of PSR-LA and others have argued
9 for an alternative version of the Project requiring soil clean-up to levels consistent with
10 background concentrations of the contaminants. ([Exhibit M](#), PE002365 – PE002366; [Exhibit F](#),
11 PE001741.) Comments by PSR-LA and others specifically proposed DTSC consider an
12 alternative applying correctly the existing screening levels approved in 2014. ([Exhibit F](#),
13 PE001752. *See id*, PE001747 – PE001756.) Any discussion of these alternatives has now been
14 rendered superfluous by the SSFL Agreement.

14 **ii. The SSFL Agreement Forecloses an Alternative Without Multipliers**

15 The SSFL Agreement further forecloses alternatives considering a cleanup to the 2014
16 Human Health RBSLs or more stringent levels by multiplying the Human Health RBSLs by 5
17 times above those levels for some of Boeing’s areas of responsibility. ([Exhibit C](#), Ex. 5,
18 PE000133 – PE000151; *see* [Exhibit Q](#), App. B, PE002452 – PE002453.) The rest of Boeing’s
19 sites are weakened even further by a multiple of 100 times the screening levels. (*Id.*) These
20 additional multipliers improperly provide an impetus to Boeing’s preferred soil remediation
21 Project in a manner that forecloses alternatives that would ordinarily be part of CEQA review for
22 the Project, including considering, for example, a cleanup applying the 2014 Human Health
23 RBSLs without multipliers. (14 Cal. Admin Code § 15004(b)(2).); *See Save Tara*, 45 Cal.4th at
24 138). Indeed, commenters have advocated for that very alternative in the DEIR process. (*See*
supra, p. 7; Petition, ¶ 60.)

25 **iii. The SSFL Agreement Prejudged the Validity of an Alternative Which**
26 **Cleans up More than 444,000 Cubic Yards of Soil**

27 As a practical matter, the SSFL Agreement commits DTSC to require the excavation of
28 no more than 440,000 cubic yards of soil from those areas of the SSFL for which Boeing is
responsible. ([Exhibit C](#), PE000007.) The SSFL Agreement states:

1 For purposes of resolving the Parties’ dispute and accelerating the remedial
2 activities at the SSFL, Boeing has agreed as part of this settlement that it will not
3 contest a soil remedy decision by DTSC that is consistent with the processes,
4 methodologies and schedule under this Agreement and the Exhibits, and is among
5 the scenarios and within the range of estimates presented in the summary table on
6 page iii of Appendix K to the Draft PEIR.

7 (*Id.*) Appendix K estimates an upward bound of 440,000 cubic yards of soil removal that would
8 be required by the cleanup alternative presented in the DEIR. ([Exhibit E](#), App. K, PE001421.) By
9 capping the volume of soil excavation it would require, DTSC again forecloses consideration of
10 any cleanup alternatives that would require more soil to be excavated from the site. For example,
11 in 2010, Boeing estimated that cleaning up its site to background levels would require excavation
12 of 1.9 million cubic yards of soil. ([Exhibit J](#), PE002267.) DTSC did not concur with that estimate
13 but it does illustrate that more robust cleanup alternatives would require more soil excavation
14 than are estimated for the controversial cleanup levels identified in the Draft EIR. Indeed,
15 comments on the DEIR submitted by Petitioners and the City of Los Angeles did just that –
16 criticizing the insufficiency of the cleanup efforts discussed in the Draft EIR and advocating for
17 consideration of an alternative that would cleanup Boeing soil contamination to background
18 levels. ([Exhibit G](#), PE001927; Exhibits [N](#), [F](#).) By agreeing up front that it would not require
19 more than 440,000 cubic yards of soil to be excavated in order to avoid a challenge by Boeing,
20 DTSC has foreclosed consideration of the more robust cleanup alternatives requested by the
21 Petitioners, City of LA, and others, including more stringent clean-up levels and which do not
22 leave any soils in place that are contaminated above background levels. (*See* [Exhibit F](#),
23 PE001757.)

24 **iv. The SSFL Agreement Forecloses the Consideration of Clean-up
25 Alternative to a Level Consistent with the County’s Zoning Allowing
26 Rural Residential/Agricultural Uses.**

27 Ventura County’s zoning for the SSFL authorizes a rural residential/agricultural use.
28 (Exhibit T [Excerpt from Ventura County Zoning Code].) However, the SSFL Agreement has
now eliminated consideration of an alternative requiring Boeing to clean up contaminated soils
to levels allowing rural residential/agricultural uses. The SSFL Agreement states: “[Risk-Based
Screening Levels] for the rural residential (agricultural) exposure scenario do not need to be
included or updated in SRAM Rev. 2 Addendum (2022).” ([Exhibit C](#), Ex. 5, PE000124.) DTSC
reasons that its determination is based on “numerous factors, including but not limited to the

1 following . . . : population growth patterns and projections; soil type and topography; the lack of
2 a water source for irrigation purposes; market forces; and the site’s location in relation to urban,
3 residential, commercial, industrial, agricultural and recreational areas.” (*Id.*) Petitioners and other
4 public commenters requested that the Draft PEIR consider a clean-up alternative requiring
5 Boeing to clean up soils to levels allowing agricultural uses. ([Exhibit G](#), PE001853, PE001855 –
6 PE001856; [Exhibit M](#), PE002366; [Exhibit F](#), PE001741 - PE001742.) By stating that a rural
7 residential/agricultural exposure scenario will not be considered pursuant to the SSFL
8 Agreement, DTSC has foreclosed consideration of this potential alternative in the EIR process.

9 **v. The Reservation of CEQA Discretion in the SSFL Agreement Does
10 Not Excuse DTSC from Its Duty to Conduct Proper CEQA Review.**

11 The SSFL Agreement acknowledges that DTSC is conducting CEQA review for the
12 remediation of the site and that, by signing the SSFL Agreement the agency is not foregoing any
13 of its discretion. ([Exhibit C](#), PE000010.) Despite that effort to claim its CEQA process is
14 unaffected by the SSFL Agreement, the Agreement’s commitments still improperly foreclose
15 alternatives without CEQA review. In the SSFL Agreement, DTSC purports to “reserve[] all of
16 its rights, powers, discretion and authority as the CEQA . . . lead agency for the remediation of
17 contamination at the SSFL in selecting a soil remedy” ([Exhibit C](#), PE000015; *Id.* at
18 PE000215.) But as the Supreme Court held in *Save Tara*, if the circumstances surrounding an
19 agreement commit the agency to the project, “the simple insertion of a CEQA compliance
20 condition will not save the agreement from being considered an approval requiring prior
21 environmental review.” (*Save Tara*, 45 Cal.4th at 132.)

22 “[C]ourts should look not only to the terms of the agreement but to the surrounding
23 circumstances to determine whether, as a practical matter, the agency has committed itself to the
24 project as a whole or to any particular features, so as to effectively preclude any alternatives or
25 mitigation measures that CEQA would otherwise require to be considered....” (*Id.* at 139.) As
26 outlined above, the terms of the SSFL Agreement foreclose consideration of alternative soil
27 cleanup levels and site uses, despite an ongoing EIR process in which members of the public had
28 submitted comments regarding the remediation project. Therefore, despite the inclusion of a
CEQA compliance provision in the SSFL Agreement, DTSC has foreclosed alternatives and cut
off the public review and comment process in violation of CEQA.

**b. The Regional Board Improperly Foreclosed Alternatives and Mitigation
Measures by Approving a Memorandum of Understanding**

1 DTSC and Boeing made the SSFL Agreement contingent on the approval by the
2 Regional Board of the Water Board Agreement. By approving an agreement which made the
3 SSFL Agreement effective, the Regional Board also foreclosed alternatives and mitigation
4 measures in violation of CEQA. The SSFL Agreement states that “[t]he Effective Date of this
5 Agreement is the later of the following after both have occurred: (a) the day it is signed by the
6 last signatory, and (b) the Effective Date of Water Board Agreement.” ([Exhibit C](#), PE000029.)
7 The Regional Board granted their approval of the Water Board Agreement on August 11, 2022.
8 ([Exhibit S](#) [Regional Board Resolution Approving the MOU Between Boeing and the Regional
9 Water Board]; [Exhibit D](#).) In doing so, the Regional Board violated CEQA by taking an action
10 that significantly furthered the SSFL Remediation Project in a manner that forecloses alternatives
11 or mitigation measures, despite ongoing review of the Project through the Draft PEIR process.
12 (*Supra*, pp. 5-7.) By triggering the effectiveness of the SSFL Agreement, the Regional Board’s
13 action forecloses alternatives to the soil remediation efforts at the site, and thereby also
14 forecloses mitigation measures that would be considered to address those alternatives’ impacts.
15 Prior to the Regional Board’s approval of the Water Board Agreement, Petitioners submitted
16 comments to the Regional Board critiquing the SSFL Agreement because of its weakening of
17 clean-up thresholds for the site. ([Exhibit Q](#).) Despite this, the Regional Board approved the
18 Water Board Agreement, triggering the effectiveness of the SSFL Agreement, in which DTSC
19 prematurely limited alternatives and mitigation. ([Exhibit S](#); [Exhibit D](#).) That action by the
20 Regional Board violated CEQA.

21 **V. CONCLUSION**

22 For all of the above reasons, Petitioners respectfully request that the Court issue an
23 alternative writ directing DTSC, the Regional Board, and Boeing to vacate the SSFL Agreement
24 and Water Board Agreement or, alternatively to show cause at a time and place specified by
25 court order why they should not do so and why a peremptory writ should not issue. Petitioners
26 are informed and believe that DTSC is continuing with preparation of a final EIR. Petitioners
27 request a prompt hearing to show cause within 30 days of the issuance of the writ.

28 October 4, 2022



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