

First Supplement to Memorandum 2020-62

Recodification of Toxic Substance Statutes (Comments on Tentative Recommendation)

The main memorandum begins the discussion of comments received on the tentative recommendation. This supplement continues that discussion, focusing on the comment of Attorney Peter Weiner. His comment pertains to provisions applicable to a specific site, the Santa Susana Field Laboratory.

Unless otherwise indicated, any statutory citations are to the Health and Safety Code. Citations to “proposed” sections refer to the proposed sections contained in the Commission’s tentative recommendation for the recodification of Chapter 6.8.

COMMENT OF ATTORNEY PETER WEINER

Attorney Peter Weiner contacted the staff by phone to raise concerns about the provisions applicable to the Santa Susana Field Laboratory. In particular, Mr. Weiner pointed to a 9th Circuit opinion, *Boeing Co. v. Movassaghi*,¹ that found the existing provisions governing Santa Susana Field Laboratory, which are located in existing Section 25359.20, invalid.

Mr. Weiner also raised questions about the treatment of Section 25359.20 in the recodification. Section 25359.20 is proposed for recodification as three sections, which comprise proposed Article 2 (commencing with Section 69465) of Chapter 6.²

Santa Susana Field Laboratory

Before describing Mr. Weiner’s concern, some brief context about the Santa Susana site may be helpful.³ The Santa Susana Field Laboratory is a former rocket engine test and nuclear research facility, located 30 miles northwest of downtown

1. 768 F.3d 832 (2014).

2. Aside from one minor change to reflect drafting preferences (i.e., avoiding use of both the singular and plural form of a word), the three sections in proposed Article 2 of Chapter 6 continue the existing language of Section 25359.20 without change. See Comments to proposed Sections 69465-69475.

3. See generally https://en.wikipedia.org/wiki/Santa_Susana_Field_Laboratory; https://dtsc.ca.gov/sitecleanup/santa_susana_field_lab/.

Los Angeles.⁴ Operations at the site occurred roughly between 1948 to 2006.⁵ Due to the activities at the site, the site has both chemical and radioactive contamination of the soil and groundwater.⁶

Operations at the site now are limited to trying to clean it up. Different aspects of the cleanup are carried out under different federal and state authorities. The federal government supervised the cleanup of radioactive contamination, and the California Department of Toxic Substances Control supervised the cleanup of chemical contamination under generally applicable state law.⁷

Law Governing Santa Susana

In 2007, Senate Bill 990 enacted existing Section 25359.20.⁸

During the legislative process, proponents of the legislation raised concerns about inconsistent standards and contradictory regulatory responsibilities marring the site cleanup.⁹ The bill sought to “require the [Santa Susana] site to be thoroughly remediated for both chemical and radioactive contamination, as determined by DTSC, prior to any sale, lease or transfer of all or any part of the property.”¹⁰

The validity of this law was challenged in *Boeing Co. v. Movassaghi*,¹¹ which culminated in a 9th Circuit opinion in 2014.

The subject of this litigation is a state’s authority, as opposed to the federal government’s authority, to regulate the cleanup of radioactive pollution. The issue is whether the state may mandate more stringent cleanup procedures, not generally applicable within the state, to a particular site where the federal government undertook to clean up nuclear contamination it created. In the circumstances of this case, the answer is no.¹²

4. See https://dtsc.ca.gov/sitecleanup/santa_susana_field_lab/; https://dtsc.ca.gov/sitecleanup/santa_susana_field_lab/santasusanafielabfaq/.

5. See <https://ssfl.msfc.nasa.gov/about> (Santa Susana Field Laboratory opened in 1948); https://www.boeing.com/resources/boeingdotcom/principles/environment/pdf/Santa_Susana_background.pdf (rocket engine testing at the site ended in 2006). See also https://en.wikipedia.org/wiki/Santa_Susana_Field_Laboratory (“[The site] was used mainly for the development and testing of liquid-propellant rocket engines for the United States space program from 1949 to 2006, nuclear reactors from 1953 to 1980 and the operation of a U.S. government-sponsored liquid metals research center from 1966 to 1998.”).

6. See https://dtsc.ca.gov/sitecleanup/santa_susana_field_lab/santasusanafielabfaq/.

7. *Boeing*, 768 F.3d at 836.

8. 2007 Cal. Stat. ch. 729 (SB 990 (Kuehl)).

9. Assembly Committee on Environmental Safety and Toxic Materials Analysis of SB 990 (June 26, 2007), p. 3.

10. *Id.* at 2.

11. 768 F.3d 832.

12. 768 F.3d at 836.

The 9th Circuit concluded that the law “impermissibly regulates and discriminates against the federal government and its contractor,” in violation of the Supremacy Clause.¹³ Further, the 9th Circuit determined that “the terms of SB 990 are unseverable.”¹⁴

Should Santa Susana Provisions be Removed from the Recodification Altogether?

Notwithstanding the 9th Circuit decision, the tentative recommendation proposes to continue the Santa Susana provisions.

Although the Commission has authority to eliminate obsolete provisions,¹⁵ that authority has generally been used sparingly, only to delete statutory material that is, on its face, plainly obsolete. That is not the case here.

In a recodification, the Commission does not typically adjust the law to conform to individual judicial decisions. Instead, the recodification includes provisions (hereafter, general rules of construction)¹⁶ to make clear that the relevant judicial decisions, as a class, continue to apply to the recodified law. The general rules of construction in the proposed law provide, in part:

68020. (a) A judicial decision interpreting a previously existing provision is relevant in interpreting any provision of this part that restates and continues that previously existing provision.

(b) However, in enacting the Hazardous Substance Account Recodification Act, the Legislature has not evaluated the correctness of any judicial decision interpreting a provision affected by the act.

(c) The Hazardous Substance Account Recodification Act is not intended to, and does not, reflect any assessment of any judicial decision interpreting any provision affected by the act.

68025. (a) A judicial decision on the constitutionality of a previously existing provision is relevant in determining the constitutionality of any provision of this part that restates and continues that previously existing provision.

(b) However, in enacting the Hazardous Substance Account Recodification Act, the Legislature has not evaluated the constitutionality of any provision affected by the act, or the

13. 768 F.3d at 834; see also *id.* at 839 (“Under the Supremacy Clause, ‘the activities of the Federal Government are free from regulation by any state.’ Accordingly, state laws are invalid if they ‘regulate[] the United States directly or discriminate [] against the Federal Government or those with whom it deals.’ SB 990 is invalid on both grounds.”) (citations omitted).

14. 768 F.3d at 843 (“We decline to construe SB 990 as limited to non-radioactive cleanup because it would ‘require us to examine and rewrite most of the statute in a vacuum as to how the various provisions were intended to intersect and in a way that would be at odds with the purpose of the statute.’”).

15. See 2020 Cal. Stat. res. ch. 46.

16. See proposed Sections 68010-68030.

correctness of any judicial decision on the constitutionality of any provision affected by the act.

(c) The Hazardous Substance Account Recodification Act is not intended to, and does not, reflect any determination of the constitutionality of any provision affected by the act.

This approach allows the Commission to avoid having to make individual determinations of how to address relevant decisions. And, this, in turn, ensures that the Commission does not inadvertently exceed its authority by making a substantive change to the law or substitute its judgment for the Legislature's in determining how to resolve a legal defect (i.e., should the provision simply be deleted altogether or replaced with something different?).

For these reasons, the staff recommends against removing the Santa Susana provisions from the proposal altogether.

Should Adjustments be Made to the Recodification to Limit Possible Confusion?

Mr. Weiner raised concerns about possible confusion for future users of the recodified law.

Minimize Changes?

As indicated above, the tentative recommendation proposed recodifying Section 25359.20 as an article, breaking the substance into three sections. In this case, breaking the section into multiple pieces could contribute to an (erroneous) inference that the organizational changes have a substantive effect. To avoid that inference, the Commission could consider preserving the Santa Susana law as is, to the extent possible (i.e., in a single section, making only the necessary cross-reference updates to reflect the proposed recodification numbering).

Would the Commission like to change the proposed treatment of existing Section 25359.20 to preserve it intact and unchanged (to the extent possible)?

Adjust Commission Comment?

The Commission could also consider flagging the case or the general rules of construction in its Comment to help users find the relevant materials and facilitate understanding.

The Commission has been reluctant to use this approach in the past, as doing so is fraught with difficult line-drawing problems. Unless all the Comments include references to the prior case law or general rules of construction (in which case, they become so ubiquitous as to be unhelpful), the Commission's decision to

include this information in a particular Comment requires a value judgment about the significance or effect of an individual court decision. Making those assessments could be labor intensive and potentially controversial.

The staff recommends against including a reference to the 9th Circuit opinion or the general rules of construction in the Commission’s Comment.

Add to List of Substantive Issues for Possible Future Study?

The Commission could consider adding the Santa Susana provisions to the list of issues for possible future study. In particular, the following item could be added to the list:

Should proposed Article 2 of Chapter 6 (commencing with Section 69465) be repealed or amended in light of the 9th Circuit opinion in *Boeing Co. v. Movassaghi*, 768 F.3d 832 (2014)?

COMMISSION DECISION

Would the Commission like to adjust the treatment of the Santa Susana provisions proposed in the tentative recommendation?

Respectfully submitted,

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