From:	Jennings, Stephanie
To:	SSFL_DOE_EIS
Subject:	FW: Santa Ynez Chumash Comment opposing restriction of EIS alternatives
Date:	Thursday, March 13, 2014 10:46:13 AM
Attachments:	Chumash update to memo.DOE.docx

From: Sam Cohen [redacted]
Sent: Wednesday, March 12, 2014 5:36 PM
To: Jennings, Stephanie
Cc: Sam Cohen
Subject: Santa Ynez Chumash Comment opposing restriction of EIS alternatives

Dear Ms. Jennings:

The Santa Ynez Band of Chumash Indians as a consulting party to the DOE EIS provide this legal memo in opposition to anything short of a robust analysis of alternatives for remediation in the DOE EIS.

Sincerely,

Sam Cohen
Government and Legal Specialist
Santa Ynez Band of Chumash Indians

The email cited above included an attachment addressed to Sam Cohen from Marzulla Law that was marked Attorney-Client Privileged, Attorney Work Product. On October 15, 2018, DOE received permission from Sam Cohen, Government Affairs and Legal Officer of the Santa Ynez Band of Chumash Indians, to make the attachment available as a public reference to the *Final Environmental Impact Statement for the Remediation of Area IV and the Northern Buffer Zone of the Santa Susana Field Laboratory*.

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MEMORANDUM

To: Sam Cohen
From: Nancie G. Marzulla, Roger J. Marzulla
Date: March 12, 2014
Re: Santa Susana Cleanup

This follow up memo (supplementing the December 17, 2012 memo) analyzes DOE's requirements under NEPA for analyzing environmental impacts of major federal actions.

Issue: In preparing its Environmental Impact Statement ("EIS") for the Santa Susana cleanup, does the National Environmental Policy Act ("NEPA") require that the Department of Energy ("DOE") consider all reasonable alternatives?

Answer: Yes. The same analysis applies to both NASA and DOE: NEPA requires that they consider all reasonable alternatives in preparing their EIS.

Discussion

In our December 17, 2012, memorandum we concluded that NEPA requires that a federal agency analyze the environmental impacts of any major federal action significantly impacting the quality of the human environment, and further requires that the agency in an EIS "rigorously explore and objectively evaluate all reasonable

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alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated."[1] This rule applies equally to NASA and to DOE as they make decisions regarding remediation of the Santa Susana site. In that memorandum we described NASA's cleanup history at the site and its failure, in our opinion, to comply with NEPA in designing a remediation plan.

What we said in that memorandum about NASA goes equally for DOE, which operated the other portion of the Santa Susana site:

> From the 1950's to the 1980's, acting pursuant to its exclusive authority under the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. §§ 2011, et seq., DOE conducted a federal program at SSFL to research the peacetime use of nuclear energy. Boeing participated in that program in its capacity as a DOE prime contractor, and it set aside a portion of SSFL, which is now known as Area IV, for that activity. DOE operations in Area IV were conducted in a DOE controlled complex known as the Energy Technology Engineering Center ("ETEC") that at its peak included more than 200 buildings and facilities, many of which were constructed and owned by DOE.[2]

Exercising its cleanup authority under the Atomic Energy Act,[3] DOE initially announced a stringent cleanup standard for Santa Susana:

> In 1996, DOE finally approved procedures governing the cleanup of the radiological contamination located in Area IV. Based on the DOE's procedures, Area IV would be cleaned up to a standard of suburban-residential, recreational, or industrial pursuant to which future users of the site would be exposed to a dose of no more than 15 millirem of radiation per year. There is no serious dispute that this standard is exceedingly conservative, and it is more protective than the standard normally applied

[1] 40 C.F.R. § 1502.14(a).
[2] *Boeing Co. v. Robinson*, 2011 WL 1748312 at *2 (C.D. Cal. April 26, 2011).
[3] 42 U.S.C. §§ 2011–2023.

> by the NRC in decommissioning commercial nuclear facilities. Moreover, the parties agree that compliance with this standard would result in a lower dose of radiation per year than four cross-country round trips on an airplane, and that the 15 millirem per year standard for radiological cleanup fully protects human health and the environment.[4]

But in 2007, in response to a lawsuit brought by the Natural Resources Defense Council, the federal district court for the Northern District of California invalidated DOE's cleanup plan on the ground that NEPA requires preparation of an EIS for this project.[5] After preliminary scoping investigation, DOE reopened the scoping period on February 7, 2014.[6]

DOE is currently in the process of scoping an environmental impact statement for the site, and has extended the comment period to April 2, 2014. DOE plans to announce alternative possible remedies for the site in spring or early summer 2014.[7] DOE has invited the Chumash Tribe to participate as a consulting agency in preparation of the EIS as a consulting agency.

Analysis

The analysis of DOE's NEPA obligations is no different from that applicable to NASA (and other federal agencies). DOE has the same obligation to determine the

[4] *Boeing*, 2011 WL 1748312 at *4.
[5] *Natural Res. Def. Council, Inc. v. Dep't of Energy*, 2007 WL 1302498 (N.D. Cal. May 2, 2007).
[6] Amended Notice of Intent to Prepare and Environmental Impact Statement for Remediation of Area IV and the Northern Buffer Zone of the Santa Susana Field Laboratory and Conduct Public Scoping Meetings, 79 Fed. Reg. 4,439 (Feb. 7, 2014).
[7] http://www.etec.energy.gov/Char_Cleanup/EIS.html.

impacts on the human environment as NASA, and to review all reasonable alternatives for cleanup plans and standards.[8] As we stated in our December 17, 2012 memorandum:

NEPA regulations require that an EIS "[r]igorously explore and objectively evaluate all reasonable alternatives [to a proposed action], and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated."[9] NEPA regulations also state that the consideration of alternatives is "the heart of the environmental impact statement."[10]

The Ninth Circuit has invalidated EISs that fail to consider reasonable alternatives: "We have repeatedly recognized that if the agency fails to consider a viable or reasonable alternative, the EIS is inadequate."[11] The Ninth Circuit has also held that "[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate,"[12] and that "informed and meaningful consideration of alternatives—including the no action alternative—is thus an integral part of the statutory scheme."[13]

[8] *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113 (9th Cir. 2012) (reviewing a Department of Energy EIS under NEPA).
[9] 40 C.F.R. § 1502.14(a).
[10] 40 C.F.R. § 1502.
[11] *Se. Alaska Conservation Council v. Fed. Highway Admin.*, 649 F.3d 1050, 1056 (9th Cir. 2011) (citing *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008); *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1095 (9th Cir. 2006).
[12] *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985).
[13] *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988).

At the same time, NEPA regulations "oblige agencies to discuss only alternatives that are feasible, or (much the same thing) reasonable."[14] An "agency bears the responsibility for deciding which alternatives to consider in an environmental impact statement,"[15] and must "follow only a 'rule of reason' in preparing an EIS."[16] "[T]his rule of reason governs 'both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them.'"[17] A reviewing court reviews an agency's determination as to alternatives "deferentially" and will "uphold its discussion of alternatives so long as the alternatives are reasonable and the agency discusses them in reasonable detail."[18] However, as the D.C. Circuit has explained, agencies may not allow the EIS process to become a "foreordained formality" by unreasonably narrowing the alternatives considered:

> We realize, as we stated before, that the word "reasonable" is not self-defining. Deference, however, does not mean dormancy, and the rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them. Environmental impact statements take time and cost money. Yet an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS

[14] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991) (citing 40 C.F.R. §§ 1502.14(a)-(c), 1508.25(b)(2)); *see* Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026, 18,026 (1981).
[15] *Citizens Against Burlington, Inc.*, 938 F.2d at 195 (citing *North Slope Borough v. Andrus*, 642 F.2d 589, 601 (D.C. Cir. 1980)).
[16] *Id.*
[17] *Citizens Against Burlington, Inc.*, 938 F.2d at 195 (citing *Alaska v. Andrus*, 580 F.2d at 475) (emphasis in original).
[18] *Citizens Against Burlington, Inc.*, 938 F.2d at 196.

> would become a foreordained formality. *See City of New York v. Department of Transp.*, 715 F.2d at 743. Nor may an agency frame its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish those goals and the project would collapse under the weight of the possibilities.[19]

Finally, worth mentioning is a December 2013 preliminary injunction issued by a California Superior Court (and now on appeal) requiring the California Department of Toxic Substance Control to comply with CEA (California's "little NEPA") before approving the disposal of building materials, which may be contaminated with radionucleids, from the Santa Susana site.[20] Although neither the state court decision nor the state statute is binding on DOE as a federal agency, the injunction's practical effect is to apply CEQA to at least the disposal of the material which is being done by Boeing under contract to DOE. Boeing's (and thus DOE's) ability to dispose of contaminated materials from Santa Susana may, as a practical matter, impact the nature of the remediation plan DOE may select.

[19] *Citizens Against Burlington, Inc.*, 938 F.2d at 196.
[20] *Physicians for Social Responsibility-Los Angeles v. Dept. of Toxic Substances Control*, 2013 WL 7805409 (Superior Ct. of Cal. Dec. 11, 2013).