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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

PHYSICIANS FOR SOCIAL RESPONSIBILITY-LOS ANGELES, a non-profit corporation; SOUTHERN CALIFORNIA FEDERATION OF SCIENTISTS, a non-profit corporation; COMMITTEE TO BRIDGE THE GAP, a non-profit corporation; and CONSUMER WATCHDOG, a non-profit corporation

Petitioners,

v.

DEPARTMENT OF TOXIC SUBSTANCES CONTROL; DEPARTMENT OF PUBLIC HEALTH; and DOES 1 to 100

Respondents.

THE BOEING COMPANY, a corporation; ROES 1 to 100

Real Party In Interest.

Case No.: 34-2013-80001589-CU-WM-GDS

MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hrg. Date:	**TBD**
Department:	**14**
Judge:	**Hon. Allen H. Sumner**

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, at a date and time to be determined by the Court, in Department 14 of the above court, located at 720 9th Street, Sacramento, California, Petitioners Physicians for Social Responsibility – Los Angeles, Southern California Federation of Scientists, Committee to Bridge the Gap, and Consumer Watchdog, will move for a preliminary injunction to preserve the status quo pending resolution of their claims that Respondents Department of Toxic Substances Control ("DTSC") and Department of Public Health ("DPH") have failed to comply with the California Environmental Quality Act ("CEQA") and the Administrative Procedures Act ("APA") in reviewing and approving requests by Real Party in Interest the Boeing Company ("Boeing") to demolish radioactively contaminated structures located in Area IV of the Santa Susana Field Laboratory ("SSFL") site and dispose of the debris in offsite facilities not licensed for low-level radioactive waste. DTSC is the lead agency preparing an Environmental Impact Report ("EIR") of the remediation of the SSFL site, but that EIR has not been drafted, much less certified. In spite of the pendency of the EIR, DTSC and DPH have been serially approving – in a process that provides no formal public notice or comment opportunity – the demolition of structures used for nuclear experiments and research, which are demonstrably contaminated with radioactive isotopes, including plutonium-239, cesium-137, and strontium-90, all highly carcinogenic. To date, DTSC and DPH have approved the demolition of at least one radiologic facility, and has authorized Boeing to dispose of the debris in facilities not licensed to receive radioactive waste, in spite of clear legal requirements prohibiting the disposal of radiologically-contaminated materials in any facility that is not specifically licensed to receive radioactive waste. Respondents improperly rely upon "guidance documents," illegal underground regulations that have not been adopted pursuant to formal rulemaking requirements as the generally applicable clean-up and disposal standards governing the remediation of radioactively contaminated sites and structures.

As a result of Petitioners bringing this action, Respondent DTSC and Boeing voluntarily agreed to cease demolition and disposal activities in Area IV until September 30, 2013. After that date, Respondents and Boeing will resume these illegal actions, unless ordered by this Court to cease this activity pending resolution of the merits of this litigation. These actions risk serious harm to the public and to the environment as a result of the improper handling and disposal of radioactive waste.

Petitioners request that Respondents DTSC and DPH be preliminarily enjoined from reviewing or approving any demolition or disposal plans filed by Boeing pertaining to radiologic structures owned by Boeing within Area IV of the Santa Susana Field Laboratory site, or taking any other actions that authorize or permit such demolition and disposal. Petitioners will further request that Real Party in Interest Boeing be enjoined from any demolition or disposal activity in Area IV of the Santa Susana Field Laboratory site. ***DTSC and Boeing have voluntarily agreed to cease all demolition and disposal activities in Area IV until September 30, 2013.*** This Court's intervention is necessary prior to September 30 in order to resolve this urgent question and preserve the status quo. ***Petitioners have filed and served this Notice of Motion and Motion for Preliminary Injunction in compliance with Code of Civil Procedure section 1005, subdivision (b) so that this Court may schedule a hearing on Friday, September 27, 2013.***

This motion is based upon the attached memorandum of points and authorities, the Declaration of Arnold Gunderson in Support of Preliminary Injunction, the Declaration of Beverly Grossman Palmer in Support of Preliminary Injunction, Petitioners' Request for Judicial Notice, and on other such argument or evidence as may be presented at the hearing.

Dated: September 3, 2013

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This case involves remediation efforts in a 290-acre portion of the Santa Susana Field Laboratory ("SSFL") site known as Area IV, a highly contaminated site used as a nuclear research facility from the mid-1950s through the 1990s. During the decades of activity, poor waste management practices such as open-air burn pits for radioactive materials, and operational errors such as a reactor meltdown, led to extensive environmental contamination, including both chemical and radioactive compounds, in the soil, groundwater, and the existing structures on the site. The radioactive isotopes detected on site include plutonium-239, cesium-137, and strontium-90, all highly carcinogenic. Respondent Department of Toxic Substances Control ("DTSC") is in the process of preparing an Environmental Impact Report ("EIR") pursuant to the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 *et seq.*), addressing the remediation of the entire SSFL site, including Area IV, but has not yet released the draft EIR for public comment. CEQA review is thus nowhere near complete.

At the same time, Respondents DTSC and the Department of Public Health ("DPH") have been quietly approving the demolition and disposal of the existing structures in Area IV. There has been no CEQA review of these actions, nor any determination that the activity is exempt from CEQA. Respondents have already authorized the destruction and disposal of several so-called "non-radiologic" buildings in Area IV, despite Boeing's own data demonstrating that the structures were radioactively contaminated. These actions were taken without formal notice to the public and without opportunity for public comment. To the extent that documents relating to Boeing's demolition and disposal activities are made public, they are buried in a section of DTSC's online document library confusingly titled "RCRA Facility Investigation – Soils."

The demolition of the Area IV structures has the potential to cause significant impact to human health and the environment by releasing previously contained radioactive particles. Moreover, Respondents have expressly authorized Boeing to ship the radioactive debris offsite for disposal in waste facilities that are neither licensed nor designed to safely dispose of radioactive waste. Disposal of radioactive waste in non-licensed facilities creates risk of serious harm to the environment and the public. The facilities that Respondents have authorized for disposal do not impose stringent isolation

and burial requirements mandated for low-level radioactive waste, nor do they comprehensively monitor for the release of radionuclides to air or groundwater. Releases of radiation may go undetected and expose the public to radioactively contaminated water or crops grown with such water, potentially leading to cancer, leukemia, and genetic effects on offspring.

In determining that these dirty, radioactive materials are "safe" for the public and for unlicensed disposal facilities, Respondents have relied on unofficial "guidelines" – otherwise known as underground regulations – that purport to set "acceptable" levels of radiological contamination – an evasion of law this Court has already once prohibited them from committing in a judgment Respondents simply ignore. These underground regulations are antiquated, not protective of human health, and not even intended to apply to disposal of radioactive debris. These guidelines do not permit Respondents to authorize disposal of radioactive materials in facilities that are not designed specifically for the disposal of radioactive waste. And because Respondents have neither adopted them as regulations pursuant to notice-and-comment rulemaking as required by the Administrative Procedures Act ("APA") (Gov't Code, § 11340 *et seq.*), nor assessed their environmental impact under CEQA, they cannot be relied on to set standards for "acceptably dirty" materials to which the public will be exposed.

Now, DTSC is poised to approve Boeing's application to demolish and dispose of, among others, Building 4055, which housed the production of highly radiotoxic nuclear fuels, including plutonium-239. This extraordinarily dangerous radionuclide is virtually certain to cause cancer if even minute quantities are inhaled. Multiple other radiologic facilities are also scheduled for demolition. Petitioners Physicians for Social Responsibility – Los Angeles, Southern California Federation of Scientists, Committee to Bridge the Gap, and Consumer Watchdog (collectively, "Petitioners"), therefore request preliminary injunctive relief directing Respondents to refrain from reviewing and approving Boeing's requests for authorization to demolish and dispose of radiologic structures from Area IV until they have complied with CEQA by evaluating the project's environmental risks and complied with the APA by ceasing reliance on invalid standards for cleanup of decommissioned nuclear sites.

STATEMENT OF FACTS

Established in the 1940s, SSFL is a former nuclear-weapon and rocket development facility in the Simi Hills of Ventura County, about 30 miles from downtown Los Angeles. The site is divided into

four areas; the nuclear testing and production occurred in a 290-acre portion of SSFL known as Area IV, which is now owned and operated by Boeing. Boeing and its predecessors conducted work with radioactive materials under a license issued by the agency now known as the California Department of Public Health. (Petitioner's Request for Judicial Notice ("RJN"), Exh. 6; Exh. 16 p. 2.)

At its peak, Area IV was the site of ten reactors, seven criticality test facilities, a "Hot Laboratory" for manufacturing large radiation sources, the "Nuclear Materials Development Facility" which included the plutonium fuel fabrication facility, and various test and nuclear material storage areas. The Hot Laboratory suffered a number of fires involving radioactive materials, and at least four of the ten nuclear reactors suffered accidents. The most significant incident occurred in 1959, when an experimental sodium reactor in Area IV suffered a partial nuclear meltdown. The reactor had no containment structure to prevent radioactive material from spewing into the environment. (Verified Petition for Writ of Mandate ("Pet."), ¶ 37.) Among the radionuclides detected in Area IV are americium-241, uranium-238, thorium-232, cesium-137, plutonium-239/240, curium-234/244, strontium- 90, and cobalt-60; according to the EPA, these isotopes are highly carcinogenic. (Pet., ¶ 38.) Indeed, epidemiological studies have shown higher rates of cancer among SSFL workers and people living near the site. (*Ibid.*)

DPH's Radiologic Health Branch regulates radioactive materials in California and DTSC is the "lead regulatory agency responsible" for cleanup at SSFL. (RJN, Exhs. 17; 26). In 2007, DTSC, Boeing, DOE, and NASA entered a consent order for corrective action to govern the cleanup of the site. The site's owners agreed to facilitate DTSC's completion, pursuant to CEQA, of an EIR of the remediation of the entire SSFL facility. (RJN, Exh. 16, § 3.8.) DTSC currently purports to be selecting a contractor to perform this EIR, which it anticipates completing in 2015. (RJN, Exh. 23.) At the same time, Respondents are in the process of reviewing and approving requests by Boeing to demolish structures in Area IV of the SSFL, and Boeing is actively engaged in demolition and disposal of the resultant debris. (Pet., ¶¶ 53-54.)

At no time has the public been permitted to comment on procedures or standards for the demolition activity in Area IV. In 2010, DTSC required Boeing to prepare Standard Operating Procedures ("SOP") for the demolition activities at the SSFL site. (RJN, Exh. 19) At that time, DTSC solicited public comment on Boeing's SOP, stating that the proposed SOP was "not applicable to

building demolitions at SSFL in areas where radiological contamination elements are documented or suspected (such as Area IV)." (RJN, Exh. 17.) In spite of this statement to the public, and *without any public notice*, in November 2012, Boeing and DTSC agreed to amend the SOP to include procedures for demolition and disposal of what Boeing termed "non-radiological buildings in Area IV," including "pre-demolition radiation screening." (Declaration of Beverly Grossman Palmer ("Palmer Declaration"), Exh. E, pp. 23-24.) This amendment required Boeing to screen the surface of buildings and debris, applying so-called "release criteria" embodied in several regulatory guidance documents: DPH Radiologic Health Branch guidance DECON-1 and IPM-88-2; USNRC Regulatory Guide 1.86; DOE Order 5400.5. As discussed below, these guidance documents, which purport to establish "acceptable" levels of radiological contamination, have never been adopted by DPH or DTSC as demolition and disposal standards for radiological sites. DTSC did not make the November 2012 amendment public at the time; it was not until the SOP was again amended in April 2013 ("April 2013 SOP") that both amendments were posted on its website, without an opportunity for the public to comment. (*Ibid.*; see also *id.* at ¶ 8.) The April 2013 SOP explicitly permitted Boeing to demolish structures in Area IV without conducting new radiation sampling. (*Id.* at pp. 25-28.) The April 2013 SOP also provides in a footnote that DTSC approved, by email, the use of Class I hazardous waste facilities – which are not authorized to receive radiological waste -- for the disposal of all debris from Area IV radiologic structures. (*Id.* at p. 26.) No public notices were posted prior to approving either amendment, nor was public comment sought on the SOP amendments applicable to Area IV.

Under this framework, Boeing has already submitted for approval, and DTSC has authorized, the demolition of several Boeing-denominated "non-radiological" structures in Area IV. Many of these structures, however, housed production or testing of radioactive materials. (See Declaration of Arnold Gundersen in Support of Preliminary Injunction ("Gundersen Decl."), Exh. B at pp. 30-31 & Fig. 7.) Indeed, Boeing's submissions to DTSC conceded that its tests of these buildings revealed contamination not only above background levels, but also above the "release criteria" it was employing for "acceptable contamination levels." (Gundersen Decl., ¶ 24.) And its own data showed even greater indications of contamination than it admitted to DTSC. (*Id.* at Exh. C, p. 37 [Fig. 8].)

Most recently, Respondents issued the first approvals for the demolition of an admittedly radiologic structure, the remains of the L-85 building. As the material submitted to Respondents by Boeing reflects, when the L-85 facility ceased using radioactive materials, the facility was so contaminated that an additional layer of concrete was required to be poured over the floor to seal in the radiation and make the building acceptable for reuse. (RJN, Exh. 24, p. 2.) The radiation remains in the original floor of the L-85 building, and thus is present in the broken-up debris that Respondents have permitted Boeing to dispose in a Class I hazardous waste facility – a facility *without* a license to dispose radioactive waste. (RJN, Exh. 25.) It is unclear whether Boeing has already disposed of all material from the L-85 structure.

Currently pending before Respondents are Boeing's requests for approval to demolish and dispose of several structures they admit are radiologic structures, including the former plutonium fuel fabrication building ("Building 4055"), which is impregnated with extremely toxic plutonium radionuclides. (Gundersen Decl., ¶ 5.) Data submitted by Boeing show of Building 4055 showed that 87 of 108 samples had radioactivity levels above background (*ibid.*), suggesting that significant portions of this structure remain contaminated and thus unacceptable for disposal in any facility without a license to receive low-level radioactive waste. Without an order from this Court barring further demolition and disposal, after September 30, 2013, Respondents will resume their review and approval of Boeing's demolition requests, and Boeing will continue to dispose of the debris in facilities not licensed to receive radioactive waste – and the public will remain without opportunity to comment and without full disclosure of the extent of Respondents and Boeing's activities in Area IV of the SSFL.

ARGUMENT

I. PETITIONERS MEET BOTH PRONGS OF THE STANDARD FOR TEMPORARY INJUNCTIVE RELIEF

Petitioners readily meet the standard for the issuance of injunctive relief: they have a strong case on the merits and there is clear risk of irreversible harm should the demolition and disposal of radioactive material continue pending trial. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 441-442.) The attempt by Respondents to authorize the demolition of structures impregnated with radiation and disposal of the materials in unauthorized landfills without any CEQA compliance, relying

on underground regulations to set legally and factually improper tolerances, all without public notice or input establishes far more than a "reasonable probability" Petitioners will prevail at trial. (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 206.) The threat to public health— the damage that can be caused by improperly handled and disposed radioactive substances—vastly exceeds the requisite "harm that they allege will occur if the injunction does not issue." (*King v. Meese* (1987) 43 Cal.3d 1217, 1227.) At the same time, Respondents and Real Party in Interest can identify no plausible detriment to further delay in demolishing structures that have been standing for decades while the parties comply with state law. DTSC and Boeing committed voluntarily to cease demolition and disposal activities in Area IV only until September 30, 2013. (Declaration of Beverly Grossman Palmer, Exhs. A & B.) This Court's action is needed to preserve the status quo and prevent serious harm to the public and the environment before the voluntary commitment has expired.

II. PETITIONERS WILL PREVAIL ON THE MERITS BECAUSE RESPONDENTS HAVE CLEARLY VIOLATED BOTH CEQA AND THE APA

Petitioners need only establish a "reasonable probability" of prevailing on the merits (*Robbins*, *supra*, 38 Cal.3d at p. 206); in light of Respondents' flagrant violation of both CEQA and the APA, this standard is easily met. DTSC has repeatedly acknowledged that the cleanup of Area IV requires an EIR to be performed under CEQA and has taken steps to prepare an EIR, while simultaneously authorizing the demolition of the structures on the site *prior* to completing that EIR. At the same time, DTSC and DPH are relying upon policy documents that purportedly establish "release standards" for radiologic structures, but neither agency has adopted these documents by a notice-and-comment rulemaking as required by the APA. Even worse, this Court in 2002 issued a writ of mandate barring DPH from using release standards without first preparing an EIR, an order DPH flouts by utilizing illegal underground regulations rather than promulgating regulations and preparing the EIR.

A. The Demolition of the Existing Radiologic Structures in Area IV Is a Discretionary "Project" That Must First be Assessed Under CEQA

DTSC and DPH have not conducted *any* aspect of the CEQA review process, which "ensure[s] that public agencies inform their decisions with environmental considerations." (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 112.) CEQA requires environmental review and analysis *prior* to the implementation or approval of *discretionary projects* by a state agency. (See Pub. Resources

Code, § 20180.) CEQA's objective is long-term protection of the environment. (*Id.*, §§ 21000, subd. (a), 21001, subd. (g).) The law's basic purposes are to inform governmental decision makers and the public about the potential significant environmental effects of proposed activities, identify ways that environmental damage can be avoided or significantly reduced, prevent such damage by the imposition of mitigation measures or the adoption of alternative activities that avoid such damage, and disclosure to the public of the reasons for approving an activity with significant, unmitigable environmental effects. (Cal. Code Regs., tit. 14, § 15002(a).) CEQA requires public notice of agency action and transparency regarding government decisionmaking. Respondents have secretly approved the demolition and disposal of the radiologic structures, without public notice or comment, and have thereby gutted CEQA's informational disclosure mandates.

In this case DTSC and DPH have failed even to take the first step in CEQA review. (See *Davidon Homes*, *supra*, 54 Cal.App.4th at p. 112.) When an agency first considers an action, it must determine whether it is a "project" under CEQA, which is defined as "an activity which may cause either a direct physical change or a reasonably foreseeable indirect change in the environment." (Pub. Resources Code, § 21065; see also Cal. Code Regs., tit.14 § 15378(a).) The term "project" encompasses "the whole of an action which has a potential for resulting in physical change in the environment, directly or ultimately, and includes the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies." (*Burbank–Glendale–Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592 ("*BGPAA*").) An agency issues an "approval" under CEQA when a public agency's decision "commits the agency to a definite course of action in regard to a project intended to be carried out by any person." (Cal. Code Regs., tit. 14, § 15352(a).)

Respondents and Boeing are engaged in a "project" as that term as been broadly defined under CEQA. (See *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1188-1189.) The approval of the April 2013 SOPs and of Boeing's demolition and disposal proposals for Area IV radiologic structures is directly undertaken by DTSC, and also grants Boeing an "entitlement" to demolish and dispose of environmentally hazardous material, meeting the requirements of Public Resources Code section 21065 subdivisions (a) and (c). (See, e.g, *McQueen v.*

Board of Directors (1988) 202 Cal.App.3d 1136, 1143, ["Project" interpreted broadly to "maximize protection of the environment"].)

DTSC acknowledges that the remediation of the SSFL site in general is subject to review under CEQA. In a 2007 consent order entered between DTSC and Boeing, NASA, and DOE, Boeing agreed to provide information to assist "DTSC's preparation of a CEQA analysis, including a Facility-wide Environmental Impact Report (EIR)." (RJN, Exh. 16, § 3.8.) "Facility" was defined as "the entire SSFL site." (*Id.* § 1.4.) DTSC is presently seeking a contractor to prepare the required EIR. (RJN, Exh. 23.) Yet Respondents are approving the demolition of the Area IV radiologic structures without having analyzed the full impacts of the remediation project, violating CEQA's mandate to analyze the whole of an action:

> "CEQA mandates that environmental considerations do not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences. . . . A narrow view of a project could result in the fallacy of division, that is, overlooking its cumulative impact by separately focusing on isolated parts of the whole." (*BGPAA*, *supra*, 233 Cal.App.3d at p. 592.)

Moreover, "a group of interrelated actions may not be chopped into bite-size pieces to avoid CEQA review." (*Association for a Cleaner Environment v. Yosemite Community College District* (2004) 116 Cal.App.4th 629, 638.) The demolition of the Area IV radiologic structures is part of the overall site remediation that DTSC has committed to evaluate in an EIR. (RJN, Exh.16, § 3.8; Exh. 22.) Respondents cannot carve out the demolition of the radiologic structures as if it were not an "interrelated action" to the other remedial activities at the site.

And even if the "project" were conceived of simply as DTSC's review and approval of the demolition and disposal of Boeing-owned buildings in Area IV, it is still an endeavor with the "potential for resulting in physical change in the environment," (*BGPAA*, *supra*, 233 Cal.App.3d at p. 592) because radioactive materials could easily be released into the environment as a result of the demolition and disposal, something DTSC implicitly acknowledged in exercising special oversight of the demolition of the Area IV structures. (See RJN Exhs..17. 18; Palmer Decl., Exh. E, p. 25.) The Area IV radiologic demolition is either a "project" on its own, requiring CEQA review, or it is a part of the overall site remediation project for which an EIR is in process: either way, CEQA review is required *before* action.

The CEQA pre-requisite that an activity be "discretionary" is easily satisfied here. A project is discretionary if it "requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity." (*Mountain Lion Found v. Fish and Game Com'n.* (1997) 16 Cal.4th 105, 117-118.) Courts apply a functional test to determine if an activity is involves the exercise of discretion, assessing whether "the approval process involved allows the government to shape the project in any way which would respond to any of the concerns which might be identified in an environmental impact report." (*Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 270.) "[W]here the agency possesses enough authority (that is, discretion) to deny *or modify* the proposed project on the basis of environmental consequences the EIR might conceivably uncover, the permit process is 'discretionary' within the meaning of CEQA." (*Friends of Westwood, supra*, 191 Cal.App.3d at p. 272 (emphasis in original).)

Throughout the demolition at the SSFL, DTSC has required Boeing to proceed under its oversight, such that DTSC can condition the activity to address environmental and safety concerns. The SOPs were themselves *required* by DTSC, in order to provide for "DTSC's oversight and approval" for demolition and to ensure that buildings where radiologic materials were used were not demolished. (RJN, Exh. 18.) The secretly-approved April 2013 SOPs, which for the first time established procedures applicable to the demolition of radiologic buildings in Area IV, clearly state that the SOPs were "approved" by DTSC in the first instance, and that the amendment was prepared at DTSC's specific request. (Palmer Declaration, Exh. E , p. 25.) Pursuant to the April 2013 SOP, Boeing notifies DTSC prior to beginning demolition activities so that Respondents can review Boeing's proposal, imposing conditions under which demolition and disposal are acceptable to Respondents. (*Id.*, pp. 26-28.)

The final element of the first phase of CEQA review is to determine whether any exemption applies to a project. Respondents have not identified any applicable exemption. Nevertheless, no exemption from CEQA applies if the project presents unusual circumstances, and there is a reasonable possibility of a significant effect on the environment due to the unusual circumstances. (*Voices for Rural Living v. El Dorado Irr. Dist.* (2012) 209 Cal.App.4th 1096, 1107.) The destruction of structures formerly used to handle plutonium and fission products, some of the most toxic substances on earth, and the evidence from recent radiological surveys by Boeing and EPA of widespread radioactive

contamination in and around the structures, clearly present "unusual circumstances" with the potential for significant environmental effects. (Gundersen Decl., ¶¶ 5, 6, 13, 15, 24; RJN, Exh. 26.)

Because Respondents are exercising their discretion over Boeing's demolition and disposal activity, and because no exemption to CEQA applies, Petitioners are likely to prevail on their claims that Respondents have failed to comply with the substantive and procedural mandates of CEQA prior to approving the April 2013 SOPs and the demolition of Area IV radiologic structures.

B. Respondents' Reliance on Regulatory Guidance Documents Purporting to Establish Acceptable Contamination Limits Violates the APA

In approving Boeing's demolition and waste disposal plans, DTSC and DPH illegally relied on several unsanctioned documents: an undated document generated by DPH's Radiologic Health Branch titled "Guidelines for Decontamination of Facilities and Equipment Prior to Release for Unrestricted Use" ("DECON-1"); a 1991 "policy memorandum" from the same source denominated IPM-88-2;[1] Regulatory Guide 1.86, adopted in 1974 by the former U.S. Atomic Energy Commission (later renamed the Nuclear Regulatory Commission); and DOE's Guidance 5400.5. (See, e.g., RJN Exhs. 3, 4, 8, 10,.) Regulatory Guide 1.86 establishes standards for terminating operating licenses for nuclear reactors, establishing "acceptable surface contamination levels" for structures that may remain on site after the license is terminated. (RJN, Exh. 3.) DOE 5400.5, DECON-1, and IPM-88-2 replicate these surface contamination guidelines for similar purposes. (RJN, Exhs. 4, 8, 10.) None of these regulatory standards have been formally adopted by DPH or DTSC. Indeed, none of the regulatory guidance documents have been adopted, formally or informally, as a guide to the offsite *disposal* of radiologically contaminated debris. IPM-88-2 was expressly superseded by Policy RML-00-02. (RJN, Exh. 9, p. 2.) RML-00-02 was itself rescinded in February 2013 as a result of the writ of mandate overturning DPH's previous clean-up regulations. (*Id.*, p. 1 ["Due to court order . . . the content on which this policy relies is moot. . . Decommissioning is currently performed case-by-case."] DOE Order 5400.5 has likewise been superseded by the agency that issued it. (RJN, Exh. 11.) Yet Respondents expressly rely the standards in the superseded IPM-88-2 and DOE Order 5400.5 in their review of the demolitions.

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[1]Before 2006, the Radiologic Health Branch was within the Department of Health Services. The Legislature then created the Department of Public Health and transferred authority over various functions, including the Radiologic Health Branch, to the new agency. (See Health & Saf. Code, § 131051; S.B. 162, Stats. 2006, ch. 241.)

Respondents' reliance on these guidelines violates the law designed to ensure transparent, responsive government. The APA requires agencies, before adopting a rule of general application, to give public notice of its proposed action (Gov. Code, §§ 11346.4, 11346.5); state the full text of the proposed regulation, accompanied by a statement of the reasons for adopting it (*id.*, § 11346.2, subds. (a), (b)); allow interested parties to comment (*id.*, § 11346.8); and respond in writing to public comments (*id.*, §§ 11346.8, subd. (a), 11346.9). These rules "ensure that those persons or entities whom a regulation will affect have a voice in its creation" and provide "security against bureaucratic tyranny." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568-69.) The public participation requirements apply to all "regulations," broadly defined as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.) To prevent agencies from skirting these requirements, the APA explicitly forbids agencies from declaring or relying on any generally applicable statement of policy without first adopting it as a rule. (Gov. Code, § 11340.5, subd. (a).) Any standard of general application intended to "implement, interpret, or make specific the law enforced or administered by [the agency], or to govern its procedure" that the agency has adopted or utilized in any manner other than formal rulemaking is an "underground regulation" and must be "judicially declared invalid." (*Morning Star Co. v. State Board of Equalization* (2006) 38 Cal.4th 324, 333.)[2]

This is not the first time DPH has run afoul of the APA in its quest to designate radioactive materials as safe. In 2002 DPH was ordered to set aside a regulation establishing radiological criteria for decommissioning nuclear sites because it had neither complied with CEQA nor with the APA. (*Committee to Bridge the Gap et al. v. Diana M. Bonta, Director, California Department of Health Services; State of California* (Super. Ct. Sacramento County, Apr. 10, 2002, Case No. 01CS01445; RJN

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[2] DPH has the authority to "[d]evelop programs . . . for licensing and regulation of byproduct, source, and special nuclear materials, and other radioactive materials." (Health & Saf. Code, § 11500, subd. (b).) These guidance documents therefore fall within "the law enforced or administered by" DPH. And in issuing DECON-1, a regulatory "guideline," and IPM-88-2, a "policy memorandum," DPH clearly intended "its rule to apply generally, rather than in a specific case." (*Id.*; see *Ligon v. State Personnel Bd.* (1981) 123 Cal.App.3d 583.) DECON-1 purports to apply Section 30256 of the Radiation Control regulations, which establishes guidelines for decommissioning facilities licensed for radiological use. (14 Cal. Code Regs. § 30256.) IPM-88-2 refers to the prior version of the same regulation, and similarly applies generally rather than to a particular regulated entity.

Exhs. 28, 29). In the more than a decade since, DPH has never properly adopted decommissioning standards, instead relying on antiquated guidance documents that it has never even attempted to properly promulgate by notice and comment rulemaking.

Respondents cannot, as they tried to do last time, hide behind federal agencies' promulgation of informal guidance because the state has the authority to "choose a standard more stringent than the federal standard" in determining so-called "acceptable" levels for radioactive clean-up. (RJN, Exh. 28; Exh. 1.) Respondents cannot simply claim, therefore, that they are *required* to use the federal guidance, as the state must engage in a rulemaking process that fully discloses its freedom to adopt a more stringent standard than federal guidelines. Moreover, as discussed more fully below, Respondents misapply the federal guidance to permit the demolition and disposal in a facility not licensed to receive low-level radioactive waste. These guidelines have nothing to do with disposal; both federal and state law make clear that disposal of radioactive waste is only permitted in a licensed facility, and neither has adopted a "below regulatory concern" rule that would permit some radioactive waste to be disposed outside a licensed facility. Because Respondents are relying on standards of general application that were never adopted under the required rulemaking procedures, Petitioners are very likely to prevail on their claim that Respondents have violated the APA.

III. PETITIONERS AND THE PUBLIC WILL BE IRREPARABLY HARMED IF RESPONDENTS CONTINUE TO AUTHORIZE DEMOLITION OF AREA IV BUILDINGS WITHOUT CEQA REVIEW

The serious danger posed by radioactive waste requires maintaining the status quo until a final decision on the merits. Any release of radioactive material into air, soil, and water sources increases the risk of cancer and represents an irremediable threat to public health. (Gundersen Decl., ¶¶ 11, 12.) If performed without adequate safeguards, demolition of the former plutonium production building and other radiological facilities will release radionuclides currently trapped within the building materials. These particles cannot be recaptured after they are released; once inhaled, even a miniscule quantity of plutonium-239 is virtually certain to cause lung cancer. (*Id.* ¶ 5.) Likewise, solid radioactive waste that is improperly disposed of cannot readily be retrieved and relocated following final disposition of this case on the merits. (*Id.* ¶¶ 5, 19.) Respondents and Boeing can cite no countervailing harm in

preserving these structures in situ while this litigation is pending: the structures presently exist, and DTSC has just begun to prepare an EIR for site remediation.

Moreover, the harm from the improper disposal of radioactive waste is explicitly anticipated by California's Radiation Control Law, which requires disposal of radioactive waste at facilities that are licensed and specially equipped to permanently isolate it. These facilities must, as a threshold matter, comply with federal regulations for siting, design, and monitoring.. (Health & Saf. Code, § 115261, subd. (a); 10 C.F.R. §§ 61.40, 61.41; RJN Exh. 13.) In 2002 the Legislature adopted Assembly Bill 2214 to add additional licensure requirements for low-level radioactive waste facilities. Radioactive waste must be stored within "multiple, engineered barriers" that are designed to last for a minimum of 500 years and in facilities providing "visual inspection or remote monitoring" of the waste storage structures to detect any potential leakage. (Stats. 2002, ch. 513, sec 4; Health & Saf. Code § 115261, subd. (b).) California also prohibits "shallow land burial," or the disposal of radioactive waste within thirty meters of the earth's surface. (Id., subds. (c), (e)(6).) The radiologically contaminated debris from Area IV is currently being sent to disposal facilities that meet none of these standards. (Gundersen Decl. ¶¶ 7, 17.)

These provisions reflect the Legislature's recognition that disposal of radioactive waste at unlicensed facilities is unacceptably dangerous. (See RJN, Exh. 13, Stats. 2002, ch. 513, sec. 2 (b) [invoking "the need to protect public health and the environment" from "the potential for the migration of radioactive waste beyond the site and to groundwater"]; *id.*, sec. 1(h) [observing that radioactive materials at storage sites elsewhere in the United States had "migrated" beyond their steel containers, in one case resulting in designation as a Superfund site]; see also RJN, Exh. 14.)

This legislative intent to completely and permanently isolate from the environment *all* radioactive material precludes Respondents' assertion that the contamination remaining in Area IV structures does not present cognizable harm. (See, e.g., *King v. Meese* (1987) 43 Cal.3d 1217, 1225 ["[T]his court may . . . infer from enactment of the 1984 Act itself that the Legislature had determined that substantial harm was being caused by uninsured drivers."].) Where the Legislature has prohibited a particular activity, "it would be a usurpation of the legislative power for a court to arbitrarily deny enforcement merely because in its independent judgment the danger caused by a violation was not significant." (*People ex*

rel. San Francisco Bay Conservation etc. Com. v. Smith (1994) 26 Cal.App.4th 113, 125.) A "judicial reexamination of the wisdom of the statute" is "something which [a court] cannot do under the rubric of 'irreparable harm.'" (*Ibid.*) Respondents' assertion that Boeing's Area IV buildings possess only "acceptable contamination" conflicts with the Legislature's zero-tolerance policy towards radioactive waste. (See RJN, Exh. 14, pp. 1, 7 [AB 2214 intended to "[e]nsure that *no radioactive material* will be released into the environment" and "to prevent *any leakage* of radioactive materials and exposure to environmental impact"]; Exh. 15, p. 3 [AB 2214 designed to "completely contain and permanently protect radioactive materials from the biosphere inhabited by man"].)

Chemical waste facilities such as Buttonwillow may not legally receive radioactive waste that is contaminated at *any* level, a fact that DPH has made clear in other instances when third parties have attempted to send radioactive material to Buttonwillow. (See RJN Exhs. 12, 20.) Without the necessary triple-containment and monitoring systems, radionuclides may migrate undetected into soil, air and water. (Gundersen Decl., ¶ 9.) Indeed, the presence of hazardous chemicals at these sites may *accelerate* the release of harmful isotopes from radioactive materials. (*Id.* ¶ 10.) Moreover, the compliance with "release criteria" has nothing to do with the ability to dispose of radioactive material: neither the Radiation Control Law, nor any binding regulation, incorporates these release criteria as a lower limit on radioactive waste. (See Gundersen Decl., ¶ 12.)[3] The release standards, and the data Boeing provides Respondents about radioactivity levels, fail to distinguish what isotope is causing the radioactivity, a critical omission because some isotopes are more highly dangerous to human health. (Gundersen Decl., ¶ 23.) For instance, strontium-90 is absorbed in bone much like calcium, leading to bone cancers; cesium-137 easily penetrates muscles to serious detrimental effect. (*Id.*) Exposure to radiation *is carcinogenic at any level*; there is no safe lower bound. (*Id.* ¶ 11.) The risk of harm to humans and to the environment from the unintentional release of these radionuclides is real, and it tips the scale greatly in favor of caution, particularly where a delay in demolition of these structures would not delay the remediation of the site in general.

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[3] Regulatory Guide 1.86 was developed in 1974 and expressly applies to "termination of *operating licenses* for nuclear reactors" and replacement with "possession-only" licenses. (RJN, Exh. 3.) IPM-88-2 defines its scope as assuring that a facility that housed radioactive material "will not present a radiation hazard *to future occupants*." (RJN, Exh. 8.) They do not address demolition or disposal.

There are numerous additional reasons to distrust Respondents' assurance that demolition and disposal of these radiologic structures is safe. When Respondents approved the demolition and disposal of the Area IV non-radiologic structures, they permitted Boeing to dispose in unlicensed facilities even waste containing samples that *exceeded* the lax thresholds set for radioactive levels. (Gundersen Decl., ¶ 24.) There are numerous other instances in even the "non-radiologic" buildings of samples exceeding background levels. (Gundersen Decl., Exh. B, pp. *ii*, 33.) The surface measurements that are provided do not account for contamination trapped below the surface, known as volumetric contamination. (Gundersen Decl., 14, 21.) Because radioactive materials may be present *within* the demolished materials, testing only surfaces does not reveal the full extent of contamination. *(Id.,* ¶ 14.) Area IV was the site of nuclear meltdown and other sloppy and dangerous handling of radioactive materials, and as a result even non-radiologic structures have proved to be contaminated. EPA has recently performed a radiological survey of the soil in Area IV, which revealed hundreds of locations with radioactive contamination, up to *one thousand times* above background levels. (Gundersen Decl., Exh. B, pp. 16-18.) Boeing's own data show contamination persists in the radiologic buildings, and in light of Respondents' lack of effective oversight and persistent refusal to enforce the laws governing proper disposal of radioactive waste, continued demolition and disposal activity brings great risk of harm.

CONCLUSION

Petitioners have shown that Respondents have failed to comply with CEQA before approving the demolition of radioactively contaminated structures, and that Respondents have permitted the radioactively contaminated material to be disposed in improper, unlicensed disposal sites on the basis of "guidance" documents never promulgated as regulations under the APA. Moreover, the risk of harm from the improper handling of these carcinogenic materials is indisputable. A preliminary injunction should issue to preserve the status quo and permit a fuller hearing on the merits of Petitioners' claims.

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DATED: September 3, 2013

Respectfully submitted,

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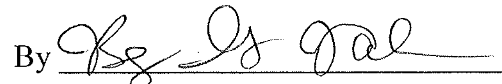
By 
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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

Re: *Physicians for Social Responsibility-Los Angeles, et al. v. Department of Toxic Substances Control,* Case No. 34-2013-80001589

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10940 Wilshire Boulevard, Suite 2000, Los Angeles, California 90024.

On **September 3, 2013**, I served the foregoing document(s) described as **MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on all appropriate parties in this action, as listed below, by the method stated:

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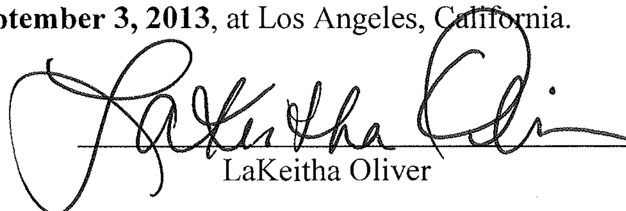
☒ If electronic-mail service is indicated, by causing a true copy to be sent via electronic transmission from Strumwasser & Woocher LLP's computer network in Portable Document Format (PDF) to the this date to the e-mail address(es) stated, to the attention of the person(s) named.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **September 3, 2013**, at Los Angeles, California.



LaKeitha Oliver