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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; and ROES 1 to 100,

Real Party In Interest.

Case No.: 34-2013-80001589

PETITIONERS' OPPOSITION TO THE BOEING COMPANY'S MOTION FOR SUMMARY JUDGMENT

Date: November 21, 2014
Time: 1:30 p.m.
Dept. 42
Judge: Honorable Allen Sumner

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INTRODUCTION

Respondents have a mandatory duty to perform an environmental assessment under the California Environmental Quality Act (CEQA) of the remediation of the Santa Susana Field Laboratory (SSFL) by virtue of administrative orders to which they agreed and the laws underlying those orders. That assessment is underway (and apparently behind schedule). By the terms of the stipulated orders, the assessment must take into account the buildings Real Party in Interest The Boeing Company's (Boeing) wishes to demolish — buildings impregnated with radionuclides that will be released to the air and soil by their demolition and then transported to a disposal site not licensed to receive them.

Boeing has now announced that it is reversing its past compliance and will no longer seek "approval" from either Respondent before demolishing the buildings. By this artifice, Boeing presumes to declare this case both "moot" and "unripe," empowering itself to perform the demolition before Respondents complete the mandatory CEQA review of its impacts. If there is any mootness to be found in this case, it lies in Boeing's attempt to render moot the assessment of its actions by demolishing the buildings before the consequences of demolition are identified.

For their parts, Respondents Department of Toxic Substance Control (DTSC) and Department of Public Health (DPH), which forswore a portion of their regulatory authority in unsuccessfully resisting this Court's preliminary injunction last year, now simply pledge their continuing allegiance to Boeing in one-sentence, unexplained "non-oppositions" to Boeing's Motion for Summary Judgment (Motion).

In fact, both agencies do have jurisdiction over these activities, jurisdiction they have repeatedly exercised. Moreover, the fact that remediation of the SSFL site is presently the subject of an EIR being prepared by DTSC is entirely unaffected by Boeing's contention that it will no long seek "approval" from Respondents. Boeing's March 20 letter is, therefore, of no legal significance to the questions presented in this litigation: Is Boeing's demolition activity a part of the SSFL remedial project under CEQA such that it must be analyzed in the pending EIR before the structures are demolished and disposed of? Should DTSC or DPH have conducted CEQA review prior to establishing procedures governing Area IV demolition or permitting the

demolition and disposal? And are the standards for acceptable radioactive contamination in the Area IV structures being demolished and their resultant debris improper underground regulations? None of these questions are answered by Boeing's declaration of independence from regulatory approval. The case remains justiciable and the Motion should be denied.

FACTUAL BACKGROUND

For decades, the SSFL was used by the Department of Energy (DOE) for the development, fabrication and disassembly of nuclear reactors and reactor fuel, during which time "disasters and foolishness," including fires, spills and a partial nuclear meltdown, created a "terrible environmental mess." (*Boeing Co. v. Movassaghi* (9th Cir. 2014) 768 F.3d 832, 835; Petitioners' Statement of Undisputed Material Facts (PUMF) 1, 3) The Environmental Protection Agency (EPA) has found elevated levels of dangerous radionuclides in Area IV of SSFL, where work involving nuclear materials took place, including cesium-137, strontium-90, and plutonium-239. (PUMF 5; see also PUMF 4.) Half a million people now live within 10 miles of the site. (*Boeing v. Movassaghi*, 768 F.3d at p. 834.)

The remediation of the SSFL site is undertaken pursuant to two separate, legally-binding orders, the 2010 Administrative Order on Consent (AOC) and the 2007 Consent Order (Consent Order), both of which specifically state that DTSC will perform an environmental review under CEQA of the remedial work to be performed at the site.

Administrative Order on Consent. DTSC entered the AOC with DOE to compel the cleanup to "background levels" of Area IV "soils," defined as "saturated and unsaturated soil, sediment, and weathered bedrock, debris, *structures*, and other anthropogenic materials." (PUMF 32, 35, 36 (emphasis added).) The AOC specifically requires DTSC to prepare an analysis under CEQA, including "identification and quantification of environmental impacts that are anticipated to occur as a result of implementing the activities specified in [the AOC]." (PUMF 39.) Thus, the AOC requires DTSC to prepare a CEQA analysis of the Area IV cleanup, including its structures and their demolition.

The AOC is "binding upon DOE, and agents, employees, contractors, consultants, successors, and assignees." (PUMF 34.) Boeing is a clean-up contractor to DOE at SSFL.

(PUMF 6; *Boeing Co.*, *supra*, 768 F.3d at p. 836 ["To clean up the radioactive contamination, DOE hired Boeing."].)[1] The AOC applies to Area IV, including chemical and radioactive contamination.[2] Because the AOC specifically defines "soil" to include structures, all Area IV demolition activities are subject to the AOC. The AOC further specifies that "soils contaminated with radioactive contaminants above local background" shall be disposed at "licensed low-level radioactive waste (LLRW) disposal site." (PUMF 38.) While the AOC does not compel Boeing to demolish its privately-owned buildings, it mandates the eventual demolition of Boeing's buildings as part of the remediation project encompassed by the AOC. The AOC obligates DOE to eventually remove *all* buildings – it does not exempt Boeing's buildings. (See PUMF 40.) Because the AOC broadly defines "soil" to include "structures," and imposes a goal of cleanup to background levels, all structures are treated the same, regardless of ownership status.

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[1] Boeing notes in its Motion for Summary Judgment that this Court relied in part upon "SB 990," a 2007 state statute that set specific remediation standards for the SSFL site and consolidated oversight of the remedial efforts with DTSC. As Boeing noted, a District Court had ruled that SB 990 was preempted. Petitioners have never relied upon SB 990 for the proposition that DTSC is required to review the Area IV demolition activity under CEQA. The Ninth Circuit's opinion affirming the District Court ruling, which came out after Boeing filed its Motion, confirms that the agreements established in the AOC remain valid regardless of the court's ruling on SB 990: "The 2010 Administrative Orders on Consent from the California Department of Toxic Substances Control that DOE and NASA agreed to do not affect the analysis of SB 990. Both Orders set a radioactive cleanup standard for the soil in certain areas of Santa Susana. They do not set cleanup standards for bedrock or groundwater, and SB 990 does." (*Boeing v. Movassaghi*, 768 F.3d at p. 843.) As this statement makes clear, because the federal government *agreed* to the standards and procedures in the AOC, the intergovernmental immunity issues that lead the Ninth Circuit to invalidate SB 990 are not implicated. As the federal government asserted in the SB 990 litigation, the AOC remains valid regardless of the ruling on SB 990. (PUMF 41)

[2] Boeing has contended that nearly *all* radioactive contamination at Area IV is attributable to DOE work at the site, and that any private contamination cannot be segregated. (PUMF 42.) Whatever the source of the contamination is, Boeing loses either way. If it is true that, as Boeing asserted in the SB 990 litigation, that the contamination is all DOE's, the contaminants on the Area IV structures are subject to the AOC. If the contamination is Boeing's, it is private radiation, subject to regulation by DPH pursuant to the federal delegation of authority to regulate radiation as an Agreement State. (See Health & Saf. Code, § 115235.) As both DPH and DTSC are Respondents, this Court need not determine on summary judgment which is the case.

Consent Order. In 2007, pursuant to its authority under Health and Safety Code section 25187, DTSC entered a Consent Order with Boeing setting forth the manner in which Boeing and DTSC would conduct remediation activities throughout the SSFL site. (PUMF 21-22.) The 2007 Consent Order requires the preparation of Corrective Measure Studies to address contamination in soil and groundwater throughout the SSFL site. (PUMF 25-26.) Among the constituents of concern identified in that Order are radioactive wastes, and the Order requires sampling for radioactivity as well as chemical contamination. (PUMF 31.) The Consent Order, like the AOC, requires DTSC to comply with CEQA in connection with the site's remediation. (PUMF 29)

Both the 2007 Consent Order and the AOC remain in effect and govern DTSC's oversight of Boeing's demolition activities in Area IV. Both make clear that DTSC will prepare a CEQA analysis for the remediation of the SSFL site and that Respondent DTSC is the lead agency in that process. (PUMF 29, 39.) DTSC has publically stated that remedial activities at SSFL are "related" for CEQA purposes, and that its Programmatic EIR — currently being drafted — is intended to provide "full consideration of cumulative impacts" and permit consideration of "program-wide mitigation measures." (PUMF 13.)

Standard Operating Procedures. In 2008, DTSC required Boeing to establish procedures governing the evaluation of buildings at SSFL. (PUMF 48-50.) In 2009, DTSC became concerned about possible migration of radioactive contamination from Area IV and determined that additional oversight was needed prior to Boeing's demolition activity. (PUMF 57.) DTSC therefore "required" Boeing to prepare the Building Demolition SOP to ensure that DTSC receive advance notification as well as a certification that the structures involved had no radiological history. (PUMF 58-60, 62, 70.) DTSC's internal correspondence explained its intent for these non-Area IV structures where chemical contamination was expected to be the primary issue, "to assure there is a review process to identify — before demolition — that materials or media that have been impacted by chemical releases in areas proposed for building demolition are properly managed and disposed, and removal does not by-pass DTSC's approval obligation,

CEQA assessment and notification to the community." (PUMF 61.)[3]

In response to DTSC's requirements, Boeing submitted an initial draft of the Building Demolition SOP in late 2009. (PUMF 63.) DTSC required Boeing to significantly revise the document to include additional radiological screening, stating that "[t]he SOP *must* include notification of DTSC if radiological screening detects any results above accepted background conditions. . . . Demolition activities should immediately cease in these areas, and resumption *shall only occur with DTSC concurrence*." (PUMF 64-65 (emphasis added).) DTSC stated that it would "approve" the SOP, and did so after seeking public comment and informing the public that the SOP was not applicable to activities in Area IV. (PUMF 66, 69.)[4]

In 2012, when Boeing proposed to begin pre-demolition work in Area IV, DTSC required Boeing to revise the Building Demolition SOP to address the nonradiological structures, and required even more amendments imposing numerous new requirements in 2013 before Boeing could demolish the radiological structures. (PUMF 73-74, 77, 80-81, 85-90, 92.) These amendments include many provisions designed to mitigate the potential environmental effects of demolition activities in Area IV radiologic structures. (PUMF 94-97, 101-103.) Unlike the original SOP, neither amendment was subjected to public notice or comment. (PUMF 15, 72.)[5]

Radioactive Materials License. DPH is the state agency that issues and terminates

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[3] This is not the only occasion in which DTSC employees raised the concern that demolition activity at SSFL might require review under CEQA, or its federal analogue, NEPA. (See, e.g., PUMF 147-148.)

[4] Boeing strenuously objected to what it termed "unnecessary public review," contending that it would "effectively kill the demolition program" and threatening the state employees that "several people will likely lose their jobs as a result of this decision." (PUMF 71.)

[5] DTSC has provided Petitioners with few internal communications surrounding the 2013 SOP Amendments for radiological structures, as compared with prior amendments. DTSC has claimed the attorney-client privilege, the deliberative process privilege, and an exception for draft documents to withhold documents, and has refused to provide a privilege log that would permit Petitioners to determine whether documents that are being withheld concern the 2013 SOP Amendments that are central to this litigation. (Palmer Decl., Exhs. 8, 15-17.) At this point, Petitioners intend to pursue this issue in litigation. (Palmer Decl. ¶ 35.) Petitioners' present inability to present evidence on this aspect of their case due to the gap in the evidentiary record is on its own a reason to deny summary judgment. (Code Civ. Proc., § 437c, subd. (h).)

licenses for the use and possession of radioactive materials. (PUMF 112-115, see also Health & Saf. Code, § 115235 [delegating authority for regulation of specified nuclear materials to State of California pursuant to agreement between state and federal government].). SSFL is under an active license issued by DPH's Radiologic Health Branch. (PUMF 20; see also PUMF 16-17.) As part of the site's license, DPH has adopted a "site-wide release" standard, based upon the potential radiation dose to the public from the site after it is released from the license. (PUMF 18.) This release standard remains a part of the site license, thus continuing DPH's jurisdiction over the site until Boeing satisfies the standard, establishing conclusively that DPH maintains jurisdiction over SSFL. DPH has also adopted as part of the site license provisions governing the disposal of debris from demolished structures. (PUMF 150-153.)

The Instant Litigation. This case arose from Petitioners' concerns that Respondents were permitting Boeing to demolish the radiological structures in Area IV without first completing review under CEQA. (See PUMF 14.) In September 2013, Petitioners sought a preliminary injunction to stop Respondents' approvals and reliance upon the procedures established without CEQA compliance. This Court preliminarily determined that Petitioners were likely to prevail on their claims that DTSC had failed to comply with CEQA, both when approving the demolition activity and when approving the procedures it required Boeing to follow in conducting the demolitions. (See Palmer Decl., Exh. 88 (Dec. 11, 2013, Statement of Decision (Stmt. Decn))[6].)

On March 20, 2014, Boeing notified DTSC that, pursuant to the litigating position the agency took in opposition to Petitioners' Motion for Preliminary Injunction, it would no longer seek DTSC's "approval" for future demolitions in Area IV, and that it withdrew the "notifications" that it had previously sent to DTSC regarding planned demolitions in Area IV. Boeing did not state that it no longer intended to demolish Area IV structures, and stated that it would follow the procedures imposed by DTSC in the SOP governing all future Area IV demolition. (PUMF 43-46.) DTSC never publicly responded to Boeing's letter. (PUMF 47.)

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[6] All future references to the December 11, 2013, Statement of Decision are to Exhibit 88 of the Palmer Declaration.

Boeing now contends that its own unilateral decision that it would no longer seek "approval" has either mooted Petitioners' litigation or made it unripe. Respondents, apparently eager to support Boeing's effort to dispose of this litigation, but reluctant to further damage their regulatory jurisdiction, remain essentially silent in the face of Boeing's request, merely telling the Court in identical filings that they have "no opposition" to the motion but offering no substantive support for Boeing's assertion that they now have no jurisdiction over the demolition activity or the disposal of the debris.

LEGAL STANDARD FOR SUMMARY JUDGMENT

Summary judgment may not be granted unless the moving party demonstrates that there are no issues of material fact outstanding and the party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) The facts, and all inferences drawn from those facts, must be construed in the manner most favorable to the party opposing summary judgment. (*Ibid.*, see also *Hayward Area Planning Assn, Inc. v. Alameda County Transp. Authority* (1999) 72 Cal.App.4th 95, 103.) Boeing does not satisfy this standard by claiming that it has unilaterally rendered Petitioners' case moot or unripe.

ARGUMENT

I. Legal Doctrines of Ripeness and Mootness

The immediacy of the potential Area IV demolitions and the extensive factual record in this case establish that this controversy is neither moot nor unripe. "[T]he ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy." (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.) The requirement that the courts adjudicate an "actual controversy" is satisfied if a judgment will "decree, not suggest, what the parties may or may not do." (*Id.* at p. 171, quoting *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 117.) A case in which the parties "dispute whether a public entity has engaged in conduct or established policies in violation of applicable law" is ripe for review. (*Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716,

1723.) Judicial resolution of an allegedly unlawful agency policy is particularly appropriate as an alternative to "piecemeal review of similar issues" in challenging agency actions implementing that policy. (*Californians for Native Salmon etc. Assn. v. Department of Forestry* (1990) 221 Cal.App.3d 1419, 1430 ("*Californians for Native Salmon*").)

Like the ripeness doctrine, a court's authority to dismiss a case on mootness grounds protects it from "declar[ing] principles or rules of law which cannot affect the matter in issue in the case before it." (*National Assoc. of Wine Bottlers v. Paul* (1969) 268 Cal.App.2d 741, 746.) Courts may "resolve controversies that are technically moot if the issues are of substantial and continuing public interest." (*DeRonde v. Regents of University of California* (1981) 28 Cal.3d 875, 880.) Courts also generally refuse to "consider a case moot where a party voluntarily ceases an allegedly illegal practice but is free to resume it at any time." (*In re J.G.* (2008) 159 Cal.App.4th 1056, 1063.)

II. Boeing's March 20 Letter Cannot and Does Not Moot Petitioners' Claims Regarding CEQA Review

A. The March 20 Letter Has No Effect on DTSC's Pending EIR for the Remediation of SSFL

Even if Boeing were never to seek, and neither DTSC nor DPH were to provide, approvals for the demolition and disposal of the remaining Area IV buildings, this case would still present a live controversy precluding summary judgment. DTSC is currently preparing an EIR for the remediation of the SSFL site, a fact unaltered by Boeing's March 20 letter. Boeing's professed intention to demolish the Area IV structures before DTSC's EIR is certified means that the question whether demolition must be analyzed in the EIR is ripe for review — without such review now, the question will become a nullity.

Both the Consent Order and the AOC *commit* DTSC to conducting an environmental review regarding the cleanup of the SSFL site, and DTSC is currently preparing an EIR on the project. (PUMF 9-13, 29, 39.) The demolition and disposal of the Area IV debris are part of the larger project under CEQA and thus cannot be omitted from the EIR already underway without improperly segmenting the project. (See *Association for a Cleaner Environment v. Yosemite Community College District* (2004) 116 Cal.App.4th 629, 638; *Burbank–Glendale–Pasadena*

Airport Authority v. Hensler (1991) 233 Cal.App.3d 577, 592.) Indeed, one of the federal agencies responsible for cleanup of a different area of SSFL prepared such a document under NEPA, analyzing in an EIS the impacts of demolition of its SSFL facilities as well as the impacts of proposed cleanup of its portions of the facility. (PUMF 30.)

Boeing's March 20 letter simply has no bearing on the fact that the remediation of the SSFL site, particularly as described in the AOC, is the subject of environmental review by DTSC. It may be that *Boeing* did not sign the AOC, but *Boeing* does not have to comply with CEQA: DTSC does, and it is DTSC who established the scope of the project in the AOC by requiring the removal of all Area IV structures, and the cleanup of soil, including structures and debris, to "background" levels. The demolition activity is by definition a part of the project under review. (See *Lincoln Place Tenants Assoc. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1508 [demolition of structures at project site is part of larger project]; *Orinda Assoc. v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, 1172 [same].) If Boeing is permitted to proceed with the Area IV demolition projects, which it has stated it will do if summary judgment is granted, any subsequent CEQA analysis of the demolition will take place post hoc, when the opportunity to effectively mitigate any environmental impact is past. It is therefore imperative to resolve the CEQA issues now. (See *Farm Sanctuary, Inc. v. Department of Food & Agriculture* (1998) 63 Cal.App.4th 495, 503 [rejecting ripeness challenge when dismissal would effectively make the agency action "immune from judicial review"].) Petitioners' claim is ripe for review, prior to the demolition taking place.

And while DTSC may currently play a dominant role as a Lead Agency under CEQA, DPH is at the very least functioning as a Responsible Agency under CEQA. The CEQA Guidelines define a "Responsible Agency" as "all public agencies other than the Lead Agency which have discretionary approval power over the project." (See, e.g., *Riverwatch v. Olivenhain Mun. Water Dist.* (2009) 170 Cal.App.4th 1186, 1201.) While the overall cleanup of the SSFL appears to be proceeding under the lead of DTSC, DPH retains significant authority to issue discretionary approvals concerning both the specific demolition activities in Area IV radiologic structures and the overall release of the site from the existing radioactive materials license. (See,

e.g., 17 Cal.Code Reg. 30256(k); PUMF 112-119.) DPH has not released the site from its license and still has the regulatory obligation to ensure proper disposal, decontamination, and appropriate radiation levels for all remaining components on the SSFL site. DPH is therefore at least a Responsible Agency under CEQA and remains so, in spite of Boeing's statements in the March 20 letter.

B. Boeing Says It Will Continue to Rely on the Standard Operating Procedures, Which Itself Constituted an Approval Under CEQA

As the Court recognized in ruling on the preliminary injunction, DTSC's conduct "approving" Boeing's demolition and disposal "is the type of activity for which CEQA requires environmental review." (Stmt. Decn. p. 8:18-19.) Moreover, the Court found that DTSC "has undertaken a regulatory program designed to protect the environment from contamination by radioactive materials resulting from Boeing's activities." (*Id.*, p. 10:27-28.) Boeing avers that when it recommences its Area IV demolition projects it will "conduct its demolitions in a manner consistent with the Building Demolition SOP." (PUMF 46.) This document, which was drafted and repeatedly amended to meet the agencies' requirements (PUMF 58-65, 79-92), constitutes an *ongoing exercise* of regulatory authority that is ripe for judicial resolution.

The evidence demonstrates that Respondent DTSC unequivocally exercised regulatory authority in preparation of the SOP. As described above, DTSC instructed Boeing to draft the SOP and required inclusion of specific provisions, including a pre-demolition notification requirement, in order to ensure that DTSC would "be advised of any potential demolition activities that may require DTSC oversight and/or approval." (PUMF 59.) Both DTSC and Boeing recognized that the SOP must meet DTSC's approval before taking effect. (PUMF 66, 68.) Indeed, the SOP itself states that it "was approved by the Department of Toxic Substances Control (DTSC)." (PUMF 82, 93.) The SOP also enumerates circumstances under which demolition must halt until DTSC is consulted and grants permission to proceed, and imposes requirements designed to mitigate the environmental impacts of demolition, and to protect the public and the environment from exposure to contaminated materials. (PUMF 95-103, 111.) The adequacy of these measures to limit the environmental impact of Boeing's activities is precisely the question that CEQA requires Respondents to publicly address. Thus, even if Boeing had

proven that DTSC will never issue additional "approvals" for future demolition activities in Area IV, it would not vitiate the *separate* regulatory approval of the procedures for conducting those activities. (See *Californians for Native Salmon*, *supra*, 221 Cal.App.3d 1419 [trial court erred in holding that a logging company's withdrawal of a plan approved by the California Department of Forestry mooted environmental groups' challenge, because the agency's broader practice of failing to timely respond to public comments and to assess the cumulative impact of logging activities remained justiciable]; *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 928-29 [real estate board's deletion of a challenged bylaw requiring members to be "primarily engaged in the real estate business" did not moot the case, because the suit also alleged that rules limiting access to board listings to members were illegal].)

An EIR is the instrument by which the agency discharges its duty "to mitigate or avoid the significant effects on the environment" (Pub. Resources Code, § 21002.1, subd. (b)), and in this case the SOP is the instrument for that avoidance and mitigation. Just as an EIR on a proposed shopping mall will result in conditions limiting traffic impacts, and the EIR on a proposed factory will result in conditions limiting discharges to the air, the EIR on the SSFL cleanup project will result in conditions avoiding or mitigating radiological contamination. The SOP contains what purports to be such conditions with respect to demolition and disposal of the debris, but they have not yet been subjected to the CEQA process.

Because Respondents have already purported to approve the SOPs, it is ripe for review, and Boeing's plan to comply with the SOP means that the regulatory conduct underlying Petitioners' CEQA and APA claims is not moot. Dismissing the case as moot would require Petitioners to file a new lawsuit for each demolition notification to litigate the single underlying issue of whether preparation of the SOP was itself complied with CEQA. Such "piecemeal litigation of the issues in scores of individual proceedings would be an immense waste of time and resources." (*Californians for Native Salmon*, *supra*, 221 Cal.App.3d at p. 1430.)

III. Boeing Cannot Negate the State's Jurisdiction

We trust it is clear that the legal authority of DTSC and DPH to approve or disapprove demolition of radioactive buildings in Area IV cannot be made to disappear by the simple artifice

of a Boeing letter announcing that it chooses no longer to be bound by that jurisdiction. The administrative consent orders governing the remediation of the site, the history of strict regulatory oversight over Boeing's cleanup activities, and the statutes undergirding those actions all confirm that Boeing's letter is nothing less than defiance of the law, scarcely grounds for granting it summary judgment. Indeed, the extensive involvement of DTSC and DPH in the demolition and disposal process at this site was not ultra vires meddling, it was these agencies' necessary and purposeful exercise of their jurisdiction and authority over the demolition and disposal of Area IV radiologic structures — jurisdiction they are suddenly reluctant to exercise or even acknowledge.

A. DTSC's Has and Exercises Authority over SSFL Remedial Activities

DTSC concedes in its Answer to the Verified Petition that "***it oversees the demolition and disposal of some but not all of the buildings at the SSFL site.***" (PUMF 8 (emphasis added).) DTSC also admits that it "has authority to set cleanup goals for radioactive materials" at SSFL. (PUMF 104.) At the hearing on the preliminary injunction, DTSC's counsel acknowledged that DTSC has jurisdiction over and is "overseeing" Boeing's demolition of Area IV structures, and has the authority to prohibit Boeing from engaging in demolition activity in Area IV. (PUMF 105-106.) The evidentiary record supports all of these statements and demonstrates clearly that Boeing cannot moot the case by unilateral pronouncement.

As set forth above, DTSC oversees the remediation of the SSFL site pursuant to the Consent Order and the AOC. These two remedial orders are solidly grounded in DTSC's statutory authority. DTSC has, as cited in this Court's ruling on preliminary injunction, broad statutory authority under the Hazardous Substance Account Act (HSAA) to "provide for response authority for releases of hazardous substances . . . that pose a threat to public welfare or the environment." (Stmt. Decn., p. 10, quoting Health & Saf. Code, § 25301.) As the Court noted, hazardous substances under the HSAA include any substance designated as hazardous under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which include some radionuclides. (Stmt. Decn., p. 10, quoting Health & Saf. Code §§ 25315, 25316; 40 CFR § 302.4.) DTSC entered the AOC under its HSAA authority (PUMF

33), as well as federal law authorizing federal facilities such as SSFL to be remediated under state authority (see 42 U.S.C. §§ 6961, 9620). DTSC also has authority to address releases of "hazardous wastes" under the Hazardous Waste Cleanup Law (HWCL). Health and Safety Code section 25187 gives DTSC the authority to issue an order for corrective action for releases of hazardous waste or constituents. (*Id.*, at subd. (b).) Such an order must require corrective action pertaining to the release of hazardous substances, and "any other necessary action." (*Id.*, subd. (b)(2).) A "hazardous waste facility" is defined as "the entire site that is under the control of an owner or operator engaged in the management of hazardous waste." (*Id.* at § 25187, subd. (b)(6).) Boeing and DTSC acknowledge that certain facilities at the SSFL site were hazardous waste facilities. (PUMF 2.) In accordance with DTSC's broad authority to order corrective action over the entire site under the control or ownership of an operator, DTSC in fact compelled Boeing to include Area IV *buildings* in the scope of remediation activities pursuant to a RCRA Facilities Investigation undertaken in connection with the 2007 Consent Order — which order also states that DTSC will prepare an EIR in connection with the remediation. (PUMF 23, 53)

In addition to the clear statutory authority under HSAA and HWCL to compel a party to remediate hazardous wastes and substances, the AOC and CO are solidly grounded in DTSC's broad powers "related to matters within its jurisdiction," including addressing nuisances that are dangerous to health, "to compel the performance of any act specifically enjoined upon any person . . . by any law of this state," and generally, "to protect and preserve the public health." (Health & Saf. Code, § 58009 & 58010.) DTSC relied upon both of these provisions as a basis for its authority to enter the 2010 AOC, thereby acknowledging that remediation of the soils (including, by AOC definition, structures and debris) in SSFL Area IV is within its jurisdiction and intended to abate a nuisance and protect and preserve public health.

Pursuant to DTSC's jurisdiction over releases of hazardous wastes, DTSC began in 2008 to exercise its jurisdiction over Boeing's proposed demolition activities of its structures on the SSFL site outside of Area IV, requiring Boeing to adhere to increasingly stringent protocols and procedures in connection with its demolition activities at SSFL. (PUMF 48-56.) As DTSC's awareness of the nature of the contamination both in and around the structures increased, DTSC

imposed additional requirements and layers of oversight on Boeing. (PUMF 57-92.) In March 2009, on the basis of samples drawn adjacent to structures in Area IV, "as well as concerns regarding the decisions made for determining if sampling was warranted, DTSC *requires* that the existing buildings *in Area IV* be addressed under the RFI [RCRA Facilities Investigation], rather than wait until after the demolition." (PUMF 53 (emphasis added).) The RFI, like the 2007 Consent Order, is undertaken pursuant to the agency's authority under the HWCL. This order *explicitly* establishes that DTSC's authority under the HWCL extends to Boeing-owned Area IV structures and that DTSC exercised that authority to require Boeing to investigate hazardous contamination in Area IV structures *prior* to demolition. (PUMF 54.)

As set forth in the Statement of Facts, in 2009, DTSC "required" Boeing to prepare the SOPs that governed demolition in all areas of the site outside of Area IV. DTSC required revisions to the SOP and "approved" the document. DTSC required Boeing to amend the SOPs to address the demolition of the facilities in Area IV, again exercising its jurisdiction over this activity as a component of the site remediation it was overseeing.

DTSC's authority to compel Boeing to seek its approval originates not only from its HWCL authority, but also from the AOC. In March 2013, DTSC sent a letter to Boeing regarding extensive soil disturbance that agency personnel observed during demolition activity. (PUMF 88.) The letter directly connected Boeing's demolitions in Area IV to the AOC, stating that the AOC mandated the cleanup of soil "to a stringent background level," and demanded that Boeing include in the revisions to its SOP procedures to minimize soil disturbance and notify DTSC of any unanticipated excavations. (PUMF 89-90.) Consistent with its authority under the HWCL and HSSA, and with its decision to exercise that authority pursuant to the Consent Order and the AOC, DTSC repeatedly referred to Boeing's responses to its regulatory directives as "required" and to DTSC's own actions with respect to Boeing's demolition and disposal activities as "approvals." (See, e.g., PUMF 48-49, 51, 53-54, 59, 61-62, 66, 70, 82, 90, 93, 107-110, 125-126, 138.)

As the evidence makes patently clear, since entering the 2007 Consent Order, Boeing cannot demolish structures in Area IV without DTSC's explicit approval. As Boeing's

demolition activity progressed at the SSFL site from structures outside Area IV to the non-radiological structures at Area IV to the radiological structures at issue in this case, DTSC required even more information and analysis from Boeing prior to authorizing demolition and disposal. In the face of a legal challenge to its failure to conduct a CEQA review of these activities, DTSC reversed course and argued in its Opposition to the Preliminary Injunction that the demolition activity is (a) not related to the cleanup project and (b) not subject to DTSC's oversight and approval. This time, DTSC is unwilling to commit to writing *any* argument or submit any evidence in support of Boeing's interpretation. The agency's newly-minted litigating position cannot shield Boeing from DTSC's years confirming its statutory authority.

B. DPH Has Likewise Exercised Continuing Authority and Oversight

In addition to its licensing authority, DPH has both statutory and regulatory authority over management of radiation that has entered the environment as well as the disposal of radioactive materials. (See Health & Saf. Code, §§ 114705, 114715, 114755, 115261.) Demolition and removal of individual structures does not terminate DPH's jurisdiction over the SSFL site. DPH's licensing regulations set forth specific obligations of the agency when determining whether to terminate a license, which include determining that all material has been properly disposed and reasonable effort made to eliminate residual contamination. (17 Cal. Code Regs., § 30256 (k).)

Respondent DPH has confirmed that its Radiologic Health Branch (RHB) exercises jurisdiction over the radioactive materials in Area IV. (PUMF 114.) This jurisdiction extends to materials that may pose a threat to public health due to radioactive contamination, regardless of whether those materials are associated with a structure licensed by DPH. Indeed, DPH staff acknowledged that it has an oversight role in "decommissioning" of facilities, including demolition and disposal, even after the facilities have been released from a license; likewise, even after a license has been released DPH "regulates" the remaining materials to ensure compliance with Governor Davis' executive order "concerning decommissioned waste." (PUMF 117, 131-132.)

For years, DPH has played a critical role in Boeing's efforts to demolish the former

radiologic structures at SSFL, including oversight of both demolition and disposal activities, even for facilities that were never subject to a DPH license. For instance, in 2004 and 2005 Boeing demanded that DPH approve its plans to dispose of materials generated at SSFL in hazardous waste facilities. (PUMF 119, 154-157.) DPH responded by issuing a written approval, noting that the material was at "background levels," and thus suitable for disposal. (PUMF 119.)

DTSC, for its part, insisted that DPH review and "approve" protocols related to radiation screening and disposal of excavated materials for remediation activities overseen by DTSC. (See PUMF 123.) In 2006, DTSC requested that DPH approve a screening protocol that utilized the license's "site-wide release criteria" of 15 millirem per year dose to determine whether material could be disposed at a hazardous waste facility rather than a facility licensed to receive low-level radioactive waste. Internally, DPH managers—including DPH's declarant opposing the preliminary injunction, Robert Greger—expressed significant concerns about the proposed criteria, objecting that the release criteria are for "releasing the facility for unrestricted use" with the "contaminants above background [to] remain onsite, not for disposal at an offsite RCRA Class I disposal site." (PUMF 124-125.) DPH management similarly expressed reservations about using Nuclear Regulatory Commission Regulatory Guide 1.86 as a standard to permit the disposal of structures previously released for unrestricted use, noting that it was "based on typical portable instrument detection limits in 1974" and "not dose based." (PUMF 140.) These internal emails directly contradict DPH's litigating position here that once a structure has been "released for unrestricted use" the owner is free to do what it likes with the structure, including disposal of materials with residual radioactivity and without further consideration of volumetric contamination within the structural materials. (See, e.g., PUMF 127.)

In 2012, DPH noted its past practice of issuing "letters approving facilities to dispose of decommissioned materials in facilities other than low level radioactive waste sites" and lamented that it "has been a major political issue for CDPH in the past." (PUMF 120.) Attentive to its "political" problem, when asked to advise DTSC on the appropriateness of Boeing's disposal plans for the radiological structures in Area IV, DPH carefully excised from the interagency contract language that referred to DPH approving disposal of materials in Class I hazardous

waste facilities. (PUMF 121-122.)

In spite of DPH's stated reluctance to take a position on "disposal," the agency reviewed and commented upon Boeing's and DTSC's plans for disposal of demolished facilities, including facilities previously released for unrestricted use. (See PUMF 128.) During the recent work on the radiological structures in Area IV that is the subject of this litigation, DPH and DTSC worked in tandem in issuing reviews and approvals of Boeing's Area IV structures, with DTSC conditioning its approval on DPH's concurrence. (PUMF 129-131, 133-144.) DTSC stated, for example, that additional surveys were "conducted at the request of DTSC and CDPH as a *condition of approval* for the demolition of the remnant features at the L-85 site and Class I Hazard Waste Landfill disposal of the resulting debris." (PUMF 145 (emphasis added).)

Plainly DPH's jurisdiction over the release of the SSFL site generally and the disposal of materials from decommissioned sites requires its continued oversight of Boeing's activity at SSFL. Boeing's unilateral statement that it would no longer "request" any "approval" from DPH, to which DPH is unable to even formulate a substantive response in support, is no match for the long history of DPH recognizing its authority to extend to decommissioning activities and proposed disposal of debris from decommissioned facilities. Boeing's future requests to demolish Area IV radiological structures remain subject to the same review and approval by DPH regardless of Boeing's unilateral statements in the March 20 letter.

C. There Is No Competent Evidence that Respondents Do Not and Will Not Require Boeing to Submit Its Demolition Plans for Approval

Boeing's March 20 letter and its Motion rely entirely on the litigating positions of the agency Respondents, without any further evidentiary support from those agencies themselves. It is black letter law that an interpretation set forth for the first time in an agency's legal brief in a matter is entitled to *no* deference in that case. (*Culligan Water Conditioning of Bellflower, Inc. v. State Bd. of Equalization* (1976) 17 Cal.3d 86, 92-93 [no deference to agency interpretation of its law that was "merely its litigating position in this particular matter"].) Yet Boeing relies *entirely* upon DTSC's legal statements *in this case* to conclude that DTSC will not engage in a CEQA project in the future when it reviews Boeing's demolition requests pursuant to the SOP. There could be no more stark example of a mere litigating position entitled to no deference, particularly

when it is at odds with its longstanding construction of the law.

DTSC's and DPH's statements *prior to* the filing of this case affirm both agencies' long-held position that each has jurisdiction over aspects of Boeing's demolition and disposal requests. Such statements, reflecting long-standing positions maintained by the agencies' management, are entitled to deference. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12-13 [factors requiring deference include indications of careful consideration by senior agency officials, evidence that the agency has consistently maintained the interpretation in question, especially if it is long-standing].) When an agency interpretation contradicts its earlier interpretation, as DTSC's and DPH's litigating positions do, it is entitled to no deference. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1106, fn. 7.)

Boeing contends that the CEQA cause of action is simultaneously moot and not ripe for judicial review because Boeing has, for the time being, withdrawn its pending demolition proposals. Yet Boeing's carefully worded March 20 letter in no way nullifies Respondents' continued exercise of regulatory authority over Boeing's activities in Area IV. Boeing's letter, and Respondents' silence in the face of Boeing's motion, hardly establish as a matter of *undisputed fact* that Boeing can or will proceed with demolition absent any regulatory oversight. Boeing has long behaved as though Respondents' approval or concurrence of its demolition-related activities was necessary. (PUMF 158-163.) Indeed, Boeing's intent to resume demolition after its motion is granted, and to do so in accordance with the Building Demolition SOP approved by Respondents—namely the conditions on demolition that satisfied Respondents without benefit of the EIR they are now producing—confirms that the issues before this Court remain justiciable.

Boeing's ripeness and mootness arguments rely on the unspoken premise that but for the company's requests for approval, neither DTSC nor DPH has any authority to approve or disapprove demolition and disposal. As explained, that is a premise that fails in the face of the AOC, the Consent Order, and the laws underlying them. Boeing has been seeking past approvals not by generous acquiescence but by obedience to legal processes it now flouts.

It is well established that voluntary, revocable discontinuance of a challenged practice

"does not remove the pending charges of illegality from the sphere of judicial power or relieve the court of the duty of determining the validity of such charges." (*United Farm Workers of America, AFL-CIO v. Dutra Farms* (2000) 83 Cal.App.4th 1146, 1164 [citations omitted]; *accord Marin County Bd. of Realtors*, *supra*, 16 Cal.3d at p. 929 ["Although the [challenged] rule has been discontinued, there is no assurance that the board will not reenact it in the future"]; *Kidd v. State* (1998) 62 Cal.App. 4th 386, 398 ["Given the Board's express reservation of the option to reinstitute [the challenged policy], plaintiffs' challenge to that policy is not moot"]; *In re J.G.*, *supra*, 159 Cal.App.4th at p. 1063 [declining to accept "carefully worded assurances" that Respondent would provide the relief sought].) Boeing's "unilateral decision . . . is also unilaterally rescindable." (*Cook v. Craig* (1976) 55 Cal.App.3d 773, 780.) The same is true of DTSC's sudden disclaimer of its authority to require Boeing to submit its demolition plans for advance approval. "In such circumstances, especially where, as here, the issue is one affecting the public generally, the courts need not accept mootness." (*Ibid.*)

IV. The Agencies Rely on Underground Regulations

Boeing's Motion rises and falls upon its insistence that DTSC has not and will not "approve" its demolition activities at the remaining Area IV radiologic structures. DTSC and DPH have relied upon the federal "release standards," not promulgated through notice and comment rulemaking, to determine that the debris from Boeing's demolition may be disposed at facilities that are not licensed to handle radioactive materials. Absent analysis of the use of these standards in an EIR or their adoption as duly promulgated regulations, Petitioners' objections remain valid and ripe for review.

V. Summary Judgment Cannot be Granted in this Writ Action Without a Certified Administrative Record

Respondents' pre-litigation construction of their authority to condition or withhold approval of Boeing's demolition plans is central to evaluating Boeing's claim of mootness, which in turn depends on construction of laws and orders that these respondents have construed over many years. Boeing's claims must be evaluated against the full administrative record of respondents' actions, precluding summary judgment. (See *Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1292.)

The administrative record remains incomplete because Respondents have not satisfied Petitioners' repeated Public Records Act requests for documents relevant to oversight of Boeing's demolition and disposal activities. (Palmer Decl., ¶ 3-35.) For example, Respondent DTSC has yet to explain why the "deliberative process" privilege permits them to withhold certain responsive documents. (*Id.*, ¶ 16-17; see *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 306-307 [party resisting disclosure of documents under deliberative process privilege must establish basis for claim of privilege; generalized statements are insufficient].) DPH has not yet provided documents relating to its use of unpromulgated release standards at other sites and has provided excessively redacted versions of the site's license. (Palmer Decl., 26-28, 32-33.)

The existence of these outstanding documents represents an independent ground to deny the Motion. When "facts essential to justify opposition may exist but cannot . . . be presented, the court shall deny the motion, or order a continuance" until the evidence is available. (Code Civ. Proc., § 437c, subd. (h); *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395 [denial or continuance mandatory when opposing party has made requisite showing].) The Declaration of Beverly Grossman Palmer satisfies section 437c by showing that the documents withheld by Respondents may contain additional evidence relevant to Respondents' construction of their regulatory power. (See *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 634 ["affiant is not required to show that essential evidence does exist, but only that it may exist."].) Section 437c, subdivision (h), therefore requires denial of Boeing's motion.

CONCLUSION

Boeing's Motion declares that it may demolish buildings containing radiological contamination before the requirements for decontamination of the site have been reviewed under CEQA. The very notion that such activity may be undertaken without environmental review is facially preposterous. It is also, as has been shown, contrary to the law and contrary to Respondents' orders and longstanding application of the law.

The Motion should be denied, and this case should be determined on the merits.

//

Date: November 7, 2014

Respectfully submitted,

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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 **November 7, 2014**, I served the foregoing document(s) described as **PETITIONERS' OPPOSITION TO THE BOEING COMPANY'S MOTION FOR SUMMARY JUDGMENT** on all appropriate parties in this action, by the method stated as listed on the attached Service List.

☒ 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.

☐ If U.S. Mail service is indicated, by placing this date for collection for mailing true copies in sealed envelopes, first-class postage prepaid, addressed to each person as indicated, pursuant to Code of Civil Procedure section 1013a(3). I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing contained in the affidavit.

☒ If overnight service is indicated, by placing this date for collection by sending true copies in sealed envelopes, addressed to each person as indicated, pursuant to Code of Civil Procedure, section 1013(d). I am readily familiar with this firm's practice of collecting and processing correspondence. Under that practice, it would be deposited with an overnight service in Los Angeles County on that same day with an active account number shown for payment, in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **November 7, 2014**, at Los Angeles, California.

LaKeitha Oliver

Service List

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

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