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August 5, 2013

Via Email, Facsimile Transmission, and Overnight Mail
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Re: Demolition and Disposal of Radioactive Structures from Santa Susana Field Laboratory and Illegal Shipments to Clean Harbors, and Other Non-licensed Facilities.

Dear Ms. Raphael and Dr. Chapman:

We write on behalf of the Consumer Watchdog, Center on Race, Poverty & the Environment, Physicians for Social Responsibility-Los Angeles, Committee to Bridge the Gap, and the Southern California Federation of Scientists to strongly object to the demolition and disposal of radioactive structures and components from Area IV of the Santa Susana Field Laboratory ("SSFL"), a former nuclear meltdown site located in the Simi Hills of Ventura County, about 30 miles from downtown Los Angeles, without required review of the environmental impacts of these

activities.[1] This letter requires your urgent, immediate attention, as your agencies' actions and approvals have created the risk of imminent public harm through the disposal of radiologically contaminated material at levels above background in sites that are not licensed to receive such materials, including municipal landfills and metals recycling facilities. As we explain herein, this conduct violates numerous laws, including the California Environmental Quality Act ("CEQA"), the Health and Safety Code provisions governing disposal of radioactive materials, and an Executive Order prohibiting the disposal of waste from decommissioned facilities in municipal landfills. Unless we receive, within 24 hours of receipt of this letter, a good faith agreement by both your Departments that you will immediately halt all approvals of demolition and the on-going disposal of radioactively contaminated waste pending further review, we will seek a judicial order staying all such activities.

The SSFL has a long history of poor operations and botched, illegally conducted remedial efforts. In 1959, this area was the site of a partial meltdown of a nuclear reactor in which a third of its fuel melted and radioactive material was released into the atmosphere for weeks. At least three other reactors also suffered accidents. None had containment structures. Site operations were also marked by unsafe practices such as open-air "burn pits" for radioactively contaminated material. The site's remediation has reflected a disregard for legal requirements and safe practices. During previous remedial efforts, Boeing disposed of soil and debris at inappropriate facilities, including some of the very same facilities receiving waste from the demolition today. History appears to be repeating itself at SSFL, but your agencies can end this tragic legacy now.

The demolition and disposal of the radioactive structures in Area IV without the required review under CEQA is a direct violation of the law by the very agencies that are supposed to protect the public health and environment from toxic harm. We call for an immediate halt to the shipments of radioactive demolition debris to disposal sites and metal, concrete, and asphalt recycling facilities that are not licensed to accept this material. We call on you to cease and desist in approving such illegal activity and to rescind all such prior approvals immediately. With this letter, we submit to you a report documenting this illegal disposal and illegal actions by your departments in approving them.[2] The findings in this report are drawn directly from documents submitted to your Departments and the approvals issued by you.

According to California and federal law, "low-level radioactive waste" (LLRW) can only be disposed of at specially designed and licensed LLRW facilities. The demolition and disposal activities in Area IV have a direct effect on the health of the communities surrounding the lab site, communities in the areas in which waste from the site is being disposed of, and consumers in

[1] Area IV, the section of SSFL concerned here, spans 290 of SSFL's 2,850 acres. According to the U.S. EPA, the site housed ten experimental nuclear reactors, a plutonium fuel fabrication facility, a "hot lab" for cutting apart irradiated nuclear fuel and manufacturing of radioactive sources, numerous other facilities for handling radioactive materials, and a burn pit in which radioactive wastes were burned in the open air. In 1996, Boeing bought Rocketdyne, which owned Area IV.
[2] Available at http://www.committeetobridgethegap.org/SSFLDemolitionAndDisposalStudy.pdf.

general, who may well come into direct contact with products made from recycled radioactive materials from the site, such as anything from steel girders to belt buckles and zippers.

According to a demolition table dated April 24, 2013, prepared by the Department of Toxic Substances Control ("DTSC"), and based on data provided by Boeing, as of this date, Boeing has already delivered some 4,888 tons of debris from the Area IV site to recycling facilities, municipal landfills, and hazardous waste facilities that are not licensed to receive low-level radioactive waste. Boeing's own measurements show that portions of this debris are radioactive. But the debris has been sent to facilities not licensed or designed to receive such radioactive material.

These shipments from Area IV include 493 tons of material to metal recycling facilities, 2,432 tons of debris to asphalt/concrete recyclers, 242 tons of material to Class III landfills, 568 tons of material to Class II landfills, and 1,153 tons of material to Class I landfills. Class III landfills are regular municipal garbage dumps. Class II landfills are designed for non-radioactive industrial waste. Class I landfills are for hazardous chemical waste that is not radioactive. None of these facilities are permitted under California law to accept radioactive materials with contamination above background, a position that Department of Public Health ("DPH") has confirmed on several occasions.

In a July 3, 2013 notification to the DTSC, Boeing announced its intention to demolish the plutonium fuel fabrication building commencing 30 days thereafter. Plutonium is one of the most dangerous substances on earth. The inhalation of a few millionths of an ounce of plutonium will cause cancer, with near 100% statistical certainty.

Authorization by DTSC and DPH of Boeing's demolition, disposal of, and recycling of materials from contaminated structures inside Area IV, without any environmental review, violates CEQA. It also violates a writ of mandate issued by the Sacramento Superior Court requiring that any standards for cleanup and release of radioactive contamination be adopted through rulemaking under the Administrative Procedure Act ("APA") and with an environmental impact report ("EIR") pursuant to CEQA. Instead of complying with this writ, DPH is utilizing decades-old standards not intended for use for demolition and disposal, and is doing so without having followed the public procedures for the adoption of an agency regulation – more blatantly illegal conduct.

In addition, these approvals violate the Governor's Executive Order D-62-02 that directed promulgation of regulations for disposal of radioactive waste from the decommissioning of nuclear facilities, and that required such promulgation be conducted in accordance with CEQA. The order further imposed a moratorium on disposal in municipal landfills of wastes from the decommissioning of nuclear sites ("Governor's Moratorium"). These approvals and the resultant disposal of waste at the Class I Buttonwillow facility also violate that facility's Conditional Use Permit, which *specifically* bars the landfill from receiving low-level radioactive waste.

We call on your Departments to rescind all approvals and issue no new approvals for dismantlement and disposal of any Boeing structures in Area IV. In particular, your Departments

should instantly halt disposal of the L-85 reactor facility debris into unlicensed facilities and immediately prevent the demolition and disposal of the plutonium fuel fabrication building. We call on your Departments to order Boeing to cease all demolition and disposal of all structures from Area IV of the Santa Susana Field Laboratory until an EIR is completed and all existing agreements, orders, laws, and restrictions are complied with.

I. DTSC's Authorization of the Demolition and Disposal of Area IV Structures Violates CEQA.

a. DTSC's authorization of Boeing's demolition of Area IV structures and disposal of radioactive waste is a "project" under CEQA, and must be conducted only after compliance with CEQA's substantive and procedural mandates.

Boeing's demolition of Area IV structures that Boeing's own data show to be radioactively contaminated is a "project" subject to environmental review under CEQA. Your Departments have been playing fast and loose with CEQA, proposing to prepare an EIR for full cleanup of the SSFL site, while ignoring the fact that DTSC continues to authorize Boeing to demolish and dispose of debris from the structures in Area IV before that EIR is done, and indeed without *any* environmental review, public notice, or public comment as required under CEQA. DTSC must cease issuing any further authorizations to Boeing or conducting any review of Boeing's demolition requests until such time as the project has been reviewed in its entirety consistent with CEQA.

The on-going demolition in Area IV is a "project" as that term is broadly defined in CEQA. A "project" under CEQA includes any activity which may cause either a direct physical change or a reasonably foreseeable indirect change in the environment, and which is either an activity directly undertaken by a public agency or involves the issuance of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies. (Pub. Resources Code, § 21065; 14 CCR § 15378.) CEQA applies to any actions by state agencies, including their actions in approving projects undertaken by corporations and approved by public agencies. (Pub. Resources Code, § 20180.) Once an agency decides to undertake a "project," meaning that the agency has committed itself to a definite course of action, CEQA review is triggered and such review must be completed before the agency may engage in that project or authorize a third party to undertake the activities. (Pub. Resources Code, § 20180, subd. (b); 14 CCR § 15352(a).)

Boeing and DTSC's conduct with respect to the demolition of radioactive structures in Area IV demonstrates conclusively that these are agency actions subject to CEQA review. DTSC commenced this project when, in April 2013, it approved Boeing's proposed standard operating procedures ("SOP") for the demolition and disposal of the radiological structures in Area IV. Until that time, the DTSC-approved procedures did not include provisions for the demolition of radiological structures in Area IV. Indeed, when the original SOP was issued for public comment in 2010, DTSC assured the public that demolition of structures in Area IV was not included and was not planned. The SOP was amended in April of this year, however, specifically for

radiological structures in Area IV, with no formal notice or opportunity for public comment and with no CEQA review. Pursuant to the newly amended SOP, DTSC and DPH have in recent days approved dismantlement and disposal of the first of these Area IV radiological facilities, with several more pending. DTSC, DPH, and Boeing intend to demolish and dispose of *all* of the contaminated structures in Area IV in the near future, without conducting review under CEQA.

Following these newly adopted procedures, DTSC and DPH have recently been approving proposals by Boeing to tear down and dispose of the debris from structures where the measurements submitted by the company show radioactive contamination exists. Boeing has sought approval by your Departments of its plans for each structure. The DTSC uses a 30-day period from the time of receipt of individual Boeing proposals to provide its comments and grant authorization for Boeing to begin its demolition work. The determinations by DTSC and DPH that a proposed demolition may proceed and the debris disposed of in other than a licensed LLRW site is a discretionary decision that triggers CEQA requirements. DTSC has already reviewed, commented on, and authorized the demolition of at least six structures in Area IV, denominated by Boeing as "non-radiological," and the disposal of their debris in unlicensed sites. There are at least five remaining structures in Area IV, all of which are, by Boeing's identification, "radiological" facilities.

Boeing continues to submit requests for approval of its demolition and disposal plans to DTSC, with the most recent being the request to demolish the "former Building 4055, the plutonium fuel fabrication building," a building impregnated with residual contamination. The activity is on-going and the violation of CEQA is continuous.

DTSC has never made any effort to comply with CEQA with respect to its review and approval of Boeing's demolition and disposal activities in Area IV. It has never conducted an Initial Study. It has never made a determination that somehow this project falls into a CEQA exemption – and indeed, no exemption could possibly apply to this risky handling and disposal of radioactive waste. Instead, DTSC has entirely ignored its obligations under CEQA regarding the demolition of structures in Area IV, thereby violating CEQA in numerous respects, preventing public comment on its activities that would otherwise be required by CEQA, and creating the risk of harm to the environment and to the health of the public by issuing approvals that permit radioactive waste to be disposed of in facilities not licensed to accept radioactive waste or to enter the consumer product stream via recycling. DTSC must immediately cease approving any further demolition or disposal by Boeing and order Boeing to stop all demolition and disposal of Area IV structures.

b. <u>EIR for site remediation must include an analysis of the demolition and disposal of onsite radioactive structures.</u>

To the extent that DTSC has begun to conduct environmental review for purposes of preparing an EIR for full SSFL site cleanup, it has illegally segmented the project and improperly defined the scope of the project to exclude the required demolition and disposal activities that it has already approved without an EIR under CEQA. In its recently issued request for qualifications for a consultant to prepare an EIR for the remediation of the full SSFL site, DTSC acknowledges that

these remedial activities are a "project" requiring environmental review under CEQA. According to its notice, DTSC anticipates the EIR will not be completed before 2015. At the same time, Boeing has announced that it plans to have demolished all of the structures in Area IV by the end of 2013 – well *before* any EIR for site remediation has been completed. DTSC has illegally excluded from the scope of this planned EIR the demolition activities already underway at the site, a violation of the clearly established principle under CEQA that study of the environmental impacts of a project requires that the *entirety* of a project be analyzed. The DTSC must conduct environmental review of the demolition, and it cannot structure its EIR for the remediation as if demolition activities are not an integral part of the overall site remediation.

This approach is in utter disregard of DTSC's duties to ensure that the possible impacts of a proposed project are properly assessed, disclosed to the agency and to the public, and alternatives or mitigation measures to eliminate all feasible impacts are imposed *before* that project commences. DTSC's authorization of Boeing's demolition prior to completing the EIR clearly violates CEQA and defeats all of the environmental and public protections that are an integral part of CEQA review.

II. DPH is Utilizing Standards for the Demolition and Disposal Activities that Violate a Previously Issued Writ and Were Not Promulgated Pursuant to the APA.

DPH reviews and approves the radiological measurements that Boeing provides in its requests to demolish Area IV structures. In its reviews, it employs standards that were never promulgated pursuant to the APA, and which were never intended to be used as health-protective standards for the remediation of sites or the disposal of waste off-site. In approving Boeing's demolition and waste storage plans, DTSC and DPH rely on four guidance 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; a DOE Order, 5400.5, and Regulatory Guide 1.86, issued in 1974 by the federal Atomic Energy Commission (later renamed the Nuclear Regulatory Commission). Not one of these standards has been formally adopted as regulations by DPH pursuant to the APA. Even if they had been properly adopted, none of these policies purport to condone disposal of radiological contaminated materials at facilities other than those licensed to receive low-level radioactive waste, a practice that is indeed barred by state law. The agency's reliance on these underground regulations is unlawful and DPH must immediately cease relying upon them.

The APA imposes important procedural requirements that ensure that the public is fully informed of the agency's proposed regulations and provided an opportunity to comment upon them. The APA also requires that the agency respond to comments and provide a statement of reasons for adopting the regulations it chooses *after* the public comment period has closed. 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 APA specifically prohibits agencies from utilizing *any* "guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule" unless it was adopted pursuant to the APA's procedures. (Gov. Code, § 11340.5, subd. (a).) Any "standard of general application" that "implement[s], interpret[s], or make[s] specific the law enforced or administered by" an agency that is not promulgated through the APA is an underground regulation and may be judicially invalidated. (*Tidewater Marine*, 14 Cal.4th at p. 571; see also *Morning Star Co. v. State Board of Equalization* (2006) 38 Cal.4th 324, 333.) The use of these generally applicable standards by DPH and DTSC as the standards against which Boeing's Area IV structures are assessed to determine whether and how the structures may be demolished and whether the contaminated debris may be disposed in a non-licensed facility is contrary to the APA's requirements and must be terminated.

Moreover, DPH has been specifically ordered to comply with the APA and with CEQA in promulgating regulations governing cleanup of radiologically contaminated sites. By relying upon standards that have never been adopted in a formal APA rulemaking, nor subjected to CEQA review, DPH is violating a writ of mandate that remains under the continuing jurisdiction of the Sacramento Superior Court.

In 2000, the predecessor agency to DPH, the California Department of Health Services ("CDHS") proposed to adopt clean-up standards that were widely viewed as non-protective. CDHS also announced, entirely outside of the APA rulemaking notice, that it intended to use these non-protective standards to determine what materials could be disposed in facilities not licensed to receive low-level radioactive waste. CDHS also claimed that its decision to adopt the regulations was exempt from CEQA. Committee to Bridge the Gap, Southern California Federation of Scientists, and Physicians for Social Responsibility sought a writ of mandate for violation of CEQA and the APA. In 2002, Judge Ohanesian of the Sacramento Superior Court ruled that CDHS had violated both the APA and CEQA, and issued a writ of mandate prohibiting CDHS from adopting *any* clean-up standards for radiologically contaminated sites without proper APA review and compliance with CEQA. More than a decade later, DPH still has not begun a rulemaking or complied with CEQA, relying instead on underground regulations, the exact harm that the 2002 writ of mandate sought to avoid.

III. Boeing's Disposal Activities Violate the Governor's Executive Order and the State's Radiation Control Law Prohibiting Disposal of Low-Level Radioactive Waste in Non-Licensed Facilities.

Debris from Area IV, which, by Boeing's own measurements contains numerous instances of materials that are contaminated above background (naturally-occurring) levels, has been disposed of in municipal landfills, in hazardous waste landfills, and sent to the metal, concrete, and asphalt recycling stream. It has not, however, been sent to facilities that are specifically licensed by California or by any other jurisdiction to receive low-level radioactive waste. This action violates several laws and other restrictions.

In 2002, Governor Gray Davis signed into effect a moratorium banning the disposal of radioactive waste from decommissioned nuclear sites into Class III (municipal) landfills in California. D-62-02, or the "Governor's Moratorium," imposes "a moratorium on the disposal of decommissioned materials into Class III landfills and unclassified waste management units." The Governor's Moratorium was issued in response to concerns over the release of contaminated materials originating from the SSFL site itself. The moratorium remains in effect today.

Nevertheless, DTSC illegally authorized the disposal of at least 242 tons of Boeing's radioactive demolition waste at Class III municipal landfills at Lancaster and Azusa, California.

Disposal of radioactive materials at hazardous waste facilities or by recycling is likewise prohibited. Under California law, radioactive waste is defined as any discarded material "that spontaneously emits ionizing radiation." (Health & Saf. Code, § 114710, subds. (f), (g).) All such "regulated radioactive waste," with exceptions not relevant here, must be disposed of in special facilities licensed to receive LLRW. (Health & Saf. Code, §§ 115621, subd., (e)(4), 115255, subd. (i).) California's Radiation Control Law does not allow a threshold level of contamination below which radioactive waste is unregulated (i.e., there is no "below regulatory concern" level for radioactive waste disposal). *All* radioactively contaminated waste must go to a licensed facility. Yet DTSC is approving Boeing's requests to send these materials facilities lacking an appropriate license for LLRW disposal, a transparent violation of the law.

IV. Boeing's Disposal Action Violates Conditions of the Buttonwillow Hazardous Waste Landfill Permit.

Boeing has sent much of its demolition waste to a Class I hazardous waste dump at Buttonwillow, CA, owned by Clean Harbors, Inc. This was the site of a drawn-out environmental justice legal battle over the disposal there of radioactive material in an area with a predominantly low-income Latino population. Low-level radioactive waste from Boeing's SSFL holdings and how it disproportionately impacted minority communities were central in the court fight.

In 2003, the Buttonwillow legal dispute concluded in a settlement between the operator of the facility and local residents under the Tanner Act. The settlement amended the facility's conditional use permit to bar the facility from accepting radioactive waste such as that shipped from SSFL. By authorizing Boeing's shipment of radioactive waste to the facility, DTSC breaches this condition.

V. Conclusion

DTSC and DPH still have the ability to remedy all of the above legal misconduct. We request that you stop the demolition and disposal of the plutonium fuel fabrication building and take immediate steps to prevent additional harm from further demolition and disposal of structures in Area IV, such as the disposal of the L-85 reactor debris at unlicensed facilities. However, as activity at the site is on-going, time is of the essence. The undersigned groups intend to seek a judicial order halting demolition in Area IV. However, if the Departments are willing, in good faith, to stop all approvals and order Boeing to immediately stop demolition and disposal in Area IV, the undersigned groups will not proceed with litigation at this time. Due to the urgency of the situation, we request a response within 24 hours of receipt of this letter as to whether the Departments intend to stop this illegal activity at this time. Should you wish to discuss this matter, please contact Pamela Pressley, Litigation Director at Consumer Watchdog at (310) 392-0522, ext. 307, or at pam@consumerwatchdog.org.

Sincerely,

Pamela Pressley

Pamela Pressley
Litigation Director, Consumer Watchdog on behalf of Consumer Watchdog, Physicians for Social Responsibility-Los Angeles, Committee to Bridge the Gap, and the Southern California Federation of Scientists

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