SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME	**October 25, 2013, 2:00 p.m.**	**DEPT. NO**	**42**
JUDGE	**HON. ALLEN SUMNER**	**CLERK**	**M. GARCIA**
PHYSICIANS FOR SOCIAL RESPONSIBILITY-LOS ANGELES, et al. **Petitioners,** **v.** **DEPARTMENT OF TOXIC SUBSTANCES CONTROL, et al.,** **Respondents.** **THE BOEING COMPANY, et al.** **Real Party in Interest**		**Case No.: 34-2013-80001589**	
Nature of Proceedings:	**MOTION FOR PRELIMINARY INJUNCTION**		

Following is the court's tentative ruling granting Petitioners' motion for a preliminary injunction scheduled for October 25, 2013, at 2:00 p.m. in Department 42.

INTRODUCTION

This is a big case – literally. The court estimates the moving, opposition and reply papers exceed 2,500 pages. Five separate briefs were filed. If the court's count is accurate, the parties filed twelve declarations with over 60 exhibits. They also filed four requests for judicial notice, with over 40 exhibits. Over 200 separate evidentiary objections were also filed. The court simply has not had time to adequately consider all the papers, or rule on the objections.

The issues raised by this petition are also complex. Neither side cites definitive, controlling law.

Given the complexity and size of this case, this tentative ruling is just that – tentative. Until the court has adequate time to more fully analyze this motion, it intends to temporarily grant the motion and maintain the status quo.

BACKGROUND

All parties appear to agree on some basic facts. The Santa Susana Field Laboratory ("Santa Susana") is a former nuclear weapon and rocket development facility in Ventura County. The site is divided into four areas. This petition involves only Area IV. Real Party in Interest Boeing owns all of the land and some of the buildings in Area IV.[1] This petition involves only six of Boeing's buildings: Buildings 4005, 4009, 4011, 4055, 4093, L-85, and 4100.[2] (Pet. ¶¶ 49, 53.)

Petitioners, Respondents Department of Toxic Substances Control (DTSC) and Department of Public Health (DPH), and Boeing characterize these six buildings as, variously, radiological buildings, structures or facilities. The court will use the generic term "buildings." It appears undisputed these buildings once contained radiological materials and were licensed for radiologic use by DPH and/or the federal Nuclear Regulatory Commission.[3] It also appears undisputed all building were "decommissioned" by the relevant regulatory authority and "released for unrestricted use." (Carpenter Decl., ¶ 34; Perez Decl., ¶ 11.) However, the parties dispute whether, or to what extent, the decommissioning and release for unrestricted use affects this petition.

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[1] Some of the buildings in Area IV are apparently owned by the federal Department of Energy. (Lennox Decl., ¶ 7.) This petition does not involve any DOE buildings.

[2] It appears buildings L-85 and 4093 are not two separate buildings, but that L-85 is instead part of 4093. The court asks the parties to clarify and/or confirm this at the hearing.

[3] The boundaries of the two entities' regulatory authority are not clear. Nor is it clear if those boundaries are relevant to disposition of this case.

Boeing has begun demolishing these buildings and disposing of the debris in Class I hazardous waste landfills. (Pet. ¶ 51; Lennox Decl. ¶ 19.) It appears undisputed Class I hazardous waste landfills are not licensed to dispose of ***low-level radioactive waste***. (See, e.g., Carpenter Decl., ¶ 41.) However, the parties dispute whether the debris is low-level radioactive waste. It is unclear if any of the buildings has been demolished and whether any debris has been disposed of. It appears only building L-85 has been demolished, but none of the resulting debris has been disposed of.[4] The court asks the parties to confirm and/or clarify this at the hearing.

Beyond this, the parties' agreement ends. Petitioners contend the buildings remain contaminated with unacceptably high levels of radiation;[5] demolition will "release" that radiation; release of radiation could harm the public and environment; and further harm to the public and environment could result if the debris is not disposed of in a facility licensed to receive low-level radioactive waste.[6] Petitioners allege DTSC and DPH violated the California Environmental Quality Act ("CEQA") by ***approving*** Boeing's demolition and disposal activities without performing an environmental review. They also allege DTSC and DPH violated the Administrative Procedures Act by relying on "underground regulations" in defining acceptable levels of radiation when approving Boeing's demolition and disposal activities.

Petitioners seek to enjoin further demolition and disposal until environmental review is performed under CEQA, utilizing properly promulgated regulations. Petitioners reach this result, however, in a circuitous fashion. They do not seek to enjoin

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[4] In an email to the court dated September 10, 2013, Boeing represented it is storing one 250-gallon container of hazardous waste on site that must be disposed of by October 30, 2013. The waste in that container is from a demolished sewage lift station identified as Building 4014. Because Building 4014 is ***not*** one of the buildings subject to this petition, it does not appear the requested injunction would affect disposal of that container. The court invites clarification.

[5] It appears Petitioners contend ***any*** level of radiation is unacceptably high, while Respondents and Boeing contend very low levels of radiation are safe.

[6] It appears very few facilities in the United States are licensed to accept low-level radioactive waste, and none are located in California. The court asks the parties to confirm or clarify this at the hearing.

Boeing.[7] Instead, they seek to enjoin DTSC and DPH from ***approving*** Boeing's demolition and disposal activities.

DTSC, DPH and Boeing filed separate oppositions to the motion, raising similar, but not identical, arguments.

DTSC and DPH primarily argue they did not ***approve*** Boeing's demolition and disposal activities, and have no authority to do so. DTSC acknowledges it is the lead agency for cleaning up ***soil and groundwater contamination*** at Santa Susana. It also acknowledges these cleanup activities will require CEQA review; it is in the process of seeking a consult to prepare an environment impact report ("EIR") and other CEQA-required documents for the cleanup. However, DTSC contends it has no jurisdiction to approve or disapprove Boeing's demolition or disposal of the buildings.

DPH acknowledges it has authority to license the receipt, possession or transfer of radioactive materials, and to decommission licensed sites. It also acknowledges it licensed some of the buildings at issue. Apparently either DPH or the federal Nuclear Regulatory Commission thereafter decommissioned the buildings and "released" them for unrestricted use.[8] (See Perez Decl., ¶¶ 10, 11.) DPH argues it has not approved the demolition and disposal activities Petitioners challenge, nor is Boeing required to obtain DPH's approval.

Boeing states the buildings were all decommissioned and released for unrestricted use by the relevant licensing authorities. This means debris from the buildings cannot, by definition, be considered ***low-level radioactive waste***. Accordingly, Boeing may dispose of the debris at Class I hazardous waste facilities. Boeing also contends any radiation in the debris would be far below the background radiation present in the environment from

[7] The Petition seeks a writ of mandate and injunction directed solely at Respondents. (Pet. at 26:21 to 28:12.)

[8] Petitioners do not challenge to the decommissioning decisions. The court asks the parties to explain whether, and to what extent, those decommissioning decisions were subject to CEQA, and/or are controlling on the current action.

natural sources. Finally, Boeing argues the only approval it needs to demolish the buildings is a zoning clearance permit, already issued by Ventura County.[9] Boeing maintains it is not required to obtain ***any*** approval to dispose of the debris.

DISCUSSION

A preliminary injunction preserves the status quo until a final determination of the merits. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.) In deciding whether to issue a preliminary injunction, the court considers two interrelated factors: (1) whether there is a reasonable probability Petitioners will prevail on the merits; and (2) the interim harm the parties will suffer if an injunction is not issued compared to the interim harm if it is. (*White v. Davis* (2003) 30 Cal.4th 528, 554; *Butt v. State of California* (1992) 4 Cal.4th 668, 667-678; *Robbins v. Superior Cour*t (1985) 38 Cal.3d 199, 206.) "[T]he more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue." (*King v. Meese* (1987) 43 Cal.3d 1217, 1227.)

1. Likelihood of success on the merits

A. The CEQA claim

It is undisputed no CEQA review has been done regarding the demolition and disposal of these buildings. The dispute is over whether a CEQA review is required. DTSC, DPH and Boeing argue Petitioners cannot prevail on their CEQA claim because CEQA simply does not apply to the demotion of these buildings. The court is not persuaded.

CEQA applies to activities that may cause a direct physical change, or a reasonably foreseeable indirect physical change, in the environment.[10] (Pub. Res. Code §

[9] Ventura County is not a party to this action.

21065.) DTSC, DPH and Boeing do not suggest Boeing's demolition and disposal activities will not have such an effect. For purposes of this motion, the court will thus assume the challenged activities may cause a physical change in the environment.

CEQA, however, does not apply to purely private actions. (*Sunset Sky Ranch Pilots Assn. v. County of Sacramento* (2009) 47 Cal.4th 902, 908; *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 19.) CEQA only applies if a government entity undertakes or participates in the action, finances it or approves it. (*Sunset Sky Ranch*, *supra*, 47 Cal.4th at 908; Pub. Res. Code § 21065; 14 Cal. Code Regs. § 15002, subd. (c).) The essence of this case is Petitioners' contention CEQA applies because ***DTSC and/or DPH approved*** Boeing's activities.[11] DTSC and DPH must comply with CEQA only if their actions constitute approval of Boeing's activities. (*Taxpayers for Accountable School Bond Spending v. San Diego Unified Sch. Dist.* (2013) 215 Cal.App.4th 1013, 1063.)

i. DPH

Petitioners spend little time arguing DPH approved Boeing's demolition or disposal activities. Instead, their focus is on DTSC. They speak of "approval . . . undertaken by DTSC," DTSC's role in the remediation of the Santa Susana site and its role in performing a site-wide CEQA analysis, "DTSC's review and approval of the demolition and disposal of Boeing-owned buildings," and requirements imposed on

[10] To use CEQA's terminology, CEQA only applies to ***projects***, defined as an activity that meets two separate tests. First, the activity must cause a direct or indirect physical change in the environment. Second, the activity must be either (1) directly undertaken by a public agency; (2) supported by a public agency through contracts, grants, subsidies, loans, or other assistance; or (3) involve the issuance of a lease, permit, license, certificate, or other entitlement for use by a public agency. (Pub. Res. Code § 21065.) DTSC, DPH and Boeing focus on the second test: whether demolition of these buildings was undertaken, financed or approved by DTSC or DPH.

[11] See, for example, Pet. ¶ 69 [CEQA applies because Respondents are approving Boeing's requests to demolish and dispose of buildings]; Pet. at 26:22-25 [seeking writ of mandate commanding Respondents to stop approving Boeing's demolition requests]; MPA at 7:8-10 [Respondents have "secretly approved the demolition and disposal of the radiologic structures"]; MPA 7:24-26 [DTSC's approval of Boeing's demolition and disposal proposals meet CEQA's requirement for government participation or approval].

Boeing by DTSC. (MPA 7:24-25, 8:3-7, 8:16-17; 8:20-21, 9:12-20; see also Reply at 4:7-8, 10:20-26, 11:26-27.)

Petitioners cite only one document as evidence DPH approved Boeing's disposal activities. (Reply at 11:11-12 [citing Pet. RJN, Ex. 25].)[12] That document, however, does not establish DPH ***approved*** anything. The document is a two-page memo outlining DPH's review of documents related to demolition material from building L-85, and concluding the federal Nuclear Regulatory Commission's 1987 decision to release L-85 for unrestricted use was correct. ***Review*** does not constitute ***approval***. The memo also implies demolition has already occurred, because it mentions "post-demolition" surveys. This further tends to disprove Petitioners' assertion DPH approved the demolition. Moreover, the memo does not mention disposal of demolition debris.

The court is thus inclined to find DPH has not approved Boeing's demolition and disposal activities.

ii. DTSC

DTSC contends Boeing does not require its approval to demolish the buildings or dispose of the debris. (Carpenter Decl., ¶¶ 7, 33-37, 40-43; Malinowski Decl, ¶¶ 28-29.) DTSC also argues it has no regulatory authority over radioactive materials such as those alleged in this case. The court is not persuaded.

Petitioners present evidence tending to establish DTSC approved Boeing's activities. DTSC required Boeing to make charges to its Standard Operating Procedures ("SOP") governing Boeing's demolition and disposal activities at Santa Susana. (RJN, Ex. 18, p. 1, Ex. 19, p. 2.) The SOP requires Boeing to notify DTSC whenever it intends to demolish a building. DTSC states these changes to Boeing's SOP were required

[12] Exhibit 25 contains several documents. The only document authored by DPH is a June 11, 2013, memo from Ted Ward to Roger Lupo. The court assumes this is the document Petitioners contend establishes DPH approved Boeing's demolition or disposal activities.

because, "***it is essential DTSC be advised of any potential demolition activities that may require DTSC oversight and/or approval***."[13] (RJN, Ex. 18, p. 1 [emphasis added.)

DTSC's website explains:

> DTSC ***required*** the Boeing Company to submit the SOP document to make sure an evaluation of each structure proposed for demolition occurs. The SOP requires an assessment of each structure for possible chemical and ***radiologic contamination***. . . .
>
> The SOP and demolition process ***requires*** a thorough review of site historical documents for radiological materials or activity. Chemical and ***radiological screening*** guidelines in the SOP are ***intended to assure that the demolition debris materials will not be hazardous to workers or the public***. . . .
>
> As ***DTSC reviews each building assessment, it will determine whether issues are present that require more thorough review,*** and whether observation field work is necessary. . . .
>
> The debris will be taken offsite. ***After careful screening and analysis, the debris will be characterized and appropriate management requirements identified for safe and legal disposal. . . . Any demolition debris contaminated with radioactive materials will be disposed of at appropriately licensed facilities***.

(RJN, Ex. 17, pp. 1-2 [emphasis added].)

This sounds like DTSC will oversee Boeing's demolition of the buildings and disposal of the resulting debris to ensure the public and environment are protected from radioactive contamination.

Additionally, after Boeing notified DTSC it intended to demolish building L-85, DTSC sent a letter to Boeing on May 1, 2013, requesting the demolition debris "be subjected to additional ***radiological screening*** and that the survey data be submitted for

[13] The court understands DTSC's argument to be that it is responsible for any cleanup needed to remediate contamination of soil or groundwater at the site. Therefore, DTSC only "approves" demotion activities that could affect the soil under and around the buildings. Absent an effect on the soil, DTSC contends it has no authority over building demolition. In effect, DTSC argues its jurisdiction ends at the buildings' foundation. At the hearing, the court asks DTSC to clarify how it defines its jurisdiction and authority.

agency review ***before its disposal as Class I waste***." (RJN, Ex. 24, p. 2 [emphasis added].) The letter goes on to explain DTSC staff has concluded:

> fixed and removable ***radionuclide contaminants*** are not present above background activity levels in these materials. Data from an additional Boeing survey . . . will be reviewed by the agencies [presumably, DTSC and DPH] ***prior to clearance of this debris for Class I landfill disposal***. . . .
>
> Currently inaccessible portions of the L-85 concrete slab, ground cover, and paved asphalt surfaces should be screened for ***radiological activity*** before this material is removed from the site for ***Class I landfill disposal***. . . .
>
> . . . ***Future Boeing Area IV Buildings proposed for demolition may require additional focused radiological surveys, to be determined by DTSC*** and CDPH, based on site-specific conditions. . . .
>
> If subgrade features found during demolition are distinctly different in character from the features screened for chemical and ***radiological contamination*** as part of the pre-demolition characterization . . . , ***additional radiological screening data should be collected from debris and made available to DTSC before offsite debris disposal is implemented***.

(Id., pp. 3-4 [emphasis added].)

In a follow-up letter dated July 22, 2013, DTSC responded to Boeing's report on the results of the additional radiological surveys, which were "conducted at the request of DTSC and [DPH], as a ***condition of approval for the demolition*** of the remnant features at the L-85 site ***and Class I Hazardous Waste Landfill disposal*** of the resulting debris." (RJN, Ex, 25, p. 1 [emphasis added].) DTSC agreed the surveys were performed according to applicable standards "and that measured activity and calculated exposure levels for the former L-85 segregated concrete and piping debris ***meet all acceptable regulatory limits for disposal at a Class I Hazardous Waste Landfill***." (Id. [emphasis added])

Petitioners argue this history belies DTSC's claim it has ***no authority*** over radioactive materials in general, and ***no authority*** over Boeing's demolition and disposal

activities in particular. Put simply: If Boeing did not need DTSC approval, why did DTSC give it?[14] And if DTSC has no jurisdiction over radioactive materials, why did it require radioactive screenings and surveys to ensure the buildings and debris met certain limits?

DTSC explains it administers two laws: the Hazardous Waste Control Law (Health & Saf. Code §§ 25100 et seq.) and the Hazardous Substance Account Act (Health & Saf. Code §§ 25300 et seq.). Under the Hazardous Waste Control Law, radioactive materials are specifically excluded from the definition of "hazardous waste." (22 Cal. Code Regs. § 66261.4, subd. (a)(2) source, special nuclear or by-product material as defined by the federal Atomic Energy Act of 1954 are not "hazardous materials"]; see also *Boeing v. Robinson* (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS 52507, *15 [pursuant to Chapter 6.5, DTSC supervises only non-radiological contamination]; see also Malinowski Decl., ¶ 6.) It would thus appear DTSC has no jurisdiction over radioactive materials -- including the potentially contaminated buildings and debris at Santa Susana -- under the Hazardous Waste Control Law.[15]

In contrast, the Hazardous Substance Account Act defines "hazardous substance" to include any substance designated as hazardous under the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), which includes some radionuclides. (Health & Saf. Code §§ 25315, 25316, subd. (c); 40 Code of Fed. Regs. § 302.4.) DTSC thus appears to have some jurisdiction over radioactive materials under the Hazardous Substance Account Act.[16]

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[14] The court notes DTSC admits it entered into an Administrative Order on Consent (AOC) with the federal Department of Energy and NASA in 2010. According to DTSC, in this AOC "DTSC chose to exercise its enforcement discretion and directed DOE and NASA to prepare building demolition plans and to submit them to DTSC for review and approval." (Opp. at 5, fn. 5.) DTSC states it entered into the AOC pursuant to the Hazardous Substance Account Act, which gives DTSC some authority over the cleanup of released of radioactive materials that may have occurred in or around those buildings. (Id.) If DTSC could exercise its enforcement discretion to require approval of DOE and NASA demolition plans, why does DTSC lack authority to require approval of Boeing's plans?

[15] Petitioners may agree. In their reply, they suggest the source of DTSC's authority to regulate radioactive substances is the Hazardous Substance Account Act, not the Hazardous Waste Control Law. (Reply at 17:5-8.) If not, Petitioners can address this point at the hearing.

[16] DTSC acknowledges it "may consider radioactive contaminants in setting cleanup levels in cleanups DTSC conducts under the HSAA." (Opp. at 3:2-4.)

The Hazardous Substance Account Act ("Act") was enacted to "[e]stablish a program to provide for response authority for releases of hazardous substances, including . . . hazardous waste disposal sites that pose a threat to the public health or the environment." (Health & Saf. Code § 25301; see also *Brown v. State of California* (1993) 21 Cal.App.4th 1500, 1504-05 [purpose of Act is to clean up hazardous substance releases posing a threat to public welfare or the environment].) DTSC has broad authority under the Act to determine whether "there may be an imminent or substantial endangerment to the public health or welfare or to the environment, because of a release or threatened release of a hazardous substance." (Health & Saf. Code § 25358.3, subd. (a); see also § 25358.1 [DTSC may require responsible party to furnish information and access to property; to inspect and obtain samples from property; and enter upon property for purposes of taking remedial action].) When DTSC determines the release or potential release of a hazardous substance threatens public health or the environment, it may require the responsible party to undertake remedial action or may undertake remedial action itself. (Health & Saf. Code § 25358.3.) DTSC's apparently broad authority under the Hazardous Substance Account Act would appear to give it authority over the demolition and disposal activities at issue.

Has DTSC been approving Boeing's demolition and disposal activities pursuant to its authority under the Hazardous Substance Account Act? If so, Petitioners have established a reasonable probability they will prevail on their claim DTSC failed to comply with CEQA before approving Boeing's activities.

DTSC, DPH and Boeing appear to argue that because these buildings were decommissioned and released for unrestricted use, they are no longer subject to ***any*** government regulation or oversight. Because anything Boeing does with the buildings would thus be purely private action, its actions are not subject to CEQA. The court finds it hard to believe Boeing can demolish a former nuclear reactor without any governmental oversight or CEQA review.

B. The Administrative Procedures Act Claim

Petitioners also contend DTSC and DPH are violating the Administrative Procedures Act ("APA") by relying on four "underground regulations" in approving Boeing's demolition and disposal activities. The court is not persuaded.

A state agency may not issue, use or enforce a "regulation" unless the agency complies with the APA's procedural requirements, including public notice and comment. (Gov. Code § 11340.5, subd. (a); *Bollay v. Office of Administrative Law* (2011) 193 Cal.App.4th 103, 106.) A "regulation" is defined as a rule, order or standard of general application adopted by a state agency to implement, interpret or make specific the law it enforces or administers, or to govern its procedures. (Gov. Code § 11342.600; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.) A regulation adopted without complying with the APA is termed an "underground regulation" and may be declared invalid by a court. (*Bollay*, *supra*, 193 Cal.App.4th at 107.)

Petitioners contend Respondents are enforcing four regulations not adopted pursuant to APA:

(1) A "Regulatory Guide" published by the federal Atomic Energy Commission regarding termination of operating licenses for nuclear reactors. This Regulatory Guide contains a table identifying "acceptable" radiation levels for decommissioned facilities.

(2) A document promulgated by the federal Department of Energy regarding "radiation protection of the public and the environment" identified as DOE Order 5400.5.

(3) Guidelines promulgated by DPH for "Decontamination of Facilities and Equipment Prior to Release for Unrestricted Use." These Guidelines are referred to by the parties as DECON-1.

(4) A 1997 DPH "Policy Memorandum" identified as IPM-88-2 outlining procedures to verify facilities where radioactive materials were used have

been decontaminated to acceptable levels prior to release for "uncontrolled use."[17]

It is undisputed neither DTSC nor DPH adopted these documents pursuant to the APA. DTSC and DPH argue, however, these documents are not regulations within the meaning of the APA. The court is inclined to agree.

Even assuming, arguendo, they once met the definition of regulations, DPH maintains DECON-1 and IPM-88-2 have not been DPH policy since at least 2002.[18] (Perez Decl., ¶¶ 2, 3.) The other two documents announce rules promulgated by two federal agencies, not rules of DTSC or DPH.

Petitioners nevertheless argue Respondents ***relied*** on all four documents in approving Boeing's demolition plans. This makes these documents regulations. (Pet. ¶¶ 84, 86-88, 91; MPA at 10:8-9, 24-25.) The court is no persuaded.

No evidence is cited that ***Respondents*** relied on any of the documents. The standard operating procedures ***drafted by Boeing*** require Boeing to screen the buildings and debris using the criteria in the four challenged documents. (MPA at 4:6-11.) Assuming this is true,[19] Petitioners do not explain how standard operating procedures ***adopted by Boeing*** become regulations promulgated by DTSC or DPH. (Gov. Code § 11342.600 [regulation means rule adopted by an agency]; § 11342.5 [prohibiting state agencies from enforcing regulations until properly adopted].)

Finally, even if these procedures had been required by DTSC or DPH, the court is not persuaded procedures governing one company's demolition of buildings located in one location are "rules of general application." (*Tidewater*, *supra*, 14 Cal.4th at 571 [to be a regulation, the agency must intend its rule to apply generally, rather than in a

[17] These four documents are attached to Petitioners' request for judicial notice as Exhibits 3, 4, 8, and 10.

[18] IPM-88-2 was superseded in 2000 by Policy No. RML-00-02 (which was itself formally rescinded on January 1, 2013). (Perez Decl., ¶ 2.) DECON-1 has not been DPH policy since at least 2002. (Id., ¶ 3.)

[19] Boeing's standard operating procedures appear to contain only one reference to the four documents: "Release criteria for surface contamination of building structures, material, equipment and debris shall be those specified in USNRC Regulatory Guide 1.86, USDOE Order 5400.5 . . . , and [DPH] guidance DECON-1 and IPM-88-2." (Grossman Decl., Ex. E, p. 22.)

specific case.]; *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal. 2d 317, 323-24 [resolution regarding construction of one particular bridge not a regulation because not rule of general application]; *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 630 [although rule of general application need not pertain universally, it must pertain to all members of a particular class].)

The court is thus inclined to find Petitioners are not reasonably likely to prevail on their claim DTSC and DPH violated the APA.

2. Interim harm

In deciding whether to issue a preliminary injunction, the court compares the interim harm Petitioners will suffer if an injunction is not issued with the interim harm Boeing will suffer if it is.[20]

Boeing argues it will suffer a delay in its planned demolition activities, and thus a delay in transitioning the property to use as public open space.[21] (Lennox Decl. ¶ 21.) However, DTSC is in the process of selecting a contractor to prepare an EIR for DTSC's anticpated cleanup and remediation of Santa Susana. (Pet. RJF, Ex. 23.) Can Boeing release the land for public use before DTSC's cleanup and remediation is complete? It is not clear Boeing's plans will actually be delayed if the court issues an injunction.

Balanced against this harm to Boeing if an injunction issued, Petitioners contend the public and environment could suffer grave harm if potentially harmful radiation is released. Boeing contends any radiation present in the debris is "miniscule" and "far

[20] DTSC and DPH do not contend they will suffer any harm if the court issues an injunction.

[21] Boeing also asserts an injunction would cost it over $6 million – the difference between disposing of the demolition debris at a Class I hazardous waste disposal facility verses at a facility licensed to receive low-level radioactive waste. (Lennox Decl., ¶ 24.) However, this argument is premature. It goes to the relief Petitioners seek on the merits, not the cost of an interim order maintaining the status quo.

Boeing also alleges an injunction would cause it to incur penalties of up to $25,000 a day for storage of hazardous waste without a permit. (Lennox Decl., ¶ 23.) But there is no evidence Boeing is storing debris from any of the buildings. Without such evidence, it would appear Boeing's fear of penalties is premature. If Boeing is storing debris, the court asks for clarification at the hearing, and that Boeing and DTSC explain the penalties that could be applicable.

below the normal doses that people receive in their daily lives from background radiation." (Opp. at 8:14-16.) Each side offers competing expert declarations and objections to support its contention. The court has not had time to evaluate the proffered evidence.

Additionally, Petitioners allege the public and environment will be harmed if the debris is disposed of in a facility not designed to contain low-level radioactive waste. Boeing and DPH contend the building debris can be legally disposed of in a Class I hazardous waste facility because it does not meet the definition of ***low-level radioactive waste***. According to Boeing and DPH, because all the buildings have been decommissioned and released for unrestricted use, they are no longer subject to ***any*** regulation.[22]

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[22] Boeing and DPH argue low-level radioactive waste is defined as "***regulated*** radioactive material." (Health & Saf. Code § 115255, Art. 2, subd. (I) [emphasis added], § 115261, subd. (e)(4).) Boeing and DPH argue buildings released for unrestricted use by the relevant regulatory authorities are no long ***regulated,*** and thus demolition debris from the buildings cannot be considered low-level radioactive waste even if it contains residual radioactivity above background levels. Boeing and DPH therefore conclude the demolition debris does not need to be disposed of in a facility licensed to receive low-level radioactive waste. It can legally be disposed of in a Class I hazardous waste facility.

Petitioners contend Boeing and DPH are confusing ***regulation*** with ***licensure***. Petitioners argue the fact the buildings were decommissioned and released for unrestricted use does not mean any remaining radiation in the buildings or demolition debris is unregulated.

Given the history of SB 1970 from 2002, Boeing and DPH have the more persuasive argument. SB 1970 would have defined "radioactive waste" as "any discarded radioactive material with radioactivity above the background level when measured with the best available technology." The bill would have required radioactive waste so defined be disposed at specially licensed facilities. It would have prohibited continued disposal of such materials at Class I facilities. However, SB 1970 was vetoed by Governor Gray Davis. In his message vetoing SB 1970, Governor Davis noted the bill "***redefines*** the term 'radioactive waste' to include any discarded decommissioned material with the slightest trace of detectable radioactivity not attributable to background sources, and prohibits all such material from being disposed of at all existing hazardous or solid waste disposal facilities in the State of California." The Governor found the bill "overly broad."

The same day he vetoed SB 1970, Governor Davis issued Executive Order D-62-02, ordering DPH to "adopt regulations establishing dose standards for the decommissioning of radioactive materials by its licensees" and to "assess the public health and environmental safety risks associated with the disposal of decommissioned materials, and shall comply with all applicable laws, including the California Environmental Quality Act." In the Executive Order, the Governor noted no state or federal government agency "monitors the disposal of residual radioactive materials once a site is decommissioned and released for unrestricted use," and that there are no California laws "governing the disposal of 'decommissioned materials,' which are materials with low residual levels of radioactivity that, upon decommissioning of a licensed site, may presently be released with no restrictions upon their use."

This legislative history certainly suggests both the Legislature and Governor believed materials decommissioned and released for unrestricted use are no longer subject to regulation and could legally be disposed of in hazardous waste disposal facilities.

The court is unable to satisfactorily resolve the issue at this time. First, it is unclear from the briefing whether this debris meets the definition of ***low-level radioactive waste***, and if not, what restrictions govern its disposal. Second, the court has not had time to adequately review the voluminous declarations from competing experts and numerous objections thereto. But on its limited review, the court is inclined to find the potential harm to Petitioners, the public and environment if an injunction does not issue outweighs the minimal harm alleged to Boeing if it does.

CONCLUSION

For the foregoing reasons, the motion for a preliminary injunction is temporarily granted.

Appearances are required. The court prefers that any party intending to participate at the hearing be present in court. Any party who wishes to appear by telephone must contact the court clerk by 4:00 p.m. the court day before the hearing. (See Cal. Rule Court, Rule 3,670; Sac. County Superior Court Local Rule 2.04.)

Oral argument shall be limited to no more than thirty (30) minutes per side.

Any party desiring an official record of the proceeding shall make arrangement for reporting services with the clerk of the department not later than 4:30 p.m. on the day before the hearing. The fee is $30.00 for civil proceedings lasting under one hour, and $239.00 per half day of proceedings lasting more than one hour. (Local Rule 9.06(B) and Gov't. Code § 68086.) Payment is due at the time of the hearing.