Case No. C088821

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

PHYSICIANS FOR SOCIAL RESPONSIBILITY-LOS ANGELES; SOUTHERN CALIFORNIA FEDERATION OF SCIENTISTS; COMMITTEE TO BRIDGE THE GAP; AND CONSUMER WATCHDOG,

Plaintiffs and Appellants,

v.

DEPARTMENT OF TOXIC SUBSTANCES CONTROL; DEPARTMENT OF PUBLIC HEALTH; AND DOES 1 TO 100,

Defendants and Respondents,

THE BOEING COMPANY,

Real Party in Interest and Respondent,

Appeal from the Superior Court for the County of Sacramento, Case No. 34-2013-80001589, The Hon. Richard K. Sueyoshi, Department 28

BRIEF OF RESPONDENT DEPARTMENT OF TOXIC SUBSTANCES CONTROL

ROB BONTA
Attorney General of California
EDWARD H. OCHOA
Senior Assistant Attorney General
SARAH E. MORRISON
(SBN 143459)
Supervising Deputy Attorney General

KAVITA LESSER (SBN 233655)
* DAVID ZAFT (SBN 237365)
Deputy Attorneys General
300 South Spring St., Ste. 1702
Los Angeles, CA 90013
Telephone: (213) 269-6325
Fax: (916) 731-2128
David.Zaft@doj.ca.gov
Kavita.Lesser@doj.ca.gov

Attorneys for Respondent Department of Toxic Substances Control

COURT OF APPEAL THIRD APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER: C088821
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 237365 NAME: David Zaft FIRM NAME: Office of the Attorney General for the State of California STREET ADDRESS: 300 S. Spring St. CITY: Los Angeles STATE: CA ZIP CODE: 90013 TELEPHONE NO.: 213-269-6372 FAX NO.: E-MAIL ADDRESS: david.zaft@doj.ca.gov ATTORNEY FOR (*name*): Defendant/Respondent Department of Toxic Substances Control	SUPERIOR COURT CASE NUMBER: 34-2013-80001589
APPELLANT/ PETITIONER: Physicians for Social Responsibility-Los Angeles, et al. RESPONDENT/ REAL PARTY IN INTEREST: Department of Toxic Substances Control, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party *(name*): Department of Toxic Substances Control

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest *(Explain):*
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: September 13, 2022

David Zaft
(TYPE OR PRINT NAME)

David Zaft
(SIGNATURE OF APPELLANT OR ATTORNEY)

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION

This appeal concerns the planned demolition and disposal by Real Party in Interest The Boeing Company ("Boeing") of six of its structures located at the Santa Susana Field Laboratory ("SSFL") site, a former federal research and testing facility located in southeastern Ventura County. In their petition, Petitioners claim that Respondent California Department of Toxic Substances Control ("DTSC") violated the California Environmental Quality Act, Public Resources Code section 21000 et seq. ("CEQA"), by failing to conduct an environmental review before purportedly "approving" Boeing's demolitions. They also claim that DTSC engaged in an underground rulemaking in violation of the Administrative Procedure Act, Government Code section 11340 et seq. ("APA"), when it referenced certain radiological screening criteria in documents regarding the demolition of Boeing's structures. On November 19, 2018, following oral argument, the trial court ruled in Respondents' favor and denied all of Petitioners' claims. Petitioners subsequently filed this appeal.

The trial court's ruling should be affirmed.

First, Petitioners contend that Boeing's demolitions constitute a "project" under Public Resources Code section 21065, subdivision (c), and therefore required DTSC to comply with CEQA before "approving" the demolitions. However, subdivision (c) applies to an activity when it "involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use" by a public agency. (Pub. Resources Code, § 21065, subd. (c).) DTSC did not issue an entitlement for use to Boeing that

authorized the demolitions. Rather, DTSC, exercising its enforcement authority, reviewed Boeing's demolition plans to ensure the demolitions would not compromise the hazardous waste investigation and cleanup of soils at the SSFL site. When it performed this review in 2013, DTSC assumed that Boeing had already obtained, or would obtain, whatever permits or other authorizations it needed to demolish its buildings at the SSFL site. Boeing's demolitions thus are not a "project" as defined by Public Resources Code section 21065, subdivision (c).[1]

Second, Petitioners contend that DTSC's review of an amendment to Boeing's standard operating procedures for building demolitions (referred to as "Amendment 2") constituted a "project" by DTSC for CEQA purposes under Public Resources Code section 21065, subdivision (a). This provision applies to activities directly undertaken by an agency. This argument fails for two reasons. First, Petitioners initially raised this argument in their reply brief in the writ proceeding. Consequently, the trial court correctly declined to consider it. Second, even if Petitioners had properly raised this argument, they have failed to show that DTSC's review of Amendment 2 "cause[d] either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment," as required for an activity

[1] To the extent Boeing's demolitions may have involved the issuance of an entitlement for use by another, unnamed agency that could trigger CEQA obligations for that agency under subdivision (c), Petitioners have not alleged such facts or named any such agency in this action.

to be considered a "project" under CEQA. (Pub. Resources Code, § 21065.) Petitioners seek to overcome this obstacle by citing the alleged impacts they believe Boeing's demolitions might cause, but *DTSC's review of Amendment 2*—the activity "directly undertaken" by DTSC that Petitioners claim is the "project" for purposes of subdivision (a)—did not authorize the demolitions, and Petitioners have not identified any environmental changes that are specifically attributable to DTSC's review.

Petitioners also argue that DTSC improperly "segmented" the environmental review for the building demolitions from the review of the site cleanup required by DTSC's 2010 Administrative Order on Consent ("2010 AOC") with the U.S. Department of Energy ("DOE"). However, because Boeing's demolitions are not, by themselves, a "project" subject to CEQA, no improper "segmenting" has occurred.

Petitioners' APA claims also fail. Petitioners assert that DTSC engaged in an underground rulemaking in violation of the APA when it referenced four radiological release criteria in DTSC documents relating to the demolition of Boeing-owned structures at SSFL. The trial court properly rejected this claim, finding that Petitioners failed to demonstrate that DTSC intended the release criteria to apply generally (as a rule does), rather than in a specific case. (*Tidewater Marine Western, Inc. v. Bradshaw*, (1996) 14 Cal.4th 557, 571.) Petitioners point to only one other instance when DTSC referenced any of the radiological release criteria in question, which is insufficient to show that DTSC has established a rule of general application. Moreover, in both

instances it is undisputed that the criteria referenced by DTSC were approved and utilized by other agencies with authority over the management and disposal of radiological materials at the sites in question, and not by DTSC. Petitioners' APA claim is predicated on a fundamental misunderstanding of the jurisdictional limits applicable to DTSC. DTSC lacked the statutory authority to set or revise the radiological release criteria for Boeing's former radiological structures, and it therefore did not interpret or make specific a law it administers when it referenced the criteria. (*Ibid*.) Accordingly, DTSC did not engage in an underground rulemaking.

For these reasons, the Court should affirm the lower court's judgment in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

I. OVERVIEW OF THE SSFL SITE

The SSFL is a former research facility situated on approximately 2,850 acres in southeastern Ventura County. (DTSC 1184; see also *Boeing Co. v. Movassaghi* (9th Cir. 2014) 768 F.3d 832, 834.) Boeing operated at SSFL as a defense contractor and conducted its own private research there. In 1996, Boeing acquired approximately 2,400 acres of the SSFL site from Rockwell International Corporation ("Rockwell"). (*Movassaghi*, 768 F.3d at pp. 834–35.) Boeing owns most of the SSFL site, including a portion called Area IV, where the structures at issue in this case are located. The federal government owns approximately 450 acres of the SSFL site, which the National Aeronautics and Space Administration ("NASA") administers. (DTSC 1185.)

Since the 1940s, various federal agencies used the SSFL for the development of technologies for the federal government's defense and space programs. (*Movassaghi*, 768 F.3d at pp. 834-35; DTSC 813; DTSC 1184.) The primary activity at SSFL was the testing of liquid rocket engines by NASA and the United States Air Force, which continued until 2006. (DTSC 813; *Movassaghi*, 768 F.3d at pp. 835–36.) DOE conducted nuclear research in Area IV, where it operated ten small nuclear research reactors at various times until the 1980s. (DTSC 5891.) DOE and NASA hired Boeing to assist in the nuclear research and rocket testing. (*Movassaghi*, at p. 835.) In 1996, DOE decided to close its research center and many of the facilities were removed at that time. (*Movassaghi*, at pp. 835–36.) Boeing also conducted commercial nuclear work at SSFL under licenses from the Atomic Energy Commission (the predecessor to the Nuclear Regulatory Commission or "NRC") and the California Department of Public Health ("DPH").

This research activity resulted in multiple and substantial environmental impacts. The soil and groundwater at the site are contaminated with hazardous substances, including solvents, heavy metals, and other toxins. (*Movassaghi*, 768 F.3d at p. 835.) The primary chemicals of concern include industrial solvents such as trichloroethylene and various components of diesel, kerosene and other fuels. (DTSC 0027; DTSC 0477.) Portions of the site—principally areas within Area IV—are also impacted by radioactive contamination. (*Movassaghi*, 768 F.3d at p. 836.) The Ninth Circuit has noted that "[t]he federal government, not

Boeing, appears . . . to be responsible for the radioactive pollution" at the SSFL site, and that "no radioactive contamination has been traced to Boeing's private activity." (*Id.* at p. 835.)

II. DTSC'S ENFORCEMENT AND OVERSIGHT OF THE INVESTIGATION AND CLEANUP OF HAZARDOUS WASTE AT THE SSFL SITE

For decades, DTSC has directed and overseen corrective action to address hazardous waste contamination in the soil and groundwater at the SSFL site pursuant to the Hazardous Waste Control Law, Health & Safety Code §§ 25100 et seq. ("HWCL"). DTSC administers the HWCL in California in lieu of the federal Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq. ("RCRA").[2]

Two important steps of corrective action under the HWCL are the RCRA Facility Assessment and the RCRA Facility Investigation. In 1991, DTSC and the United States Environmental Protection Agency ("US EPA") issued an Interim Final RCRA Facility Assessment Report, which identified over one hundred areas within the SSFL site where hazardous waste releases may have occurred, which were categorized either as solid waste management units ("SWMUs") or areas of concern.

---

[2] As discussed in Section II.B. of the Argument section, both RCRA and the HWCL specifically disclaim authority over radioactive materials regulated under the federal Atomic Energy Act. (See 42 U.S.C. §§ 6903(27), 6905(a); Cal. Code Regs., tit. 22, § 66261.4(a)(2).)

(DTSC 1188.) US EPA issued a Final RCRA Facility Assessment Report in 1994. (DTSC 1188.)

Around this time, DTSC began directing the parties responsible for the releases of hazardous waste at the SSFL site—Rockwell, DOE and NASA—to perform the RCRA Facility Investigation for the site. The purpose of the RCRA Facility Investigation was to identify the areas requiring further investigation to determine the nature and extent of releases of hazardous wastes into the soil and groundwater.[3] (DTSC 1189.) In 1992, DTSC issued a Stipulated Enforcement Order directing Rockwell to conduct "an in-depth investigation of waste generation and release" at each of the areas identified in the RCRA Facility Assessment and propose "necessary further actions." (DTSC 0002.) Between 1993 and 2003, Rockwell (and later Boeing), NASA, and DOE submitted a series of work plans proposing steps to investigate and sample the areas under investigation. (DTSC 0005–0454; DTSC 0455–0775; DTSC 0776–01102; DTSC 1103–1183.) In 2004, Boeing, NASA, and DOE jointly submitted a RCRA Facility Investigation Report providing a comprehensive description of the soil investigation of the SSFL site. (See DTSC 1189.)

In 2007, DTSC, Boeing, NASA, and DOE entered into a Consent Order for Corrective Action for SSFL ("2007 Corrective

[3] The RCRA Facility Investigation addressed non-radioactive waste. As explained in the next section, radioactive contamination was being addressed under a separate regulatory program.

Action Order"). (DTSC 1184–1257; DTSC 1223.) This order directed Boeing, NASA, and DOE to prepare and submit work plans, reports and other materials, including a Corrective Measures Study Report proposing the remedies for contamination in the soil and groundwater at the site. (DTSC 1193–1204.)

In 2010, DOE entered into the an Administrative Order on Consent with DTSC (the "2010 AOC"), which supplemented the 2007 Corrective Action Order and clarified DOE's obligations with respect to addressing the contamination at the SSFL site. (See DTSC 2101–2141l.) The purpose of the 2010 AOC was "to further define and make more specific" DOE's "obligations with respect to only the cleanup of soils" in the portion of the SSFL for which it is responsible.[4] (DTSC 2102.) Boeing is not a party to the 2010 AOC, and its obligations with regard to the site investigation and cleanup are governed by the 2007 Corrective Action Order.

DTSC's selection of the final remedies to remediate the contaminated soil and groundwater at the SSFL site is subject to environmental review pursuant to CEQA. (DTSC 1206, DTSC 6287.) DTSC is currently conducting a CEQA review of the proposed soil and groundwater cleanup required under the 2007 Corrective Action Order and the 2010 AOC with DOE.

---

[4] NASA also entered into a similar Administrative Order on Consent with DTSC that applies to NASA's cleanup of its portion of the site.

III. THE REGULATION OF RADIOACTIVE MATERIALS AT SSFL

Radioactive pollutants "are regulated differently" from non-radioactive pollutants, and a different statutory framework applies. (*Movassaghi*, 768 F.3d at p. 837.)[5] At SSFL, given that the "radioactive contamination either resulted from federal activity or is indistinguishable from federal contamination," responsibility for addressing radioactive pollution at Area IV rests with DOE and NRC. (*Id.* at p. 835.) Indeed, DTSC's ability under the HWCL to evaluate certain areas at SSFL for non-radioactive contamination is limited until DOE and NRC address any radioactive contamination and approve those areas "for unrestricted use." (See *U.S. v. Manning* (9th Cir. 2008) 527 F.3d 828, 833 and fn. 4 [explaining that state agency authority under RCRA to regulate mixed radioactive and non-radioactive waste is limited to non-radioactive components].)

The separated state–federal jurisdictions for radioactive and non-radioactive contamination at SSFL is reflected throughout the administrative record. For example, an Addendum to the RCRA Facility Investigation Work Plan for the SSFL site states:

---

[5] In 2007, the California legislature attempted to shift the regulatory authority over radioactive contamination at SSFL to DTSC when it passed Senate Bill 990, 2007 Reg. Sess., ch. 729 (2007) ("SB 990"), which established cleanup levels for SSFL, including for radioactive contamination. (Health & Saf. Code, § 25359.20.) Boeing brought a legal challenge to SB 990 that resulted in the Ninth Circuit holding SB 990 unconstitutional as violating the Supremacy Clause. (See *Movassaghi*, 768 F.3d at pp. 840-42.)

> SWMUs identified in the RCRA Facility Assessment (RFA) with potential radioactive contamination [citation] *are being addressed by NRC or DOE programs*, under the oversight of DTSC Region 3. Evaluation of other potential chemicals at these sites will be conducted after each site has been approved for unrestricted use by the NRC and DOE. Further evaluation of non-radioactive chemicals at these sites is considered within the scope of the RCRA Corrective Action Program.

(DTSC 0817–18 (emphasis added).)[6]

To document the set of approved guideline values for the release of former radiological facilities at SSFL, in 1996, Rockwell (Boeing's predecessor) submitted to DOE a "Proposed Sitewide Release Criteria for Remediation of Facilities at SSFL," which included the surface contamination limits of NRC Regulatory Guide 1.86, DOE Order 5400.5, and DPH DECON-1. (DPH 2737.) Pursuant to its license to use radioactive material, Rockwell also

---

[6] See also DTSC 0039 ["not all areas identified as SWMUs or [areas of concern] during the RFA are being investigated during the RFI. . . . SWMUs associated with radioactive materials will be investigated under other regulatory jurisdictions"]; DTSC 0488 ["The RFI program is designed to evaluate *the chemicals* in soil at the SWMUs and [areas of concern] at the SSFL" (emphasis added)]; DTSC 0808-09 [summary of DTSC field sampling plans showing that sampling in Area IV is limited to volatile organic compounds, total petroleum hydrocarbons, metals, anions and pH and does not include sampling for radioactive materials]; DTSC 0815-17 [noting that "[e]nvironmental programs not related to RCRA" that "are under the jurisdiction of various agencies" including a program for "Mixed and Radioactive Waste Monitoring and Closure Activities"].

submitted its proposed sitewide release criteria to DPH for review and approval. (*Id.*) DOE and DPH "subsequently approved the use of these criteria for release of radiological facilities at [SSFL] for unrestricted use" in a document entitled "Approved Sitewide Release Criteria for Remediation of Radiological Facilities at the SSFL," which DPH incorporated into its license for Rockwell. (*Id.*; see also DPH 5119.)

IV. BOEING'S BUILDING DECOMMISSIONING AND DEMOLITION PROGRAM

Concurrent with—but independent from—DTSC's enforcement of HWCL corrective action requirements at the SSFL site, Boeing (and, previously, Rockwell) have been conducting a building decommissioning and demolition program at the site that stretches back decades. (See DTSC 2069 [Boeing response to comments from Petitioner Committee to Bridge the Gap discussing demolitions from the 1990s and early 2000s].) The NRC and DPH (as the state agency designated to assume licensing authority from the NRC) have authority over the decommissioning process. (See Health & Saf. Code, § 115000, subd. (b); Cal. Code Regs., tit. 17, § 30256; Exhibit 151, p. 14.)[7]

As part of the hazardous waste corrective action required under the 2007 Consent Order, in 2008, Boeing, DOE and NASA submitted to DTSC a joint set of standard operating procedures ("SOP") for the evaluation and sampling of building features at the site. (DTSC 1357–87.) The purpose of the SOP was to

[7] Petitioners provided the trial exhibits to the Court with the administrative record.

"identify[] building features and process areas where chemicals were potentially used, document[] the conditions of those features, and, if warranted, collect[] samples to assess environmental impacts." (DTSC 1361.) DTSC requested the preparation of the SOP to ensure the corrective action to address the hazardous waste contamination at the SSFL site would not be compromised. Without the SOP, a building might be demolished and removed from the site and information relevant to the investigation and cleanup of hazardous waste releases would be lost. For instance, a demolition might inadvertently remove a feature (such as a sump) that, had it been properly documented and reviewed, might have been determined to be a SWMU requiring further investigation as a potential source of hazardous waste contamination. (DTSC 1515.) DTSC was also concerned that Boeing and its contractors might "use the demo as a means of intentionally excavating impacted soil" which would compromise the site investigation and cleanup. (DTSC 1452; see also DTSC 1638 [summarizing DTSC staff's concerns regarding building demolitions].)

DTSC subsequently became concerned that the joint SOP "may not result in DTSC being advised and involved in those [Boeing] demolition activities that require DTSC's oversight or approval[.]" (DTSC 1520.) On October 14, 2009, DTSC, exercising its enforcement authority "[a]s the agency responsible for ensuring that all Resource Conservation and Recovery Act (RCRA) corrective action and response action requirements are met," asked Boeing to submit a revised SOP that would be

specific to Boeing's demolition program, and "that will ensure that DTSC is notified of any potential demolition activities located near or within either a solid waste management unit or where there may have been a release of a hazardous substance." (DTSC 1520.) As described by Gerard Abrams, a Senior Engineering Geologist at DTSC:

> The intent of the revised SOP is 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 notice to the community.

(DTSC 1661 (emphasis added).) Mr. Abrams was particularly sensitive to the possibility that "some chemical impacted soils … may be uncovered during a demolition activity" which could transform the demolition into an interim cleanup, which would require CEQA review. (*Id.*; see also DTSC 1716 [summarizing purpose of SOP].)

On November 4, 2009, Boeing submitted a draft of its revised SOP addressing the demolition of its buildings, which DTSC made available for public review and comment. (DTSC 1622–40; DTSC 1783–85.) (The final revised SOP is at DTSC 1796–1814.)

From 2010 to 2012, Boeing demolished and removed eight structures from Areas I and III of the SSFL site in accordance with the terms of its revised SOP. (DTSC 6655.) DTSC regularly updated the public on Boeing's demolition activities by posting

Boeing's demolition notification packages and DTSC's monthly status reports on DTSC's SSFL website. (See, e.g., DTSC 2931. DTSC 2933.)

V. BOEING'S DEMOLITIONS IN AREA IV AND THE AMENDMENTS TO THE SOP

In early 2012, Boeing began submitting demolition notification packages to DTSC for non-radiological buildings in Area IV, starting with Building 4015. (See, e.g., DTSC 2426–27, DTSC 2857–2914.) These buildings were classified as "non-radiological" because they were never licensed or approved to handle or store regulated radiological materials and had no documentary history of such use. As with Boeing's previous demolitions, at no point during this process did DTSC authorize or disallow Boeing's demolition of its non-radiological buildings in Area IV. It was Boeing's responsibility to obtain whatever entitlements for use it needed for the demolitions. Rather, DTSC reviewed Boeing's demolition notification packages to confirm that the demolitions would not adversely impact the site investigation and cleanup being overseen by DTSC, and that the debris from the demolition was properly characterized for disposal in compliance with the HWCL.

DTSC posted Boeing's notification packages on DTSC's SSFL website, and DTSC included an update on the Area IV demolitions in its June 29, 2012 monthly status report to the public. (DTSC 2933.) Boeing elected to perform radiological screening on all demolition waste to ensure it met the acceptance criteria of the disposal facilities. (Declaration of Paul Carpenter

in support of DTSC's Opposition Brief ("Carpenter Decl."), 11AA008284, ¶ 7.)

DTSC subsequently asked Boeing to delay demolition activities in Area IV while DTSC reviewed the pre-demolition radiological waste characterization screening requirements that had been proposed by Boeing. (DTSC 2943, DTSC 5775.) As part of this review, DTSC consulted with DPH and US EPA, and reviewed radiological surveys of SSFL and other documents. (DTSC 5806–07; see also DTSC 2960–61, DTSC 3131; DTSC 7076 [later email describing review process used for all non-radiological buildings].)

On October 15, 2012, DTSC informed Boeing by letter that it had concluded that the proposed demolition of Building 4015 "should not disturb chemically-impacted soil or other impacted surficial media currently under investigation" and that the proposed actions did not merit a more detailed work plan. (DTSC 5806.) DTSC also provided comments on the radiological screening criteria Boeing intended to use for Building 4015. Following its consultation with DPH and US EPA, DTSC concluded that "radionuclide contaminants are not present above background activity levels at the Building 4015 demolition area or in demolition materials identified for disposal and recycling." (DTSC 5806.) DTSC recommended that Boeing screen certain features (e.g., the road base underlying the asphalt) for radiological activity and also sample these materials for chemicals and metals, and it told Boeing that DTSC staff planned to be present for the radiological screening. (DTSC 5807, DTSC

5822.) DTSC posted its review letter on the SSFL website. (DTSC 5824.)

After issuing its Building 4015 review letter, DTSC asked Boeing to amend the revised SOP to cover the non-radiological buildings in Area IV.[8] (DTSC 5885.) Boeing provided the SOP amendment to DTSC on November 1, 2012 ("Amendment 1"). (DTSC 5885, DTSC 5897–99.) During the next several months, Boeing submitted demolition notification packages for five non-radiological structures in Area IV. DTSC reviewed these and provided comments. (See, e.g., DTSC 6281–86, DTSC 6312–19; DTSC 7041–48; DTSC 7597–7603; see also DTSC 6655.) DTSC also posted Boeing's notifications on its SSFL website and included updates regarding the status of Boeing's demolitions in DTSC's monthly status reports. (See, e.g., DTSC 6656–67 (January 2013), DTSC 6726–37 (February 2013), DTSC 7581–92 (March 2013).)

In September 2012, Boeing informed DTSC that it planned to demolish its six former radiologic buildings in Area IV that had been licensed for radiologic uses by either DPH or the NRC. (DTSC 2981.) These included Building 4005 (remaining slab only); Building 4009; Building 4011 (low bay); Building 4055; the L-85 site (remaining slab and wall from former Building 4093); and Building 4100. (*Id.*; see also DTSC 7848.) Except for Building 4100, each of these buildings had been decommissioned and

[8] Boeing's 2009 revised SOP was not applicable to "areas where known radiological contaminant releases are documented or suspected (such as Area IV)." (DTSC 1784.)

released for unrestricted use by the relevant radiological licensing authority—either by NRC or DPH—decades earlier. (See DPH 6249 [noting release of Building 4005 in 1995]; DPH 6252 [noting release of Building 4011 in 1998]; DPH 6607, [noting release of Building 4055 from NRC license in late 1980s]; DPH 6611 [footnote 9 noting release of Building 4009 in 1999]; DPH 6621 [noting "prior USNRC release of L-85 area for unrestricted use"].)

On February 6, 2013, Boeing sent DTSC the first demolition notification package for a former radiological building in Area IV, specifically concerning the removal of some remaining asphalt, several concrete slabs, and a wall from the site of a former radiological building, L-85. (DTSC 6804–6973.) The actual buildings that comprised L-85 had been demolished and removed in 1995. (DTSC 6804.) DTSC posted the demolition package for public review. (See, e.g., DTSC 7050 [February 13, 2013 email from community member providing comments to DTSC on L-85 package].)

To assist its review of the notification packages for Boeing's former radiological buildings to determine whether any changes should be made, DTSC consulted with DPH and US EPA and asked these agencies to review the radiological release survey documents for these structures. (Carpenter Decl., 11AA008285–86, ¶ 11.) DTSC asked Boeing to prepare another amendment to the revised SOP to cover the radiological structures. (DTSC 7593–96.) Boeing provided DTSC with the amendment. After incorporating comments from DTSC (see DTSC 7645), Boeing

finalized this amendment ("Amendment 2") and sent it to DTSC on April 19, 2013. (DTSC 7824–51.) In Amendment 2 to the SOP, Boeing agreed that

> [i]f building material surface activity exceeding federal and state release criteria is observed during the above post-demo survey, demolition will be halted and DTSC, CDPH and the Department of Energy (DOE) will be notified. Contaminated structural material would be segregated and managed and disposed of as low level radioactive waste.

(DTSC 7850.)[9]

After consulting with DPH and US EPA, DTSC sent Boeing a letter on May 1, 2013, in response to the notification package for the L-85 site. In its letter, DTSC recommended additional post-demolition screening for some of the material at the L-85 site. (DTSC 7921–34.) DTSC's recommendation was intended to address a note in the 1987 NRC decommissioning report stating that, during the initial building demolition, a small volume of neutron-activated concrete had been left in place and covered with fresh concrete to complete the decay process. (*Ibid*.) Boeing agreed to perform this screening to assure that the concrete met the federal and state release criteria. (Carpenter Decl., 11AA008286, ¶ 13.)

[9] The "release criteria" were previously proposed by Boeing and reviewed either by NRC or DPH during the decommissioning process for each building. An explanation of the decommissioning process is provided in DPH's brief.

Between May 2 and May 7, 2013, Boeing removed the asphalt, concrete, and wall at the L-85 site, and DTSC staff were present to observe some of the work. (DTSC 7937.) As it had agreed, Boeing stockpiled some of the concrete and metal piping onsite for focused radiological surveys. (DTSC 7989; DTSC 9227–42, DTSC 9323.) As with Boeing's previous demolitions, DTSC did not authorize or disallow Boeing's demolition of the remaining features at the L-85 site. Instead, DTSC reviewed and commented on the demolition notification package, the proposed screening procedures, and the survey results to confirm that the demolition would not adversely impact the hazardous waste investigation and cleanup at the SSFL site overseen by DTSC, and that the debris from the demolition was properly characterized for disposal under the HWCL.

During July and August 2013, Boeing prepared and submitted demolition notification packages for four of the remaining former radiological buildings. Before DTSC could complete its review of these packages, Petitioners filed this action.

VI. PROCEDURAL BACKGROUND

Petitioners filed their Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief against DTSC and DPH on August 6, 2013. Oral argument took place on November 9, 2018, before the Honorable Richard K. Sueyoshi. On November 19, 2018, Judge Sueyoshi issued a ruling in which he denied Petitioners' First Amended Petition and Complaint for Injunctive and Declaratory Relief. (See 12AA009163–82.)

The trial court denied Petitioner's first cause of action alleging that DTSC violated CEQA. It found that Petitioners failed to identify any legal authority requiring Boeing to obtain a lease, permit, or other entitlement for us from DTSC. (Ruling, p. 11.) Absent this, the trial court held that Boeing's demolitions could not be considered a "project" under Public Resources Code section 21065, subdivision (c).

The trial court also denied Petitioner's third cause of action alleging that DTSC engaged in an underground rulemaking in violation of the APA. The court found that Petitioners had failed to identify evidence showing that DTSC required compliance with the radiological release criteria, or disapproved of an action not complying with the criteria, in the course of enforcing a law within DTSC's jurisdiction. (*Id.*, p. 14.)

The trial court also denied Petitioners' second and third causes of action against DPH. Having denied Petitioners' substantive claims, it also denied their fourth and fifth causes of action for injunctive and declaratory relief against DTSC and DPH. (*Id.*, pp. 14, 19.)

After Judgment was entered in favor of Respondents (12AA009190–96), Petitioners filed this appeal.

ISSUES PRESENTED

With respect to DTSC, this appeal presents the following issues:

1. Whether Boeing's demolitions of its former radiological structures are a "project" under Public Resources Code section 21065, subdivision (c) because they "involve[d] the issuance . . . of

a lease, permit, license, certificate, or other entitlement for use" by DTSC.

2. Whether DTSC's review of Amendment 2 to Boeing's SOP is a "project" under Public Resources Code section 21065, subdivision (a).

3. Whether DTSC improperly segmented the CEQA review of Boeing's building demolitions and DTSC's CEQA review of DOE's proposed cleanup required by the 2010 AOC with DOE.

4. Whether DTSC engaged in an impermissible underground rulemaking in violation of the APA when it referenced certain radiological cleanup criteria previously established by other agencies for Boeing's buildings at the SSFL site and at another site in San Francisco, the Hunters Point Shipyard Site.

STANDARD OF REVIEW

"Whether an activity is a project [for CEQA purposes] is an issue of law that can be decided on undisputed data in the record on appeal." (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 382, as modified (Sept. 12, 2007) ("*Muzzy Ranch*").) Similarly, "[w]hether two activities are parts of a single project is a question for our independent review." (*County of Ventura v. City of Moorpark* (2018) 24 Cal.App.5th 377, 385.) Accordingly, this Court reviews Petitioners' CEQA claims de novo.

Whether an administrative agency promulgated and relied upon an underground violation in violation of the APA is generally an issue of law. (See *Tidewater Marine Western, Inc. v.*

Bradshaw (1996) 14 Cal.4th 557, 572 [independently reviewing the record and determining, as a matter of law, that the disputed policy was an underground regulation].) Thus, Petitioners' APA claim against DTSC is also subject to de novo review.

ARGUMENT

I. DTSC DID NOT APPROVE OR CARRY OUT A "PROJECT" AS DEFINED BY CEQA

CEQA applies only to activities that meet the statute's definition of a "project." (See Public Resources Code, § 21080, subd. (a) [stating that CEQA "shall apply to discretionary projects proposed to be carried out or approved by public agencies"].) "An activity that is not a 'project' . . . is not subject to CEQA." (*Muzzy Ranch*, *supra*, 41 Cal.4th 372 at p. 380.) Public Resources Code section 21065 provides that, for purposes of CEQA, a "project" is "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment," and which meets one of three additional requirements. The activity must be one of the following:

> (a) An activity directly undertaken by any public agency.
>
> (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
>
> (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

(Pub. Resources Code, § 21065.)

Petitioners argue that DTSC issued an entitlement for use for Boeing's demolitions, which therefore constitute a "project" under section 21065, subdivision (c). They also argue that DTSC's 2013 review of Amendment 2 to Boeing's SOP was an activity directly undertaken by DTSC, and thus falls within section 21065, subdivision (a)'s definition of a "project." As explained below, both arguments fail. DTSC never issued an entitlement for use for Boeing's demolitions, so subdivision (c) of Public Resources Code section 21065 does not apply. With respect to DTSC's review of Amendment 2, Petitioners failed to properly raise this argument in the trial court, and the trial court declined to consider it on that basis. Accordingly, Petitioners are precluded from raising it on appeal. Furthermore, Petitioners have failed to show that DTSC's review of Amendment 2 could have resulted in direct or reasonably foreseeable indirect physical changes to the environment. In sum, Boeing's building demolitions and DTSC's review of Amendment 2 do not meet the definition of a "project," and Petitioners' CEQA claims must therefore be rejected.

A. Boeing's Demolitions Did Not Involve the Issuance of an Entitlement for Use by DTSC

1. Petitioners Have Not Identified an Entitlement for Use Issued by DTSC

A private activity may be subject to CEQA if it "involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."[10] (Pub.

[10] A private activity also may be subject to CEQA if it is supported "through contracts, grants, subsidies, loans, or other (continued…)

Resources Code, § 21065, subd. (c).) To subject such an activity to CEQA, the agency's issuance of a lease, permit, or other entitlement for use must be a necessary precondition for the private activity, without which the activity could not legally proceed. The regulations implementing CEQA in the California Code of Regulations, title 14, section 15000 et seq. ("CEQA Guidelines") define a "private project" as one that "will need a discretionary approval from one or more governmental agencies[.]" (Cal. Code Regs., tit. 14, § 15377(b).) The CEQA Guidelines' interpretation that a private project *needs* an agency's discretionary approval should be accorded great weight. (*Save Tara,* 45 Cal.4th at p. 128, fn. 7.)

This interpretation accords with the common sense understanding that CEQA is not applicable unless there is an "affirmative governmental agency action altering the status quo." (*Main San Gabriel Basin Watermaster v. State Water Resources Control Bd.* (1993) 12 Cal.App.4th 1371, 1383 [holding that no EIR was necessary when the agency denied a permit application].) For example, an agency's issuance of a zoning variance or a conditional use permit clearly places the underlying activity within the definition of "project" in Public Resources Code section 21065, subdivision (c), as does the issuance of a site development

---

(…continued)

forms of assistance from one or more public agencies." (Pub. Resources Code, § 21065, subd. (b).) Petitioners do not allege that Boeing's demolitions were supported by such assistance from DTSC, and thus this subdivision is not applicable here.

permit (*City of Antioch v. City Council of the City of Pittsburgh* (1986) 187 Cal.App.3d 1325, 1336–38), or the issuance of a demolition permit for a designated landmark (*First Presbyterian Church of Berkeley v. City of Berkeley* (1997) 59 Cal.App.4th 1241, 1257). By contrast, where—as here—a public agency action is not the "pivotal go/no-go approval" for the private activity, subdivision (c) does not apply to the agency's action. (*Parchester Village Neighborhood Council v. City of Richmond* (2010) 182 Cal.App.4th 305, 314 [city's letter of support and municipal service agreement with tribe did not transform casino into a "project" for purposes of CEQA].)

Petitioners do not direct the Court to anything in the administrative record that is even arguably a lease, permit, license, certificate, or other entitlement for use issued by DTSC to Boeing authorizing the demolitions. This is because no such document exists. An examination of the review letter DTSC sent in response to Boeing's demolition notice for the L-85 site demonstrates that it is not a permit or entitlement. (DTSC 7921–34.) The same is true of DTSC's letter reviewing the survey data from the stockpiled debris at the L-85 site. (DTSC 9227–42.) DTSC's response to Boeing's draft of Amendment 2 to the SOP is also not an entitlement for use. (DTSC 7639.) These DTSC documents do not state that they authorize any action by Boeing. They do not identify a statute vesting DTSC with the power to authorize or disallow Boeing to undertake the demolition of Boeing's Area IV structures. They do not purport to grant Boeing a legal entitlement upon which it could rely in undertaking the

demolitions in the manner of a lease, permit, license, certificate, or other entitlement for use. In short, DTSC's review letters regarding the demolition notice and survey data for L-85, and its response to Amendment 2, are not discretionary authorizations for Boeing's demolitions.

Petitioners also fail to identify any law requiring Boeing to obtain from DTSC a lease, permit, license, certificate, or other entitlement for use before commencing the demolitions. The HWCL, the statute governing DTSC's oversight of Boeing's investigation and cleanup at the SSFL site, does not include such a requirement. The Area IV structures that were the subject of Boeing's demolition notification packages are not "permitted" units under the HWCL. Therefore, no prior authorization from DTSC was required for their demolition in the absence of evidence of hazardous waste contamination. (Health & Saf. Code, § 25200.15 [owner or operator of a hazardous waste facility may "change facility structures or equipment" that are "not within a permitted unit"].)[11]

2. DTSC's Review of Boeing's Planned Demolitions Did Not Constitute the Issuance of an Entitlement for Use

Despite Petitioners' inability to point to any formal authorization, Petitioners argue that DTSC's review of Boeing's

[11] In contrast, if the buildings had been used for the treatment or storage of hazardous waste, they would have been permitted by DTSC, and DTSC would have required an approved closure plan before Boeing could demolish them. (Cal. Code Regs., tit. 22, § 66265.113, subd. (b).)

demolition plans was equivalent to the issuance of an entitlement for use under Public Resources Code section 21065, subdivision (c). (Pet. Op. Br. 23.) Petitioners claim that DTSC "exercised complete control over Boeing's demolition activities" and that by so "regulat[ing] Boeing's demolition activities," the demolitions therefore involved the issuance of an "entitlement for use." (*Ibid.*) If adopted by this Court, Petitioners' interpretation would expand the definition of "project" well beyond the limits established by Public Resources Code section 21065.

Petitioners' interpretation conflates DTSC's review of Boeing's demolitions with the issuance of a legal entitlement, such as a zoning variance, development permit, or demolition permit. As the lead agency overseeing the HWCL corrective action at the SSFL site, DTSC is vested with broad discretionary authority to investigate matters related to hazardous waste management and take steps to enforce its rules and regulations. (Health & Saf. Code, § 58009 [DTSC "may commence and maintain all proper and necessary actions … to enforce its rules and regulations" and "to protect and preserve the public health"]; Gov. Code, § 11180 [broadly authorizing state agencies to "make investigations"]; Asimow et al., Cal. Practice Guide: Administrative Law (The Rutter Group 2016) § 7:1 ["The Government Code provides general authority for all state agencies to investigate matters under their jurisdiction"].)

Here, DTSC exercised its enforcement authority under the HWCL when it asked Boeing to prepare the revised SOP and the two amendments, reviewed and provided comments on those

documents, and reviewed and provided comments on Boeing's demolition packages. DTSC took these actions because it was concerned that Boeing's demolitions could compromise the ongoing site investigation and cleanup by destroying important information regarding the locations and types of potential sources of hazardous waste releases before they could be documented, and improperly removing contaminated soil from the site before a cleanup plan for the SSFL site was approved. (See DTSC 1452, DTSC 1515, DTSC 1638, DTSC 1661, DTSC 1716.) For this reason, the first items addressed in each of DTSC's review letters are DTSC's conclusions regarding whether the proposed demolition would compromise the site investigation, including whether any building features existed that should be documented for further investigation as part of the hazardous waste investigation and cleanup of the SSFL site. (DTSC 7922 [sections 1 and 2 in DTSC's review letter for the L-85 site]; see also DTSC 6313, DTSC 6322, DTSC 7042 [examples of DTSC review letters for non-radiological buildings in Area IV].)

DTSC's review of Boeing's demolition notification packages and its requests to Boeing to delay a demolition did not constitute the issuance of a legal entitlement authorizing Boeing to conduct the demolitions. Petitioners focus on occasions where DTSC staff used terms such as "require" or "approve" while reviewing Boeing's demolition notification packages. (Pet. Op. Br. 22–23.) Although these or similar terms may be used by agencies when issuing a permit, license or similar authorization, their use by DTSC staff in

this context does not somehow transform DTSC's review of the demolition packages into the issuance of an entitlement for use. As discussed above, DTSC does not have the authority to issue an entitlement for use in connection with Boeing's demolitions. Instead, when DTSC staff employed those terms, they were engaged in information gathering and observation of Boeing's activities to ensure the the site investigation and the future cleanup would not be compromised. Such enforcement actions are a necessary part of DTSC's responsibilities under the HWCL. They are not equivalent to the issuance of a permit, license, or other entitlement for use that make a private activity a "project" under Public Resources Code section 21065, subdivision (c).

3. The Cases Cited by Petitioners Are Inapplicable

None of the authorities cited by Petitioners support their unduly expansive interpretation of "project" under subdivision (c) of Public Resources Code section 21065. In *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, disapproved of on other grounds by *Kowis v. Howard* (1992) 3 Cal.4th 888, the Supreme Court affirmed that "the word 'project' as used in . . . provisions of the [CEQA] includes the issuance of permits, leases and other entitlements" and was not restricted to public works projects carried out by the government. (*Id.* at p. 262.) While it is true that private projects may be subject to CEQA if they involve the issuance of such authorizations, this is irrelevant here because DTSC never issued a permit, lease, or other entitlement for use for Boeing's demolitions.

In *Stockton Citizens for Sensible Planning* (2010) 48 Cal.4th 481, the question confronted by the Supreme Court was *not* whether the private activity in question involved the issuance of a permit; the construction of a new Walmart store unquestionably did. (*Id.* at p. 512.) Instead, the question was whether the City's issuance of a notice of exemption was sufficient to demonstrate its approval of the project, thereby commencing the limitations period for the petitioner's suit. The Supreme Court held that it did. (*Id.* at pp. 505–06.) This decision is inapposite here where DTSC did not issue a notice of exemption, and the timeliness of Petitioner's challenge is not at issue.

Petitioners' reliance on *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80, is misplaced. Petitioners cite *McCorkle* for the court's statement that CEQA applies where an agency has power to eliminate or mitigate the environmental consequences that might be identified in an environmental study. (Pet. Op. Br. 31.) However, the court's statement was related to CEQA's application to construction projects that *require* governmental approval. "As applied to private projects, the purpose of CEQA is to minimize the adverse effects of new construction on the environment." (*McCorkle Eastside Neighborhood Group*, 31 Cal.App.5th at p. 90, quoting *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 933.) This statement is inapplicable here because, as explained above, Boeing's demolitions did *not* require an entitlement for use from DTSC.

Moreover, the case shows that Petitioners' expansive interpretation of "project" is erroneous: the court of appeal held that the city's review and approval of the design for a new multifamily development did *not* trigger CEQA because such design reviews "cannot be used to impose environmental conditions." (*McCorkle Eastside Neighborhood Group*, 31 Cal.App.5th at p. 94.) This demonstrates that not every review by a public agency of a private activity constitutes the issuance of an entitlement for use.

Finally, the decisions in *County of Amador v. City of Plymouth* (2007) 149 Cal.App.4th 1089, and *McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, overruled on another point in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570 fn. 2, are inapplicable to the question of whether Boeing's demolitions are a "project" under subdivision (c) of Public Resources Code section 21065. Neither decision analyzed or applied subdivision (c); rather, the provision at issue in those cases was subdivision (a), which applies to activities directly undertaken by public agencies. (149 Cal.App.4th at p. 1099, 1108 [municipal service agreement obligated city to undertake improvements to public structures and other public works, and to transfer an access road]; 202 Cal.App.3d at p. 1140 [regional open space district acquired two parcels of surplus federal property containing hazardous waste].)

B. Petitioners' Claim that DTSC's Review of Amendment 2 Was a "Project" Under the "Direct Agency Activity" Prong Fails

Petitioners also argue that DTSC's review of Amendment 2 to Boeing's SOP is a "project" under Public Resources Code section 21065, subdivision (a), which applies to "[a]n activity directly undertaken by any public agency." (Pet. Op. Br. 32.) Petitioners first raised this argument in their reply brief during the writ proceeding below, and the trial court properly declined to consider it based on the holdings in *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, and other cases, which hold that a party may not wait to raise an argument in its reply brief. (Ruling on Submitted Matter re: Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief ("Ruling"), p. 7, fn. 7.)[12] In their opening brief on appeal, Petitioners do not contest that the trial court erred when it rejected this argument as untimely, and they therefore have waived any such argument. (See *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 56.) Having failed to properly raise their subdivision (a) argument in the trial court, they are precluded from raising it on appeal. (*Holden v. City of San Diego* (2019) 43 Cal.App.5th 404, 419 [where petitioner failed to "adequately raise and discuss . . . [an] issue in the trial court, he is precluded from raising that issue on appeal."].)

Even if Petitioners had properly raised and preserved their argument that DTSC's review of Amendment 2 was a "project"

[12] The trial court's Ruling is at 12AA009163–82.

under subdivision (a) of Public Resources Code section 21065, it still would fail. First, Petitioners do not show—or even attempt to show—that DTSC's review of Amendment 2 may have caused "either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Pub. Resources Code, § 21065.) The CEQA Guidelines provide examples of direct agency activities that meet this requirement, such as "public works construction and related activities clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption and amendment of local General Plans or elements thereof pursuant to Government Code Sections 65100–65700." (Cal. Code Regs., tit. 14, § 15378, subdivision (a).) By contrast, an agency's oversight actions, such as DTSC's review of Amendment 2, generally will not be found to cause changes to the physical environment. (See *Center for Biological Diversity v. California Department of Conservation* (2019) 36 Cal.App.5th 210, 227 [agency's oversight of a regulatory program encompassing private activity is not a "project" requiring CEQA review].) As explained above, unlike a city or county, DTSC has no general permitting role in the demolition of buildings. Boeing was responsible for obtaining any authorizations required to demolish its buildings at the SSFL site, as it had been doing for decades without DTSC's involvement.

Petitioners cite a statement in Amendment 2 that DTSC allegedly concurred with Boeing that debris from the demolitions could be taken to a Class I disposal facility. (Pet. Op. Br. 32–33.)

However, this statement in Amendment 2 simply reflects the policy established in Executive Order D-62-02 (Governor Davis 2002), providing that materials from decommissioned facilities released for unrestricted use—such as the structures at issue here—should not be disposed at a Class III or unclassified landfill in California. (See DPH 4525–26.) Given that Boeing's disposal plan was consistent with the limitations contained in this policy, Petitioners do not explain how DTSC's alleged concurrence caused any direct or indirect environmental changes.[13]

Petitioners also assert without explanation that Amendment 2 "limits the use of pre-demolition radiological surveys, and require [sic] post-demolition radiological surveys of inaccessible materials." (Pet. Op. Br. 33.) It is unclear what conclusions Petitioners want the Court to draw from this assertion. In any case, this assertion is insufficient to show that DTSC's review of Boeing's proposals in Amendment 2 regarding the use of

---

[13] To the extent Petitioners contend that the material is low-level radioactive waste and is required be sent to a low-level radioactive waste facility, they are mistaken. Low-level radioactive waste can only be disposed at a licensed low-level radioactive waste disposal facility. (See Health & Saf. Code, § 115255, art. 2(P), art. 6(A).) However, by definition, material from a decommissioned building is not low-level radioactive waste because it is no longer "regulated." (See Health & Saf. Code, §§ 115255, art. 2(I) and 115261, subd. (e)(4) ["Low-level radioactive waste" means "regulated radioactive material"]; see also Cal. Code Regs., tit. 17, § 30100, subd. (c) ["[d]ecommission" means "to remove safely from service and reduce residual radioactivity to a level that permits release of the property for unrestricted use and termination of the license"].)

radiological surveys caused a direct or indirect physical changes to the environment. This failure is fatal to their subdivision (a) argument.

Moreover, there is a significant disconnect between Petitioners' "direct agency activity" argument and the relief they seek. Even if this Court were to find that DTSC's review of Amendment 2 is a "project" requiring CEQA review, it is not clear what effect this would have on Boeing's demolitions. Boeing's demolitions are not dependent on the issuance of an entitlement for use by DTSC. Thus, Boeing might elect to proceed with the demolitions and voluntarily comply with the requirements in Amendment 2, which is, after all, Boeing's document.

Petitioner's authorities are inapposite. (See Pet. Op. Br. 33.) The cases all involve the application of CEQA to agency regulations. It is well-established that an agency's adoption of, or amendment to, its own regulations *can* satisfy the requirement in subdivision (a) of "[a]n activity directly undertaken by [a] public agency," but to be considered a "project" under Public Resources Code section 21065, an activity still must meet the key requirement that it may cause a direct or reasonably foreseeable indirect physical change to the environment.[14] In the absence of any such showing, Petitioners' subdivision (a) argument fails.

---

[14] In all these cases, the direct agency activity at issue met this requirement. In *John R. Lawson Rock & Oil, Inc. v. State Air Resources Bd.* (2018) 20 Cal.App.5th 77, the Air Resources Board modified its regulations to extend the deadline by which certain small fleet operators had to comply with diesel emission limits. (*Id.* at pp. 85, 98.) In *POET, LLC v. State Air Resources Bd.* (2017)

(continued…)

C. DTSC Did Not Improperly "Segment" Its Review of DOE's Proposed Soil Cleanup Required by the 2010 AOC

Petitioners argue that DTSC, by not conducting an environmental review of Boeing's structure demolitions, improperly "segmented" its CEQA review of the remediation for the SSFL site required by the 2010 AOC with DOE. (Pet. Op. Br. 34.) This argument fails.

CEQA prohibits an agency from segmenting the environmental review of a project to ensure that "environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences." *Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 396, as modified on denial of rehg (Jan. 26, 1989) (citation and quotation marks omitted). Similarly, "[s]ome courts have concluded a

---

(…continued)

12 Cal.App.5th 52, the plaintiff challenged the Air Resources Board's adoption of regulations establishing low carbon fuel standards. (*Id.* at p. 57.) In *California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.* (2009) 178 Cal.App.4th 1225, the activity at issue was the air district's adoption of a rule authorizing the use of road paving as an accepted method to offset increased dust and particulate pollution caused by a project. (*Id.* at p. 1230.) Finally, in *Plastic Pipe & Fitting Assn. v. Cal. Building Standards Com.* (2014) 124 Cal.App.4th 1390, the activity was the potential adoption by the Building Standards Commission and state building agencies of a regulation allowing the use of cross-linked polyethylene pipes in construction projects. (*Id.* at p. 1413.)

proposed project is part of a larger project for CEQA purposes if the proposed project is a crucial functional element of the larger project such that, without it, the larger project could not proceed." (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 99.) As these cases and the cases cited by Petitioners demonstrate, this prohibition presumes that each smaller part of the larger project meets the definition of "project" in Public Resources Code section 21065.[15] Here, as explained above, Boeing's demolitions do not meet the definition of a "project" as defined by CEQA, and an activity that is not a "project" for purposes of CEQA is not subject to CEQA.[16] (*Muzzy*

---

[15] Thus, in *Assoc. for a Cleaner Environment v. Yosemite Community College Dist.* (2004), 116 Cal.App.4th 629, the court determined that the closure and removal of a campus shooting range was itself a project for CEQA purposes because it was "an activity directly undertaken by" the community college. (116 Cal.App.4th at p. 639.) In *RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1204, the trucking of water was supported through a contract with the OM Water District. (170 Cal.App.4th at p. 1204.) It also required the Water District to make physical changes to its structures. (*Id.* at p. 1205.) In *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, as modified (Oct. 31, 2007), the road realignment work had to be approved by the City and Public Utilities Commission. (155 Cal.App.4th at p. 1227 fn. 7.)

[16] While it may be possible that Boeing's demolitions involved the issuance an entitlement for use by some unnamed agency, Petitioners do not allege such facts and did not name such an agency in this action. (See fn. 1, above.) As explained above, DTSC did not issue an entitlement for use for Boeing's demolitions that would have triggered CEQA under Public Resources Code section 21065, subdivision (c).

Ranch, *supra,* 41 Cal.4th 372 at p. 380.) Petitioners' segmenting argument fails on this basis. (See *County of Ventura v. City of Moorpark*, *supra*, 24 Cal.App.5th at 386 [notwithstanding court's finding that settlement agreement was part of the larger beach restoration project, environmental review of agreement was not required based on CEQA exemption].)

Moreover, Boeing is not a party to the 2010 AOC, which applies only to DOE. (DTSC 2101 [listing the parties as DTSC and DOE].)[17] Thus, Boeing's demolition of Boeing's buildings is not subject to the requirements in the 2010 AOC. Boeing's obligations with respect to the site cleanup are set forth in the 2007 Corrective Action Order, which does not contain provisions regarding Boeing's decommissioning and demolition program (and Petitioners have not argued otherwise).

II. DTSC DID NOT VIOLATE THE APA

Petitioners contend that DTSC adopted an underground regulation in violation of the APA by referencing two federal criteria for radiological release (Reg. Guide 1.86 and DOE Order 5400.5) and two internal DPH policy memoranda (DECON-1 and

---

[17] This is reflected in Section 2.3 of the AOC, which governs "Building Demolition Activities." Section 2.3.2 requires DOE to "make every effort to gain The Boeing Company's cooperation and approval in removing the buildings at the Site that remain under the ownership and control of The Boeing Company." (DTSC 2107.) The AOC also provides in Section 2.3.3 that "[t]o the extent DOE is unable to remove, or arrange with Boeing to remove, the buildings at the Site that remain under the ownership and control of Boeing, DOE's obligations under this Order related to soils beneath those buildings shall be stayed …"[17] (*Ibid*.)

IPM-88-2) in DTSC documents relating to SSFL and the Hunters Point Shipyard Site in San Francisco, California ("Hunters Point").[18] Under the APA, "[n]o state agency shall issue, utilize, enforce, or attempt to enforce any . . . regulation . . . unless [it] has been adopted as a regulation and filed with the Secretary of State" in conformity with APA requirements. (Gov. Code, § 11340.5, subd. (a).) A "regulation" is defined as: "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.)

The Supreme Court has established a two-prong test for evaluating whether a rule or standard must be adopted in accordance with the APA. (See *Tidewater Marine Western, Inc. v. Bradshaw*, (1996) 14 Cal.4th 557, 571.) First, "the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided." (*Ibid*.) Second, the rule must "implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure." (*Ibid.)* As detailed below, Petitioners fail to meet either prong of the *Tidewater* test. DTSC's mere reference to the Four Documents does not establish

[18] These criteria are referred to below as the "Four Documents."

a rule of general application. Further, in referencing some or all of the Four Documents, DTSC was not implementing, interpreting, or making specific any law that it enforces or administers.

A. Petitioners Cannot Establish the First Prong of the *Tidewater* Test Because the Documents Are Not a DTSC Rule of General Application

As the trial court correctly held, Petitioners fail to demonstrate that DTSC referenced the Four Documents "to 'apply a rule generally' or 'declare how a certain class of cases will be decided' as required by *Tidewater*." (Ruling, p. 14.) Indeed, it is unclear what exactly Petitioners are arguing with respect to DTSC's purported adoption of an underground regulation given that Petitioners' legal theory has changed on appeal. At the trial court, Petitioners defined the class of cases to which DTSC's alleged rule applied as: "the demolition of radiologically contaminated structures, and disposal of the resulting waste." (10AA007668.) Now, on appeal, Petitioners have re-defined the class of cases to be: "sites contaminated with low-level radioactive waste that are being considered for unrestricted release." (Pet. Op. Br. 51). Having failed to properly raise this argument in support of their APA claim at the trial court, Petitioners are precluded from raising it on appeal. (*Holden v. City of San Diego*, *supra*, 43 Cal.App.5th at 419 [where petitioner failed to "adequately raise and discuss . . . [an] issue in the trial court, he is precluded from raising that issue on appeal."].) At a minimum, Petitioners' shifting definition of the "class of cases," illustrates their difficulty in pinning down an APA violation on DTSC.

In an attempt to craft a rule of general application, Petitioners point to DTSC's reference to the Four Documents in DTSC documents regarding SSFL and Hunters Point. (See Pet. Op. Br. 48, citing DTSC009227, *id*. at 50 ["Upon supplying data showing compliance with Reg. Guide 1.86 standards, the Navy obtained DTSC and DPH concurrence in the release for unrestricted use ….].) But DTSC neither selected nor imposed the radiological release criteria contained in the Four Documents for either the SSFL site or Hunters Point. (Ruling, p. 14.)

For the SSFL site, Petitioners cite DTSC's reference to the Four Documents in internal memoranda regarding the planned demolition of certain Boeing-owned buildings. But DTSC referenced the Four Documents because they constitute the radiological release criteria that had been previously approved by other agencies for Boeing's structures. As previously stated, *DTSC is not the state agency responsible for decommissioning radiological buildings*. Rather, the NRC and DPH (as the state agency designated to assume licensing authority from the NRC) have authority over the decommissioning process. (See Health & Saf. Code, § 115000, subd. (b); Cal. Code Regs., tit. 17, § 30256; Exhibit 151, p. 14.) Nor does DTSC have authority over the cleanup of radioactive materials related to DOE activities. Rather, DOE has exclusive authority over DOE clean-up activities, DOE prime contractors, and DOE-related materials that are regulated under the Atomic Energy Act. (42 U.S.C. §§ 2018, 2140(a); see also *Pacific Legal Foundation*, 659 F.2d 903, 920, fn. 26.)

To the extent Petitioners argue that DTSC "adopted" these criteria as a general standard applicable to the regulation of radioactive material or radioactive waste, *DTSC does not have the statutory authority to make such determinations.* (See, e.g., Health & Saf. Code, §§ 115060, subd. (a) [DPH authority to license the possession of radioactive materials], 114715, 114720 [authorizing DPH to "prohibit the disposal of radioactive wastes" in such a manner as would "result in . . . significant radioactive contamination of the environment"].) For these reasons, DTSC was not imposing a rule by citing to the criteria, but instead referencing the radiological screening standards that had been incorporated by other agencies into Boeing's licenses at the SSFL site.

With respect to Hunters Point, the Navy is responsible for implementing the cleanup of radiological contamination at Hunters Point, which resulted from years of using radioactive materials in shipyard operations and in Naval Radiological Defense Laboratory research at the site. (See Exhibit 47, *Final Basewide Radiological Removal Action, Action Memorandum – Revision 2006, Hunters Point Shipyard*, (April 21, 2006).) Contrary to Petitioners' assertions, the Navy and US EPA, not DTSC, selected the radiological release criteria in the "2006 Action Memorandum" cited by Petitioners in support of its APA claim. (*Id*.) Further, Petitioners' reliance on Hunters Point to illustrate DTSC's general rule of applying the Four Documents is fatal on its face, as only one of the Four Documents – NRC Reg. Guide 1.86 – is referenced in the Hunters Point documents.

In sum, Petitioners have failed to satisfy the first prong of the *Tidewater* test and show that DTSC applied a rule generally to a particular class of cases. In each of the two instances cited by Petitioners, DTSC's reference to the Four Documents simply reflects the fact that these criteria were previously incorporated into licenses by the agencies having jurisdiction over licensing the use and possession of radioactive materials at that site. DTSC did not exercise any discretionary judgment in the formulation of the criteria, and it had no role in choosing the applicable criteria.

B. Petitioners Cannot Establish the Second Prong of the *Tidewater* Test Because the Documents Do Not Interpret or Make Specific a Law that DTSC Administers

Petitioners fail to show that DTSC's mere reference to the Four Documents "implement[ed], interpret[ed], or [made] specific" any law that DTSC enforces or administers. (*Tidewater*, 14 Cal.4th at p. 571.) Citing provisions of the HWCL, Petitioners assert that the second prong of the *Tidewater* test is met because "DTSC licenses hazardous waste facilities and enforces the law when violations occur." (Pet. Op. Br. 56.) As explained above, the HWCL is California's analog to RCRA. (*Movassaghi*, *supra*, 768 F.3d at 837.) The HWCL grants DTSC "cradle to grave" authority over hazardous waste and authorizes DTSC to compel cleanup actions of hazardous waste contamination at hazardous waste management facilities such as SSFL. (Health & Saf. Code, §§ 25200 et seq.; Cal. Code Regs., tit. 22, §§ 66261.20 et seq.; Health & Saf. Code, § 25187.) However, both RCRA and the HWCL specifically exclude from the definition of hazardous waste

radioactive materials regulated under the federal Atomic Energy Act. (42 U.S.C. §§ 6903(27), 6905(a); Cal. Code Regs., tit. 22, § 66261.4(a)(2); see also *Manning*, *supra*, 527 F.3d at 833 & fn. 4.) DTSC is not the agency statutorily charged with regulating and licensing radioactive materials, setting radiological release standards, and regulating the disposal of radioactive materials and low-level radioactive waste. Instead, DOE, NRC, and DPH have authority over the regulation of radioactive materials, radioactive waste, and the disposal of low-level radioactive waste.

The cases cited by Petitioners are distinguishable in that they address instances where agencies acted in a quasi-legislative manner by adopting rules, policies, or standards that implement, interpret, or make specific a law the agency enforces. For example, in *Tidewater*, the Supreme Court held that the Division of Labor Standards Enforcement (DLSE), a state agency empowered to enforce California's labor laws, was subject to the APA when it established a written enforcement policy to determine whether state labor laws applied to employees in the maritime industry. (*Tidewater Marine Western, supra*, 14 Cal.4th at p. 572.) The Court found that the policy was expressly intended as a rule of general application and interpreted the law that DLSE enforces. (*Id.*) Likewise, in *Vasquez v. Department of Pesticide Regulation* (2021) 68 Cal.App.5th 672, 690–91, the court held "there can be no real dispute" that the state agency's adoption of an annual cap on the amount of certain pesticides that could be applied in a township implemented the law

regulating pesticides, which the agency was responsible for enforcing, and was thus a regulation under the APA.

In contrast to *Tidewater* and *Vasquez*, DTSC was not interpreting or making specific a law *that it administers*. Instead, DTSC simply referenced the radiological release criteria other agencies had already determined to be applicable to Boeing's structures. To the extent Petitioners claim that DTSC actions involved the exercise of judgment and discretion by DTSC, and thus somehow satisfies the second prong of the *Tidewater* test, such a conclusion runs directly afoul of APA case law: "If, indeed, appellants would have us believe that any exercise of discretion by the [agency] must be a quasi-legislative action subject to the APA, we reject that line of reasoning." (*Sherwin-Williams Co. v. South Coast Air Quality Management District* (2001) 86 Cal.App.4th 1258, 1286.) Petitioners' failure to establish the second prong of the *Tidewater* test is fatal to its APA claim. Therefore, the trial court's judgment should be affirmed.

CONCLUSION

For the foregoing reasons, DTSC respectfully requests that this Court affirm the trial court's decision that DTSC did not violate CEQA or the APA.

Dated: September 14, 2022

Respectfully submitted,

ROB BONTA
Attorney General of California
EDWARD H. OCHOA
Senior Assistant Attorney General
SARAH E. MORRISON
Supervising Deputy Attorney General

/s/ David Zaft
DAVID ZAFT
KAVITA LESSER
Deputy Attorneys General
Attorneys for Respondent Department of Toxic Substances Control

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF OF RESPONDENT DEPARTMENT OF TOXIC SUBSTANCES CONTROL uses a 13-point Century Schoolbook font and contains 11,028 words.

Dated: September 14, 2022

Respectfully submitted,

ROB BONTA
Attorney General of California
EDWARD H. OCHOA
Senior Assistant Attorney General
SARAH E. MORRISON
Supervising Deputy Attorney General

/s/ David Zaft
DAVID ZAFT
KAVITA LESSER
Deputy Attorneys General
Attorneys for Respondent Department of Toxic Substances Control

DECLARATION OF ELECTRONIC SERVICE AND
SERVICE BY U.S.
MAIL

Case Name: *Physicians for Social Responsibility v. Department of Toxic Substance Control, et al.*
Case No.: *C088821 (3RD Sitrcit Court of Appeal)*
Case No.: *34-2013 80001589 (Sacramento Superior Court)*

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On September 14, 2022, I electronically served the attached **BRIEF OF RESPONDENT DEPARTMENT OF TOXIC SUBSTANCES CONTROL** by transmitting a true copy via this Court's TrueFiling system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on September 14, 2022, at Los Angeles, alifornia.

David Zaft	*/s/ David Zaft*
Declarant	Signature

Because one or more of the participants in this case have not registered with the Court's True Filing system or are unable to receive electronic correspondence, on September 14, 2022, a true copy of the above-referenced document enclosed in a sealed envelope has been placed in the internal mail collection system at the Office of the Attorney General at 300 S. Spring St., Los Angeles, CA 90013, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on September 14, 2022, at Los Angeles, California.

Lois Smith	*/s/ Lois Smith*
Declarant for U.,S. Mail	Signature

SERVICE LIST

Case Name: *Physicians for Social Responsibility v. Department of Toxic Substance Control, et al.*
Case No.: *C088821 (3RD Circuit Court of Appeal)*
Case No.: *34-2013 80001589 (Sacramento Superior Court)*

Hashim M. Mooppan
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
E-mail Address: hmmooppan@jonesday.com

David J. Feder
JONES DAY
555 South Flower Street, 15th Floor
Los Angeles, CA 90071
E-mail Address: dfeder@jonesday.com

Michael J. Strumwasser
Andrea Sheridan Ordin
Beverly Grossman Palmer
Julia Michel
STRUMWASSER &WOOCHER LLP
10940 Wilshire Blvd., Suite 2000
Los Angeles, CA 90024
E-mail Address: mstrumwasser@strumwooch.com
E-mail Address: aordin@strumwooch.com
E-mail Address: bpalmer@strumwooch.com
E-mail Address: jmichel@strumwooch.com
E-mail Address: loliver@strumwooch.com
E-mail Address: jthomson@strumwooch.com

Harvey Rosenfield
Pamela Pressley
CONSUMER WATCHDOG
6330 South San Vicente Blvd., Suite 250
Los Angeles, CA 90048
E-mail Address: harvey@consumerwatchdog.org
E-mail Address: pam@consumerwatchdog.org

Jeffrey P. Reusch
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I Street, Suite 125
Sacramento, CA 94244
E-mail Address: Jeffrey.Reusch@doj.ca.gov

Gordon Edward Hart
PAUL HASTINGS LLP
101 California Street, Floor 48
San Francisco, CA 94111
E-mail Address: gordanhart@paulhastings.com
E-mail Address: carolinelee@paulhastings.com

Via U.S. Mail

Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814
Case No.: 34-2013 800001589