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,
Petitioners and Appellants,
v.
Department of Toxic Substances Control; Department of Public Health; and Does 1 to 100,
Respondents,

The Boeing Company,
Real Party in Interest.

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

APPELLANTS' OPENING BRIEF

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APPELLANT/ PETITIONER: Physicians for Social Responsibility-Los Angeles, et al.

RESPONDENT/ REAL PARTY IN INTEREST: Department of Toxic Substances Control, et al.

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INTRODUCTION

There are few environmental issues that require more serious consideration than the management of radioactive materials from this nation's Cold War era, the legacy of nuclear development. The agencies tasked with protecting the public from these hazards are held to exacting standards for public disclosure, opportunity for comment, and reasoned analysis in support of their ultimate decisions which are embodied in both the California Environmental Quality Act (CEQA) and the Administrative Procedure Act (APA). Respondents Department of Toxic Substances Control (DTSC) and Department of Public Health (DPH, collectively Respondents) have flouted both statutes, permitting The Boeing Company to avoid public scrutiny and increased costs of safely demolishing and disposing the radioactively contaminated legacy of decades of nuclear development and testing on Boeing's property.

This appeal involves Respondents' failure to analyze the environmental consequences of demolishing and disposing debris from Boeing-owned structures located on a 290-acre portion of Boeing's Santa Susana Field Laboratory (SSFL) known as Area IV, a highly contaminated site used as a nuclear research and testing facility from the mid-1950s into the 1990s with hundreds of thousands of people living within a few miles. Decades of investigations have disclosed significant contamination of buildings, soil, groundwater, and bedrock, with carcinogenic radionuclides such as plutonium-239, cesium-137, and strontium-90 and various toxic chemicals. The environmental and public health risks of improperly disposing waste contaminated with these substances are significant and troubling.

Appellants Physicians for Social Responsibility, Southern California Federation of Scientists, Committee to Bridge the Gap, and Consumer Watchdog brought this suit to remedy the actions of DTSC and DPH in

abdicating their legal responsibilities by approving the demolition and disposal of radioactive structures without even the first step of CEQA review. In addition, instead of enforcing a duly-promulgated regulation that aspires to eliminate radioactive contamination, Respondents have consistently utilized a set of never-properly-adopted numeric "clean-up standards" without addressing the existing regulatory standard of eliminating all residual radiation. Respondents have used those same rules to allow radioactive debris to be dumped at facilities not licensed for the disposal of radioactive waste, including municipal landfill and recyclers. Material that meets the agencies' unadopted numeric standards is not "clean." Moreover, these standards are illegal underground regulations that violate the APA. Reliance on these numeric standards is also in violation of a 2002 writ of mandate commanding Respondent DPH to comply with CEQA and the APA prior to adopting any regulation setting numeric clean-up standards. Rather than comply with this order, DPH has ignored its duly adopted regulations and relied upon underground regulations.

Unifying these legal violations is Respondents' fundamental departure from key principles of California law: open, public decisionmaking processes. Failing to conduct CEQA review for the demolition of structures contaminated with nuclear waste, Respondents made their decisions behind closed doors, far from the open process required by CEQA. Likewise, by repeatedly relying on standards that were not adopted following an APA-compliant rulemaking with public notice and comment, DPH has shielded from public scrutiny its decisions about acceptable residual radioactive contamination at SSFL and other sites throughout the state and hidden from the public the consequent impacts on public health. The purposes of both CEQA and the APA—requiring agencies to set out the reasoning behind their decisions to the public—have been roundly defeated by Respondents, who have structured their decisions

to avoid public review and scrutiny. In the course of violating these two laws, Respondents are, without any public process, making decisions that expose Californians to cancer-causing radiation from a facility a federal court has described as "a terrible environmental mess."

Appellants' petition for a writ of mandate was denied by the superior court on the grounds that Respondents did not approve a "project" under CEQA, applying a narrow and formalistic test of what constitutes a "project" that is at odds with years of settled CEQA jurisprudence. The court also concluded that Respondents were allowed to rely upon numeric standards that declare radiologically-contaminated materials "acceptably dirty" even though those standards have *never* been adopted under the procedures of the APA. Both rulings are wrong as a matter of law and must be reversed.

STATEMENT OF FACTS

The Santa Susana Field Laboratory, Its Role in U.S. Nuclear Research and Testing, and Environmental Contamination

During the Cold War, the U.S. government made and tested rockets, nuclear reactors, and various nuclear applications at SSFL. (See *Boeing Co. v. Movassaghi* (*Movassaghi*) (9th Cir. 2014) 768 F.3d 832, 834.) SSFL was selected for this dangerous research because it was remote, but today, residential neighborhoods exist within a mile of the site, (DTSC001192[1]) more than a half million people live within 10 miles (*Movassaghi*, 768 F.3d at p. 834). SSFL's neighbors include Simi Valley, Chatsworth, Canoga

[1] Citations to the certified administrative record for DTSC are prefaced by "DTSC;" citations to the certified administrative record for DPH are prefaced by "DPH;" or "4100Building" and citations to the stipulated set of exhibits for the second and third causes of action refer to "Exhibit." Citations to Appellants' Appendix are cited as AA, in which the volume number precedes the AA and the Bates page follows the AA.

Park, Moorpark, Thousand Oaks, Agoura Hills, Calabasas, the Santa Monica Mountains National Recreation Area, two state parks, and a 3,000-acre education center and camp. (Exh. 82, p. 2.) Nuclear reactor activities took place in Area IV. (*Id*. at p. 3.) At its peak, Area IV had ten nuclear reactors and numerous nuclear laboratories and testing facilities, including one fabricating plutonium fuel. (*Ibid.*)

This appeal concerns the DTSC and DPH approval of the demolition and disposal of six Boeing-owned structures formerly used for nuclear research: Building 4005, a uranium carbide manufacturing facility; Building 4009; Building 4011; Building 4055, the plutonium fabrication facility; L-85, a research reactor; and Building 4100, a laboratory hosting a nuclear reactor. (DTSC007647.)

The decades of operations at SSFL created what the Ninth Circuit Court of Appeals called "a terrible environmental mess" that "unarguably imposed tremendous harm to the environment. The soil, ground water, and bedrock were seriously contaminated." (*Movassaghi*, 768 F.3d at p. 835.) "In 1959, one of the reactors experienced a partial meltdown that released radioactive gases into the atmosphere for three weeks," leading to extensive contamination throughout the site. (*Ibid*.) Other contamination resulted from:

> nuclear reactor accidents, an open burn pit for sodium-coated materials, and numerous fires and accidents at the "Hot Lab." The "Hot Lab" was used for cutting up spent nuclear fuel from the site's reactors and spent fuel shipped to the lab from elsewhere in the United States. Radioactive material was also dumped at various locations around the site. One disposal procedure consisted of shooting barrels of toxic substances with shotguns to make them explode and burn.

(*Ibid.*)

The radioactive isotopes on site include plutonium-239, cesium-137, and strontium-90, all highly carcinogenic. (DTSC005893.) A 2012 soil

study by EPA in Area IV revealed extensive radiological contamination: of the 3,750 samples, 500 had radioactivity above background, many around Area IV structures. (DTSC005892.)

Origins of Litigation

Respondent DTSC is the lead agency responsible for enforcing California's Hazardous Waste Control Law. (1AA000795.) DTSC has overseen remedial efforts at SSFL for decades. (DTSC000001-4 [1992 enforcement order].) Today, DTSC oversees remediation of the SSFL site pursuant to a 2007 Consent Order for Corrective Action[2] and the 2010 Administrative Order on Consent for Remedial Action ("AOC").

DTSC entered the AOC with DOE under its broad statutory authority under the California Hazardous Substances Account Act (HSAA) to "provide for response authority for releases of hazardous substances"[3] "that pose a threat to public welfare or the environment." (Health & Saf. Code, § 25301; DTSC002101) as well as federal law authorizing federal facilities such as SSFL to be remediated under state authority (42 U.S.C. §§ 6961, 9620). The AOC applies to Area IV (DTSC002101-2141l), covers both chemical and radiological contamination (DTSC002103), calls for an EIR (DTSC002118), and requires the remediation of soils (which are defined to include structures and debris) to local background levels (DTSC002104-2105). "Background" levels mean the levels of

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[2] This Order was issued to Boeing, the U.S. Department of Energy (DOE), and the National Aeronautics and Space Administrative (NASA). It identifies numerous structures in Area IV that require further investigation and remediation. (DTSC001228, DTSC001239-1243.)

[3] Hazardous substances under the HSAA include any substance designated as hazardous under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which include some radionuclides. (Health & Saf. Code, §§ 25315, 25316; 40 CFR § 302.4.)

radionuclides present before nuclear activity began on the property. (Exh. 79, p. 20.) The AOC thus specifically applies to structures and debris, includes demolition of all structures as part of site remediation, and requires disposal of all materials with radiation above background in a licensed low level radioactive waste facility. (DTSC002105-2107, DTSC002141e.)

Respondent DPH regulates radioactive materials in California, including by issuing radioactive material licenses (1AA000719), like the one it issued for SSFL. (DPH000001.) The license applies to the entire SSFL site and remains in effect. (DPH0000002 [conditions 13(b) & (j)].) DPH also oversees the disposal of low level radioactive waste. (See Cal. Code Regs., tit. 17, § 30470.)

DTSC and DPH's Approval of Area IV Demolition Activities and Debris Disposal

Since 2008, DTSC has required Boeing to seek its approval prior to *any* demolition at SSFL. (DTSC001287-88.) In 2009, DTSC ordered Boeing to draft Standard Operating Procedures ("SOP") for DTSC's approval that would govern the demolition activities at the SSFL site. (DTSC001520.) DTSC solicited public comment on the SOP, and publicly represented that it was "not applicable" to demolitions "where radiological contamination elements are documented or suspected (such as Area IV)." (DTSC001784.)

Despite its public assurance, and *without any public notice*, in November 2012 Boeing and DTSC privately amended the SOP to include procedures for demolition and disposal of what Boeing termed "non-radiological buildings in Area IV" (DTSC005898), but these "non-radiological" structures contained detectable quantities of radioactive contamination. (Exh. 79, pp. 39-42.) Nevertheless, these supposedly non-radiological structures were demolished in 2012 and early 2013, and DTSC permitted Boeing to dispose the radioactive debris in *municipal landfills*

and asphalt recycling and scrap metal facilities, where it could enter the consumer product stream. (DTSC007809; DTSC007570; Exh. 79, pp. 74-83.)

DTSC required another SOP amendment in April 2013 covering demolition procedures for the six admittedly *radiological* buildings in Area IV. (DTSC007824-7851.) Radioactive contamination can be deposited on surfaces (e.g., on floors or inside air ducts), but it can also penetrate walls and floors. (See Exh. 79, p. 33; 1AA000096-97.) This occurs when normal materials (like concrete walls or floors) are "activated" (meaning they become radioactive) by being exposed to beams of radiation, for example, when a nuclear reactor is operated inside a building. (*Ibid*.) Demolishing structures with contamination *in* the materials themselves, such as in a slab on which a reactor had been located, likely releases the radioactivity under the surface and threatens workers and the public off-site; disposing of that contaminated material at facilities that are not licensed or equipped to deal with radioactive waste risks contamination migrating into groundwater or the air. (1AA000097.)

An initial review of the buildings in Area IV revealed that, based on their history, all structures had potential residual radioactivity, including the possibility of "activated" concrete or radioactive materials in drainage structures. (DPH004852-4855.) And this prediction turned out to be true. For example, surveys of the debris from the now-demolished L-85 building, which was disposed of prior to this litigation, contained readings not only above background level of radiation, but even above Respondents' unadopted "guidance" criteria for "acceptable" contamination. Yet Respondents concurred in the off-site disposal of *all* this debris to a facility that was not licensed for the disposal of radioactive waste. (DTSC009227-9242.) These are non-trivial doses of radiation; depending on the radionuclide the concentrations at the levels in these "guidance" documents

are hundreds, thousands, or even tens of thousands times higher than EPA's remediation goals for human exposure in buildings. (10AA007683-7684.)

However, California law prohibits disposal of radioactive materials except at sites specially licensed and designed for that purpose. (Health & Saf. Code, § 115261.) Health and Safety Code section 114985, subdivision (m), defines low-level radioactive waste as "radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material." Importantly, there is no exemption for materials contaminated with only very low levels of radiation; indeed, when the Nuclear Regulatory Commission attempted to adopt a "below regulatory concern" threshold, Congress expressly overturned it. (Exhs. 60 & 61.) Hence, the AOC governing the remediation of Area IV requires disposal of structures and anthropogenic material with radioactive contamination above background at a licensed low-level radioactive waste facility. (DTSC002141e.)

But despite their previous commitments to ensuring disposal of materials with low levels of radioactivity would not end up in California's hazardous waste facilities[4] and the fact the Buttonwillow hazardous waste facility "shall not accept Radioactive Waste or Prohibited Materials" (Exh. 55, p. 3), DTSC (which regulates the hazardous waste facilities) and DPH (which regulates the disposal of radioactive material) have nevertheless

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[4] Exh. 67 [Chief of Radiologic Health Branch (RHB) of DPH explaining to hazardous waste landfill operator that California requires disposal of radioactive materials above naturally occurring levels at a site licensed for the disposal of radioactive waste]; Exh. 69 [RHB Chief telling McClellan Air Force Base it could not dispose radium-contaminated materials at Buttonwillow because facility not licensed for disposal of radioactive materials]; DTSC002958 [DTSC informing Boeing "of the decision of Cal EPA Secretary Rodriguez and DTSC Director Raphael that materials from Area IV with radiation levels above background cannot be routed for recycle or for non-rad disposal in California."].)

allowed SSFL radioactive waste to be dumped at Buttonwillow—a hazardous waste facility unlicensed for radiologically-contaminated debris.

By the time this litigation was filed in August 2013, Boeing had submitted requests to demolish four additional structures, but DTSC and DPH had not yet approved those requests. (DTSC002426 [Building 4011]; DTSC007132 [Building 4055]; DTSC008020 [Building 4055]; DTSC008751 [Building 4009]; DPH004886 [Building 4100].) Appellants notified Respondents of their serious concerns about the environmental consequences of demolition and off-site disposal on August 5, 2013 (5AA004465-4473), including a report by Appellant Committee to Bridge the Gap (Exh. 79). That report explained that one of the structures slated for demolition was the former plutonium fuel fabrication facility (*id.*, p. 2), reminding Respondents that "[p]lutonium is one of the most toxic substances on earth; a few millionths of an ounce, if inhaled, will cause lung cancer with a virtual 100% statistical certainty." (*Ibid.*) The report meticulously analyzed the pre-demolition radiological surveys of the purportedly "non-radiological" structures in Area IV, observing that even these "non-radiological" structures had results exceeding background radiation levels and "acceptable" contamination levels (Exh. 79, p. 39-43).

DTSC responded the next day, generally denying the allegations and defending its decision not to undertake an environmental review before pre-demolition activity began. (10AA007549.) To prevent any further demolition activity, Appellants filed this lawsuit this same day seeking a writ of mandate to compel Respondents to comply with CEQA and the APA. Within days DTSC and Boeing agreed to pause Area IV demolition. (1AA000630-000633.)

STATEMENT OF THE CASE

On September 3, 2013, Petitioners filed a Motion for Preliminary Injunction to preserve the status quo. (1AA000065.) Petitioners' Motion

was heard by the superior court on October 25, 2013. The court granted Petitioners' Motion on the basis that DTSC appeared to have approved a project without CEQA compliance. (4AA002930-2934.)

On May 23, 2014, Boeing filed a Motion for Summary Judgment, contending that it would no longer "seek nor wait for DTSC approval before commencing future demolition activities." (4AA002962.) The Motion was denied on January 5, 2015 (5AA004335), with the court ruling that Boeing had not established that "it does not need DTSC's approval to demolish the buildings or that DTSC lacks authority to require such approval." (5AA004341.)

The merits were fully briefed and set for hearing on May 4, 2018. (11AA008570.) The day before the hearing, the court vacated the hearing (11AA008570) and directed Petitioners to seek leave to amend their pleading to detail their specific CEQA claim against DPH arising from approval of decommissioning Building 4100. Petitioners filed their Motion for Leave to Amend (11AA008572), which the court granted. (12AA008830.) The court allowed Respondents and Boeing to file opposition briefs solely on the Building 4100 issues, and Petitioners were permitted to file a reply brief solely on such issues. (*Ibid.*.)

The merits hearing proceeded on November 9, 2018. The court denied the Writ Petition on all grounds on November 19, 2018. (12AA009024.)

Judgment was entered on January 2, 2019. (12AA009096.) Petitioners timely filed a Notice of Appeal on January 24, 2019. (12AA009150.)

STANDARD OF REVIEW

In reviewing CEQA compliance, "the appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo." (*Vineyard Area Citizens for*

Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 427; *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1183 [whether an activity constitutes a "project" is question of law]; *POET, LLC v. State Air Resources Bd.* ("*POET II*") (2017) 12 Cal.App.5th 52, 100; *County of Ventura v. City of Moorpark* ("*Ventura*") (2018) 24 Cal.App.5th 377, 385 ["[T]he question of which acts make up the whole of the action constituting the CEQA project is a question of law…resolved without deference to the agency's determination."].)

Whether an agency action constitutes a regulation is a question of law that is reviewed de novo on appeal. (*Cnty. of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, 517; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571 [applying without stating de novo review standard].) This case does not raise factual questions, rather legal ones regarding the necessary showing to satisfy the *Tidewater* standards of general applicability to a class of cases. (*Vasquez v. Dep't of Pesticide Regul.* (2021) 68 Cal.App.5th 672, 685; *Malaga Cnty. Water Dist. v. Cent. Valley Reg'l Water Quality Control Bd.* (2020) 58 Cal.App.5th 418, 435.)

ARGUMENT

I. DTSC VIOLATED CEQA BY APPROVING AND IMPOSING CONDITIONS ON DEMOLITION AND DISPOSAL OF AREA IV RADIOLOGIC STRUCTURES WITHOUT ENVIRONMENTAL REVIEW

The demolition and disposal of buildings historically used for nuclear development that are contaminated with both chemicals and radiation has obvious potential environmental impacts. Yet it is undisputed that DTSC undertook *no* effort to comply with CEQA despite its continuing approvals of demolition and disposal and its approval of amendments to the SOPs for demolition of Area IV radiologic structures. Moreover, DTSC ignored the clear mandate of the AOC that its provisions applied to *all* Area IV structures and debris, improperly segmenting the demolition and

disposal activity at issue here from the project to be analyzed in the AOC's required EIR. DTSC does not deny that the AOC covers Area IV structures and debris. The superior court found no CEQA violation by entirely ignoring the AOC and applying a narrow, formalistic test of what constitutes a "project" (12AA009010-9016)—an approach that conflicts with settled law and results in an impermissibly cramped interpretation of CEQA. These conclusions cannot be sustained.

A. CEQA, Which Must be Broadly Construed in Favor of Environmental Protection, Requires Agencies to Analyze Environmental Impacts of Actions They Authorize.

DTSC's failure to comply with CEQA undercuts the clear legislative mandate upheld and enforced by courts for decades. "CEQA is a comprehensive scheme designed to provide long-term protection to the environment. In enacting CEQA, the Legislature declared its intention that all public agencies responsible for regulating activities affecting the environment give prime consideration to preventing environmental damage when carrying out their duties." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112 [citing Pub. Resources Code, § 21001].) The Supreme Court has instructed that CEQA is interpreted "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.)

Because CEQA requires agencies to give major consideration to *preventing* environmental damage (Pub. Resources Code, § 21000, subd. (g)), CEQA requires environmental review and analysis *prior* to the approval of discretionary projects by state agencies. (*Id.*, § 21080.) A "project" is "an activity which may cause either a direct physical change or a reasonably foreseeable indirect change in the environment," and "involves the issuance to a person of a lease, permit, license, certificate, or

other entitlement for use by one or more public agencies;" or "an activity directly undertaken by any public agency." (*Id.*, § 21065; Guidelines, §§ 15378(a), 15002(c) ["private action is not subject to CEQA unless the action involves government participation, financing, or approval"];[5] see also *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 382 ["project" is "an activity that is undertaken, supported, or approved by a public agency" which may change the environment].) The term "approval" refers to "the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." (Guidelines, § 15352(a).) "With private projects, approval occurs upon the earliest commitment to issue… [a] lease, permit, license, certificate, or other entitlement for use of the project." (Guidelines, § 15352(b).)

The term "'[p]roject' is given a broad interpretation in order to maximize protection of the environment." (*County of Amador v. City of Plymouth* (*Amador*) (2007) 149 Cal.App.4th 1089, 1099 [quoting *McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1143].) "No particular form of approval is required." (*Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 506.) In recognition of this broad construction of the concept of "project," in 2018, after the ruling in this case was issued, the Natural Resources Agency amended Guideline 15357 defining "discretionary project," adding the following: "***The key question is whether the public agency can use its subjective judgment to decide whether and how to carry out or approve a project***." (Emphasis added.) The amendment, which adds no new substantive requirements, was intended "to clarify that a discretionary project is one in which a public

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[5] All references to "Guidelines" refer to Cal. Code Regs., tit. 14, § 15000 et seq.

agency can shape the project in any way to respond to concerns raised in an environmental impact report," and which reflected prior cases that had been "consistently followed" by the Supreme Court and Court of Appeal. (*Available at* https://resources.ca.gov/CNRALegacyFiles/ceqa/docs/2018_CEQA_Final_Statement_of%20Reasons_111218.pdf; p. 63 (last visited June 21, 2022)).

When evaluating whether an activity is a "project," the question is whether "the proposed activity is the sort that is capable of causing direct or reasonably foreseeable indirect effects on the environment," for, if it is, "some type of environmental review is justified, and the activity must be deemed a project." (*Union of Medical Marijuana Patients, Inc. v. City of San Diego* (*UMMP*) (2019) 7 Cal.5th 1171, 1197–1198.)

Here, no one disputes that demolition and disposal of the buildings in Area IV will cause physical changes in the environment. And yet the superior court concluded DTSC had no responsibility under CEQA because its approval of the Area IV demolition and disposal was not a "project." The superior court concluded that in the absence of a statute *requiring* Boeing to seek DTSC's approval *specifically* for demolition activity, DTSC's evident exercise of control, authority, and discretion over Boeing's demolition and disposal activity was not, as a matter of law, a "project" for purposes of CEQA. (12AA009015.)

This interpretation is unsupported by the statute, caselaw, or logic and violates the instruction to interpret the word "project" "in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Sierra R.R. v. Tuolumne Park & Recreation Dist.* (*Friends of Sierra*) (2007) 147 Cal.App.4th 643, 653 (quoting *Friends of Mammoth*, 8 Cal.3d at p. 259).) As the administrative record reveals, DTSC exercised approval authority over Boeing's demolition activities and also itself approved the procedures

by which Boeing would be permitted to engage in the demolition and disposal of the Area IV structures.

B. DTSC Approved Boeing's Demolition Activities in Area IV.

The administrative record demonstrates that DTSC exercised complete control over Boeing's demolition activities in Area IV, repeatedly authorizing Boeing's demolition and disposal of the Area IV structures. DTSC's letters conditioning Boeing's demolition activity constitute "[a]n activity that involves the issuance" of an "entitlement for use," by granting Boeing approval for demolition and clearing debris for disposal in hazardous waste facilities regulated by DTSC. (Pub. Resources Code, § 21065, subd. (c).) DTSC's ability to control whether, when, and how Boeing demolished these Area IV structures was never questioned. Only after this suit was filed has DTSC changed its tune, arguing it did not approve a "project" because Boeing never needed DTSC's approval in the first place. Legal posturing aside, DTSC operated as though it regulated Boeing's demolition activities—the agency made representations to this effect, to Boeing and to the public, and its internal communications reflect the same understanding.

Indeed, as soon as DTSC learned that Boeing had demolished a structure at SSFL without its advance knowledge, DTSC informed Boeing that it required advance notice for demolitions and pre- and post-demolition sampling. (DTSC001287-1293; DTSC001456 [complaining it "never provided approval" for demolition in 2008].) In 2009, when Boeing first proposed demolition near, but not in, Area IV, DTSC applied the regulatory brakes:

> "DTSC staff have expressed concern about the presence of contamination that might have migrated from Area IV into Area III. I thought we agreed Boeing would put together a special demolition plan to address how to identify

> any potential radioactive or chemical contamination in this area that could potentially impact demolition materials such [sic] the foundation building materials, underground utilities, etc. that are slated for offsite disposal and/or recycling."

(DTSC001515; see also DTSC001525 ["We do not want to approve the demolition unless we can confidently determine the building materials are free from rad and chemicals and/or managed appropriately."].)

Internal staff communications explained that the agency "must be satisfied with the level of detail [in the documentation provided by Boeing] before we can approve demolition," insisting on "a defensible internal review procedure prior to *allowing* any structure removals." (DTSC001638-1639 [emphasis added].) Staff also shared concerns about demolition activity, including "potentially allowing poorly characterized soils to be transported offsite" and "potentially generating contaminated building or road debris that will be taken offsite in an uncontrolled manner." (DTSC001638.)

Consistent with DTSC's recognition that the SSFL structures are potential sources of chemical and radiological contamination (e.g., DTSC001267-1271; DTSC001313-1314), in 2009, DTSC informed Boeing that it had "concerns regarding proposed and ongoing demolition activity," because "[a]s the agency responsible for ensuring that all [Resource Conservation and Recovery Act [(RCRA)] corrective action and response action requirements are met, it is essential that DTSC be advised of any potential demolition activities that may require DTSC oversight and/or approval." (DTSC001520.) DTSC therefore "require[d]" Boeing to prepare Standard Operating Procedures, which DTSC staff reviewed and required Boeing to modify. (DTSC001520; DTSC001661; DTSC001663-1664; DTSC001716-1722.) DTSC explained the SOPs were meant to assure that building demolition would not result in the removal and uncontrolled reuse of potentially contaminated debris, and to ensure that "review, approval,

documentation and the administrative record of proposed building demolition at a minimum meet federal RCRA and state HWCL regulatory requirements." (DTSC001716; see also DTSC001661 [internal communication stating that purpose of SOPs was ensuring that demolition "does not by-pass DTSC's approval obligation, CEQA assessment and notification to the community."].) DTSC recognized the potential for environmental contamination: "DTSC regulates release of hazardous waste and hazardous waste constituents into the environment. Most of the buildings in Area I and III intended for demolition have been utilized in site operations where hazardous materials or chemicals were used or managed and have resulted in operations where chemicals were likely spilled or released." (DTSC002042.)

DTSC solicited public comment on these SOPs, stating it had "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." (DTSC001783.) The public was also informed that the SOP would not apply to demolitions "in areas where known radiological contaminant releases are documented or suspected (such as Area IV)." (DTSC001784; see also DTSC001927; DTSC002041.)

DTSC staff reviewed and revised the SOPs, adding requirements to protect environmental resources, including endangered species and historic and cultural resources. (DTSC002082.) DTSC required screening for radiation, even in areas where radiation was not historically used. (DTSC001663.)

Boeing first raised the prospect of demolishing structures in Area IV in June 2012 (DTSC002738), telling DTSC that its radiological structures would not be further surveyed prior to demolition (DTSC002739). In short order, DTSC ordered Boeing to stop all preparation for demolition in Area

IV. (DTSC002924 ["Until we reach conclusions on demolition-related Area IV radiological characterization, DTSC cannot concur with pre demolition activities by Boeing in Area IV that involve the removal or disturbance of any site features,"]; see also DTSC002943 [ordering that demolition and pre-demolition be delayed until DTSC completes Area IV review]; DTSC002952 ["DTSC agrees that special radiological considerations exist for the demolition and removal of Area IV buildings and debris. We have notified Boeing that we cannot concur with the commencement of Building 4015 demolition by their requested start date…"].) Several months later, DTSC informed Boeing that it could commence "pre-demolition activities" only at supposedly non-radiological facilities in Area IV. (DTSC002969-2970.) DTSC required radiation screening results from pre-demolition work before material was sent off-site for disposal. (DTSC002970.)

DTSC first approved demolition of a non-radiological structure in October 2012, permitting Boeing to demolish Building 4015, requiring additional radiological screening of inaccessible portions of the structure. (DTSC005805-06.) Boeing next submitted requests to demolish additional Area IV non-radiological structures (DTSC005900; DTSC005912; DTSC005824; DTSC006329). DTSC approved these requests, imposing requirements that Boeing conduct additional radiological screening and provide results to DTSC. (DTSC005805-5808; DTSC005900-5902; DTSC006281-6286; DTSC006312-6319; DTSC007597-7603; DSTC007629.) Boeing did not take any action in furtherance of demolition without awaiting DTSC's approval. (DTSC005799; DTSC006540; DTSC003131.)[6] As DTSC described the relationship between Boeing and

[6] Boeing argued below that the only authorization it required to demolish these chemically- and radiologically-contaminated structures is a "ministerial 'zoning clearance' and ministerial building permit for demolition from Ventura County." (10AA007834.) Boeing's argument fails

DTSC: "Boeing has performed demolition and removal of its non-radiological buildings at SSFL's Area IV since October 2012, under the terms of an amendment February 2010 [SOP] document which closely involves DTSC in the review, comment, and field oversight process for building demolition." (DTSC007604.)

Boeing moved on to plan demolition of the six structures at issue in this litigation, the former radiological facilities. In December 2012, Boeing was waiting for an "ok to proceed" with pre-demolition in the Area IV former radiological buildings and was told by DTSC that it was "looking to have DPH agree with an 'ok to begin demolition'" for these structures. (DSTC006540; see also DTSC006684 [DTSC instructs Boeing not to begin pre-demolition work so it can consult with DPH]; DTSC006686 [DTSC concern with pre-demolition is removal of materials for off-site disposal]; DPH004817 [Boeing "waiting for concurrence" for pre-demolition].) In DTSC's January 2013 status update, it noted that Boeing began "pre-demolition" work in Area IV radiological facilities "with DTSC concurrence." (DTSC006658.)

Boeing submitted its first demolition proposal for an Area IV radiological structure in February 2013. (DTSC006804; DTSC007039 [staff noting that proposal is first former radiological site "under our oversight program with Boeing"].) Boeing submitted its SOP Amendment 2

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to account for what it expressly assured Ventura County: that DTSC had full authority and oversight over Boeing's demolition and that Boeing was in fact awaiting DTSC's "plan review and concurrence." (11AA008435; see also 11AA008444 ["DTSC… oversees all aspects of Boeing related demolition activities"].) Indeed, the permits issued by the County specifically require Boeing to comply with "all local and federal cleanup regulations. Compliance not regulated by County staff." (11AA008383; see also 11AA008398 & 11AA008412.) It is simply wishful thinking that the demolition of these structures is strictly a ministerial county-regulated process. Notably, DTSC did not make this argument below.

to address the former radiological facilities in March 2013. (DTSC007593-96.) DTSC reviewed and commented (DTSC007615, DTSC007639-43) and Boeing incorporated the revisions in April 2013 (DTSC007645-50). But this time, no public review or comment was solicited. These SOP amendments clearly state that the SOPs were prepared at DTSC's specific request and "approved" by DTSC in the first instance. (DTSC007647.) This SOP amendment requires the involvement of both DTSC and DPH in reviewing demolition requests, and commits to sending all demolition waste to a Class I hazardous waste landfill, such that materials with elevated radiation above naturally-occurring levels could be disposed of at a hazardous waste landfill. (DTSC007648-49.)

Pursuant to the SOP amendment, Boeing's request to demolish L-85 was reviewed by both DTSC and DPH, which required Boeing to conduct an additional radiological survey of the debris prior to off-site disposal. (DTSC007921-34.) Boeing performed this survey and the results were reviewed by DTSC, DPH, and the U.S. EPA. (DTSC008076-81; DTSC000828-29; DTSC000854-55.) In its review letter, DTSC states that it and DPH "concur with Boeing's proposals" for radiological screening of the debris (DTSC007922), that additional data would "be reviewed by the agencies prior to clearance of this debris for Class I landfill disposal" (DTSC007923). After reviewing data from the debris screening, DTSC "concur[red] 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." (DTSC009227.)

C. DTSC's Approval of Demolition and Disposal of Area IV Structures Is a CEQA Project.

Despite this uncontroverted evidence, the trial court found that DTSC did not "approve" any "project" under CEQA because it did not

have any legal obligation to approve the demolition and never issued any "lease, permit, license, certificate or other entitlement for use" under Public Resources Code section 21065, subdivision (c). (12AA009010-9015-.) This ruling was in error. The DTSC-approved demolition and disposal "involves" issuance of an "entitlement for use" under CEQA. (Pub. Resources Code, § 21065, subd. (c).) As the Supreme Court held in *Friends of Mammoth,* to qualify as a "project" requires "only that . . . the government must have some minimal link with the activity, either by direct proprietary interest or by permitting, regulating, or funding private activity." (8 Cal.3d. at pp. 262-263.) Particularly in light of the instruction to interpret the statutory language to afford the fullest possible protection (*Friends of Sierra*, 147 Cal.App.4th at p. 653), DTSC's approval to proceed with demolition and disposal is an "entitlement for use."

An "entitlement for use" may take varied forms. For example, this Court held in *Amador*, 149 Cal.App.4th 1089, that an agreement between a city and Indian tribe concerning the support for a casino complex constituted a "project" because the agreement committed the city to taking actions which would have an environmental impact, even though the casino required no City approval. (*Id.* at pp. 1099-1100.) The analysis focused on the "causal link" between the city's action and the potential for environmental impact. (*Id.* at p. 1101.) Moreover, the agreement committed the city to a "definite course of action" with respect to specific future actions and activities. (*Id.* at p. 1104.) Here, DTSC's approval to Boeing permitted it to demolish the L-85 slab and to dispose the waste at a Class I facility, a direct causal link and definite course of action.

In *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, the Supreme Court considered whether a letter labeled "status report" from a director of a city department to Walmart, stating that review of submitted plans was completed and requiring five minor

corrections constituted "approval" of the project for purposes of CEQA. (*Id.* at pp. 492, 495, 505-506.) Even though the plaintiffs argued that the approval did not follow appropriate city procedures, because "the Director acted under the *ostensible* authority" the letter was deemed to commence the statute of limitations. (*Id.* at p. 506.) Here, DTSC's communications with Boeing were intended by both parties to grant the agency's approval of Boeing's demolition and disposal, as evidence by the communications in the administrative record.

DTSC's approval constituted the pivotal "go/no-go" determination on demolition and Class I facility disposal for the Area IV facilities at issue. DTSC immediately ordered Boeing to stop all work on radiological structure demolition until it had studied the issue. (See DTSC002738- 2739, DTSC002924; DTSC002943; DTSC002952 [discussing Boeing demolition plans in Area IV and DTSC demand to allow agency to review potential issues prior to Boeing demolition].) DTSC reviewed and imposed conditions upon the demolition of the non-radiological structures in Area IV. (DTSC005805-06; DTSC005805-5808; DTSC005900-5902; DTSC006281-6286; DTSC006312-6319; DTSC007597-7603; DTSC007629.) Boeing did not take any action in furtherance of demolition without first awaiting DTSC's approval. (DTSC005799; DTSC006540; DTSC003131.) DTSC imposed "condition[s] of approval" on the demolition. (DTSC009227.)

DTSC does not dispute it had authority to place conditions on the demolition.[7] The fact that DTSC recognizes its authority to impose conditions on the demolition distinguishes this case from those relied on by the trial court. (12AA009015 [citing *Parchester Village Neighborhood*

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[7] Even Boeing recognizes the expansiveness of DTSC's authority. (10AA007650-7651.)

Council v. City of Richmond (2010) 182 Cal.App.4th 305].) In *Parchester*, the court decided CEQA did not apply to the proposed casino site because the City "has *no* legal authority over the property upon which the casino will be situated…the City has *no* legal jurisdiction over the property." (*Id*. at p. 313 (emphasis added).)

DTSC *does* have power to eliminate or mitigate the environmental consequences a study could reveal. (*See McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80, 90.) DTSC admits it imposed conditions to mitigate *environmental* consequences. (11AA008244.) Even if DTSC did not actually have this authority, CEQA still holds government officials accountable for how they *manifest* their authority. (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1146 [rejecting argument that agreement was not part of the "project" absent board authorization because district "relied upon and ratified the agreement."].) DTSC's regulation of the demolition and disposal process was specifically intended to ensure that contaminated materials were properly disposed of (DTSC001515; DTSC001525 [DTSC did not "want to approve the demolition" without "confidently determin[ing] the building materials are free from rad and chemicals and/or managed appropriately."].) Exercising its authority to mitigate potential environmental harm by regulating Area IV demolition and disposal should have triggered CEQA compliance; DTSC abused its discretion by not undertaking any CEQA assessment of these activities, and the trial court erred in holding otherwise.

D. DTSC Directly Undertook Activities Without CEQA-Required Review When Approving Amendments to the SOP for Demolition and Disposal of the Radiologic Structures.

While it is clear that DTSC's control over the demolition activities constituted approval of such activity, it is similarly straightforward that, by approving Amendment 2 to the SOPs to establish the conditions under

which Boeing could demolish and dispose of the radiologic structures in Area IV, DTSC itself directly undertook an activity that could result in a physical change to the environment. (Pub. Resources Code, § 21065, subd. (a).)

As discussed in detail above, the SOPs were originally approved by DTSC in 2010, as part of DTSC's effort to ensure that it was "advised of any potential demolition activities that may require DTSC oversight and/or approval," (DTSC001520), to ensure demolition meets regulatory requirements (DTSC001716) and that demolition "does not by-pass DTSC's approval obligation, CEQA assessment and notification to the community" (DTSC001661). SOP Amendment 2 states that the SOPs were approved by DTSC and that DTSC required the amendment in order to address "the heightened interest in released former radiological buildings in Area IV." (DTSC007647.) Boeing revised the SOP Amendment to incorporate DTSC's alterations and DTSC incorporated it within the SOPs on April 3, 2013. (Compare DTSC007594-7596 to DTSC007640-43 to DTSC007647-50; DTSC007654.)

The SOP was a regulatory document governing the demolition and disposal. The SOP amendment included DTSC's regulatory determination that "all demolition waste, including the contents of buildings removed during pre-demolition preparations, will be disposed of to a Class I hazardous waste landfill." (DTSC007648.) The amendment limits the use of pre-demolition radiological surveys, and require post-demolition radiological surveys of inaccessible materials. (DTSC007648-49.) In approving the SOP amendment, DTSC made determinations about how the level of contamination at these structures would be determined and where the resultant debris would be sent, both decisions with clear potential for impact on the environment.

An action of a state agency to modify an existing regulation, like the existing SOP document, is a project subject to CEQA review. (*John R. Lawson Rock & Oil, Inc. v. State Air Resources Bd.* (*Lawson*) (2018) 20 Cal.App.5th 77, 100-101 [Board expression of inclination for future regulatory modification constituted "approval" of "project" under CEQA]; *POET, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52, 73-74; *California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.* (*CURE*) (2009) 178 Cal.App.4th 1225, 1241-1242 [rulemaking allowing offsets for road paving is project as direct agency action with possible environmental effect].) In *Plastic Pipe & Fitting Association v. California Building Standards Commission* (2004) 124 Cal.App.4th 1390, the court recognized that government actions adopting regulations or similar schemes "may need to be regarded as the project" even if the purpose is "to control activities to be initiated later by other people." (*Id.*, p. 1412 [quoting Off. of Planning and Research, com. foll. Guidelines, §15378].)

"Approvals under CEQA…are not dependent on 'final' action by the lead agency, but by conduct detrimental to further fair environmental analysis." (*Lawson*, 20 Cal.App.5th at p. 99.) A key question when an agency directly acts is "whether the agency has taken any steps foreclosing alternatives, including that of not going forward, or has otherwise created bureaucratic or financial momentum sufficient to incentivize ignoring environmental concerns." (*Id.*, p. 100.) Approving the SOP Amendment left no room for further environmental analysis of the consequences of demolition, and most critically, of disposal of this debris. This agency action constitutes a CEQA project, yet DTSC did not take the first step in the review process.

E. DTSC Improperly Segmented the Demolition From Environmental Review of the Project Set Forth in the

2010 AOC, Which Includes Demolition of All Area IV Structures.

The trial court concluded that there was "insufficient evidence" that Boeing's demolition was part of the "overall site remediation" (12AA009016), but the trial court refused to consider the AOC (12AA009013). The court failed to recognize that DTSC's failure to conduct environmental review on Area IV demolition and disposal improperly severed related project approvals, defeating the objective of CEQA to have an early, *comprehensive* environmental review of agency action. At the time this litigation commenced, DTSC was preparing an EIR for "remedial activities at the Santa Susana Field Laboratory site" (DTSC008546-49) which was to include activities under the 2007 Consent Order (DTSC001206) and the AOC (DTSC002118).

DTSC does not dispute that the AOC grants DTSC authority over remediation of radiation in Area IV "soils" (DTSC002103), and that soils by definition include "soil, sediment, and weathered bedrock, debris, structures, and other anthropogenic materials" (DTSC002105). DOE committed to a cleanup to "background" such that "no contaminants will remain in the soil above local background levels." (DTSC002141c) The AOC requires disposal of all "soils" (which include "structures") with radioactive contaminants above local background to a licensed LLRW disposal site. (DTSC002141e.) The AOC provides that buildings on-site will be demolished, eventually including Boeing's. (DTSC002016-17.)

DTSC also acknowledged that remediation generally includes demolition. (DTSC001325 ["numerous buildings, concrete pads, and adjacent supporting infrastructure" will "undergo demolition as part of the site-wide decommissioning and demolition program."].)

CEQA Guidelines forbid agencies from "tak[ing] any action which gives impetus to a planned or foreseeable project in a manner that

forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project." (Guidelines, § 15004(b)(2)(B).) The AOC requires preparation of an EIR regarding "the environmental impacts that are anticipated to occur as a result of implementing the activities specified in this Order." (DTSC002118.) The AOC foreseeably includes the demolition of *all* structures at SSFL. (DTSC002015 [definition of "soils" includes "structures" and definition of "clean up to background levels" is "removal of soils contaminated above local background levels"]; DTSC002107 [Boeing's deferral of any particular demolition stays obligations "until such time as the buildings have been removed"].)

It is axiomatic that a project analyzed must include an analysis of the reasonably foreseeable consequences of the full project. (*Laurel Heights Improvement Assn. vs. Regents of Univ. of Calif.* (1988) 47 Cal.3d 376, 396.) CEQA "start[s] with the premise that 'the whole of an action' must be considered in determining whether or not a 'project' exists. (Guidelines, § 15378, subd. (a).)" (*Association for a Cleaner Environment v. Yosemite Community College Dist.* (*Yosemite*) (2004) 116 Cal.App.4th 629, 638; see also *Riverwatch v. Olivenhain Mun. Water Dist.* (2009) 170 Cal.App.4th 1186, 1204 [trucking recycled water "is *part of the whole action* or operations of the Landfill project."].) "[A] group of interrelated actions may not be chopped into bite-size pieces to avoid CEQA review" therefore interrelated "activities constitute the whole of the action that we consider for purposes of determining the existence of a 'project' for purposes of CEQA." (*Yosemite*, at p. 639.)

The demolition of Area IV structures, including Boeing's, is expressly called for in the AOC, is interrelated with other AOC activities, and is a foreseeable consequence of AOC implementation. The demolition of the Area IV structures and the site's overall remediation are "related acts that constitute a single CEQA project." (*Tuolumne County Citizens for*

Responsible Growth, Inc. v. City of Sonora (*CCRG*) (2007) 155 Cal.App.4th 1214, 1227; *Ventura*, 24 Cal.App.5th at p. 385 [approval of beach stabilization project and settlement agreement with city concerning construction traffic caused by stabilization project is a single project]; *Yosemite*, 116 Cal.App.4th at p. 639 [closure and removal of shooting range, cleanup, and transfer of shooting to different location are a single project].) This Court must perform an independent review to determine whether the demolition of Boeing's Area IV structures is "independent of, and not a contemplated future part of" the implementation of the AOC. (*Ventura*, at p. 385.) The demolition is not independent. As the AOC makes clear, demolition of all structures in Area IV is contemplated. (DTSC002105-108.) Accordingly, DTSC has no discretion to approve part of the project—demolition—before preparing an EIR to evaluate the impacts of implementing the AOC. (*Save Tara vs. City of West Hollywood* (2008) 45 Cal.4th 116, 132.)

By approving the Area IV demolition without any environmental review, DTSC robbed itself and the public of valuable information of the full scope and environmental consequences of remediation under the AOC. DTSC violated the CEQA principle that EIRs must "be prepared as early as feasible in the planning process to enable environmental considerations to influence" the project design (Guidelines, § 15004(b)) because it committed itself to a definite course of action with respect to the "whole of an action" (*id.*, §15378) absent required environmental review. An "EIR is intended 'to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its actions[,]'" and any discussion of environmental effects post-approval would just be a pointless post hoc rationalization. (*Save Tara*, 45 Cal.4th at p. 136 [quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86].)

The practical effects of DTSC's failure to conduct any environmental analysis under CEQA of the Area IV demolition and disposal activity cannot be overstated. Instead of ensuring "the fullest possible protection to the environment" (*Friends of Mammoth*, 8 Cal.3d at p. 259), the result is a regulatory no-man's land, where *no agency* evaluates the *radiological* effects of demolition and disposal of debris from facilities used for nuclear development. This narrow definition of "project," asserted by Respondents and adopted by the trial court, leaves the public in the dark about undisputedly significant potential environmental impacts *and* eliminates the consideration of alternatives or conditions that could carry fewer costs for the environment—plainly contrary to CEQA's emphasis on public disclosure and informed governmental decisionmaking.

F. DPH Violated CEQA By Approving Building 4100 for "Unrestricted Use," Knowing That Would Induce Demolition, Without Ever Considering Whether CEQA Applied.

Although it is the state agency responsible for regulating the use and disposal of radioactive materials (1AA000719; Health & Saf. Code, § 114715), whose statutory mandate includes "control of those activities that could lead to the introduction of radioactive materials into the environment" (*id*., § 114705), DPH did not consider the environment impacts of "release for unrestricted use" of Building 4100.

DPH issued past approvals for unrestricted release, which resulted in materials being disposed at sites without licenses for low-level radioactive waste and generated controversy. (Exhs. 2, pp. 5-6, 73; 3, pp. 5, 11, 153; DPH004660.) In 2012-2013, DPH sought to avoid becoming enmeshed in disposal decisions by artificially segmenting its licensing responsibilities from future demolition and disposal. Boeing informed DPH about its demolition plans (DPH004616-17), and DTSC requested DPH to recommend disposal options (DPH006188), but DPH resisted and

attempted to shift this responsibility to DTSC (DPH006195-6200 & DPH006210-6215 [DPH editing contract language to strike out role overseeing disposal]). Yet DPH was still required to approve Boeing's demolition of Area IV structures, because Building 4100 remained on the radioactive materials license as an authorized place of use. When DPH issued this approval, however, it failed to consider the "reasonably foreseeable" (Pub. Resources Code, § 21065) consequence of approving decommissioning (namely, demolition and disposal) and did not assess the possibility for environmental impact as required by CEQA.

Building 4100 was used for research, testing, and storing radioactive materials; it housed the Fast Critical Experimental Laboratory, and the Advanced Epithermal Thorium Reactor. (DPH003463; DPH004361; DPH004674.) In November 2012, Boeing requested that DPH release Building 4100 for "unrestricted use"—or approve its "decommissioning." (DPH004668.) On July 9, 2013, DPH amended the radioactive materials license to remove Building 4100 as an authorized place for use of radioactive materials. (4100Building000001-188.)

DPH cannot dispute that at the time that it approved decommissioning, it had *actual knowledge* that Boeing planned to demolish Building 4100 *and* that demolition required release for "unrestricted use." The record is voluminous on this point. (E.g., DPH004516; DPH004817 [December 2012 agenda noting future demolition proposals and license issues for Building 4100]; 4100Building001274, 001480, 001679-001682, 001690-1691, 001685-1686 [Boeing stating that DTSC had "given the go-ahead to begin pre-demo work on several Boeing-owned former released radiological facilities in Area IV, including building 4100 which is still awaiting your release" and DPH instructing its staff to complete review "so that we won't be impeding its demolition process schedule"], 4100Building001696-1698, 4100Building001704, 4100Building001761,

4100Building001762 [forwarding "proposed 2013 demolition schedule"]; 4100Building001773-1776 ["I understand [Boeing] has a tight schedule to demolish this subject building by the end of March 2013."], 4100Building001782, 4100Building001933-1935, 4100Building001939-1940, 002115.) In spite of the clear nexus between decommissioning and demolition, DPH's segmented approval of Building 4100's decommissioning violates CEQA.

When DPH approved Building 4100's decommissioning, it issued an "entitlement for use" (Pub. Resources Code, § 21065, subd. (c)) because it entitled Boeing to "unrestricted use" of the structure. (Cal. Code Regs., tit. 17, § 30100, subd. (c)). DPH cannot dispute that decommissioning was "approved" within the meaning of CEQA (Guidelines, §15352), so the only question is whether decommissioning meets the second element of a CEQA project, i.e., that it "may cause either a direct physical change in the environment, or reasonably foreseeable indirect physical change in the environment." (Pub. Resources Code, § 21065; Guidelines, §15378.)

The Guidelines define and provide examples of reasonably foreseeable indirect changes to the environment. "An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project" (Guidelines, §15064(d)(2) and is "a reasonably foreseeable impact which may be caused by the project." (*Id.*, (d)(3).) "While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can." (Guidelines, §15144; see also *Laurel Heights,* 47 Cal.3d at pp. 394-399 [failure to analyze the impacts of the reasonably foreseeable second phase of project violates CEQA].)

Here, the environmental change caused by decommissioning Building 4100 include its demolition and disposal of its debris, which were reasonably foreseeable by DPH. Emails in August 2012—months before

Boeing's formal request to have Building 4100 decommissioned and approved for unrestricted use—confirm that Boeing, DPH, and DTSC were already discussing demolition of buildings in Area IV. (DPH004516-004518; DPH004632.) DPH could "reasonably anticipate" that amending the license to remove Building 4100 "may have the consequence" of enabling Boeing to demolish the building. (E.g., *Muzzy Ranch Co. v. Solano County Airport Land Use Com*. (2007) 60 Cal.Rptr.3d 247 [government "may reasonably anticipate" banning development in an area may "displac[e] development to other areas of the jurisdiction."].)

In fact, this result of decommissioning was not just foreseeable, it was *actually* forecasted in the Final Status Survey Report for Area IV Building 4100, which contained express statements regarding the debris and its disposal. (DPH004694 ["The post-demolition debris from 4100 will be radiologically acceptable for off-site disposal and/or recycling."].[8]) It strains credulity for DPH to instruct its employees to prioritize review of the license amendment for the demolition schedule (4100Building001773; DPH004825; see also DPH005413) and then to suggest, in court, that demolition and disposal were not a reasonably foreseeable consequence of the decommissioning.

DPH's approval of Building 4100 for "unrestricted use" triggered CEQA obligations, because it was an entitlement for use by Boeing that

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[8] The Superior Court concluded that this reference to "post-demolition debris from 4100" was not "specific enough to constitute DPH approval" (12AA009020), but the Supreme Court, in *Laurel Heights*, rejected a similar argument as "beside the point"; even though defendants there had "not formally decided *precisely* how they will use the remainder of the building" they nevertheless "have admitted that they intend to use the entire facility, and, in light of the record before us, it is reasonably foreseeable that the facility will be used." (47 Cal.3d at pp. 396–397.) It is sufficient for CEQA purposes that DPH was aware of Boeing's intent to demolish this structure upon its release from the license.

may cause a reasonably foreseeable indirect change in the environment. DPH cannot simply point a finger at some other entity down the road and ignore the "reasonably foreseeable" demolition. "Under CEQA's definition of a project, although a project may go through several approval stages, the environmental review accompanying the *first discretionary approval* must evaluate the impacts of the ultimate development authorized by that approval." (*CURE*, 178 Cal.App.4th at p. 1242.) DPH was informed that DTSC was "*also* involved in approving the building 4100 for demolition" (4100Building001776, emphasis added) but that "we need to evaluate the submittal by Boeing for release of building 4100 for unrestricted use" and "[w]e need to do our work *first*" (4100Building001696-1698, emphasis added).[9] That work should have included a CEQA-compliant analysis.

When an activity is "an essential step leading to potential environmental impacts," it is a considered a "project." (*Muzzy Ranch*, 41 Cal.4th at p. 383.) DPH's approval of Building 4100 for "unrestricted use" was an "essential step" toward demolition—a reality the agency's employees immediately recognized when presented with the related license release and demolition issues. (See 4100Building001696-1698.)

Nevertheless, the Superior Court held that DPH "did not issue to Boeing an entitlement with respect to anything that Boeing might do with the property *after* it was decommissioned" (12AA009055), failing to address the "reasonable foreseeability" of demolition and disposal. DPH granted an entitlement for Boeing to do whatever it wanted with the property, and DPH was informed that Boeing planned demolition. Many cases exemplify this point,[10] but *Bozung v. Local Agency Formation Com.*

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[9] DTSC also contracted with DPH to review the impending demolition of Area IV structures, including Building 4100. (DPH006272.)

[10] See, e.g., *McQueen*, 202 Cal.App.3d at p.1147 [acquisition of contaminated property is a "project" that include the handling of the toxic

(1975) 13 Cal.3d 263 best illustrates why the Superior Court's point that "decommissioning was not conditioned on Boeing following through with" demolition (12AA009056) is irrelevant. The Supreme Court held that CEQA applied to the approval of annexation of land intended to be developed following the annexation approval because approval of the annexation was a "project" for purposes of CEQA. In so doing, the Court rejected the argument "that such an approval is merely permissive and does not compel the city to annex" and "involve[d] the issuance ... of an entitlement for use." (*Bozung*, 13 Cal.3d at pp. 278-279.) Applying *Bozung*, DPH cannot escape its CEQA responsibility.

Nor is there any good reason to allow DPH to approve decommissioning and turn a blind eye to the effects of demolition and disposal of radiological material when those activities are an immediate consequence of decommission, as DPH itself acknowledged in its contract with DTSC. (DPH006272-73 [equating release for unrestricted use with demolition and Class I disposal].) Such an outcome violates CEQA principles against segmentation (see *CCRG*, 155 Cal.App.4th at pp. 1226-1228) and flouts the Guidelines' instruction to conduct an initial study that considers "[a]ll phases of project planning, implementation, and operation." (Guidelines, § 15063, subd. (a)(1).) The DPH's position is simply untenable: if it releases Building 4100 from its license before demolition unlocks the residual radioactivity currently trapped in the building (e.g.,

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substances on property even where agency did not have plan for future use or decontamination of property]; *Riverwatch*, 170 Cal.App.4th at p. 1203 [project includes whole of an action that may result in a direct physical change to the environment, including projects subject to a series of discretionary approvals by government agencies]; *Amador*, 149 Cal.App.4th at p. 1100 [broad definition of project requires actions that will result from a governmental act that may affect the environment, even if the government action is not required for project].

DHP004852 [discussing possibility of radiation in drains and activated concrete in all four structures examined]), it claims that the radiation-contaminated building debris can be disposed at any old waste facility, instead of a facility licensed for radioactive material. But at the same time, it claims that it need not study the environmental consequences of demolition and disposal, even though it argues strenuously that once a building is released for unrestricted use, there is no further regulation of the material. This argument simply "avoid[s] full environmental disclosure" (*CURE*, 178 Cal.App.4th at p. 1242) by creating a building-sized hole in the environmental analysis. The breach could be remedied by a CEQA-compliant assessment of the reasonably foreseeable consequences of decommissioning. DPH's determination not to treat the decommissioning of Building 4100 as a CEQA project cannot be sustained.

II. FOR DECADES, RESPONDENT AGENCIES HAVE VIOLATED THE APA BY UTILIZING STANDARDS NEVER ADOPTED AS REGULATIONS TO GUIDE THEIR DECISIONS ON DECOMMISSIONING, DEMOLITION, AND DISPOSAL OF RADIOLOGICALLY CONTAMINATED STRUCTURES

Under the rulemaking provisions of the APA, executive branch rules of general applicability must be adopted by formal rulemaking, with public notice, opportunity for comment, and full transparency, which "promote the APA's goals of bureaucratic responsiveness and public engagement in agency rulemaking." (*Morning Star Co. v. State Bd. of Equalization* ("*Morning Star*") (2006) 38 Cal.4th 324, 333.) Compliance with these procedures is a condition for a proposed agency regulation to become effective: An agency may not "issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule" that has not been formally "adopted as a regulation . . . pursuant to this chapter." (Gov. Code, § 11340.5, subd. (a).)

This is the prohibition on underground regulations that Respondents have violated.

In this case, the skein of underground law is comprised of numerical standards for decommissioning, demolishing, and disposing of radiologically-contaminated building debris. Importantly, there is already a formally-adopted regulation on the books: California Code of Regulations, title 17, § 30256 (Regulation 30256) requires "[r]easonable effort… to *eliminate* residual radioactive contamination, if present." (subd. (k)(2) (emphasis added) and calls for remediation of a site ceasing to hold a DPH license by "[r]emov[ing] radioactive contamination to the extent practicable" (*id.*, subd. (c)(2).) This means California has no numeric threshold for permissible amounts of radioactive contamination; the goal is always complete elimination. However, Respondents' underground numerical standards effectively replace the more stringent standard of Regulation 30256 with more permissive numeric standards, some of which have since been repealed by the federal agencies from which they were borrowed because they were insufficiently protective of human and environmental health. (E.g., Exh. 57 [withdrawal of Reg. Guide 1.86 "means that the guide no longer provides useful information or has been superseded by other guidance, technological innovations, congressional actions, or other events."].)

For over two decades, Respondents have undermined the existing rule by replacing it with numerical standards that would allow radiation above naturally-occurring levels to remain unremedied. Indeed, in a 2002 case brought by Appellant Committee to Bridge the Gap, the Sacramento Superior Court ordered DPH not to employ any numeric clean-up standards for radioactive materials without first complying with CEQA and the APA. (See Exhibits 71-78 [materials from Case No. 01CS01445].) Governor Davis then ordered DPH to adopt regulations, to consider the public health

and environmental consequences associated with disposal in so doing and barred disposal of waste from decommissioned sites in municipal landfills or the recycling stream. (DPH004525-4526.) The Executive Order mandated APA rulemaking: "It is ordered that [DPH] shall adopt regulations establishing dose standards for the decommissioning of radioactive materials by its licensees." (DPH004526.) Twenty years later, no rulemaking has taken place.

DPH and DTSC argue that their repeated use of these numerical standards are not underground regulations, an argument the Superior Court accepted in error. This Court should reverse, for Respondents' actions meet the Supreme Court's two-pronged test for underground regulations under *Tidewater*.

A. Violating the APA and a 2002 Court Order, Respondents Rely Upon Four Guidance Documents to Approve Demolition and Disposal of Radiological Structures.

For over two decades, DTSC and DPH have relied on "guidance documents" to define acceptable levels of radiation to authorize the license amendments, decommissioning, demolition and disposal of radiologically contaminated structures, including radiologically contaminated structures at SSFL:

1. Regulatory Guide 1.86 ("Reg. Guide 1.86"), employs standards based on "typical portable instrument detection limits in 1974." (DPH004880; DPH001168-001174 ["Before areas may be released for unrestricted use they must have been decontaminated or the radioactivity must have decayed to less than prescribed limits (Table I)" and "Acceptable Surface Contamination Levels" table].) Reg. Guide 1.86 has been repealed by the NRC. (Exh. 57.)
2. DOE's Guidance 5400.5 (DPH002149; DPH002226 ["A property may be released without restrictions if residual radioactive material does not exceed the authorized limits or approved supplemental limits, as defined in paragraph IV.7a,

at the time remedial action is completed."]; DPH002229 ["Surface Contamination Guidelines" table].)

3. DPH's Radiologic Health Branch "Guidelines for Decontamination of Facilities and Equipment Prior to Release for Unrestricted Use" ("DECON-1") (Exh. 65, p. 3 ["Table of Acceptable Surface Contamination Levels"].)

4. IPM-88-2, the 1991 "policy memorandum" from DPH (Exh. 63). The IPM-88-2 contains a table of "Acceptable Surface Contamination Levels" and states "[r]adiation levels should be below those listed in attached table." (Exh. 63, pp. 3, 5.)[11]

Each of these Guidance Documents contain tables of what purports to be "acceptable" contamination levels, and none have been subject to the open and public decision-making processes required by the APA.[12] They therefore constitute "guidance documents," which "state an agency's legal interpretation of a statute or a prior regulation or indicate how the agency intends to exercise a discretionary power." (Asimow et al., Cal. Practice Guide: California Administrative Law (The Rutter Group 2014) 25:70 (2021 Update) (hereafter "Cal. Admin. Law.").) "Guidance documents are *not legally binding* but are intended to provide guidance to the public and the agency staff." (*Ibid*.) Guidance documents *cannot* be relied on or implemented unless the agency has complied with the APA's rulemaking provisions. (Gov. Code, § 11340.5, subd. (a); *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 ["rules that interpret and implement other

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[11] Hereafter these four documents are referred to as the Guidance Documents.

[12] A comparison of the tables at DPH001174; Exhibit 63, page 5; Exhibit 65, page 3, and DPH002229 reveals that the values are identical in each, except for transuranics and several other isotopes which are "reserved" on DOE 5400.5 (DPH002229). For all practical purposes these standards are materially identical.

It should be noted that, each of these four Guidance Documents addresses only surface contamination. "Surface contamination" excludes radiation imbedded in the structure itself—radiation that stands to be released if the building is demolished.

rules have no legal effect unless they have been promulgated in substantial compliance with the APA"].)

The court below found DTSC's description of these documents by DTSC as "guidance documents" "odd." (12AA009018.) On the contrary, the description was accurate. These Guidance Documents are classic underground regulations. (See Cal. Admin. Law, 25:70 ["Most underground regulation cases involve guidance documents"].) Indeed, for 20 years, internal DPH documents have recognized that it cannot use the underground regulations it has persisted in applying. (E.g., Exh. 58 [October 2002 email questioning use of Reg Guide 1.86 after court order]; Exh. 59 [as a result of 2002 writ, DPH cannot clean up large complex sites until adopting a release standard and compliance with CEQA].) Similarly, Boeing acknowledged in 2006 that DPH's use of any "a priori chosen dose limit," would violate the 2002 order, yet at the same time proposed allowing materials with surface contamination above background but below Reg. Guide 1.86 levels to be disposed in a Class I landfill. (Exh. 13.)

The 2002 writ of mandate (Exh. 74) prohibiting reliance on the specific 25-millirem dose-based standard "or *any similar provisions* related to the establishment of clean-up standards for license termination" (emphasis added) makes the use of these underground regulations all the more problematic. As early as 2003, one DPH staff person recognized in response to the writ, DPH would "need to review against 'reasonable effort to eliminate residual material,'" reflecting the language of the duly-adopted regulation. (Exh. 20, p. 1; Reg. 30256(k).) She further acknowledged that such review would require a "full policy on what this means, and procedures to implement the reviews." (Exh. 20, p. 1.) Despite these internal warnings, Respondents have failed to implement Regulation 30256 and instead persist in relying on the Guidance Documents.

B. The Guidance Documents Are Given General Application, Satisfying the First *Tidewater* Criterion.

Whether a practice, rule, or standard constitutes a "regulation" that must be adopted under the APA turns on the Supreme Court's test in *Tidewater*. Emphasizing that the APA defines "regulation" "very broadly," *Tidewater* establishes a two-pronged test: First, the agency must intend its rule to apply generally, rather than in a specific case, but need not necessarily apply universally. (*Id.* at p. 571.) Second, the rule must "implement, interpret, or make specific the law enforced or administered" by the agency. (*Ibid*.) Both prongs are satisfied here, because the Guidance Documents are generally applicable and have been used by DPH and DTSC at a variety of sites, including SSFL.

Application of Guidance Documents at SSFL

- **DPH Radioactive Material License Amendments (1999-2013).** Multiple SSFL license amendments reference and rely on the release limits of Reg. Guide 1.86, DECON-1 as well IPM 88-2. (Exhs. 2, p. 25; 3, pp. 89, 151, 153; 4, p. 22; 5, pp. 3, 19; 6, pp. 50, 55; 7, p. 20; 8, p. 20; 9, pp. 193, 214, 236.)

- **DTSC Memoranda.** A July 22, 2013 review letter from DTSC explains its conclusion that "exposure levels" of the L-85 debris "meet all acceptable regulatory limits for disposal at a Class I Hazardous Waste Landfill." (DTSC009227.) This conclusion is based on an attached memorandum from a DTSC health physicist stating that "[a]ll surface activity measurements met the general surface activity limits for release/clearance of equipment and material for unrestricted use from former radiologic facilities and were below US NRC Regulatory Guide 1.86, USDOE Order 5400.5 and CDPH guidance DECON-1 and IPM-88-2 action levels." (DTSC009234.) The memorandum concludes that these results mean the debris "is certified to be radiologically acceptable for off-

site disposal… and meets the requirements of disposal facility permits and complies with the California Health and Safety Code." (DTSC009235; see also DTSC006318-19 & DTSC005810].) Reliance on the underground regulations could not be clearer.

- **"Release Criteria for Boeing Radiological Buildings in Area IV."** At the suggestion of DTSC and DPH, Boeing offered to facilitate and expedite Respondents' review by identifying sections in the voluminous survey report where release criteria were specified. Boeing's table and the subsequent excerpts from those release reports (DPH005123-5167) make clear that the Guidance Documents provided the criteria for release of these nuclear facilities for unrestricted use.

Application of Guidance Documents at Other Facilities

In addition to the consistent reliance on the Guidance Documents at SSFL, DPH utilized them throughout California to decide requests for release for unrestricted use, as Petitioners documented in the record.

- **General Atomics.** Routinely, requests to release facilities from General Atomics' radioactive material license contain a table titled "State of California Acceptable Surface Release Standards," which cites as its source the Guidance Document DECON-1, and all of the requests reference the same numeric state criteria for release for unrestricted use. (See Exhs. 31, pp. 2, 16, 29, 30, 155; 32, pp. 32, 41; 33, pp. 10-11, 21, 74, 84; 34, p. 75; 35, pp. 4, 19; 36, p. 16; 37, pp. 71, 108, 209; 38, pp. 16, 26; 39, pp. 17, 28; 40, pp. 20, 79; 41, p. 21; 42, pp. 24, 56, 66; 43, pp. 10, 123; 44, pp. 11, 23; 45, p. 24.) These license amendments contain no suggestion that DPH ever deviated from its position that the DECON-1 standards are "acceptable" levels of surface contamination permitting a release from license. (See also Exh. 46, p. 3 [characterizing "state's current release criteria" as "[b]asically taken from the NRC Regulatory Guide 1.86."].)

- **University of California, Berkeley.** DPH has approved at least eight license amendments since 2007 involving the release of facilities from the institution's radioactive material license, including at least four where DPH was informed the structures to be released would be demolished once released from the license. (Exhs. 21, 26-28.) In all of these license amendments, the agency relied on analysis demonstrating compliance with Reg. Guide 1.86. (Exhs. 21, p. 11; 22, pp. 17, 33; 23, pp. 12, 28; 24, pp. 20, 61; 25, pp. 12, 22; 26, pp. 7, 15, 39; 27, p. 20; 28, pp. 7, 49, 51.)
- **Stanford University.** In 2008 and 2013, DPH approved license amendments that expressly relied on Reg. Guide 1.86 as a clearance standard. (Exhs. 29-30.) In one 2013 amendment, the licensee noted that "due to the current situation in California, where there is not an established dose-based release criteria, [thresholds for surface contamination called DCGLs] were selected using Reg. Guide 1.86 as the release criterion." (Exh. 30, p. 27.) In that case, DPH expressly asked the licensee to confirm that it satisfied the standards of Reg. Guide 1.86.
- **Hunters Point Naval Station.** Both DTSC and DPH utilized the Guidance Documents in the remediation of the Hunters Point Naval Station in San Francisco, where DTSC oversees the remediation of the radiologically-contaminated facility. DTSC approved a 2006 "Action Memorandum" establishing Reg. Guide 1.86's standards as the remediation goals to address the former buildings, which the memorandum makes clear are a source of potential contamination due to low-level radioactive waste. (Exh. 47, pp. 24-29.) Upon supplying data showing compliance with the Reg. Guide 1.86 standards, the Navy obtained DTSC and DPH concurrence in the release for unrestricted use of numerous buildings. (Exhs. 48, pp. 70-71, 783, 875, 951; 49 [DTSC and DPH concurring in release]; 50 [DPH concurring in release for unrestricted use]; 51, pp. 119, 308-310; 52, p. 14; 54, pp. 318, 638, 752-754.)

Given this evidence presented to the lower court, Appellants cannot discern what elements of general application the court found lacking. An agency indicates its intent to apply a rule generally by "consistent" and "longstanding practice previously adopted for all similar cases" that is "applied uniformly." (*Malaga*, 58 Cal.App.5th at p. 437.) Here, Respondents have a consistent and longstanding practice of utilizing the Guidance Documents' numerical standards for levels of surface contamination that need not be remedied before release of the site for unrestricted use. The Guidance Documents are literally general numerical standards applied to an explicitly identified class of cases: sites contaminated with low-level radioactive waste that are being considered for unrestricted release. They do not identify any specific case or site. They are by their terms and usage standards of general applicability. Accordingly, the superior court failed to correctly apply *Tidewater*'s first criterion.

1. The Superior Court Fundamentally Misunderstood How the Relaxed Numeric Standards in the Guidance Documents Have Been Consistently Used to Supersede DPH's Lawfully Enacted Regulation.

Much of the trial court's legal error can be traced to its statement that Petitioners had not proven that Respondents "*require[]* the limits described by the four documents, or ha[ve] *disapproved* action that does not comply with those limits." (12AA009018.)

First, among the documents cited above, several expressly and explicitly state that release is contingent on, or being granted because of, their compliance with the standards of the Guidance Documents. (E.g., *supra*, pp. 48-51.) More importantly, the court's observation that Respondents have not "*disapproved* action that does not comply with those limits" reveals the court's logical error. As explained above, Regulation 30256 states that decommissioning requires "reasonable effort" to *eliminate* residual radioactive contamination, if present. (*Id*., § 30256, subd. (k)(2).)

The standard is *elimination* of all radiation, or all that can reasonably be eliminated. (*Ibid*.) But instead of following that regulatory standard, Respondents have replaced it with the more lenient, numerical standards stated in the Guidance Documents. So it makes no sense to ask whether Respondents "required" the limits described in the Guidance Documents. Appellants' underground regulations raise the *maximum* permissible radiation levels. They don't prohibit anybody from having *less* radiation than Respondents would allow. If some applicant would meet a *lower* standard, that does not refute the fact that Respondents are employing underground *maximum* standards. Likewise, because the Guidance Documents were less stringent than the adopted regulation, "action that does not comply" with the Guidance Documents is not even relevant to the particular question at hand: whether Respondents had replaced the eliminate-residual-radiation standard with the numerical radiation tolerances of the Guidance Documents. A showing that the agencies were strictly enforcing the underground regulation does not negate the showing that they are using an underground regulation.

2. The Superior Court Had No Legal Basis to Dismiss the Regulatory Standards in the Guidance Documents As Being the Regulated Firms' Standards Rather Than Respondents' Standards.

The lower court also overlooked how underground regulations can take a variety of forms, erroneously elevating formal distinctions over the practical inquiry called for by the cases. For example, in *Vasquez*, the Court of Appeal concluded a program of the Department of Pesticide Regulation that placed a cap on use of pesticide within a township, as a condition of manufacturer's continued registration of the pesticide, constituted an invalid underground regulation. The court explained how a "regulation subject to the APA may exist even if the agency never promulgate[s] a *written* policy setting forth the rule at all," because "the form of an agency

rule is not necessarily determinative of whether it qualifies as a regulation." (68 Cal.App.5th., at p. 669.) "The focus is on whether, as actually applied, it meets the *Tidewater* requirements." (*Ibid*.)

The superior court, however, emphasized how the underground regulation was restated in documents submitted *to* DPH by regulated entities rather than *from* DPH. (12AA009022-9023 ["Evidence that private entities are relying on the four documents in discussing release criteria does not meet the first prong of the *Tidewater* test."].) This conclusion is obviously error. If the government announced that one cannot enter an airport without an ID and travelers present their ID, that does not make the requirement the travelers'. Applicants are submitting evidence of their compliance with the Guidance Documents because they know those documents comprise the Respondents' rule. If anything, the fact that so many different entities relied on the putatively case-by-case *numerical* standards to meet the release requirements demonstrates use of these standards was a proxy for the more-stringent promulgated regulation.

At bottom, here, as in *Vasquez*, accepting the superior court's reasoning "would mean that an agency could avoid formal rulemaking by contracting with a regulated party to implement the rule." (*Vasquez*, at p. 690.) This is not the law: "[A] state regulation that is implemented through a private intermediary is still a regulation." (*Ibid*.)

3. The Superior Court Erred by Allowing Respondents to Violate the APA by Claiming That They Are Adopting Standards on a Case-by-Case Basis—The Results of Which Just Happen to Conform to the Standards of the Guidance Documents.

Respondents cannot dispute that they have "issue[d], utilize[d], enforce[d], or attempt[ed] to enforce" the Guidance Documents in making regulatory decisions, including at SSFL. (Gov. Code, § 11340.5, subd. (a);

supra, pp. 48-51.) The Superior Court immunized Respondents from the consequences of failing to engage in formal rulemaking without scrutinizing their claim that references to the Guidance Documents were merely coincidental, the product of "case-by-case" determinations. (12AA009022.) However, as *Malaga* makes clear, an agency's characterization is not enough to escape careful judicial scrutiny.

> "The test set forth by our Supreme Court seeks to suss out when a general order governs an agency's overall proceedings versus when an agency's decision applies only to the proceedings immediately before it. Where a permanent change to a duly adopted regulation is the norm, permission to change the norm in individual circumstances is rendered meaningless as individual circumstances will not be considered in the first instance." (58 Cal.App.5th at pp. 439-440.)

Here there has been precisely that "permanent change" to utilize the numeric standards in the Guidance Documents. The record is replete with documents that simultaneously (1) "memorialize[]" the underground standards (*Vasquez*, 68 Cal.App.5th at p. 686) and (2) fail to provide any discussion of whether and why the failure to eliminate all radiation was "reasonable," as would have been required under Regulation 30256. (See *supra*, pp. 48-51.) Where agency actions "will have a broad and long-term application, [courts] conclude the policy was intended as a rule of general application." (*Californians for Pesticide Reform v. Department of Pesticide Regulation* (2010) 184 Cal.App.4th 887, 907.)

The fact that, sometimes, the agencies may have incorporated release criteria that have been modified from the four documents (12A008930) does not change this conclusion. Indeed, *Malaga* outright rejected the notion that repeating a settled policy "in individual cases with minimal modification" should "allow an agency to avoid APA requirements by driving a regulation further underground." (*Malaga*, 58 Cal.App.5th at

p. 437.) Moreover, the superior court's singular exemplar of such modification does not bear up. (12A008930,) The cited document simply modified DOES 5400.5 to "specify[] the potential contaminants present" "and eliminat[e] those that are not pertinent" and does modify the actual standards. (Exh. 8, p. 20.)

In fact, the record itself refutes the claim of "case-by-case" application of the Guidance Documents. There is no evidence of any inquiry whether the numerical standards were appropriate for a given site. That was already decided. When DTSC contracted with DPH to analyze whether radioactive debris could be accepted at hazardous waste dumps, it did not ask DPH to evaluate the adequacy of Reg. Guide 1.86 to protect the public. It simply asked DPH to compare test data "against NRC Nuclear Regulatory Guide 1.86," which "documentation will provide for whether or not the Boeing buildings are approved for unrestricted use." (DTSC007784; see p. 57, *post*.) Indeed, that is the function of rules and regulations: to set standards and determine issues that may then be applied to future case-by-case decisions. The Guidance Documents are the standard being applied from case to case—exactly as Respondents have been applying them.

C. The Guidance Documents Are Intended to Be, and Have Consistently Been, Applied to Carry Out the Laws the Agencies Are Charged with Enforcing and Administering, Satisfying the Second *Tidewater* Criterion.

To qualify as a regulation under the second prong of *Tidewater*, a regulation must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure. (14 Cal.4th at p. 571.) The trial court did not analyze this criterion (12AA009016-9018 [DTSC]; 12AA009021-9023 [DPH]), but it is certainly met here.

DPH. There can be no doubt that DPH intended to and did employ the Guidance Documents to regulate remediation of its licensees' sites. The existing Regulation 30256 appears in the group of regulations comprising

"Standards for Protection Against Radiation" (Cal. Code Regs., tit. 17, §§ 30252-30358). It prescribes requirements when a license holder is "vacating [an] installation which may have become contaminated with radioactive material as a result of the licensee's activities." This regulation reflects DPH's statutory authority to, *inter alia*, "protect[] public health and safety," to develop programs "for evaluation of hazards associated with the use of sources of ionizing radiation"; to "adopt regulations relating to control of other sources of ionizing radiation"; and to issue "regulations that may be necessary in connection with proceedings" governing the licensing and regulation of sources of ionizing radiation.

DPH applies the Guidance Documents to carry out these statutory and regulatory responsibilities. It utilizes the Guidance Documents for standards to determine when a licensee's installation may have become contaminated with radioactive material, for evaluation of hazards associated with the radiation, and to administer the licensing of the radiation sources.

DTSC. DTSC licenses hazardous waste facilities and enforces the law when violations occur. (Health & Saf. Code, §§ 25187, 25200.) DPH licenses the disposal of low-level radioactive waste. (*Id.*, § 115261.) In general, DTSC has exclusive jurisdiction over "[a]ll enforcement activities for the facilities relative to the control of hazardous wastes," and DPH has exclusive jurisdiction over "all enforcement activities relative to the control of low-level radioactive waste." (*Id*., § 43210.) A question arises when, as at SSFL, remediation of a DPH-licensed facility calls for demolition and disposal of radiologically contaminated materials. Generally, licensees prefer disposal at hazardous waste sites rather than typically more expensive and remote facilities licensed to receive low-level nuclear waste.

At SSFL, DTSC formally contracted with DPH for technical support to determine whether radioactive debris from the site could be accepted at hazardous waste dumps. (DTSC007980.) The contract made explicit

DTSC's reliance on the Guidance Documents. DPH agreed to provide DTSC "technical support" comprised of "reviewing previous documentation" of radiological surveys at SSFL and providing DPH's "expertise on assessing the adequacy and completeness of the previous radiological surveys and release decisions." (DTSC007983.) The contract explicitly provides the standard for that adequacy determination: "**CDPH will evaluate data against NRC Nuclear Regulatory Guide 1.86.**" (DTSC007784 (emphasis supplied). For each specified location at SSFL, DPH's "documentation will provide for **whether or not the Boeing buildings are approved for unrestricted use (i.e., demolition and Class I landfill disposal)**." (*Ibid.* (emphasis supplied).) DTSC has not merely "utilize[d], enforce[d], or attempt[d] to enforce" Reg. Guide 1.86, it has been giving the guideline conclusive effect on whether radiological waste may be disposed of in hazardous waste facilities DTSC regulates.

The second *Tidewater* criterion is met. The Guidance Documents are plainly used "to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure" (Gov. Code, § 11342.600).

CONCLUSION

CEQA and the APA require hundreds of agencies across the state to meet standards for open government and public participation. Surely these two agencies, whose mission is to protect the health and safety of Californians from some of the most dangerous substances on the planet, should open their processes to those same standards.

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The judgment should be reversed and the superior court directed to issue the writ of mandate.

Date: June 28, 2022

Respectfully submitted,

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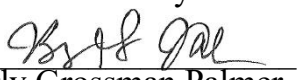
By: 
Beverly Grossman Palmer

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CERTIFICATE OF COMPLIANCE WITH RULE 8.204(C)(1)

I certify that, pursuant to California Rules of Court, rule 8.204(c)(1), the attached **APPELLANTS' OPENING BRIEF** is proportionally spaced, has a typeface of 13 points or more, and contains 13,999 words, as determined by a computer word count.

Date: June 28, 2022

Respectfully submitted,

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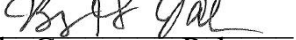
By: 
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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF SACRAMENTO

Re: Physicians for Social Responsibility-Los Angeles, et al. v. Department of Toxic Substances Control, 3DCA No. C088821; SCSC No. 34-2013-80001589

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

On **June 28, 2022,** I served the foregoing document(s) described as **APPELLANTS' OPENING BRIEF** on all appropriate parties in this action, as listed on the attached Service List, by the method stated.

☒ If Electronic Filing Service (EFS) is indicated, I electronically filed the document(s) with the Clerk of the Court by causing the documents to be sent to TrueFiling, the Court's Electronic Filing Services Provider for electronic filing and service. Electronic service will be effected by TrueFiling's case-filing system at the electronic mail addresses indicated on the attached Service List.

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

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this is executed on **June 28, 2022,** at Los Angeles, California.

LaKeitha Oliver

SERVICE LIST

Physicians for Social Responsibility-Los Angeles, et al. v.
Department of Toxic Substances Control,
3DCA No. C088821; SCSC No. 34-2013-80001589

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Via EFS Tracy L. Winsor Jeffrey P. Reusch Deputy Attorney General California Department of Justice 1300 I Street PO Box 944255 Sacramento, California 94244-2550 Telephone: (916) 327-7851 Email: jeffrey.reusch@doj.ca.gov *Attorneys for Respondent Department of Public Health*	***Via U. S. Mail*** Honorable Richard K. Sueyoshi Sacramento County Superior Court 720 Ninth Street, Dept. 28 Sacramento, California 95814