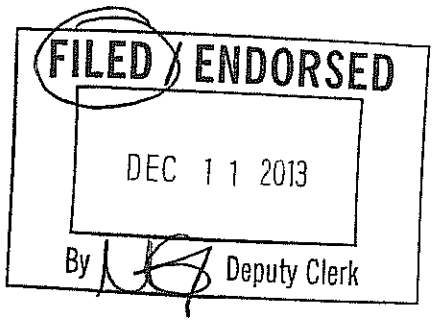

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

PHYSICIANS FOR SOCIAL RESPONSIBILITY-LOS ANGELES, et al.

Petitioners,

v.

DEPARTMENT OF TOXIC SUBSTANCES CONTROL, et al.,

Respondents.

THE BOEING COMPANY, et al.

Real Party in Interest

Case No.: 34-2013-80001589

ORDER AFTER HEARING GRANTING, IN PART, MOTION FOR PRELIMINARY INJUNCTION

Petitioner's motion for preliminary injunction against the Department of Toxic Substance Control ("DTSC") is GRANTED.

On October 24, 2013, the court issued a tentative ruling granting Petitioners' motion for a preliminary injunction. Hearing was held on October 25, 2013. Petitioners were represented by Michael Strumwasser, Beverly Grossman Palmer and Rachel Deutsch. Respondent DTSC was represented by Deputy Attorney General James Potter. Respondent Department of Public Health ("DPH") was represented by Deputy Attorney General Jeffrey Reusch. Real Party in Interest the Boeing Company ("Boeing") was represented by Peter Meier and Gordon Hart.

Based on the pleadings and arguments presented, the court issues the following order.

INTRODUCTION

Petitioners charge DTSC and DPH with failing to comply with the California Environmental Quality Act ("CEQA") and Administrative Procedures Act ("APA") in overseeing Boeing's demolition and disposal of buildings formerly used for nuclear research at the Santa Susana Field Laboratory ("Santa Susana"). Petitioners fear the buildings are contaminated with unacceptable levels of radiation; demolition could release that radiation; and the debris is being disposed of in a facility not licensed to receive radioactive waste.

This case does not address whether Boeing's demolition and disposal activities are safe. Instead, the question is whether DTSC is required to conduct an environmental review under CEQA, and whether DTSC and DPH are relying on a rule of general application without complying with the APA.

As discussed below, the court concludes Petitioners established a reasonable probability they will prevail on their CEQA claim against DTSC, and the balance of harms on the record to date tips in their favor. The court thus enjoins DTSC from granting further approval to Boeing's activities pending hearing on the merits. The motion for preliminary injunction against DTSC and DPH for allegedly violating the APA is denied. No relief is sought or ordered against Boeing.

BACKGROUND

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

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

The parties characterize these six buildings as, variously, radiological buildings, structures or facilities. The court will use the generic term "buildings." It is undisputed these buildings once contained radiological materials and were licensed for radiologic use by DPH and/or the federal Nuclear Regulatory Commission. It is also undisputed all buildings have been "decommissioned" by either DPH or the Nuclear Regulatory Commission and "released for unrestricted use." (Carpenter Decl., ¶ 34; Perez Decl., ¶ 11.) The parties dispute whether, or to what extent, the decommissioning and release for unrestricted use affects this petition.

Boeing has begun demolishing these buildings and intends to dispose of the debris in Class I hazardous waste landfills.[2] (Pet. ¶ 51; Lennox Decl. ¶ 19.) It is undisputed Class I hazardous waste landfills are not licensed to dispose of "low-level radioactive waste." (See, e.g., Carpenter Decl., ¶ 41.) The parties dispute whether the debris ***is*** low-level radioactive waste as defined by law.

Petitioners contend the buildings remain contaminated with unacceptably high levels of radiation;[3] demolition will release that radiation; release of radiation could harm the public and environment; and further harm to the public and environment could result if the debris is not disposed of in a facility licensed to receive low-level radioactive waste.[4] Petitioners, however, do not seek to directly enjoin Boeing from demolishing the buildings or disposing of the debris in a Class I hazardous waste landfill. Instead, the petition is directed solely at the role of DTSC and DPH in "approving" Boeing's activities. (Pet. at 26:21 to 28:12.)

Petitioners allege DTSC and DPH approved Boeing's demolition and disposal activities without performing the environmental review required by CEQA. They also allege DTSC and DPH relied on "underground regulations" defining acceptable levels of radiation when approving Boeing's demolition and disposal activities, in violation of the APA. Petitioners move to enjoin DTSC and DPH from further approving Boeing's demolition and disposal activities without

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[2] It appears only building L-85 has been demolished, but none of the resulting debris has been disposed of yet.

[3] Petitioners contend ***any*** level of radiation above naturally occurring background levels is unacceptably high.

[4] Very few facilities in the United States are licensed to accept low-level radioactive waste. No facility in California is licensed to accept low-level radioactive waste.

performing the required CEQA environmental review or in reliance on underground regulations in violation of the APA.

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

DPH acknowledges it has authority to license the receipt, possession or transfer of radioactive materials, and to decommission licensed sites. It licensed some of the buildings at issue. All the buildings were decommissioned and released for unrestricted years ago use by either DPH or the federal Nuclear Regulatory Commission. Petitioners do not challenge the decommissioning decisions. (See Perez Decl., ¶¶ 10, 11.) DPH argues it has not approved Boeing's demolition and disposal activities, and Boeing is not required to obtain its approval.

Boeing argues the only approval it needs to demolish the buildings is a zoning clearance permit, already issued by Ventura County.[5] It is not required to obtain any approval to dispose of the debris. Boeing argues because the buildings were decommissioned and released for unrestricted use by DPH and the Nuclear Regulatory Commission, debris from the buildings is not considered "low-level radioactive waste." Accordingly, Boeing may dispose of the debris at a Class I hazardous waste facility. Boeing maintains any radiation in the debris is far below the background radiation level present from natural sources.

STANDARD OF REVIEW

A preliminary injunction preserves the status quo until a final determination of the merits. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.) In deciding whether to issue a preliminary injunction, the court considers two interrelated factors: (1) whether there is a reasonable probability Petitioners will prevail on the merits; and (2) the interim harm the parties

[5] Ventura County's decision is not challenged and it is not a party to this action.

will suffer if an injunction is not issued compared to the interim harm if it is. (*White v. Davis* (2003) 30 Cal.4th 528, 554; *Butt v. State of California* (1992) 4 Cal.4th 668, 677-678; *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 206.) The more likely it is petitioners will ultimately prevail, the less severe must be the harm they allege will occur if the injunction does not issue. (*King v. Meese* (1987) 43 Cal.3d 1217, 1227.)

CEQA

1. Likelihood of Success on the Merits

DTSC, DPH and Boeing argue Boeing's demolition of the buildings is not a ***project*** as defined by CEQA. If not, then CEQA does not apply. (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 373, 380; *Parchester Village Neighborhood Council v. City of Richmond* (2010) 182 Cal.App.4th 305, 311.)

However, at this stage of the proceeding, it appears DTSC has so asserted control of Boeing's activities as to be a project undertaken by DTSC subject to CEQA.

A. CEQA

CEQA is designed to provide long-term protection of the environment. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112.) It achieves this goal by requiring public agencies to inform themselves about and consider the environmental effects of projects they carry out or approve. (*Muzzy Ranch Co., supra*, 41 Cal.4th at 379-80; *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1372; 14 Cal. Code Regs. § 15002, subd. (a).)

CEQA does not compel a particular environmental outcome. Instead, its purpose is to require government agencies to make decisions with environmental consequences in mind. (14 Cal.Code Regs. § 15003, subd. (g); see also *Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85, 89 [CEQA "is to assist public agencies in evaluating whether projects which they have discretion to approve or disapprove will have a significant adverse effect upon the environment."].) CEQA also gives the public an opportunity to review and comment on the

adequacy of the government's environmental review. (Pub. Res. Code § 21092 [public notice requirements]; § 21082.1, subd. (b) [public comment requirements].)

CEQA is thus designed to force the government to think about the environmental effects of its activities in a meaningful way, to mitigate those effects where feasible, and to give the public access to the decision-making process. (Pub. Res. Code § 21000, subd. (g), § 21001, subd. (d), § 21002; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.)

CEQA does not apply to purely private actions. (*Sunset Sky Ranch Pilots Assn. v. County of Sacramento* (2009) 47 Cal.4th 902, 908; *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 19.) This distinction between governmental action vs. private action is reflected in CEQA's definition of the term ***project.*** To be a ***project*** subject to CEQA review, the activity must be either: (1) directly undertaken by a public agency; (2) financially supported by a public agency; or (3) approved by a public agency. (Pub. Res. Code § 21065; 14 Cal. Code Regs. 15002, subd. (b); *Sunset Sky Ranch, supra*, 47 Cal.4th at 908.)

Petitioners argue DTSC and DPH have either directly ***undertaken*** an activity that could effect the environment, or have ***approved*** Boeing's activities. DTSC, DPH and Boeing maintain Boeing's demolition and disposal activities are purely private actions requiring no approval from DTSC and DPH.

Petitioners cite no definitive authority requiring or authorizing either DTSC or DPH to approve Boeing's demolition. The issue is whether DTSC has nevertheless asserted such control over Boeing's activities that it should be deemed to have approved Boeing's project, triggering CEQA review.

CEQA must be given a "broad interpretation" to maximize protection of the environment. (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1180; see also *McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1143; 14 Cal. Code Regs. 15003, subd. (f).) Our Supreme Court suggests the link between the public agency and the private activity need only be "minimal" for CEQA to apply. (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 262-63.)

B. It is reasonably probable Petitioners will prevail on their claim against DTSC

Petitioners presented evidence tending to establish DTSC both approved Boeing's activities and required Boeing to seek such approval.

DTSC required Boeing to make changes to Boeing's Standard Operating Procedures ("SOP") governing it's demolition and disposal activities at Santa Susana. In a letter dated October 14, 2009, DTSC stated it was "essential" DTSC be "advised of any potential demolition activities "that may ***require DTSC oversight and/or approval.***" (RJN, Ex. 18, p. 1 [emphasis added].) DTSC thus required Boeing to change its SOP to assure DTSC received the requested notification. DTSC also instructed Boeing to amend the SOP to require the notification to DTSC include a certification no radiological materials were handled and no radiological-related activities were conducted in any buildings being demolished. (*Id.*)

On February 11, 2010, after reviewing the amended SOP, DTSC sent another letter to Boeing explaining it had previously ***required*** preparation of the SOP to ensure demolition would not result in removal and uncontrolled reuse of potentially contaminated debris. (RJN, Ex. 19, p. 1.) The letter also instructed Boeing to make further revisions to the SOP, including providing more detail to DTSC about how radiological screening of the buildings and demolition debris would be conducted and requiring DTSC be notified if the screening detected any radiation above background levels. (*Id.*, p. 4.) The letter states DTSC would give the public an opportunity to comment on the SOP before "DTSC's final ***review and approval.***" (*Id.*, p. 6. [emphasis added])

Additionally, DTSC's website states it "***required***" Boeing's SOP and its amendments to assure any building proposed for demolition is assessed for radiologic contamination and the demolition debris "will not be hazardous to workers or the public." (RJN, Ex. 17, pp. 1-2. [emphasis added]) DTSC's website also informs the public the debris will carefully screened and analyzed, and any debris contaminated with radioactive materials will be disposed of "at appropriately licensed facilities." (*Id.*, p. 2.)

The record also shows DTSC exercised detailed and continuing oversight of Boeing's activities. For example, when Boeing notified DTSC it intended to demolish building L-85, DTSC responded by letter on May 1, 2013, requesting the building and demolition debris be

subjected to additional radiological screening. (RJN, Ex. 24, p. 2.) The letter noted DTSC had concluded, based on documentation previously submitted by Boeing, that "radionuclide contaminants are not present above background levels," but additional data would need to be reviewed by DTSC "***prior to clearance*** of this debris for Class I landfill disposal." (*Id.*, p. 3 [emphasis added].) DTSC's letter also states, "Future Boeing Area IV Buildings proposed for demolition may ***require*** additional focused radiological surveys, to be determined by DTSC and CDPH, based on site-specific conditions." (*Id.*, p. 4. [emphasis added])

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

At this preliminary stage, the record establishes DTSC approved Boeing's demolition and disposal activities, and required Boeing to seek such approval to assure the public and the environment are protected from radiologic contamination. This is the type of activity for which CEQA requires environmental review. (See, e.g., *Apartment Assn. of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1169 [city ordinance "clearly" activity undertaken by public agency]; *Mountain Lion Coalition v. Fish & Game Commission* (1989) 214 Cal.App.3d 1043 [agency adoption of regulation allowing mountain lion hunt during fall of 1987 subject to CEQA].) This is underscored by DTSC's argument at the hearing: DTSC acknowledged it was overseeing Boeing's demolition and disposal activities, and this oversight "obviously looks like a regulatory program."[6] (RT 67:9-10.)

DTSC argues its review of Boeing's activities is ***purely voluntary*** and thus outside

[6] "As the old saying goes, 'if it looks like a duck, and quacks like a duck, it's a duck.'" (People v. Monjaras (2008) 164 Cal.App.4th 1432, 1437.)

CEQA's purview. DTSC argues because the buildings were decommissioned and released for unrestricted use, the buildings are no longer subject to ***any*** government regulation or oversight. Accordingly, anything Boeing does with the buildings is purely private action not subject to CEQA. DTSC argues it has no authority to approve Boeing's activities and Boeing does not need DTSC's approval. Because DTSC is not ***approving*** anything within the meaning of CEQA, Boeing's activities remain purely private. There is thus no ***project*** subject to CEQA.

This argument has merit. CEQA guidelines suggest governmental approval of a private activity must be ***required*** to trigger CEQA's environmental review. (See 14 Cal. Code Regs. 15377 ["private project" is one that will "need" approval from a government agency]; 14 Cal. Code Regs. 15002, subd. (b)(3) [CEQA applies to private activities which "require approval by a governmental agency".) CEQA defines a project as an activity that involves the issuance of a "lease, permit, license, certificate, or other entitlement for use" by a public agency. (Pub. Res. Code § 21065.)

However, the court is not persuaded DTSC lacks authority to require Boeing to obtain its approval for Boeing's demolition and disposal activities. Petitioners cite a 2010 Administrative Order of Consent ("AOC") DTSC entered with the DOE, which owns buildings in Area IV. The AOC specifies DOE's obligation to the cleanup soils in Area IV. (AOC ¶ 1.5.1.) The parties defined "soils" to include "debris, structures, and other anthropogenic materials." (¶ 1.8.4.) This appears to cover buildings and their demolition debris. Similarly, "cleanup of soils" includes "the cleanup of soils that contain . . . radiological contaminants," requiring cleanup to remove all contaminants above local background levels. (¶¶ 1.8.1, 2.1.) The AOC requires DOE to submit to DTSC for "review and approval a demolition plan, demolition schedule and detailed procedure that describe the activities that DOE shall perform to sample and characterize DOE's remaining buildings to determine whether they are contaminated with radiological or chemical contaminants, and to determine appropriate handling methods for managing and disposing of demolition debris." (¶ 2.3.1.)

Boeing is not a party to the AOC between DOE and DTSC governing cleanup of DOE's buildings. Nevertheless, the AOC suggests DTSC has authority to require DOE to obtain its

approval prior to demolishing DOE's building, and require any radiation present in the buildings or demolition debris be reduced to background levels. This is consistent with the reporting and approval DTSC required of Boeing's SOP governing Boeing's activities.

Petitioners also cite the Hazardous Substance Account Act ("HSAA") as giving DTSC authority to approve Boeing's activities. (Health & Saf. Code §§ 25300 et seq.) The HSAA was enacted to "[e]stablish a program to provide for response authority for releases of hazardous substances . . . that pose a threat to the public health or the environment." (Health & Saf. Code § 25301; see also *Brown v. State of California* (1993) 21 Cal.App.4th 1500, 1504-05 [Act is to clean up hazardous substance releases posing a threat to public welfare or the environment].) When DTSC determines the potential release of a hazardous substance threatens public health or the environment, it may require the responsible party to undertake remedial action or undertake remedial action itself. (Health & Saf. Code § 25358.3.) A "hazardous substance" includes any substance designated as hazardous under the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). This includes some radionuclides. (Health & Saf. Code §§ 25315, 25316, subd. (c); 40 Code of Fed. Regs. § 302.4.) Of particular note, the HSAA gives DTSC express authority to use any legal remedies available to it to "compel a responsible party or parties to take or pay for appropriate removal or remedial action necessary to protect the public health and safety and the environment ***at the Santa Susana Field Laboratory site***." (Health & Saf. Code § 25359.20 [emphasis added].)

DTSC's broad authority under the HSAA, specifically referencing Santa Susana, appears to give it authority to approve Boeing's demolition and disposal activities, and require Boeing to obtain its approval before undertaking those activities. For purposes of this motion, the court thus finds DTSC has ***approved*** Boeing's demolition and disposal activities within the meaning of CEQA.

Even if the requirements DTSC imposed and approvals it gave were voluntary, the court finds DTSC has ***undertaken*** an activity that could effect the environment. (Pub. Res. Code § 21065.) Specifically, DTSC has undertaken a regulatory program designed to protect the environment from contamination by radioactive materials resulting from Boeing's activities. This

is precisely the type of governmental activity CEQA was intended to address. (See, e.g., Pub. Res. Code §§ 21000-21002; 14 Cal. Code Regs. 15003; see also, e.g., *Mountain Lion Coalition v. Fish & Game Commission* (1989) 214 Cal.App.3d 1043.)

Accordingly, at this stage of the proceeding the court finds the DTSC's activities constitute a ***project*** within the meaning of CEQA. Petitioners have thus established a reasonable probability they will prevail on their claim DTSC failed to comply with CEQA.

C. Petitioners are not likely to prevail on their CEQA claim against DPH

DPH is a different matter.[7] Petitioners cite only one document as evidence DPH approved Boeing's disposal activities. (Reply at 11:11-12 [citing Pet. RJN, Ex. 25].)[8] That document, however, does not establish DPH ***approved*** anything. The document is a two-page memo memorializing DPH's review of documents related to demolition material from building L-85. DPH concluded the federal Nuclear Regulatory Commission's 1987 decision releasing L-85 for unrestricted use was correct. However, ***review*** does not constitute ***approval***. Additionally, the memo implies demolition has already occurred, because it refers to "post-demolition" surveys. This is inconsistent with the theory DPH "approved" the demolition. Finally, the memo does not mention disposal of demolition debris.

On the current record, the court finds Petitioners failed to establish DPH ***approved*** Boeing's demolition and disposal activities. Accordingly, Petitioners failed to establish they are likely to prevail on their CEQA claim against DPH.

2. Interim Harm

Having determined there is a reasonable probability Petitioners will prevail on their

[7] Petitioners spend little time discussing DPH. Instead, their focus is on DTSC. They speak of "approval . . . undertaken by DTSC," DTSC's role in the remediation of the Santa Susana site and its role in performing a site-wide CEQA analysis, "DTSC's review and approval of the demolition and disposal of Boeing-owned buildings," and requirements imposed on Boeing by DTSC. (MPA 7:24-25, 8:3-7, 8:16-17; 8:20-21, 9:12-20; see also Reply at 4:7-8, 10:20-26, 11:26-27.)

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

CEQA claim against DTSC, the court must compare the interim harm Petitioners will suffer if a preliminary injunction is not issued with the interim harm DTSC will suffer if it is. (*White, supra*, 30 Cal.4th at 554; *Butt, supra,* 4 Cal.4th at 667-678.)

In its papers, DTSC does not contend it will suffer ***any*** harm if the court issues an injunction. At the hearing, DTSC argued a preliminary injunction would "send a message" to the community Boeing's activities are dangerous, which could disturb people living near Santa Susana. (RT 66:21-22.) DTSC cites no authority suggesting public concern over the message an injunction might send is "harm" the court may consider in determining whether to issue an injunction. The court balances the interim harm to ***the parties***. (*White*, *supra*, 30 Cal.4th at 554; *Butt*, *supra*, 4 Cal.4th at 678.) Moreover, although the parties spend considerable time arguing whether Boeing's activities are safe, the court's ruling makes no finding about the safety of those activities.

Boeing contends ***it*** will be harmed by delaying in its plan to dedicate the land to the public to use as open space.[9] (Lennox Decl. ¶ 21.) The court is not persuaded. First, the injunction is only directed at DTSC, not at Boeing. Petitioners have not sought injunctive relief against Boeing and the court does not address whether Boeing requires DTSC's approve to proceed. The court finds only that DTSC has undertaken to approve and control Boeings activities to an extent triggering CEQA.[10] Second, the court finds Boeing would suffer minimal, if any, harm. Boeing acknowledged it cannot release the land for public use until DTSC completes its cleanup of soil and groundwater contamination at Santa Susana. The record thus does not show Boeing's plans for the property will be delayed if the court issues an injunction.

The court stresses the interim nature of the relief. The preliminary injunction preserves

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

Boeing also alleges an injunction would cause it to incur penalties of up to $25,000 a day for storage of hazardous waste without a permit. (Lennox Decl., ¶ 23.) But there is no evidence Boeing is storing debris from any of the buildings.

[10] At the hearing, Petitioners orally requested leave to file an amended petition to request injunctive relief against Boeing. That request is granted.

the status quo pending hearing on the merits. That hearing will likely be held in the next four to five months. (Pub. Res. Code § 21167.4, subd. (c).)

Balanced against the lack of harm to DTSC and minor demonstrated harm to Boeing if an injunction is issued, Petitioners contend the public and environment could suffer grave harm if radiation is released through Boeing's demolition activities or disposal of debris at a facility not licensed to receive radioactive waste. Boeing contends any radiation in the debris is below background levels. The debris is thus not "low-level radioactive waste" and can be safely disposed of in a Class I hazardous waste facility. The parties offer voluminous competing expert declarations, and objections thereto, over whether Boeing's activities are safe.

The court need not resolve that debate to decide this motion. At the hearing, Petitioners clarified the harm they will suffer is being deprived of the opportunity for ***review*** and ***comment*** under CEQA before DTSC grants approval of demolition and disposal of Boeing's buildings.

This procedural harm would not be sufficient to tip the balance in Petitioners' favor if there were serious harm to DTSC or Boeing. (See, e.g., *Winter v. Natural Resources Defense Council, Inc.* (2008) 555 U.S. 7, 22, 24-25 [improper to grant preliminary injunction based on "possibility" of harm to plaintiffs due to failure to prepare environmental impact statement, particularly where harm to defendant Navy from having to curtail training activities was potentially enormous].) However, in the absence of demonstrated harm to DTSC or Boeing, the court finds it is sufficient to tip the balance in favor of Petitioners. (See, e.g., *High Sierra Hikers Ass'n v. Blackwell* (9th Cir. 2004) 390 F.3d 630, 642 ["In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action. While an injunction does not automatically issue upon a finding that an agency violated NEPA, the presence of strong NEPA claims gives rise to more liberal standards for granting an injunction."][11] [internal quotes and cites omitted]; *American Motorcyclist Ass'n v. Watt* (9th Cir. 1983) 714 F.2d 962, 966 [harm may be implied from failure of public agency to evaluate

[11] CEQA and NEPA "are so parallel in content and so nearly identical in words that judicial interpretation of the federal law is strongly persuasive in our deciding the meaning of our state statute." (*Environmental Defense Fund, Inc. v. Coastside County Water District* (1972) 27 Cal.App.3d 695, 701.)

environmental impact of proposed government action].) This is particularly true where the preliminary injunction will last only until hearing on the merits, likely be in the next four to five months.

ADMINISTRATIVE PROCEDURES ACT

Petitioners argue DTSC and DPH are violating the APA by relying on four "underground regulations" in approving Boeing's demolition and disposal activities. At this preliminary stage, the court is not persuaded.

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

Petitioners contend DTSC and DPH are enforcing four "regulations" not adopted pursuant to APA:

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

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

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

(4) A 1997 DPH Policy Memorandum identified as IPM-88-2 outlining procedures to verify facilities where radioactive materials were used have been decontaminated to acceptable levels prior to release for "uncontrolled use."[12]

It is undisputed neither DTSC nor DPH adopted these documents pursuant to the APA. DTSC and DPH argue, however, these documents are not regulations within the meaning of the APA. The record does not establish they are.

First, even if DECON-1 and IPM-88-2 once met the definition of regulations, DPH maintains they have not been DPH policy since at least 2002.[13] (Perez Decl., ¶¶ 2, 3.) The other two documents announce rules promulgated by two federal agencies, not rules of DTSC or DPH.

Petitioners nevertheless argue Respondents ***relied*** on all four documents in approving Boeing's demolition plans, this making these documents regulations. (Pet. ¶¶ 84, 86-88, 91; MPA at 10:8-9, 24-25.) The court is not persuaded.

No evidence is cited that DTSC or DPH relied on any of the documents. Rather, the standard operating procedures ***drafted by Boeing*** require Boeing to screen its buildings and debris using the criteria in the four documents. (MPA at 4:6-11.)[14] Petitioners do not explain how Boeing's standard operating procedures become regulations promulgated by DTSC or DPH. (Gov. Code § 11342.600 [regulation means rule adopted by an agency]; § 11342.5 [prohibiting state agencies from enforcing regulations until properly adopted].)

Finally, assuming, arguendo, that Boeing's standard operating procedures were required by DTSC or DPH, the court is not persuaded procedures governing one company's demolition of buildings located in one location are "rules of general application." (*Tidewater*, *supra*, 14 Cal.4th at 571 [to be a regulation, the agency must intend its rule to apply generally, rather than in a specific case.]; *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal. 2d 317, 323-24

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

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

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

[resolution regarding construction of one particular bridge not a regulation because not rule of general application]; *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 630 [although rule of general application need not pertain universally, it must pertain to all members of a particular class].)

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

CONCLUSION

On the record to date, the court concludes Petitioners are reasonably likely to prevail on their CEQA claim against DTSC, but not against DPH. The court also concludes Petitioners are not reasonably likely to prevail on their APA claim. However, the court stresses the preliminary nature of this motion: "The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respective equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the right claimed by him." (*Continental Baking Co., supra*, 68 Cal.2d at 528.)

Pending hearing on the merits, the motion for a preliminary injunction is granted, in part; DTSC is enjoined from approving Boeing's demolition and disposal activities without DTSC complying with CEQA.

Dated: 12/11/, 2013

Allen Sumner
Judge of the Superior Court of California,
County of Sacramento

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

PHYSICIANS FOR SOCIAL RESPONSIBILITY et al.

vs.

DEPARTMENT OF TOXIC SUBSTANCES CONTROL, DEPARTMENT OF PUBLIC HEALTH

Case Number: 34-2013-80001589

CERTIFICATE OF SERVICE BY MAILING (C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing **ORDER AFTER HEARING GRANTING, IN PART, MOTIONFOR PRELIMINARY INJUNCTION** by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at 720 9th Street, Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown below:

Michael Strumwasser
Beverly Grossman Palmer
Rachel Deutsch
10940 Wilshire Blvd, Suite 2000
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Peter Meier
Gordon Hart
55 Second St, 24th Fl
San Francisco, CA 94105-3441

I, the undersigned Deputy Clerk, declare under penalty of perjury that the foregoing is true and correct.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

Dated: December 11, 2013

By: M. GARCIA,
Deputy Clerk