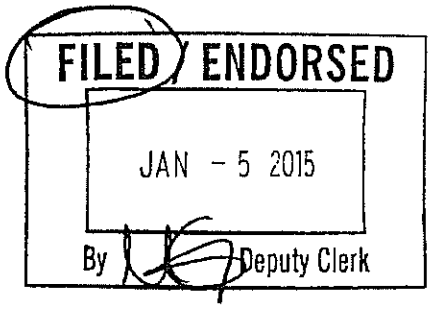

SUPERIOR COURT OF CALIFORNIA

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 DENYING MOTION FOR SUMMARY JUDGMENT

Hearing on the court's tentative ruling denying the motion for summary judgment by Real Party in Interest the Boeing Company ("Boeing") was held November 21, 2014. Boeing was represented by Peter Meier and Gordon Hart. Petitioners were represented by Michael Strumwasser and Beverly Grossman Palmer. Respondent Department of Toxic Substances Control ("DTSC") was represented by Deputy Attorney General James Potter. Respondent Department of Public Health ("DPH") was represented by Deputy Attorney General Jeffrey Reusch.

Based on the pleadings and arguments presented, the court adopts the tentative ruling as modified below.

INTRODUCTION

Boeing owns buildings formerly used for nuclear research at the Santa Susana Field Laboratory ("Santa Susana"). It wants to demolish those buildings and dispose of the debris.

Petitioners believe the buildings are contaminated with unacceptable levels of radiation; demolition could release the radiation; and the debris must be disposed of in facilities licensed to receive radioactive waste. Petitioners seek a writ of mandate requiring DTSC and DPH to comply with the California Environmental Quality Act (Pub. Resources Code § 21000 et seq. ["CEQA"]) and the Administrative Procedures Act (Gov't. Code 11340 et seq. ["APA"]) in approving Boeing's demolition and disposal activities. On December 11, 2013, the court partially granted Petitioners' request for a preliminary injunction, enjoining further action by DTSC pending hearing on the merits.

Boeing now moves for summary judgment, arguing Petitioners' action is moot because on March 20, 2014, Boeing sent DTSC a letter withdrawing all prior notices it had given to DTSC that it intends to demolish its buildings ("March 2014 letter"). For the reasons stated below, Boeing's motion is denied.

BACKGROUND

On a motion for summary judgment, the pleadings define the issues. (*Booth v. Santa Barbara Biplane Tours, LLC* (2008) 158 Cal. App. 4th 1173, 1177.) According to the pleadings,[1] Santa Susana is a former nuclear research and rocket development facility in Ventura County. The site is divided into four areas. This action involves only Area IV. Area IV was previously used for the development, fabrication and disassembly of nuclear reactors, reactor fuel and other radioactive materials. Boeing owns all of the land and some of the buildings in Area IV. It wants to demolish its buildings and dispose of the debris in Class I hazardous waste landfills.[2] (Pet. ¶¶ 14, 35, 49-54.)

The parties characterized these buildings variously as radiological buildings, structures or facilities. The court uses the generic term "buildings." It appears undisputed these buildings

[1] The verified petition for writ of mandate and complaint for injunctive and declaratory relief.

[2] Boeing notes one of its buildings (L-85) had already been demolished when the petition was filed. It argues any judicial review of demolition of that building is moot. This may be true. But Boeing moves for summary adjudication as to Petitioners' entire action, not just this particular building.

once contained radiological materials and were licensed for radiologic use by DPH and/or the federal Nuclear Regulatory Commission. Petitioners allege the buildings remain contaminated with unacceptably high levels of radiation. They argue demolition will release that radiation, harming the public and environment. Further harm to the public and environment could result if the debris is disposed of in a Class I hazardous waste landfill rather than a facility licensed to receive low-level radioactive waste.

The heart of this lawsuit is Petitioners' claim Boeing's demolition and disposal activities constitute a "project" under CEQA (Pub. Resources Code § 21065), which DTSC and DPH have approved without performing the required environmental review. (Pet. ¶ 2-3, ¶¶ 62-71.) Petitioners also allege DTSC and DPH relied on "underground regulations" in defining acceptable levels of radiation for approving Boeing's demolition and disposal activities, in violation of the APA. (Pet. ¶¶ 4-5, 73-80, 82-88.) Petitioners seek a writ of mandate directing DTSC and DPH to stop approving Boeing's demolition and disposal activities, and rescind all prior approvals, until they comply with CEQA and the APA. (Pet. at 26:21 to 28:12.) Petitioners also seek related injunctive and declaratory relief.

Petitioners' action is predicated on their contention DTSC and DPH are ***approving*** Boeing's activities without complying with CEQA. Boeing maintains, as a matter of law, its demolition activities do not require approval by DTSC or DPH. Boeing also argues its demolition did not become a "de facto" project requiring CEQA review simply because Boeing voluntarily gave DTSC notice of its plans and obtained DTSC's "approval." However, even assuming for argument that Boeing's voluntary request for DTSC's approval did trigger CEQA, Boeing argues Petitioners' action is now moot because Boeing's March 2014 letter withdrew all previous notices to DTSC that Boeing intends to demolish its buildings.

In support of its motion Boeing proffers 22 undisputed facts. Even if the court assumes all of Boeing's facts are undisputed, Boeing still fails to persuade it is entitled to summary judgment.[3]

[3] Petitioners' opposition to Boeing's motion for summary judgment did not unequivocally state whether each fact Boeing proffered is disputed or undisputed. (Cal. Rules of Court, rule 3.1350.) If disputed, Petitioners must state the nature of the dispute. (Rule 3.1350, subd. (f).) Although Petitioners dispute at least 12 of the Boeing's facts, they failed to "describe the evidence that support the position that the fact is controverted. That evidence must be supported by ***citation to exhibit, title, page, and line numbers in the evidence submitted.***" (*Id.* [emphasis added].) Instead, Petitioners often cite their own separate statement of undisputed material facts in opposition to Boeing's motion. Petitioners thus fail to properly dispute many of Boeing's facts.

Boeing's planned demolition of the buildings coincides with ***separate*** actions required of it by a 2007 Consent Order with DTSC involving DTSC's investigation of contamination at Santa Susana. (Fact 2.) DTSC's investigation requires sampling in and beneath Boeing's buildings as part of DTSC's identification of soil and groundwater contamination. (Fact 3.) The sampling was conducted in accordance with a document prepared by Boeing, referred to as the Standard Operating Procedures. (Fact 4.)

In 2009 Boeing revised its Standard Operating Procedures to agree to provide DTSC notice of its demolition activities. (Facts 5, 7.) According to Boeing, it voluntarily agreed to provide DTSC notice because Boeing recognized its demolition activities could potentially affect DTSC's soil remediation activities. (Fact 6.) But Boeing argues its Standard Operating Procedures do not require DTSC to approve Boeing's activities. (Facts 8, 9.)

Boeing's March 2014 letter to DTSC stated Boeing was withdrawing all previous notices it had given regarding its plans to demolish the buildings. Boeing also stated if it decides to recommence demolition, it will not seek DTSC's approval. (Facts 11, 13-18.) Boeing argues its letter rendered this lawsuit moot, entitling Boeing to summary judgment.

DTSC and DPH filed one-sentence notices stating they do not oppose Boeing's motion. Neither addresses the merits of Boeing's arguments, their jurisdiction or how the lawsuit should proceed.

ANALYSIS

1. Boeing's March 2014 letter does not render this case moot

Again, Petitioners maintain DTSC and DPH are approving Boeing's demolition and disposal activities without complying with CEQA.

CEQA is designed to protect 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. (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1372-73.) CEQA does not apply to purely private actions. (*Sunset Sky Ranch Pilots Assn. v. County of Sacramento* (2009) 47 Cal.4th 902, 907-08.) This distinction between public action vs. private action is reflected in CEQA's definition of the term "project." To be a project subject to CEQA, an activity must be

either directly undertaken by a public agency or 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.) If an activity is not a project, it is not subject to CEQA. (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School District* (2013) 215 Cal.App.4th 1013, 1063.)

Boeing is a private entity, and thus its demolition activities are not directly subject to CEQA. (See *Sunset Sky Ranch, supra*, 47 Cal.4th at 908.) But if DTSC and DPH are ***approving*** Boeing's activities within the meaning of CEQA, they must conduct the required environmental review.

In granting Petitioners' motion for a preliminary injunction, the court found Petitioners were reasonably likely to prevail on their CEQA claim against DTSC.[4] The court noted Petitioners presented evidence tending to establish DTSC was approving Boeing's demolition activities, and had required Boeing to seek such approval. The court thus enjoined DTSC from further approving Boeing's activities without complying with CEQA, pending hearing on the merits.

In opposing Petitioners' motion for a preliminary injunction, DTSC argued it had no authority over Boeing's demolition activities. Any review or approval DTSC had undertaken was ***voluntary*** and thus outside CEQA's purview. DTSC argued the buildings have all been decommissioned and released for unrestricted use, which means they are no longer subject to any government regulation or oversight. Therefore, because DTSC is not approving anything within the meaning of CEQA, there is no "project" subject to CEQA. Based on the pleadings before it, the court found some merit to this argument. However, given DTSC's actions appearing to approve Boeing's activities, the court was not persuaded DTSC had not asserted authority over Boeing's actions in demolishing the buildings. Nor was the court persuaded DTSC lacked authority to require Boeing to obtain its approval prior to demolition.

Boeing's motion for summary judgment does not turn on whether DTSC approved its demolition activities, or whether DTSC has authority to do so. Instead, Boeing argues its March 2014 letter renders these issues hypothetical and Petitioners' action moot.

In its March 2014 letter Boeing notes its disagreement with the court's preliminary injunction, reiterating its belief its demolition activities do not require DTSC's approval. However, Boeing also states it will voluntarily refrain from demolition activities in Area IV

[4] It bears repeating the court did not find Petitioners would prevail.

while the preliminary injunction against DTSC remains in effect. Boeing then states: "***Boeing hereby withdraws the notification packages previously sent to DTSC regarding planned demolition activities*** associated with Buildings 4005, 4009, 4011, 4055, the water line to former Building 4015, and the Conservation Yard." (Dassler Decl., Ex. B [emphasis added].) Boeing's mootness argument is based entirely on this one sentence. Boeing argues by withdrawing its notices to DTSC that it intends to demolish its buildings, there is no longer anything pending before DTSC to "approve." Boeing therefore concludes Petitioners' action has been rendered moot. The court is not persuaded.

Voluntary discontinuance of alleged illegal practices does not remove the court's jurisdiction or duty to determine Petitioners' claims. (See *Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 929; see also *Pittenger v. Home Savings & Loan Assn.* (1958) 166 Cal.App.2d 32, 37 [voluntary discontinuance of allegedly wrongful conduct does not destroy the justiciability of a controversy.].) "Courts thus hesitate to consider a case moot where a party voluntarily ceases an allegedly illegal practice but is free to resume it at any time." (*In re J.G.* (2008) 159 Cal.App.4th 1056, 1063.) A party's voluntary cessation of challenged actions does not render a claim moot, because the party may simply stop the challenged practice long enough for the case to be dismissed and then resume the practice. (See *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* (2000) 528 U.S. 167, 189.) As one court warned, a "unilateral decision" to change "is also unilaterally rescindable." (*Cook v. Craig* (1976) 55 Cal. App. 3d 773, 780.)

At the hearing Boeing argued these cases are inapplicable because it is not doing anything illegal or wrongful. Perhaps. But Boeing's argument begs that very question.

Boeing agreed a core issue of this case is whether DTSC must approve demolition of Boeing's buildings. The law, as briefed to date, it unclear.

The court found in its order of December 1, 2013, granting the preliminary injunction that the Hazardous Substance Account Act (Health & Saf. Code §§ 25300 to 25395.36 ["HSAA"]) appears to require DTSC to approve Boeing's demolition and disposal activities. Boeing notes the Ninth Circuit subsequently held one section of the HSAA (§ 25359.20) is unconstitutional as violating the Supremacy Clause. (*Boeing v. Movassaghi* (9th Cir. 2013) 768 F.3d 832.) Although this court cited section 25359.20 in its December 11, 2013, order, that section was not the sole basis for the court's order.

Numerous other sections of the HSAA are unaffected by *Movassaghi*. For example, section 25301 explains the purpose of the HSAA is 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." And section 25316 defines "hazardous substance" to include some radionuclides. (Health. & Saf. Code §§25316, subd. (b) ["hazardous substance" includes any substance designated as hazardous under CERCLA]; 40 Code of Fed. Regs. § 302.4 [designating hazardous substances under CERCLA to include certain radionuclides].) Section 25358.3 provides DTSC may require a responsible party to take remedial action if release of a hazardous substance threatens public health or the environment. These sections appear to give DTSC authority to require Boeing to obtain its approval prior to demolishing buildings, if demolition could release harmful radionuclides into the environment.

Additionally, DTSC acknowledged at the hearing it has "jurisdiction" over Boeing's buildings as part of DTSC's own cleanup activities at the Santa Susana site, explaining: "These buildings are in a site that is heavily contaminated where DTSC has issued site-wide orders." (Reporter's Transcript, 35:1-7.)

Boeing argues DTSC's 2010 Administrative Order on Consent (or "AOC") with the federal Department of Energy regarding cleanup of Santa Susana fails to establish Boeing needs approval from DTSC to demolish its buildings. This may be true. But neither does the AOC establish Boeing does not require DTSC's approval. Moreover, none of Boeing's proffered facts has anything to do with the AOC, and Boeing did not submit the AOC in support of its motion. (Code Civ. Proc. § 437c, subd. (b)(1) [motion for summary judgment must be supported by evidence and separate statement setting forth material facts moving party contends are undisputed].)

Boeing thus fails to establish by this motion that it does not need DTSC's approval to demolish the buildings or that DTSC lacks authority to require such approval.[5]

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[5] With full briefing on the merits, Boeing may well establish it does not need DTSC's approval to demolish and dispose of its buildings. In opposition to Petitioners' motion for a preliminary injunction, DTSC asserted this was the case. DTSC reiterated this assertion at the hearing on Boeing's motion. The court does not lightly disregard DTSC's position about its authority. In issuing its preliminary injunction, the court noted "[t]he 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

Boeing argues Petitioners have not established Boeing cannot demolish the buildings without DTSC approval. But as the party moving for summary judgment, Boeing "bears the burden of persuasion that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law. That is because of the general principle that a party who seeks a court's action in his favor bears the burden of persuasion thereon." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Boeing fails to meet its burden.

Accordingly, Boeing's motion fails to establish it does not require DTSC's approval to demolish its buildings, or that its March 14 letter rendered this action moot.

Moreover, even if moot, the court may still decide this case if it raises issues of "substantial and continuing public interest." (*In re J.G., supra*, 159 Cal.App.4th at 1062.) Whether CEQA requires DTSC to approve Boeing's demolition and disposal activities is an issue of substantial and continuing public interest. By its motion for summary judgment, Boeing concludes it has rendered the question of DTSC's approval moot. But this is not Boeing's decision to make, much less by unilateral action. This issue will be decided when the court rules on the merits of Petitioners' claims.

Boeing's ripeness argument is the flipside of its mootness argument. Again, Boeing states it does not intend to seek DTSC's approval for future demolition activities. It is thus speculative to litigate how DTSC may react should Boeing someday proceed to demolish its buildings without approval. Any challenge to possible future demolition activities is not ripe. But Boeing's ripeness argument fails for the same reasons as its mootness theory, discussed above.

2. Remaining issues

There is a second ground for denying Boeing's motion. If Boeing fails to establish even one of its undisputed facts, its motion may be denied. (Code Civ. Proc. § 437c, subd. (b)(1).)[6]

Boeing proffers the following as an undisputed fact: "All of the buildings at issue in this action have been decommissioned by the relevant licensing agency and released for unrestricted

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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. v. Katz* (1968) 68 Cal.2d 512, 528.)

Similarly, here the court holds only Boeing's motion fails to establish the case is moot or that Boeing does not require DTSC's approval to demolish these buildings.

[6] At the hearing Boeing did not mention this alternative ground.

use." (Fact 1.) Boeing cites only two pieces of "evidence" to establish fact: (1) the declaration of Edgar Bailey, and (2) this court's December 11, 2013, Order granting Petitioners' motion for a preliminary injunction. Although Bailey generally describes the standards for release of buildings for unrestricted use, he does not state the buildings have in fact been released for unrestricted use. He also does not discuss decommissioning. Bailey's declaration thus does not establish the proffered fact.[7]

The court's December 11, 2013, order states based on the pleadings "It is . . . undisputed all buildings have been 'decommissioned' by either DPH or the Nuclear Regulatory commission and 'released for unrestricted use.'" (Order at 3:4-6.) However, Boeing cites no authority for the proposition a background fact recited in a court order constitutes "evidence" establishing a fact supporting summary judgment. (See, e.g., *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375 [court may not take judicial notice of truth of matters stated in court filed].) Boeing's failure to establish all its proffered facts by citation to admissible evidence is an alternative ground for denying its motion. (Code Civ. Proc. § 437c, subd. (b)(1).)

Additionally, Petitioners state they are unable to ascertain whether this fact asserted by Boeing is true. Petitioners state they have requested, but not received, information from DPH regarding the buildings' licensure, release from licensure and decommissioning. (Palmer Decl., ¶¶ 26-33.) Petitioners cite Code of Civil Procedure section 437c, subdivision (h), which provides: "If it appears from the affidavits submitted in opposition to the motion . . . that facts essential to justify opposition may exist, but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance . . . ." Petitioners have met this showing, establishing facts may exist which would justify denying Boeing's motion. But Petitioners have not been able to obtain proof of such facts from DPH. Given the mootness discussion above, the court will simply deny Boeing's motion rather than continuing the matter for further discovery.

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[7] At the hearing DPH argued other evidence supports the fact Boeing's buildings have been decommissioned and released. However, the court considers only the evidence cited by Boeing in its separate statement. (Code Civ. Proc. § 437c, subd. (b)(1) ["The support papers shall include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion."].)

CONCLUSION

Whether DTSC or DPH must approve Boeing's demolition activities will be decided when the court hears the merits of Petitioners' claims. In denying Boeing's motion for summary judgment the court expresses no opinion on Petitioners' claims, which await full briefing by all parties. However, for the reasons stated above, the court finds this action is not moot. Accordingly, Boeing's motion for summary judgment is denied.

Dated: Jan 5, 2015

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 DENYING MOTION FOR SUMMARY JUDGMENT** 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:

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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: January 5, 2015

By: M. GARCIA,
Deputy Clerk