Annotated Comments by Phil Rutherford

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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 and Respondent.

From an Opinion of the California Court of Appeal
Third Appellate District, Case No. C088821

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

PETITION FOR REVIEW

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PETITION FOR REVIEW

To the Honorable Chief Justice and the Honorable Associate Justices of the California Supreme Court:

Pursuant to California Rules of Court rule 8.500, Petitioners and Appellants Physicians for Social Responsibility-Los Angeles; Southern California Federation of Scientists; Committee to Bridge the Gap; and Consumer Watchdog (Petitioners) petition this Court to grant review of the decision of the Court of Appeal, Third Appellate District, filed on May 2, 2023 (Opinion), as modified by that Court's May 24, 2023, Order Modifying Opinion and Denying Rehearing (Modification Order) in response to Petitioners' timely Petition for Rehearing.

QUESTIONS PRESENTED

1. Pursuant to the Radiation Control Law (Health & Saf. Code, §§ 114960-156273), Respondent Department of Public Health (DPH) licenses "persons to receive, possess, or transfer radioactive materials" (*id.*, § 115060, subd. (a); see Cal. Code Regs., tit. 17, § 30194)) and also sets standards for what a licensee must do for a site to be released from its license, allowing unrestricted use of the property (*id.*, § 30256 (Reg. 30256)). Reflecting a policy that no amount of residual radiation can be considered safe, the formally adopted standard for release of a licensed property requires the licensee to "[r]emove radioactive contamination to the extent practicable" and to show that a "[r]easonable effort has been made to *eliminate* residual radioactive contamination." (*Id.*, subds. (c)(2) & (k)(2), italics added.) However, DPH has a repeated, longstanding

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practice of employing certain numerical standards for permissible residual radiation that exceed the radiation-elimination standard of Regulation 30256, numerical standards that were never adopted as regulations.

This case presents the question whether DPH's practice of employing the numerical standards for permissible levels of residual radiation, rather than Regulation 30256, constitutes the illegal use of an underground regulation in violation of Government Code section 11340.5, subdivision (a) and this Court's holding in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557 (*Tidewater*) that such underground regulations are void.

2. Respondent Department of Toxic Substances Control (DTSC) regulates hazardous waste disposal sites (Health & Saf. Code, § 25200), which, like municipal waste facilities, are not locations authorized for the disposal of low-level radioactive waste (Health & Saf. Code, § 115261). DTSC uses the same numeric standards set by DPH for DTSC's own determination of permissible thresholds for the disposal of radiologically contaminated waste at facilities licensed by DTSC. This case presents the question whether DTSC's use of the same numeric standards employed by DPH constitutes the DTSC's use of an underground regulation and a violation of Regulation 30256.

GROUNDS FOR REVIEW

Review is necessary to settle important questions of law (Cal. Rules of Ct., rule 8.500(b)(1)) regarding California's regulation of radiological

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hazards, an issue with grave public health and environmental consequences. The state purports to have a strict standard for remediating radiologically contaminated sites: the removal of all radiation above "background" levels[1] unless complete removal would be impracticable and unreasonable. (Reg. 30256.)[2] Since there is no safe level of exposure to radiation, such a standard is critical to protect Californians from the consequences of exposure to radiation through the environment and through materials entering the waste or recycling streams. Yet literally for decades, DPH has not required full remediation or decontamination so long as the licensee can demonstrate that the residual radiation at a licensed site falls below numerical maxima contained in four documents (the Guidance Documents), numerical standards that effectively abrogate the remediate-to-background standard of Regulation 30256. Then, on the basis of DPH's release of a site from its license and declaration of the site as suitable for unrestricted use, DTSC has deemed that waste removed from such sites meets the criteria for disposal in municipal landfills and hazardous waste facilities, so long as its residual radiation does not exceed the same numerical standards employed

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[1] "Background" means the levels of radionuclides present before nuclear activity began on the property. (Exh. 79, p. 20.)

[2] Regulation 30256(c) provides that "the licensee shall . . . [r]emove radioactive contamination to the extent practicable," and Regulation 30256(k) prescribes that the license will be terminated only after "the Department determines that: (1) Radioactive material has been properly disposed; (2) Reasonable effort has been made to eliminate residual radioactive contamination, if present; and (3) A radiation survey has been performed which demonstrates that the premises are suitable for release for unrestricted use; . . ."

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by DPH.

"Unrestricted use," by definition, allows for such radioactive waste to wind up in places that are technically and legally incapable of receiving radioactive waste. Disposal in municipal landfills and facilities licensed to receive hazardous waste threatens radioactive contamination of groundwater, because these facilities do not meet the stringent design standards required for the disposal of low-level radioactive waste. (Health & Saf. Code, § 115261.) And because "unrestricted use" allows for recycling of waste, the contamination can even reach consumer goods. (See DTSC6655 [showing tons of asphalt, concrete, and metals from SSFL Area IV demolition going to recycling].)

This case arises from the demolition and disposal of contaminated debris from a 290-acre portion of the Santa Susana Field Laboratory (SSFL) known as Area IV. SSFL is located in eastern Ventura County, neighboring Simi Valley, Chatsworth, Canoga 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.[3]) From the 1950s to the 1980s, "the federal government made and tested liquid-rocket engines, nuclear reactors, and various nuclear applications . . . ." (*Boeing Co. v. Movassaghi* (9th Cir.

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[3] 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.

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2014) 768 F.3d 832, 835.) To quote the Court below, it would "be an understatement to say that this site, while no longer involved in active research, has been subjected to contamination by nuclear and chemical toxins, sometimes with abandon." (Opinion, at p. 2, citing *Boeing Co. v. Movassaghi* (9th Cir. 2014) 768 F.3d 832, 835.)

Petitioners brought this case to ensure that Respondent agencies hold to the regulatory promise of removing and safely disposing of all residual radioactive materials that can practicably be removed from these structures previously utilized for nuclear weapons research. Even though officials committed that radiation-contaminated debris from SSFL's structures would not be disposed at improper facilities or recycled, the determinations at issue in this litigation would permit disposal of debris with significant radioactive contamination, well above the levels that the United States Environmental Protection Agency has determined to produce unacceptable levels of risk, for disposal in facilities not licensed for low-level radioactive waste. (10AA007683-7685.)

While the scale of the contamination at SSFL is enormous, it is far from the only site where DPH sets the standards for release of a license and site decontamination. DPH licenses a wide variety of facilities, and the record contains numerous examples of other sites around the state where DPH relied on the Guidance Documents to release property for unrestricted use without requiring any showing that it was impracticable or unreasonable to fully remove the radioactive contamination left on the property. (Exhs. 31-45 [General Atomics]; Exhs. 21, 26-28 [University of California, Berkeley]; Exhs. 29-30 [Stanford University].) DTSC likewise utilizes these same standards at other sites in the state where it confronts

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remediation of radiation contaminated sites. (Exh. 47, pp. 24-29; Exh. 48, pp. 70- 71, 783, 875, 951; Exh. 49; Exh. 50; Exh. 51, pp. 119, 308-310; Exh. 52, p. 14; Exh. 54, pp. 318, 638, 752-754.)

In addition to the urgent health and safety issues posed by Respondents' practices, Respondent agencies have defied the laws requiring that state regulation take place in the sunshine, not the shadows. As this Court has explained, "public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny." (*Tidewater*, *supra*, 14 Cal.4th at p. 569.) Review should be granted to ensure that this principle is applied to the regulation and remediation of sites licensed to receive and use some of the most dangerous substances on earth.

Petitioners do not, of course, base this Petition on the claim that review "is necessary to secure uniformity of decision" (Cal. Rules of Ct., rule 8.500(b)(1), first clause), since the Court of Appeal chose not to designate its Opinion for publication,[4] so it cannot be cited to other courts (*id.*, rule 8.1105(a)). But the effect of the Opinion on California's

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[4] There is no small irony in the Court of Appeal's decision not to designate the Opinion for publication. The immediate issue, the demolition of radioactive contamination of structures on licensed property and disposal of the contaminated material, which has garnered substantial public attention over the years, plainly involves legal issues "of continuing public interest" (Cal. Rules of Ct., rule 8.1105(c)(6)). And where this case was brought to challenge the government's failure to follow the public-participation requirements for formulation of regulations, the failure to publish the disposition of the case further shields the challenged practices from the public.

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regulation of radiological hazards cannot be overstated. Respondents have been applying their diluted decontamination standard, and disregarding the text of the existing regulation, literally for decades. If the Opinion is allowed to stand, even unpublished, it will be taken by Respondents as authoritative endorsement of their longstanding practices. The Opinion sanctions the agencies' clandestine replacement of the decontaminate-to-background standard that remains on the books with less protective numerical standards that have never undergone the public processes required by the Administrative Procedure Act (APA) (Gov. Code §§ 11340-11361). If allowed to stand, the Opinion, the culmination of 10 years of litigation to date, will deter future challenges to the use of the Guidance Documents, which themselves are many decades old.

There is nothing speculative about the effect of the Opinion on Respondents' future behavior. Their abiding determination to evade the law is clear from the history of this very controversy. Twenty-one years ago, three of the four Petitioners here raised a related legal challenge against DPH's adoption of a numerical dose-based standard. At the time, DPH had actually adopted that numerical standard in formal regulations but in doing so had failed to comply with the California Environmental Quality Act (CEQA) (Pub. Resources Code, §§ 21000-21189.70.10), and made an inadequate explanation for the basis for its adoption of the regulation under the APA. (See Exhs.74, 78.) The Sacramento Superior Court found that DPH had violated both CEQA and the APA (Exh. 71, p. 3) and issued a writ of mandate ordering DPH to set aside its purported regulations and not to adopt any numeric clean-up standards for radioactive materials without complying with these laws. Governor Davis then issued an Executive Order

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directing DPH to "adopt regulations establishing dose standards for the decommissioning of radioactive materials by its licensees" and, "in adopting such regulations . . . [to] comply with all applicable laws, including the California Environmental Quality Act." (Governor's Exec. Order No. D-62-02 (Sept. 30, 2002).)

Twenty-one years later, no APA rulemaking has been commenced, no regulations have been adopted, and no environmental assessment of any numerical remediation standards has been conducted. Having ignored for two decades the terms of its own regulation, a superior court writ, and a Governor's Executive Order, DPH will only be emboldened by the Opinion to continue indefinitely its avoidance of the mandate of Regulation 30256.

The public—particularly those members who live near sites licensed to use radioactive materials—are entitled to the protection promised by the law. And all Californians are entitled to know that agencies cannot adopt stringent regulations and then undermine them with contrary rules that have never been justified in a rulemaking proceeding.

STATEMENT OF THE CASE

Over half a million people live within 10 miles of SSFL, 150,000 of them within five miles of a site that the Ninth Circuit Court of Appeal called "a terrible environmental mess." (*Boeing Co. v. Movassaghi*, *supra*, 768 F.3d at pp. 834, 835.) One would think that the California agencies charged with protecting the public and the environment from radioactive contamination would insist on the strictest application of the state's protective regulations before approving SSFL's radiologically-contaminated buildings for demolition and disposal of the debris. Yet, in an

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abdication of their statutory roles and the rulemaking provisions of the APA, the state has done precisely the opposite, disregarding the elimination-of-contamination standard of Regulation 30256 and authorizing the "unrestricted" disposal of the debris.

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* (2006) 38 Cal.4th 324, 333.) 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 that Respondents have violated.

In this case, the skein of underground law is comprised of numerical standards for decommissioning sites and demolishing and disposing of radiologically-contaminated debris from a uranium carbide manufacturing facility, a plutonium fabrication facility, a research reactor; and a laboratory hosting a nuclear reactor. (DTSC007647.). Each of the four Guidance Documents contains a nearly identical table of permissible residual contamination above background that Respondent agencies will accept. The Guidance Documents are two federal guidance issuances and two documents issued by DPH itself:

1. **Regulatory Guide 1.86** (Reg. Guide 1.86), adopted by the NRC's predecessor agency. It contains a "Table I," titled

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"Acceptable Surface Contamination Levels," based on "typical portable instrument detection limits in 1974." (DPH004880; DPH001168-001174.) Reg. Guide 1.86 has been declared "obsolete" by the NRC, which has withdrawn it as a guidance document, citing new "more up-to-date guidance in other NRC regulatory documents." (See Ex. 57, NRC, Termination of Operating Licenses for Nuclear Reactors, 81 Fed.Reg. 53507 (Aug. 12, 2016).)

2. The United States Department of Energy'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.)

Each of these Guidance Documents contains a table of what purports to be "acceptable" contamination levels,[5] and none has been subject to the open

[5] The Opinion points out that the DPH Guidance Documents (items 3 and 4 above) fill in acceptable contamination levels that were omitted ("reserved") in the DOE document, that one nuclide is placed "in a different category," and that Reg. Guide 1.86 fills in values in its table that the DOE document had reserved. (Opinion, at p. 46, fn. 18.) These differences are immaterial to their status as underground regulations. The APA prohibits use of a regulatory standard that has not been adopted as a regulation. If

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and public decision-making processes required by the APA. They all constitute underground regulations.

In their petition for writ of mandate filed on August 6, 2013, Petitioners raised precisely this APA violation. (1AA000050; 4100Building000005.) During the course of this litigation, Petitioners identified numerous examples, both at SSFL and in other licenses around the state, demonstrating that DPH has approved application after application for the release of a license for "unrestricted use" by using the more lenient standards in the four Guidance Documents instead of the stricter standard in Regulation 30256, which requires "[r]easonable effort . . . to eliminate residual radioactive contamination" (Reg. 30256, subd. (k)). Indeed, not once in the over 10 years of this litigation have Respondents offered a single example of a case where either agency has required any further cleanup once it was shown the property would satisfy the Guidance Documents. But none of that mattered to the Superior Court, which concluded that this Court's *Tidewater* test was not satisfied. (12AA009023–9024.)

The Court of Appeal made the same errors, concluding that "it was Boeing that *voluntarily* proposed the release criteria for decommissioning, demolition and disposal, not DPH or DTSC." (Opinion, at p. 44, italics added.) Boeing's various proposals were not voluntary. As demonstrated by

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agency staff had made up the table themselves and placed a copy on each desk, they would be quintessential underground regulations. The fact that they copied the text from another document, with or without alteration, is immaterial.

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numerous citations to the record and as recognized in the Opinion itself, Boeing "was waiting for an 'ok to proceed' with pre-demolition activities", which Boeing began "with DTSC concurrence" (*id.*, at p. 29), and Boeing proposed criteria to "be reviewed by the agencies prior to clearance of this debris for Class I landfill disposal" (*id.*, at p. 30). DTSC concurred "with Boeing's proposals" and reviewed "additional data" "prior to clearance" to proceed (*id.*, p. 30).

Even more importantly, the Court of Appeal further erred in concluding, without reference to the record, that "DPH evaluates each such decommissioning on a case-by-case basis, without requiring or adhering to the four documents or any criteria outside of [Regulation] 30256. (Opinion, at p. 44.) Again, there is no example of DPH requiring any clean up beyond the more lenient Guidance Document numbers, and no example of DPH requiring "reasonable efforts" above and beyond what a licensee has proposed.

On May 17, 2023, Petitioners timely filed a Petition for Rehearing to correct some of the Court of Appeal's factual and legal errors. On May 24, 2023, the Court of Appeal issued an Order Modifying Opinion and Denying Rehearing (Modification Order), and Petitioners then timely sought review by this Court.[6]

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[6] In addition to the allegations of underground regulations, Petitioners alleged that Respondents were violating CEQA with respect to the demolition of the six former nuclear research facilities by failing to perform any environmental analysis prior to authorizing Boeing to demolish these structures and dispose of the debris. The Court of Appeal ruled against Petitioners' CEQA claim, however Petitioners are not seeking this Court's review of that ruling because it has suddenly become moot.

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DISCUSSION

There can be no doubt that 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).)

As set forth at pp. 13-14, *supra*, DPH and DTSC utilize four Guidance Documents containing materially identical tables of acceptable surface contamination levels in lieu of the duly-adopted Regulation 30256 when addressing requests by regulated entities to remove facilities from DPH licenses or to evaluate the permissibility of disposing debris in hazardous waste facilities. None of these documents has been adopted pursuant to the required open and public decision-making process called for by the APA.

Each of the referenced documents constitutes a "guidance document," which "state an agency's legal interpretation of a statute or a prior regulation or indicate how the agency intends to exercise a

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After insisting that Boeing's demolition activities did not constitute a CEQA "project" (see Pub. Resources Code, § 21065), on June 8, 2023—seven days after the Court of Appeal decision became final—DTSC released a final Programmatic Environmental Impact Report (PEIR) for the disputed property which included discussion of the demolition of the six Boeing-owned structures at issue in this litigation. (See https://www.envirostor.dtsc.ca.gov/getfile?filename=/public%2Fdeliverable_documents%2F5792988419%2F00_SSFL%20Draft%20PEIR%20%5BRevised%5D.pdf.) Since compliance with CEQA was precisely the relief Petitioners sought in their CEQA claim, that claim is now moot, although the adequacy of the newly-released PEIR is still subject to legal challenge.

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discretionary power." (Asimow et al., Cal. Practice Guide: California Administrative Law (The Rutter Group 2022) 25:70.) "Guidance documents are *not legally binding* but are intended to provide guidance to the public and the agency staff. A guidance document adopted without APA compliance is invalid, unless it qualifies for an exemption . . . ." (*Ibid*., original italics.) 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 rules have no legal effect unless they have been promulgated in substantial compliance with the APA"].)

Under *Tidewater*, the prohibition against using an underground regulation applies "very broadly to include 'every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency.' " (14 Cal.4th at p. 571, quoting Gov. Code, § 11340.5, subd. (a).) The Court then specified "two principal identifying characteristics" of an underground regulation":

> First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. [Citation.] Second, the rule must "implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure."

(*Ibid.*)

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The unrebutted evidence of Respondents' repeated, explicit use of the Guidance Documents is overwhelming. Petitioners proffered evidence of multiple license amendments, disposal approvals, release criteria, and other actions taken in explicit reliance on the proposals falling within the numerical standards of the Guidance Documents. (See AOB, at pp. 48-49 (citing record).) Petitioners further tendered evidence of numerous orders releasing other facilities from their DPH licenses for unrestricted use, again explicitly citing the Guidance Documents. (*Id.*, at pp. 49-51 (citing record).) Based on repeated logical errors prompted by Respondents, the Court of Appeal failed to recognize that these official actions in reliance on the Guidance Documents constituted the use of underground regulations.

I. The Guidance Documents' Radiological Surface Contamination Standards Are Maxima That Were Uniformly Enforced in a Clearly Defined Class of Cases.

In an attempt to refute the unbroken record of reliance on the Guidance Documents, Respondents argued, and the Opinion accepted, that the Guidance Documents are not uniformly enforced, have not been applied to an identifiable class of cases, and, in any event, are not Respondents' underground regulations but someone else's.

A. The Guidance Documents Prescribe *Maximum* Permissible Levels of Residual Radiation and Were Uniformly Applied as Such, Violating the Existing Regulation.

From the beginning of this case, Petitioners have maintained that the underground regulations they were challenging consisted of the invariable application of the numerical standards of the Guidance Documents as *maxima*—surface contamination levels below which licensees need not

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remediate. Respondents' briefs argued that some licensees agreed to clean to lower levels of radiation than the Guidance Documents specify. Petitioners again explained in their Reply Brief that that is entirely consistent with an underground regulation that prescribes *maxima*. (RB, at pp. 45-49.) Yet the Opinion concludes that examples of licensees proposing cleanup levels lower than the maxima of the Guidance Documents are evidence the Guidance Documents were not being enforced. (Opinion, at pp. 44-48.) The fact that a driver chooses to drive 50 in a 65 mile-per-hour zone does not mean the highway has no maximum speed limit. It means that the speed limit is a maximum, just as the contamination levels in the Guidance Documents prescribe maximum residual radiation levels and have been utilized by DPH as such.

There are many reasons why a licensee, knowing of the agencies' use of the Guidance Documents' maximum permissible residual contamination might propose a lower level. For example, Reg. Guide 1.86 declares the maximum "Surface Contamination Levels" of uranium and associated decay particles to be 15,000 decays per minute per 100 square centimeters. (8AA006058.) Now, it may be that a given facility already falls below that standard, with readings of, say, half the prescribed maximum. Obviously DPH's reliance on Reg. Guide 1.86 does not require the licensee to add uranium contamination to the facility before it may be decommissioned. These are, as the document makes clear, maximum acceptable residual radiation levels. (See 8AA006057 ["If residual radiation levels do not exceed the values in Table I, the Commission may terminate the license."].) A licensee demonstrates compliance by tendering readings at or below the numerical standards.

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The only appearance of the word "maximum" in the Opinion is an ipse dixit declaration that "even if [the Guidance D]ocuments were set apart as the standard for the maximum limits, that does not necessarily render them regulations . . . ." (*Id.*, at p. 48.) That is *exactly* what it renders them. Respondents DPH and DTSC have, by word and deed, made it clear that anyone who can demonstrate that there is no remaining radiological contamination that exceeds the Guidance Documents' values need make no further effort to achieve complete remediation to background levels.

The Guidance Documents determine how "a certain class of cases will be decided" (*Tidewater*, *supra*, 14 Cal.4th at p. 571)—namely cases in which a DPH license will be released despite the fact that the site is contaminated above background radiation levels. In every such case, a licensee that proposes not to eliminate residual radiation but to reduce residual radiation below the maxima of the Guidance Documents receives approval. That is a clearly defined class of cases and an explicit declaration of how those cases will be decided.

B. The Fact That Licensees Propose to Comply with the Guidance Documents' Numerical Standards Does Not Negate the Fact That the Standards Are Respondents'.

Respondents argued and, again, the Opinion holds, that because licensees propose clean-up standards to Respondents DPH and DTSC, the Guidance Documents are not Respondents' standards but rather are the licensees'. (See Opinion, at p. 43 ["it was Boeing that voluntarily proposed the release criteria for decommissioning, demolition and disposal, not DPH or DTSC"].) Many licensing laws are enforced by the government adopting a rule and persons seeking a license indicating in their applications how

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they intend to comply. A regulated entity satisfying the government's radiological standards does not transmute those standards into the applicant's rule any more than an airline passenger presenting his or her driver's license to an airport security officer makes the requirement to do so the passenger's. (See AOB, p. 53.) It's the passenger's driver's license, but it's the government's requirement.

Again, there are *no* examples where the approved criteria were above the maxima of the Guidance Documents. And never in the 10 years of this litigation has any of the three Respondents offered a single example of a case where either agency has required any further cleanup once it was shown the property would satisfy the Guidance Documents—despite Petitioners' repeated challenges to come up with such an example. The conclusion is unavoidable that the Guidance Documents have been and remain the agencies' underground regulations prescribing *maximum* permissible residual radiation levels. The Opinion cites, and the record contains, nothing to the contrary.

II. The Court of Appeal Misunderstood the Exclusion of Case-by-Case Adjudication from the Prohibition of Underground Regulations.

In *Tidewater*, the Court identified an exception to the requirement that agency interpretations of statutes must be adopted as regulations: "Of course, interpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as precedents in similar subsequent cases." (14 Cal.4th at p. 571, quoted in Opinion, at p. 43.) The adjudication exception has no relevance to this case. There were no "adjudications" in any of these actions—no hearing, no administrative law

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judge, no pleadings, no sworn testimony, and, most importantly for present purposes, no written decision reflecting an agency interpretation of a law it administers.

As the quoted passage in *Tidewater* makes clear, the Supreme Court is referring to "case-specific adjudications." To avoid the evils of underground rulemaking, an agency may rely on a prior adjudicatory decision only if it designates the decision as a precedent, posts it on the agency's website, and provides an index to make its decisions publicly accessible. (See Gov. Code, § 11425.60.) This restriction underscores California's prohibition of agencies relying on unwritten law. The carve-out for precedential adjudicatory decisions is, thus, an exception to the general ban on using underground decisions, an exception that has nothing to do with an agency's repeated reliance in non-adjudicatory enforcement activities on regulatory standards that exist on agency desks but not in duly adopted agency regulations.

III. The Underground Regulations Have Effectively Amended Regulation 30256 to Weaken Its Protection of the Public from Radioactive Contamination.

Respondent Agencies have effectively employed their underground regulations to deregulate radiological contamination that is below the contamination levels permitted by the Guidance Documents but above the standard of Regulation 30256.

Regulation 30256 requires a "reasonable effort" to *eliminate* all residual radioactive contamination. (*Id*., § 30256, subd. (k)(2).) Subdivision (c)(2) makes it clear that the determination of reasonableness is a question of practicability. The standard is *elimination* of all radiation, or all that can

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reasonably be eliminated. (*Ibid*.) Respondents have replaced it with the more lenient numerical standards of the Guidance Documents.

It is no answer to say that "DPH evaluates each such decommissioning on a case-by-case basis" or that the Guidance Documents were not "used in any way other than in agreeing to consider them in Boeing's specific situation." (Opinion, at pp. 45, 47.) Of course, each application necessarily was reviewed on a case-by-case basis, as it came in the door. That doesn't change the fact that Respondents have failed to cite a single example of a Respondent requiring reasonable efforts above what the licensee has proposed, so long as the numbers are below the Guidance Documents' maxima.

And the question is not whether the agencies "agree[d] to consider them" but what constituted consideration. That is, what did that case-by-case review consist of? The answer is that if the licensee committed to numbers below those in the Guidance Documents, DPH's inquiry under Regulation 30256 was over. The agencies' obligation under Regulation 30256 is to consider whether elimination of radioactive contamination above background was reasonably achievable—a question about which the Guidance Documents and their numeric standards have nothing to say. They do not assess the practicalities of removal. They are *contamination standards*, and, as such, are in competition with the duly adopted contamination standard: residual contamination must be eliminated unless that cannot reasonably be achieved.

The agencies' "consideration" of the Guidance Documents was not to consider whether residual radiation could reasonably be *eliminated*. To show that it could not, a licensee would have to proffer *evidence* of

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impracticability, a *factual showing* of the costs and technical feasibility of full compliance. Respondents have not proffered a single example of such evidence in the record. The Guidance Documents have not been used to achieve compliance with Regulation 30256 but to effectively replace it.

The consequence of these factual and legal missteps is unmistakable: DPH (together with DTSC by deeming DPH release from the license to be conclusive certification that there is no remaining radiation) has deregulated residual radiation greater than background but less than the Guidance Documents' numerical standards. They have done so with no statutory authority and in derogation of the duly enacted regulation.

CONCLUSION

The Opinion implicates fundamental provisions and policies of the APA's prohibition of underground regulations, showing that this Court's guidance regarding a law implicated in so much of administrative law-enforcement is critically needed. The fact that the Opinion's misapprehension arises from the state's agencies charged with protection from the potentially catastrophic consequences of mismanaged risks of radioactive contamination adds urgency to the need for this Court's review. The petition for review should be granted.

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June 12, 2023

Respectfully submitted,

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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 **Petition for Review** is proportionally spaced, has a typeface of 13 points or more, and contains 5,395 words, as determined by a computer word count.

June 12, 2023

Respectfully submitted,

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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. C08882l; 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 1250 6th Street, Suite 205, Santa Monica, California 90401. My electronic mail address is loliver@strumwooch.com.

On **June 12, 2023,** I served the foregoing document(s) described as **PETITON FOR REVIEW** 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 7, 2023,** at Los Angeles, California.

LaKeitha Oliver

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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 U. S. Mail Honorable Richard K. Sueyoshi Sacramento Superior Court – Dept. 28 720 Ninth Street Sacramento, California 95814	

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