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ALAMEDA COUNTY**

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF ALAMEDA

10	SAVE STRAWBERRY CANYON, a non-profit)	Civ. No. RG 10531315
11	public benefit California corporation,)	
12	Petitioner and Plaintiff,)	
13	v.)	Hearing Date: April 18, 2011
14	REGENTS OF THE UNIVERSITY OF)	Hearing Time: 9:00 a.m.
15	CALIFORNIA, an agency of the State of California,)	
16	and DOES I – L, inclusive,)	Dept: 707
17	Respondents and Defendants,)	Judge: Hon. Alice Vilardi
18	DOES LI – C, inclusive,)	Petition Filed: August 16, 2010
19	Real Parties in Interest.)	

22 **PETITIONER'S OPENING TRIAL BRIEF**

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I. INTRODUCTION

Petitioner Save Strawberry Canyon (“petitioner”) seeks to overturn respondents Regents of the University of California, *et al.*’s (collectively, the “Regents”) unlawful approval of the Seismic Life Safety, Modernization, and Replacement of General Purpose Buildings, Phase 2 Project (“Project”) and certification of its Environmental Impact Report (“EIR”). The Regents violated the California Environmental Quality Act (“CEQA”), Public Resources Code¹ section 21000 *et seq.*, in three ways. First, their EIR erroneously concludes that the Project will have no significant impacts, despite the fact that (among other impacts) the Project would store radioactive waste on, and relocate at least 30 new employees to, a steep and unstable hillside traversed by the Hayward Fault and designated a State Earthquake-Induced Landslide Hazard Zone. Second, the Regents unlawfully deferred the formulation of the mitigation measures required in the EIR until after Project approval, denying the public a chance to review and comment upon the same. Third, the Regents failed to adequately explore off-site alternatives to the Project that would avoid the Project’s significant seismic and landslide hazards. For these reasons, the Regents’ certification of the EIR, and the Regents’ resultant approval of the Project, must be overturned.

II. PARTIES

Petitioner is a non-profit public benefit corporation engaged in public education and committed to preserving the natural resources of Strawberry Canyon, Strawberry Creek watershed, and the surrounding areas. Petitioner’s members would be harmed should the Project be built, because it will expose them and members of the public to the environmental impacts discussed below, including environmental degradation and extreme safety hazards resulting from the Project’s placement on unstable slopes near the Bay Area’s most hazardous earthquake fault, the Hayward Fault.

The Regents have “full powers of organization and governance” over the University of California, including the University of California, Berkeley, under article IX, section 9, of the California Constitution. On July 15, 2010, the Regents approved the final design of the Project, certified its EIR,

¹ Undesignated references are to the Public Resources Code.

1 and issued a Notice of Determination. AR 1, 5.²

2 III. FACTUAL BACKGROUND

3 The Project would be located “at the Lawrence Berkeley National Laboratory ([“]LBNL[”]) site in
4 Berkeley and Oakland, California. The LBNL site is an approximately 200-acre University [of
5 California]-owned site . . . adjacent to the University of California, Berkeley Campus.” AR 94. The
6 Project involves the demolition of certain buildings, the construction of a new laboratory, and the seismic
7 strengthening of a hazardous waste handling and storage facility, at LBNL. AR 94, 128.

8 “Much of the LBNL site” has been designated by the California Geological Survey as a “Seismic
9 Hazard Zone for earthquake-induced landslides.” AR 265. The perilous Hayward Fault “traverses the
10 western edge of the LBNL site.” AR 272. “[G]roundshaking [*sic*] resulting from an earthquake
11 generated by the Hayward fault is anticipated to be violent to very violent.” *Id.* “In addition, strong
12 ground shaking can be expected at the site as a result of moderate to major earthquakes generated on” the
13 four other faults in the region within 25 miles of LBNL. *Id.* Further, much of LBNL lies atop landslides,
14 including its hazardous waste storage facility,³ exacerbating LBNL’s seismic vulnerability.

15 The Seismic Phase 2 Project has three components. First, three groups of buildings at LBNL
16 would be demolished: Buildings 25 and 25B; Building 55; and the modular trailers associated with
17 Building 71. AR 94; *see also* AR 115 (map). These buildings are currently used for waste treatment;
18 storage; and laboratory and office use, and, like other buildings at LBNL, are seismically unsafe. AR
19 117, 119, 120-21. A total of 109 occupants are currently housed in these buildings. AR 113-121. These
20 occupants would be “relocated to other buildings on site.” AR 119.

21 Second, a 43,000 gross square foot General Purpose Laboratory (“GPL”) would be constructed.
22 AR 121. This building is up to 80 feet tall and “would accommodate approximately 130 occupants.” *Id.*;

23
24 ² In 2007, the Regents developed a Long Range Development Plan (“LRDP”) for LBNL, and
25 certified its EIR. But this Project’s EIR “is not tiered from” the LRDP EIR and is instead “a project-
specific, stand-alone EIR” whose conclusions must therefore be self-supported. AR 96.

26 ³ The fact that LBNL’s *radioactive* waste handling facility, constructed in 1996, was sitting *atop*
27 a potentially active landslide was “not revealed by geotechnical surveys carried out” prior to the
28 facility’s construction and was only discovered in 2006. AR 274-75. These 2006 studies also proved
incomplete; as late as April, 2010, geologists were still discovering “previously-unrecognized”
landslides beneath this hazardous waste site. AR 10852.

1 AR 126. At least 30 “graduate and post-graduate UC Berkeley researchers” would be “[r]elocat[ed] . . .
2 to the GPL,” with an accompanying “increase in the average daily population (ADP) of the LBNL . . .
3 site.” AR 1336. Third, Building 85/85A, the Hazardous Waste Handling Facility (“HWHF”) that
4 handles and stores both radioactive and non-radioactive waste, would be seismically strengthened. AR
5 128. The HWHF is located atop a State of California Earthquake-Induced Landslide Hazard Zone and
6 several potentially active landslides. *Id.*; AR 10852. These locational hazards would remain.

7 IV. STANDARD OF REVIEW

8 CEQA is interpreted to accord the fullest possible protection to the environment within the
9 reasonable scope of the statutory language. *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d
10 247, 259; CEQA Guidelines [14 C.C.R.; “Guidelines”] §15003(f). “[T]he overriding purpose of CEQA
11 is to ensure that agencies regulating activities which may affect the quality of the environment give
12 primary consideration to preventing environmental damage.” *Save Our Peninsula Committee v.*
13 *Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117. “Full compliance with the letter of
14 CEQA is essential to the maintenance of its important public purpose.” *Resource Defense Fund v. Local*
15 *Agency Formation Com.* (1987) 191 Cal.App.3d 886, 897-898.

16 The standard of review in this case is the “abuse of discretion” test established by Code of Civil
17 Procedure (“C.C.P.”) section 1094.5(b) and CEQA section 21168, because pursuant to the Regents’
18 formally adopted procedures (which “enjoy a status equivalent to that of state statutes”⁴), certification of
19 the EIR and approval of the Project could only occur at a “public hearing.” *Id.*; AR 3027. Under section
20 1094.5(b), review is limited to “whether there was any prejudicial abuse of discretion.” “Abuse of
21 discretion is established if the [Regents] ha[ve] not proceeded in the manner required by law, the order or
22 decision is not supported by the findings, or the findings are not supported by the evidence.” *Id.*

23 CEQA’s procedural mandates are “scrupulously enforce[d],” as are all legislatively mandated
24 CEQA requirements. *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007)
25 40 Cal.4th 412, 435. Any “[f]ailure to comply with the CEQA procedures is necessarily prejudicial”

27 ⁴ *Bunnett v. Regents of Univ. of Calif.* (1995) 35 Cal.App.4th 843, 848 n. 2 (treating UC
28 Retirement Plan as a “law” for purposes of section 1094.5, although because Plan did not require public
hearing, section 1094.5 did not apply).

1 (*Resource Defense Fund, supra*, 191 Cal.App.3d at 897-98) as it “results in a subversion of the purposes
2 of CEQA.” *Rural Landowners Ass’n. v. City Council of Lodi* (1983) 43 Cal.App.3d 1012, 1023; *Sierra*
3 *Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1237. “Substantial evidence challenges” under
4 CEQA “are resolved much as substantial evidence claims in any other setting.” *County of Amador v. El*
5 *Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945-46. “‘Substantial evidence’ is not
6 ‘synonymous with “any” evidence. It must be reasonable, credible, and of solid value.’” *Los Angeles*
7 *County Office of the Dist. Atty. v. Civil Svc. Com.* (1997) 55 Cal.App.4th 187, 198-99. “Substantial
8 evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported
9 by facts.” Guidelines § 15384(a), (b). “Argument, speculation, unsubstantiated opinion or narrative, [or]
10 evidence which is clearly erroneous or inaccurate . . . does not constitute substantial evidence.” *Id.*

11 Applying the foregoing standard of review, the Regents’ approval of the Project should be set
12 aside because the Regents failed to proceed in the manner required by CEQA, and key factual
13 assumptions on which their approval rests are not supported by substantial evidence. Specifically, the
14 Regents (1) failed to identify, evaluate and mitigate the Project’s significant impacts on the environment,
15 (2) unlawfully deferred the formulation of mitigation measures and (3) failed to adequately examine off-
16 site alternatives that would avoid the Project’s significant seismic and landslide hazards.

17 V. ARGUMENT

18 “An EIR’s purpose is to inform the public and its responsible officials of the environmental
19 consequences of their decisions before they are made.” *Citizens of Goleta Valley v. Bd. of Supervisors*
20 (1990) 52 Cal.3d 553, 563-64; *Laurel Heights Imp. Ass’n v. Regents* (1988) 47 Cal.3d 376, 390-91, *citing*
21 § 21061; Guidelines § 15003(b)-(e).⁵ “The ultimate decision of whether to approve a project, be that
22 decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers and
23 . . . public with the information” required by CEQA. *San Joaquin Raptor/Rescue Center v. County of*
24 *Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

25 The EIR is “the heart of CEQA” and “an environmental alarm bell.” *Laurel Heights, supra*, 47

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27 ⁵ “For the EIR to serve these goals it must present information in such a manner that the
28 foreseeable impacts of pursuing the project can actually be understood and weighed.” *Vineyard Area*
Citizens, supra, 40 Cal.4th at 449.

1 Cal.3d at 392. As such, it is the “primary means” of ensuring that public agencies “take all action
2 necessary to protect, rehabilitate, and enhance the environmental quality of the state.” *Id.*; § 21001(a).
3 The EIR is also a “document of accountability,” intended “to demonstrate to an apprehensive citizenry
4 that the agency has, in fact, analyzed and considered the ecological implications of its actions.” *Laurel*
5 *Heights, supra*, 47 Cal.3d at 392, quoting *No Oil, Inc. v. City of Los Angeles* (1975) 13 Cal.3d 68, 86.
6 “The failure to provide enough information to permit informed decision making is fatal.” *Napa Citizens*
7 *for Honest Gov’t. v. County of Napa* (2001) 91 Cal.App.4th 342, 361. “When the informational
8 requirements of CEQA are not complied with, an agency has failed to proceed in ‘a manner required by
9 law’ and has therefore abused its discretion.” *Id.*

10 The Regents failed to comply with CEQA in the respects detailed below.

11 **A. THE EIR FAILS TO DISCLOSE THE PROJECT’S SIGNIFICANT IMPACTS.**

12 The EIR fails to fully disclose and address the Project’s significant adverse environmental
13 impacts. A “‘significant effect on the environment’ means a substantial, or potentially substantial,
14 adverse change in the environment.” § 21068. In order to determine a project’s impacts, the EIR must
15 provide detailed information about the “existing physical conditions in the affected area” Guidelines
16 § 15126.2(a). Therefore, “[t]he [EIR’s] discussion should include relevant specifics of the area, the
17 resources involved, physical changes, alterations to ecological systems, and changes induced in
18 population distribution, population concentration, the human use of the land . . . and other aspects of the
19 resource base such as water, historical resources, scenic quality and public services” *Id.* “The EIR
20 must demonstrate that the significant environmental impacts of the proposed project were adequately
21 investigated and discussed and it must permit the significant effects of the project to be considered in the
22 full environmental context.” Guidelines § 15125(c); *Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83
23 Cal.App.4th 74, 92-93 (EIR’s failure to quantify potable water in aquifer prevented public from
24 evaluating risk of its contamination by landfill); *Kings County Farm Bureau v. City of Hanford* (1990)
25 221 Cal.App.3d 692, 736 (“[t]he EIR must contain facts and analysis, not just the bare conclusions of a
26 public agency”); Guidelines § 15144 (“an agency must use its best efforts to find out and disclose all that
27 it reasonably can”). Contrary to these requirements, the EIR fails to adequately disclose, quantify and
28 evaluate the “existing physical conditions in the affected area” and the following significant adverse

1 environmental impacts of the Project.

2 **1. Geology and Soils Impacts**

3 **a. Impacts From Seismic Hazards Faced By Added Employees**

4 “The EIR shall . . . analyze any significant environmental effects the project might cause by
5 *bringing . . . people into the area affected*. For example, an EIR on a subdivision astride an active fault
6 line should identify as a *significant* effect the *seismic hazard to future occupants* of the subdivision. The
7 subdivision would have the effect of attracting people to the location and exposing them to the hazards
8 found there.” Guidelines § 15126.2(a), emphasis added. Here, the Project will attract between 30 and
9 130 additional persons daily to the seismically hazardous LBNL site.⁶ *E.g.*, AR 1336, 1626 (new
10 employees), 272 (“[a]t LBNL, groundshaking [*sic*] resulting from an earthquake generated by the
11 Hayward Fault is anticipated to be violent to very violent). Yet contrary to Guideline section 15126.2(a),
12 the Regents inexplicably dismiss the seismic hazards to these additional occupants as *insignificant*. AR
13 287.

14 Because LBNL is crossed by the Hayward Fault (AR 10872), LBNL is a particularly hazardous
15 employment site. (Building 25, the GPL site, is upslope and “about 1700 feet” from the Hayward Fault.
16 AR 10718.) As a result, “violent or very violent” ground shaking is “anticipated” in the event of an
17 earthquake, and “[i]t is reasonable to assume that throughout the lifetime of the buildings, Building
18 85/85A and the GPL would be subjected to at least one moderate to severe earthquake that could produce
19 *potentially damaging* ground shaking at the site.” AR 272, 280, emphasis added. Seismic hazards to
20 LBNL workers are particularly serious because LBNL sits atop soils “highly susceptible to erosion” and
21 vulnerable to landslides in the event of an earthquake. AR 265, 275, 277. Accordingly, as the EIR
22 admits, the Project “would potentially expose a greater number of people to risk associated with regional
23 seismic events due to the growth in population of the LBNL site.” AR 287.

24 ///

25
26 ⁶ A planned increase of 100 persons to LBNL was later claimed to be reduced to a 30-person
27 increase. AR 1336, 1626. But while the newly “available GPL space would be used to provide
28 laboratory space” (AR 1626) the GPL will still, as before, “accommodate approximately *130 occupants*”
(AR 1336, emphasis added). Because the EIR includes no measures to prevent this 130-person increase
at the GPL, it is foreseeable that far more than 30 employees will be added, contrary to the EIR’s claim.

1 Contrary to these plain facts, the EIR concludes that the Project will *not*

2 expose people or structures to potential substantial adverse effects, including the risk of
3 loss, injury, or death, [1] due to rupture of a known earthquake fault . . . [¶¶] [2] involving
4 strong seismic ground shaking . . . [¶¶] [3] involving seismic-related ground failure,
including liquefaction . . . [¶¶] [or 4] involving landslides.

5 AR 278-284. This astonishing conclusion given the above facts is based on the Regents' claim that (1)
6 "only a negligible increase in the average daily population" of LBNL will result because only 30 people
7 will be added (AR 1627); and (2) "adherence to State requirements such as the California Building Code
8 would ensure seismic safety to the maximum extent feasible" and *therefore* mitigate impacts to a level of
9 insignificance. AR 287, 281 (compliance with California Building Code would assure that seismic
10 ground shaking impacts would be "less than significant"). Neither justification withstands scrutiny.

11 Taking the latter point first, the mere fact, as claimed by the Regents, that the Project "is generally
12 feasible from a . . . geotechnical hazard standpoint" (AR 10731, 10851-52) does not mean it is safe, nor
13 that its geological hazards have been mitigated to insignificance. Indeed the Regents' "'Design level'
14 earthquake shaking was defined at the 10 percent probability of exceedance in 50 years level" – i.e., that
15 the Project has a 10 percent likelihood of failure over the next 50-year life – hardly cause for comfort.
16 AR 10853. The Regents' claim that they had mitigated geotechnical impacts "to the maximum extent
17 feasible (AR 287) does not reveal, as CEQA requires, *the extent* to which the seismic risk to the new
18 LBNL employees *remained unmitigated* as necessary to determine whether these impacts were
19 *significant*. § 15144. The EIR's failure to provide this information violates CEQA's mandate that "[t]he
20 EIR must contain facts and analysis, not just the bare conclusions of a public agency . . . [T]he public and
21 decision-makers, for whom the EIR is prepared, should also have before them the basis for that opinion
22 so as to enable them to make an independent, reasoned judgment." *Kings County Farm Bureau, supra*,
23 221 Cal.App.3d at 736.

24 The Regents' claim that implementation of recommended mitigation will reduce impacts "to the
25 *maximum extent feasible*" is not supported by substantial evidence. Many recommendations only purport
26 to reduce the chance that a building will fail in an earthquake in the next 50 years to ten percent. *E.g.*,
27 AR 10853 ("We . . . solicited input from LBNL . . . on . . . 'allowable' seismic displacements. . . .
28 'Design level' earthquake shaking was defined at the 10 percent probability of exceedance in 50 years

1 level. . .”). The Administrative Record contains no evidence that it is infeasible to reduce this
2 probability of failure to *below* ten percent by, for example, moving the Project to a *safer site*. Logically,
3 and pursuant to UC policy, “feasibility is to be determined by weighing [1] the practicability and cost of
4 protective measures against [2] the gravity and probability of injury resulting from a seismic occurrence,”
5 but as discussed below the record is devoid of any evidence whatsoever as to the latter factor. AR 2386.

6 Here, neither the EIR nor the administrative record contains any “facts [or] analysis” about the
7 actual seismic risks faced by new employees at LBNL. *Id.* The EIR admits that the Project “would
8 potentially expose a greater number of people to risk associated with regional seismic events” but then,
9 rather than determining the “gravity and probability of” this risk, the EIR asks its readers to accept that
10 seismic hazards are insignificant merely because such hazards were mitigated to some undisclosed extent.
11 AR 287 (EIR), 2386 (quotation of UC Policy on Seismic Safety). As noted above, there is no substantial
12 evidence that the required mitigation is in fact the “maximum . . . feasible.” The EIR should have
13 *disclosed and analyzed the extent* to which the health and even lives of the added employees would be put
14 at risk by approval of the Project.⁷ Armed with this essential information, the Regents could then have
15 made an *informed* decision, in accordance with CEQA, whether the Project’s benefits outweighed these
16 risks. By failing to include “facts and analysis” regarding the magnitude of the Project’s actual seismic
17 risks in the EIR, the Regents abused their discretion.

18 The Regents’ apparent argument that seismic hazards are “negligible” and need not be disclosed if
19 the lives and health of “only” 30 people⁸ are at stake is patently absurd. AR 1627. In so arguing,
20 respondents ignore the cumulative impacts of their actions. Subjecting a few employees here and a few
21 more employees there to an unquantified risk of injury or death in the admittedly probable event of a
22 damaging earthquake while maintaining each time that the small *number* of additional employees in each
23 group renders impacts insignificant violates CEQA. “One of the most important environmental lessons
24

25 ⁷ “[A]ssuming a sophisticated technical analysis was not feasible, if some reasonable, albeit less
26 exacting, analysis of” seismic risks to new employees “could be performed, the [Regents] w[ere]
27 required to do so and report the results.” *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176
Cal.App.3d 421, 432.

28 ⁸ As noted *supra* fn. 6, more than 30 employees may be added to LBNL by the Project.

1 evidenced from past experience is that environmental damage often occurs incrementally from a variety
2 of small sources. These sources appear insignificant, assuming threatening dimensions only when
3 considered in light of the other sources with which they interact.” *Los Angeles Unified Sch. Dist. v. City*
4 *of Los Angeles* (1997) 58 Cal.App.4th 1019, 1025.

5 CEQA requires a cumulative impacts “analysis [to] assess the collective or combined effect of”
6 related projects. *Kings County Farm Bureau, supra*, 221 Cal.App.3d at 721. “[W]ithout a mechanism
7 for addressing the cumulative effects of individual projects, there could never be any awareness of or
8 control over the speed and manner of [LBNL] development.” *San Franciscans for Reasonable Growth v.*
9 *City and County of San Francisco* (1984) 151 Cal.App.3d 61, 77. Here, as discussed above, the Regents
10 made no attempt whatsoever to quantify the seismic hazards and impacts faced by new employees, so the
11 Regents necessarily failed to ascertain whether those impacts were “cumulatively considerable . . . when
12 viewed in connection with . . . the effects of other current projects and . . . probable future projects” and
13 therefore significant for CEQA purposes. Guidelines § 15065(a)(3). By failing to analyze the Project’s
14 cumulative seismic hazards, the Regents violated CEQA.

15 **b. Impacts From the Destabilization of Slopes and Mobilization**
16 **of Soils During Construction.**

17 The EIR concludes that the Project “would not result in substantial soil erosion or the loss of
18 topsoil” and further concludes that the Project would not render any “geologic units or soils . . . unstable.”
19 AR 284-86. This conclusion is not supported by substantial evidence, as required.⁹ The Regents ignore
20 the fact that construction may mobilize unstable soils and accordingly fail to mitigate such impacts.

21 The Regents base their conclusions in part on the claim that any landslide on the GPL site
22 allegedly “is geologically stable and has not moved in thousands of years.” AR 282. Therefore, in the
23 Regents’ view, the GPL is *not* “located on . . . soils . . . that would become unstable as a result of the
24 [P]roject.” AR 285. But this conclusion does not logically follow from this asserted fact. There is ample
25 evidence in the record, ignored by the Regents, that construction could mobilize the soils upon which the

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27 ⁹ This conclusion is based on a claim that implementing various *deferred* mitigation measures
28 would reduce the risk of slope failure to insignificance. AR 284-86; *see also* AR 1343 (FEIR revision).
As discussed *infra* section V(B), the Regents cannot rely on these deferred mitigation measures.

1 GPL would sit. For example, various past construction activities resulted in “zones of reactivation” of
2 onsite landslides. AR 10891. It is unknown to this day whether the “materials” “underlying” the GPL
3 “are capable of supporting future foundation loads.” AR 10733. “Expansive soils may be present at the
4 southern end of the GPL site.” AR 1343. (“Expansive soils shrink and swell in response to changes in
5 soil moisture and have the potential to cause damage to improvements that are supported directly upon
6 them.” AR 1646-47.) The Regents failed to analyze the impacts posed by these risks in the EIR.

7 2. **Impacts From Intentionally Destructive Acts**

8 The EIR excludes consideration of the potential impacts resulting from an intentionally
9 destructive act or terrorist attack on the sole basis that “no specific information or concerns regarding
10 potential terrorist . . . acts directed at the project . . . have been identified.” AR 1608.¹⁰ This excuse is
11 unacceptable. The mere fact that the risk of this impact is difficult to measure does not make it too
12 speculative for analysis, especially when the potential consequences of the impact are so severe given the
13 Project’s storage and use of radioactive and other hazardous materials in proximity to Berkeley’s
14 residential neighborhoods to the west, south and north of the Project site. AR 115, 336, 415, 10750,
15 10752.

16 Preparation of an EIR “necessarily involves some degree of forecasting. [And while] foreseeing
17 the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it
18 reasonably can.” Guidelines § 15144. “The fact that a single methodology does not currently exist that
19 would provide” the Regents with a “precise, or ‘universally accepted,’ quantification” of the risk of a
20 terrorist attack does not allow them to simply ignore the possibility of an attack and its attendant impacts.
21 *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th
22 1344, 1370.

23 In an analogous situation under the parallel federal National Environmental Policy Act (“NEPA”),
24 the Ninth Circuit “conclude[d] that it was unreasonable for the [defendants] to categorically dismiss the
25 possibility of terrorist attack on [a federal] facility as too ‘remote and highly speculative to warrant
26

27 ¹⁰ The EIR falsely claims that the “Draft EIR examined security-related issues (Section IV.11,
28 Public Services) and hazards (Section IV.7, Hazards and Hazardous Materials).” AR 1608. *Neither* of
those sections addresses the risks and impacts of an act of sabotage or terrorism.

1 consideration.” *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016,
2 1030 (9th Cir. 2006). This holding is persuasive authority here. *No Oil, Inc. v. City of Los Angeles*
3 (1974) 13 Cal.3d 68, 86 n. 21 (because CEQA was modeled on NEPA, “judicial . . . interpretation of
4 [NEPA] is persuasive authority in interpreting” CEQA).

5 Instead of sidestepping their CEQA duty to analyze the potential for and impacts of a terrorist
6 attack, the Regents were required to (1) “do the necessary work to educate [themselves] about the
7 different methodologies that are available” for forecasting such attacks and analyzing their impacts, and
8 (2) actually apply one or more of those methods. *Berkeley Keep Jets, supra*, 91 Cal.App.4th at 1370;
9 *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 432; *San Luis Obispo*
10 *Mothers for Peace, supra*, 449 F.3d at 1029-31. The Regents’ failure to do so violated CEQA.

11 **3. Impacts From the Project’s Extension of the HWHF’s Useful Life**

12 The EIR abjures consideration of the future impacts of operating the HWHF on the grounds that
13 this facility is already in existence. AR 128 (“proposed upgrade” to HWHF “does not change the
14 operation of the building or extend its useful life”), 286 (portion of project relating to HWHF “is limited
15 to seismic strengthening of an already existing building” so geologic impacts would be positive), 336
16 (excluding HWHF from consideration of impacts from “the routine . . . use, or disposal of hazardous
17 materials” because “the GPL is the only project component that would involve the new routine storage
18 . . . and disposal of hazardous materials”), 343-44 (again excluding operational HWHF impacts).
19 The apparent basis for this conclusion is that Guidelines section 15126.2(a) mandates that agencies
20 “should normally limit [their] examination” of environmental impacts “to changes in the existing physical
21 conditions in the affected area. . . .” But as the EIR itself admits, the Project “would facilitate the
22 continued use of Building 85/85A as the LBNL site’s hazardous waste handling facility.” AR 279.

23 Because the Project is intended to *extend the useful life* of the HWHF, the Project will also extend
24 the amount of time in which, among other potentially significant but ignored impacts, (1) radioactive
25 waste is disposed of at LBNL and (2) the HWHF is subject to failure in the event of an earthquake,
26 landslide, fire or sabotage. AR 128 (discussing functions of HWHF and stating that “the landslides”
27 underneath it “could be mobilized in the event of an earthquake”). The EIR should have discussed the
28 resulting potential impacts instead of ignoring them altogether.

1 **4. Hydrology and Water Quality Impacts**

2 As the Regents admit, “[t]he Regents’ past site activities have contaminated soil and groundwater
3 at LBNL.” Answer by Regents, dated 1/17/10, at page 4 ¶ 21 (admitting certain allegations on page 6 ¶
4 21 of Verified Petition). Project demolition and construction “would result in exposure of demolition
5 debris and soil to wind and rainfall, potentially causing erosion, carrying sediment and contaminants in
6 storm water runoff. Soil stockpiles and excavated areas would be exposed to runoff and, if not managed
7 properly, the runoff could cause erosion and increased sedimentation and pollutants in stormwater.” AR
8 372. Moreover, “[e]xposure of contaminated soil is likely during building demolition.” AR 340. The
9 EIR nonetheless concludes that no such impacts would result, “[b]ased on development and
10 implementation of” a to-be-developed mitigation plan and contaminant evaluation. AR 340-41, 374. As
11 discussed below (*infra* section V(B)), the Regents may not rely upon *undeveloped* mitigation measures to
12 support a finding of no significant impact. The Regents’ contrary conclusions are an abuse of discretion.

13 **B. THE EIR UNLAWFULLY DEFERS THE FORMULATION OF MITIGATION**
14 **MEASURES.**

15 As discussed, the EIR relies upon various to-be-developed measures to mitigate the Project’s
16 impacts. But “requir[ing] . . . the . . . adopt[ion of] mitigation measures recommended in a future study is
17 in direct conflict with the guidelines implementing CEQA.” *Sundstrom v. County of Mendocino* (1988)
18 202 Cal.App.3d 296, 306. It is true that project approval may properly be conditioned on compliance
19 with known and measurable air and water quality standards. *Id.* at 308. This is because compliance with
20 such standards is based on “specific performance criteria articulated at the time of project approval.”
21 *Sacramento Old City Ass’n v. City Council* (1991), 229 Cal.App.3d 1011, 1028 (“SOCA”). Deferred
22 mitigation is proper *only* where an agency “recognize[s] the significance of the potential environmental
23 effects, commit[s] itself to mitigating their impact, and articulate[s] specific performance criteria.”
24 *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1395; *Endangered Habitats League, Inc. v.*
25 *County of Orange* (2005) 131 Cal.App.4th 777, 793. *SOCA* is limited to the “kinds of impacts for which
26 mitigation is known to be feasible, but where practical considerations prohibit devising such measures
27 early in the planning process (*e.g.*, at the general plan amendment or rezone stage).” *SOCA, supra*, 229
28 Cal.App.3d at 1029. The formulation of mitigation measures may not be deferred unless the EIR itself

1 “demonstrate[s] that mitigation is feasible.” *League to Save Lake Tahoe v. Tahoe Regional Planning*
2 *Agency* (2010) __ F.Supp.2d __, 2010 WL 3715658, *20 (E.D.Cal. 9/16/10) (applying CEQA).

3 Here, the Regents’ EIR impermissibly relies upon a bevy of *unformulated* mitigation measures to
4 mitigate the Project’s impacts. *See, e.g.*, AR 282 (“[p]rior to final design . . . , additional site-specific . . .
5 geologic investigations should be performed . . . and recommendations presented in those reports should
6 be followed” in order to mitigate landslide impacts), 340-41 (“[t]he presence of potential subsurface
7 contamination will be evaluated during the project and remedial measures will be taken, if necessary. . . .
8 As a consequence there will be a less-than-significant impact due to potential soil and groundwater
9 contaminant issues”); AR 1343 (“[e]xpansive soils *may* be present at the southern end of the GPL site,”
10 but with deepened footings “and confirming geotechnical inspections/tests,” impacts would be mitigated
11 to a less-than-significant level). But there is no *evidence* whatsoever that these mitigation measures will
12 in fact reduce these impacts to less than a significant level. Nor do these deferred mitigations “articulate
13 specific performance criteria” as required by *SOCA*, *Gentry* and *Endangered Habitats League*.

14 Far from providing definite and reliable protections against these impacts, the Regents concede
15 that they have not even ascertained (1) whether expansive soils underlie the GPL and (2) the extent to
16 which the Project site contains subsurface contaminants.¹¹ AR 1343. No explanation has been given as
17 to why “practical considerations prohibit” the Regents from determining whether or not these hazardous
18 conditions do in fact exist *prior* to preparation of the EIR. *SOCA, supra*, 229 Cal.App.3d at 1029. Nor is
19 there any evidence that the presently unknown, to-be-formulated mitigation measures will in fact reduce
20 impacts to insignificance. By contrast, in *SOCA*, the agency clearly acknowledged that parking issues
21 “ha[d] the potential . . . of causing serious environmental problems,” “the EIR offered seven distinct types
22 of alternative[parking demand management measures] to be studied, analyzed, and possibly”

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24 ¹¹While a “limited, restricted” investigation of the presence of contaminants beneath *one portion*
25 of the Project was undertaken, “[o]ther unknown . . . groundwater contamination may be present,”
26 including the “particular concern” of “underground utilities such as sanitary sewer lines, which . . . could
27 have been a source of release into the environment.” AR 11162. The report argues that such
28 contamination “cannot be fully evaluated” without “visual observation,” but fails to explain why (1)
such visual observation could not have occurred prior to release of the EIR, and (2) a “limited,
restricted” investigation, rather than a “full[] evaluat[ion],” of this potential contamination could not
have been performed. *Id.*

1 implemented, and the EIR's discussion of these measures was "extensive." *Id.* at 1028, 1030. Here,
2 because (1) the actual mitigation measures at issue have been neither described nor identified, (2) no
3 reason has been given why inclusion of such measures in the EIR would be impractical, and (3) there is
4 no evidence that the unknown mitigation measures will in fact render impacts insignificant, *SOCA* does
5 not apply, deferred mitigation was prohibited, and the Regents violated CEQA.

6 **C. THE ALTERNATIVES ANALYSIS IS INADEQUATE.**

7 CEQA has a "substantive mandate that public agencies refrain from approving projects for which
8 there are feasible alternatives or mitigation measures." *Mountain Lion Foundation v. Fish and Game*
9 *Commission* (1997) 16 Cal.4th 105, 134; *see* §§ 21002, 21081. "The range of potential alternatives to the
10 proposed project shall include those that could feasibly accomplish most of the basic objectives of the
11 project and could avoid or substantially lessen one or more of the significant effects." Guidelines §
12 15126.6(c). Alternatives may be eliminated from detailed consideration based upon the alternative's "(i)
13 failure to meet most of the basic project objectives, (ii) infeasibility, or (iii) inability to avoid significant
14 environmental impacts." *Id.* Here, the Regents unlawfully rejected numerous alternatives that would
15 meet the Project's objectives and mitigate its impacts.¹² For example, the Regents declined to even study
16 an offsite Fremont location for the Project suggested by the public (AR 1795), yet no record evidence
17 shows that such an alternative is infeasible, and an alternate Fremont site would reduce the Project's
18 seismic impacts by not subjecting additional workers to the high seismic hazards present at LBNL. By
19 declining to study or rejecting feasible alternatives that would meet most of the basic Project objectives
20 and reduce the Project's impacts,¹³ the Regents violated CEQA.

21 The Regents may argue that offsite alternatives are infeasible because they do not meet the Project

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23 ¹² The Regents declined to study some alternatives on the basis that they would not mitigate any
24 significant impacts. *See, e.g.*, AR 1795 (rejecting proposed alternative site because "no significant and
25 unavoidable impacts are identified in the EIR analysis" and thus no impacts would be avoided). But as
26 discussed above, the Project will in fact have significant impacts. Under CEQA, the Regents were
required to study feasible alternatives, including off-site alternatives, that would avoid or reduce such
impacts.

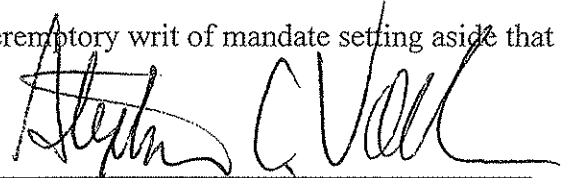
27 ¹³ The Regents rejected the Richmond Field Station Alternative in part because "an impact
28 related [to] liquefaction is likely greater at th[at] site compared to the proposed project." AR 519. The
Administrative Record contains no substantial evidence to support this bare assertion.

1 objective of “co-locat[ing] researchers and graduate students within a cluster of life science research
2 facilities.”¹⁴ AR 500. But CEQA requires consideration of a “reasonable range” of alternatives, as
3 “judged against a rule of reason,” and does not sanction the use of unduly narrow project objectives to
4 restrict the range of feasible alternatives. *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d
5 553, 565, 566; *City of Santee v. County of San Diego* (as a result of unduly narrow definition of project
6 and its objectives, “the analysis of the project alternatives . . . [wa]s incomplete, and, therefore,
7 inadequate”); *see also* Guidelines § 15126.6(a). By restricting alternatives to those located at LBNL via
8 the objective of “cluster[ing] . . . life science research[ers],” and thereby precluding an analysis of a
9 reasonable range of alternatives, including feasible off-site alternatives, the Regents violated CEQA.

10 **VI. CONCLUSION**

11 The Regents failed to adequately describe and mitigate the Project’s significant impacts,
12 unlawfully deferred the formulation of mitigation measures, improperly rejected feasible alternatives, and
13 thereby violated CEQA. Accordingly, the Regents’ approval of the Project was contrary to the
14 procedures required by law, and this Court should issue its peremptory writ of mandate setting aside that
15 approval as prayed by petitioner.

16 Dated: January 21, 2011



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27 ¹⁴Yet the Regents do not explain why physical co-location is required in order to enable
28 “interacti[on] among life scientists.” AR 500. Modern technologies such as teleconferencing and email
enable effective long-distance collaboration.

