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6 SAVE STRAWBERRY CANYON

**ENDORSED
FILED
ALAMEDA COUNTY**
FEB 22 2011
CLERK OF THE SUPERIOR COURT
By: **Anita Dhir** Deputy

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

10 SAVE STRAWBERRY CANYON, a non-profit public
11 benefit California corporation,

12 Petitioner and Plaintiff,

13 v.

14 REGENTS OF THE UNIVERSITY OF
15 CALIFORNIA, an agency of the State of California,
and DOES I – XX, inclusive,

16 Respondents and Defendants,

17 DOES XXI – XXX, inclusive,

18 Real Parties in Interest.

Civ. No. **11562317**
} VERIFIED PETITION FOR WRIT OF
} MANDATE AND COMPLAINT FOR
} DECLARATORY AND INJUNCTIVE
} RELIEF AND ATTORNEYS' FEES
} (CEQA CASE FOR ASSIGNMENT TO
} CEQA JUDGE)

20 Petitioner SAVE STRAWBERRY CANYON hereby petitions this Court for a writ of mandate
21 and declaratory and injunctive relief against respondents REGENTS OF THE UNIVERSITY OF
22 CALIFORNIA and DOES I-XX, inclusive (collectively, the "Regents"), and by this verified petition
23 alleges as follows:

24 **INTRODUCTION**

25 1. Petitioner brings this action to challenge the Regents' (1) approval of the Solar Energy
26 Research Center Project ("SERC" or the "Project") and (2) certification of the associated Final
27 Environmental Impact Report ("FEIR"). In taking these actions, the Regents violated the California
28

1 Resources Code section 21167.5, petitioner has served the Regents with notice of this suit.

2 PARTIES

3 8. Petitioner SAVE STRAWBERRY CANYON is a non-profit public benefit corporation
4 engaged in public education and committed to preserving the natural resources of Strawberry Canyon,
5 Strawberry Creek watershed, and the surrounding areas. Members of SAVE STRAWBERRY CANYON
6 would be harmed should the Project be built, because it will expose them and members of the public to
7 increased traffic, noise, congestion, air pollution, environmental degradation, and extreme health and
8 safety hazards resulting from the placement of the Project on unstable slopes near the Bay Area's most
9 hazardous earthquake fault, the Hayward Fault. Furthermore, the environmental, aesthetic, recreational,
10 scenic, scientific, historic, safety, and cultural interests of SAVE STRAWBERRY CANYON and its
11 members will, unless the relief requested herein is granted, be adversely affected and injured by the
12 Regents' failure to comply with CEQA and other environmental laws in approving the Project and
13 certifying the defective EIR.

14 9. Petitioner has authorized its attorneys to file this lawsuit on its behalf to vindicate its
15 substantial beneficial interest in securing the Regents' compliance with the laws whose violation is
16 alleged herein.

17 10. Petitioner has performed any and all conditions precedent to the filing of this Verified
18 Petition and has exhausted any and all available administrative remedies.

19 11. The REGENTS OF THE UNIVERSITY OF CALIFORNIA have "full powers of
20 organization and governance" over the University of California, including the University of California,
21 Berkeley, under article IX, section 9, of the California Constitution. On or about January 20, 2011, the
22 Grounds and Buildings Committee of the REGENTS OF THE UNIVERSITY OF CALIFORNIA
23 purportedly certified the adequacy under CEQA of the EIR, and purportedly approved the Project, and on
24 January 20, 2011, the Regents filed a Notice of Determination for the Project under section 21108. These
25 approvals were made as a result of proceedings in which by law a hearing is required to be given,
26 evidence is required to be taken, and discretion in the determination of facts is vested in the Regents.

27 12. The true names and capacities of respondents DOES I-XX, inclusive, are unknown to
28 petitioner who therefore sues said respondents by such fictitious names pursuant to Code of Civil

1 Procedure section 474. Petitioner is informed and believes, and based on such information and belief
2 alleges, that the fictitiously named respondents are also responsible for approving or implementing the
3 Project. Petitioner will, with leave of Court if necessary, amend this Verified Petition to insert the true
4 names and capacities of said DOE respondents when they have been ascertained.

5 13. Petitioner is unaware of the true names and capacities of real parties in interest DOES
6 XXI-XXX, and therefore sues such real parties in interest herein by fictitious names. Petitioner is
7 informed and believes, and based on such information and belief alleges, that the fictitiously named real
8 parties in interest have a direct economic interest in the approval of the Project and certification of its EIR
9 in a manner adverse to the interests of petitioner. When the true identities and capacities of these real
10 parties in interest have been determined, petitioner will, with leave of the Court if necessary, amend this
11 Verified Petition to insert such identities and capacities.

12 GENERAL ALLEGATIONS

13 14. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, within
14 the meaning of Code of Civil Procedure section 1086. Unless this Court issues a writ of mandate setting
15 aside the Regents' approval of the Project, and ordering them to comply with the laws whose violation is
16 alleged herein, the environmental interests of petitioner and the public will be substantially and
17 irreparably harmed, in the respects detailed above and below. No monetary damages or other legal
18 remedy could adequately compensate for the harms to petitioner and the environment that would arise if
19 the Regents' unlawful conduct were allowed to stand.

20 15. Petitioner is also entitled to preliminary and permanent injunctive relief under Code of
21 Civil Procedure section 526 and Civil Code section 3422 because the Project threatens irreparable
22 environmental harm. Unless enjoined, the Regents will implement the Project despite its lack of
23 compliance with applicable environmental laws. Petitioner will thereby suffer irreparable harm in the
24 respects discussed above and below due to the Regents' failure to take the required steps to adequately
25 protect the environment. Preliminary and permanent injunctive relief is thus warranted under Code of
26 Civil Procedure section 525 *et seq.*, Civil Code section 3422, and section 21168.9 to prevent irreparable
27 harm to the environment.

28 16. An actual controversy exists between petitioner and the Regents under Code of Civil

1 Procedure section 1060. Petitioner contends that the Regents have acted in violation of CEQA, as alleged
2 herein, and must therefore vacate and set aside their approvals of the Project. Petitioner is informed and
3 believes that the Regents dispute this contention. A judicial declaration resolving this controversy is
4 therefore necessary and appropriate.

5
6 **FACTUAL BACKGROUND**

7 17. On September 7, 2010, the Regents issued a Notice of Availability for the Project's Draft
8 EIR. Petitioner, and its members, timely submitted comments on the Draft EIR, pointing out its legal
9 inadequacies and objecting to the proposed Project. On December 22, 2010, the Regents issued a Notice
10 of Availability for the Project's Final EIR. On or about January 20, 2010, the Regents' Grounds and
11 Buildings Committee approved the Project and submitted a Notice of Determination to the California
12 Office of Planning and Research, pursuant to section 21108(a).

13 18. The Project's primary component is the SERC, a 3-story, 40,000 gsf research building.
14 The 21,000 gsf basement story is the largest and includes laboratory space and a mechanical room. The
15 9,000 gsf ground level "would house most office and all common areas including the main lobby,
16 gathering and seminary spaces, and a small kitchen." DEIR at 3.0-7. The 10,000 gsf top level would be
17 primarily occupied by wet chemistry laboratories, including "nano-interface and prototype development
18 labs." DEIR at 3.0-8. The building's highest point is "approximately 70 feet above the main entrance."
19 FEIR at 2.0-140.

20 19. The Project also includes certain transportation modifications, including the
21 reconfiguration of a portion of an alley and the "reduc[tion of] the amount of parking spaces at the site
22 from 35 to 26." DEIR at 3.0-20.

23 20. LBNL recently approved a separate project, the "Seismic Phase 2 project," which would
24 be located near the SERC facility. DEIR at 2.0-2. In the event the Seismic Phase 2 project "is not
25 constructed prior to the SERC project, the SERC project would also include the following" further
26 components:

- 27 a. Additional alley reconfigurations; and
28 b. Additional utility lines, improvements, and connections, including but not limited

1 to storm drainage, natural gas, wastewater disposal, and electrical improvements.

2 Some of these components will require extensive excavation: for example, a water
3 main will be relocated, and a new storm drain may be constructed.

4 21 The Project would be located on a site within the “Old Town” portion of the greater LBNL
5 site. The four buildings currently located on the Project site are scheduled for demolition as part of a
6 separate project, the Old Town Demolition and Environmental Restoration Project.

7 22. A large portion of the LBNL site is designated a State of California Earthquake-Induced
8 Landslide Hazard Zone. The Hayward Fault, the Bay Area’s most dangerous, traverses the western edge
9 of the LBNL site. The Project site is expected to be subject to “violent shaking severity” in the event of
10 an earthquake; this is “[d]ue to the proximity of LBNL to the Hayward fault.” DEIR at 4.3-4; 2006
11 LBNL Long Range Development Plan EIR (“LRDP EIR”) at IV.E-23. Six other active faults are located
12 between 14 and 26 miles of LBNL, including but not limited to the Calaveras, San Andreas, and
13 Concord-Green Valley faults.

14 23. Past LBNL geotechnical studies have interpreted the volcanic rock present at the Project
15 site to be part of a large-scale paleolandslide.

16 24 Groundwater conditions at LBNL can contribute to slope instability, particularly during
17 and after intense precipitation events.

18 25. There is evidence that LBNL sits on unconsolidated and unstable substrate within an
19 historic caldera (a collapsed volcano), further exacerbating the significant risks of subsidence, slope
20 failure, and liquefaction in the event of an earthquake.

21 26. The Oakland and Berkeley hills, where LBNL is located, are prone to wildfire.

22 27. The Project would increase the average daily population of the LBNL site. The DEIR
23 estimates that the Project “is . . . expected to increase the daily population of the LBNL hill site by about
24 50 persons.” DEIR at 3.0-19.

25 28. The Regents’ past site activities have contaminated soil and groundwater at LBNL. The
26 Project would sit atop a volatile organic compound (VOC) contaminant plume. Concentrations of VOCs
27 in some wells at the project site remain well above drinking water standards.

28 29. Depth to groundwater near the location of the Project site currently varies approximately

1 between 10 and 20 feet below ground surface. The basement of the SERC facility would extend below
2 the water table. Excavation activities for the Project are expected to encounter groundwater and it is
3 considered likely that some of the groundwater encountered would be contaminated.

4 30. LBNL's natural gas line crosses the Hayward Fault. This line is at risk of rupture in the
5 event of an earthquake.

6 **FIRST CAUSE OF ACTION**

7 **(Writ of Mandate, Declaratory and Injunctive Relief to Set Aside**

8 **Regents' Approval of the Project as Contrary to CEQA)**

9 31. The paragraphs set forth above are realleged and reincorporated herein by reference.

10 32. Petitioner brings this First Cause of Action pursuant to sections 21168, on the grounds that
11 the Regents committed a prejudicial abuse of discretion, in that they failed to proceed in the manner
12 required by law, failed to support their approval with adequate findings as required, and failed to base
13 their approval and findings on substantial evidence as required. As a result of these omissions, the
14 Regents considered and approved the Project without adequately describing and analyzing its potential
15 environmental impacts, alternatives and mitigations as required by CEQA.

16 33. The Regents are a "public agency" within the meaning of CEQA. § 21063. The Regents'
17 actions in approving and carrying out the Project are subject to the requirements of CEQA.

18 34. The Project constitutes a "project" subject to CEQA. § 21065(c). "'Project' means the
19 whole of an action, which has a potential for resulting in either a direct physical change in the
20 environment, or a reasonably foreseeable indirect physical change in the environment," and refers to the
21 "activity which is being approved and which may be subject to several discretionary approvals by
22 government agencies" rather than to the separate governmental approvals themselves. CEQA Guidelines
23 [14 C.C.R.; "Guidelines"] § 15378(a), (c).

24 35. The Project's EIR is tiered off of LBNL's 2006 LRDP EIR. Guidelines section 15152
25 governs the contents of such second-tier EIRs; generally speaking, agencies are limited to examining
26 environmental impacts that (1) were not found to be significant in the first-tier EIR; (2) are susceptible to
27 substantial reduction or avoidance through the implementation of project-specific mitigation measures; or
28 (3) "were not adequately addressed" in the prior EIR.

1 36 In approving the Project and certifying its EIR, the Regents failed to proceed in the manner
2 required by CEQA, and their decision is not supported by substantial evidence, in the following respects,
3 among others.

4 **The EIR's Impact Analysis and Mitigation Measures Are Deficient**

5 37. The Final EIR fails to adequately discuss, evaluate, and mitigate the direct, indirect and
6 cumulative environmental impacts of the Project as required by section 21100. The Regents' findings
7 that certain impacts are insignificant are not supported by substantial evidence, and constitute a failure to
8 proceed in the manner required by law, in the respects detailed below, among others.

9 *Geology and Soils Impacts*

10 38. The EIR determines that the Project would not "expose people or structures to potential
11 substantial adverse effects, including the risk of loss, injury, or death, [1] involving rupture of a known
12 earthquake fault . . . [¶¶] [2] due to strong seismic ground shaking . . . [¶¶] [3] due to seismically induced
13 ground failure, including liquefaction . . . [¶¶] [or 4] due to . . . landslides." DEIR at 4.3-13 through 4.3-
14 15. The EIR also concludes that no cumulative geology and soils impacts would occur. Draft EIR, p.
15 4.3-18. This conclusion is erroneous and at odds with the EIR's admissions that (1) violent shaking is
16 expected to occur at the Project site in the event of an earthquake due to the Project's vicinity to the
17 Hayward Fault; (2) groundwater conditions render LBNL vulnerable to slope instability; and (3) the
18 Project may be located atop a landslide.

19 39 The EIR concludes that the Project "would not be located on a geologic unit that may be
20 unstable or that could become unstable as a result of the Project." Yet as discussed above LBNL sits atop
21 an unstable historic caldera filled with unconsolidated debris and a high water table, whose steep and
22 unstable slopes greatly exacerbate the risk of slope failure during seismic events at the nearby Hayward,
23 Calaveras, San Andreas, and Concord-Green Valley faults.

24 40. The EIR's finding of no significant cumulative impact also conflicts with the fact that the
25 Project will bring new employees and visitors to a seismically dangerous location.² The EIR fails to
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27 ² CEQA Guidelines section 15126.2(a) directs that "[t]he EIR shall also analyze any
28 significant environmental effects the project might cause by bringing . . . people into the area
affected. For example, an EIR on a subdivision astride an active fault line should identify as a

1 quantify the seismic and geologic risks to these new employees and visitors, and instead dismisses such
2 risks conclusorily.³ Finally, the EIR ignores the risk that construction itself could undermine or mobilize
3 LBNL's unstable slopes and soils, another significant impact. By erroneously concluding that the
4 Project's geology and soils impacts are insignificant, the Regents violated CEQA.

5 *Health and Safety Impacts*

6 41. The EIR fails to adequately assess potential impacts resulting from the release of
7 nanomaterials, hazardous waste, radiation and/or other dangerous substances in the event of a natural
8 disaster, such as a fire, earthquake, landslide, subsidence, liquefaction, or other ground failure that could
9 destabilize the soil or ground underneath the Project or the surrounding area. For example, and for
10 illustrative purposes only, the FEIR contains an extensive discussion of why health impacts related to the
11 use of nanomaterials are insignificant *because it is certain that no such material could escape from the*
12 *laboratory*, yet the EIR fails to ascertain the risk or consequences of release in the event of an earthquake,
13 landslide, or wildfire. The EIR also ignores the similar risks that the on-site gas main presents in the
14 event of an earthquake, landslide, or wildfire. These failures render the EIR inadequate as an
15 informational document.

16 *Hydrology and Water Quality Impacts*

17 42. The EIR does not adequately analyze the Project's impacts on water quality. The EIR fails
18 to adequately assess the risk that demolition and construction associated with the Project will mobilize
19 groundwater contaminants. The EIR fails to describe what changes will be made to the on-site
20 groundwater contamination treatment system, fails to adequately assess the impacts of the planned
21 groundwater pumping system on the contaminant plume, and fails to analyze how the planned utility
22 construction will be affected by contaminants. Nor does the EIR contain adequate information regarding
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24 *significant* effect the seismic hazard to future occupants of the subdivision. The subdivision
25 would have the effect of attracting people to the location and exposing them to the hazards found
26 there." *Id.*, emphasis added.

27 ³ An EIR must quantify environmental impacts where it is possible to do so. *Kings*
28 *County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 735-36; Guidelines §
15144 ("an agency must use its best efforts to find out and disclose all that it reasonably can").

1 potential public exposure to these contaminants. Accordingly, the EIR violates CEQA.

2 *Deferred Mitigation Measures*

3 43. The Regents' EIR improperly postpones the preparation of crucial studies, reports, and
4 plans, including but not limited to groundwater studies, stormwater plans, site-specific geotechnical
5 studies, plans for required modifications to the groundwater contaminant treatment system, and design
6 studies. The EIR relies upon mitigation measures recommended by future studies as the primary method
7 of mitigating these risks. "[R]equir[ing] . . . the . . . adopt[ion of] mitigation measures recommended in a
8 future study is in direct conflict with the guidelines implementing CEQA." *Sundstrom v. County of*
9 *Mendocino* (1988) 202 Cal.App.3d 296, 306. These studies, and the recommended mitigation measures
10 contained within them, were required to be released for public review as part of the EIR process. The
11 Regents' deferred mitigation scheme, and the absence of these critical studies from the EIR itself, renders
12 the EIR inadequate as an informational document.

13 *Cumulative Impacts*

14 44. The Regents failed to recognize, discuss, and mitigate the Project's cumulative and other
15 impacts, and their conclusions in this regard are not supported by substantial evidence. Undisclosed
16 impacts include, but are not limited to, impacts on aesthetic resources, air quality, geology and soils,
17 greenhouse gas, hazards and hazardous materials, hydrology and water quality, noise, public services,
18 transportation and traffic, and utilities and service systems.

19 **The Project Description Is Inadequate**

20 45. CEQA requires an EIR to describe the Project's objectives and underlying purpose.
21 Guidelines § 15124. The statement of objectives helps the Lead Agency to develop a reasonable range of
22 alternatives in the EIR; accordingly, CEQA does not sanction the use of unduly narrow project objectives.
23 *Id.*; *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 980. Here, four of
24 the Regents' five project objectives require the Project to be located at LBNL and as such unreasonably
25 restrict the range of alternative locations to the Project site and violate CEQA.

26 **The Alternatives Analysis Is Inadequate**

27 46. CEQA requires EIRs to consider and discuss a reasonable range of feasible alternatives,
28 including a "No Project Alternative." Guidelines § 15126.6(a), (e). An EIR also must identify an

1 environmentally superior alternative. *Id.* § 15126.6(e)(2).

2 47. The SERC EIR's discussion of alternatives violates CEQA, because the Regents failed to
3 consider a reasonable range of feasible alternatives, as required by Guidelines section 15126.6(a), due to
4 the unduly narrow project objectives, which restrict feasible projects to only those located at LBNL. In
5 fact, *no alternatives to the Project were considered feasible* with respect to meeting Project objectives.

6 48. The Regents' conclusions regarding the Richmond Field Station Alternative are not
7 supported by substantial evidence. For example, the EIR concludes that potential geological and soils
8 impacts at this location are "similar" to those at the LBNL site, yet the EIR admits that the proposed
9 LBNL location would "place people closer to an active fault and the associated seismic hazards." DEIR
10 at 5.0-18. Additionally, the Regents' failure to disclose the significant environmental impacts of the
11 proposed location, detailed above, led the Regents to understate the environmental benefits of the
12 Richmond Field Station Alternative. By exaggerating the potential impacts that the Richmond Field
13 Station Alternative presents, the Regents skewed the alternatives analysis and violated CEQA.

14 49. The Regents failed to consider several off-site alternatives suggested by the public entirely,
15 including but not limited to Alameda Naval Station, and in so doing violated CEQA.

16 **PRAYER**

17 WHEREFORE, petitioner prays for the following relief:

18 1. Petitioner seeks this Court's alternative and peremptory writs of mandate, declaratory
19 judgment and preliminary and permanent injunctions setting aside and enjoining the Regents' actions
20 purporting to (1) certify the Solar Energy Research Center EIR and (2) approve the Project, on the
21 grounds that all such approvals and certification violate CEQA;

22 2. For a temporary restraining order, stay order, preliminary and permanent injunction, and a
23 peremptory writ of mandate, enjoining and restraining the Regents and their officials, agents, employees,
24 representatives, and all persons acting in concert or participating with them from performing in any
25 manner any other duty or obligation, or taking any other action to implement the Project that could result
26 in any change or alteration to the physical environment pending compliance with CEQA;

27 3. For attorneys' fees under Code of Civil Procedure section 1021.5 in that petitioner's
28 successful prosecution of this proceeding has conferred a significant benefit on the public, petitioner has

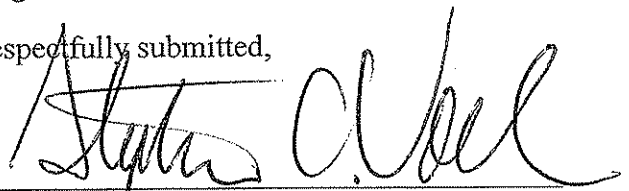
1 no pecuniary or other private interest in the matter, and an award of its attorneys' fees is otherwise
2 warranted and appropriate under this statute;

3 4. For costs of suit herein; and

4 5. For such other and further equitable or legal relief as the Court deems just and proper.

5 Dated: February 22, 2011

Respectfully submitted,



STEPHAN C. VOLKER
Attorney for petitioner and plaintiff SAVE
STRAWBERRY CANYON

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VERIFICATION

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2 I, Lesley Emmington Jones, am the President of Save Strawberry Canyon, petitioner and plaintiff
3 in this action, and have personal knowledge of the following facts. I have read the foregoing Verified
4 Petition for Writ of Mandate and Complaint for Declaratory and Injunction Relief and Attorneys' Fees
5 and know its contents. The facts therein alleged are true and correct, and are based on documents within
6 the Regents' record underlying the approvals challenged herein.

7 I declare under penalty of perjury under the laws of the State of California that the foregoing is
8 true and correct, and that this Verification was executed in Oakland, California on February 22, 2011.

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10 Lesley Emmington Jones
11 LESLEY EMMINGTON JONES
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