

RCM



9486025

FILED
ALAMEDA COUNTY

JUN 15 2011

CLERK OF THE SUPERIOR COURT

By Molly Gandy Deputy

1 STEPHAN C. VOLKER (CSB #63093)
DANIEL P. GARRETT-STEINMAN (CSB #269146)
2 LAW OFFICES OF STEPHAN C. VOLKER
436 14th Street, Suite 1300
3 Oakland, California 94612
Tel: 510/496-0600
4 Fax: 510/496-1366

5 Attorneys for Petitioner and Plaintiff
SAVE STRAWBERRY CANYON

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 CALIFORNIA,
an agency of the State of California, and DOES I – XX,
15 inclusive,

16 Respondents and Defendants,

17 DOES XXI – XXX, inclusive,

18 Real Parties in Interest.

Civ. No. RG 11562317

Hearing Date: August 19, 2011

Hearing Time: 9:00 a.m.

Dept: 31

Judge: Hon. Frank Roesch

Petition Filed: Feb 22, 2011

21 **PETITIONER'S OPENING TRIAL BRIEF**

TABLE OF CONTENTS

1

2 **TABLE OF AUTHORITIES** ii

3 **I. INTRODUCTION** 2

4 **II. PARTIES** 2

5 **III. FACTUAL BACKGROUND** 3

6 **IV. STANDARD OF REVIEW** 3

7 **V. ARGUMENT** 4

8 **A. THE EIR FAILS TO DISCLOSE THE PROJECT'S SIGNIFICANT**

9 **IMPACTS.** 6

10 **1. Geology and Soils Impacts** 7

11 **a. Seismic-Related Impacts** 7

12 **b. Impacts Related to Site Stability** 9

13 **2. Health and Safety Impacts** 10

14 **B. THE EIR UNLAWFULLY DEFERS THE FORMULATION OF**

15 **MITIGATION MEASURES.** 12

16 **C. THE ALTERNATIVES ANALYSIS IS INADEQUATE.** 14

17 **VI. CONCLUSION** 15

18

19

20

21

22

23

24

25

26

27

28

1 **TABLE OF AUTHORITIES**

2 **STATE CASE AUTHORITIES**

3 *Bunnett v. Regents of University of California*
4 (1995) 35 Cal.App.4th 843 4

5 *Cadiz Land Co., Inc. v. Rail Cycle, L.P.*
6 (2000) 83 Cal.App.4th 74 6, 8

7 *Citizens of Goleta Valley v. Bd. of Supervisors*
8 (1990) 52 Cal.3d 553 4, 15

9 *Citizens to Preserve the Ojai v. County of Ventura*
10 (1985) 176 Cal.App.3d 421 9

11 *City of Santee v. County of San Diego*
12 (1989) 214 Cal.App.3d 1438 15

13 *County of Amador v. El Dorado Co. Water Agency*
14 (1999) 76 Cal.App.4th 931 5

15 *Endangered Habitats League, Inc. v. County of Orange*
16 (2005) 131 Cal.App.4th 777 12

17 *Friends of Mammoth v. Board of Supervisors*
18 (1972) 8 Cal.3d 247 4

19 *Gentry v. City of Murrieta*
20 (1995) 36 Cal.App.4th 1359 12, 12

21 *Kings County Farm Bureau v. City of Hanford*
22 (1990) 221 Cal.App.3d 692 6, 8, 9

23 *Laurel Heights Improvement Assn. v. Regents of University of California*
24 (1988) 47 Cal.3d 376 5, 6

25 *Los Angeles County v. Civil Service Commission*
26 (1997) 55 Cal.App.4th 187 5

27 *Mountain Lion Foundation v. Fish and Game Commission*
28 (1997) 16 Cal.4th 105 14

Napa Citizens for Honest Gov't. v. County of Napa
(2001) 91 Cal.App.4th 342 6

No Oil, Inc. v. City of Los Angeles
(1975) 13 Cal.3d 68 6

Planning and Conservation League v. Dept. of Water Res.
(2000) 83 Cal.App.4th 892 11

Resource Defense Fund v. Local Agency Formation Com.
(1987) 191 Cal.App.3d 886 4

1	<i>Rural Landowners Association. v. City Council of Lodi</i>	
	(1983) 43 Cal.App.3d 1012	5
2	<i>Sacramento Old City Ass'n v. City Council</i>	
3	(1991), 229 Cal.App.3d 1011	12
4	<i>San Joaquin Raptor/Rescue Center v. County of Stanislaus</i>	
	(1994) 27 Cal.App.4th 713	6
5	<i>Santiago County Water Dist. v. County of Orange</i>	
6	(1981) 118 Cal.App.3d 818	13
7	<i>Save Our Peninsula Committee v. Monterey County Board of Supervisors</i>	
	(2001) 87 Cal.App.4th 99	4
8	<i>Sierra Club v. State Board of Forestry</i>	
9	(1994) 7 Cal.4th 1215	5
10	<i>Sundstrom v. County of Mendocino</i>	
	(1988) 202 Cal.App.3d 296	12
11	<i>Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova</i>	
12	(2007) 40 Cal.4th 412	5

FEDERAL CASE AUTHORITIES

14	<i>League to Save Lake Tahoe v. Tahoe Regional Planning Agency</i>	
	(E.D.Cal. 2010) 739 F.Supp.2d 1260	11

STATUTES

16	Public Resources Code	
17	§ 21000 <i>et seq.</i> (California Environmental Quality Act)	<i>passim</i>
	§ 21001(a)	6
18	§ 21002	14
	§ 21061	5
19	§ 21068	6
	§ 21081	14
20	§ 21168	4
21	Code of Civil Procedure	
	§ 1094.5	4
22	§ 1094.5(b)	4

REGULATIONS

24	CEQA Guidelines [14 C.C.R.]	
	§ 15003(b)-(e)	5
25	§ 15003(f)	4
	§ 15065(a)(3)	9, 11
26	§ 15125(c)	6
	§ 15126.2(a)	6, 7
27	§ 15126.6(a)	15
	§ 15126.6(c)	14
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

§ 15144 5, 8, 11
§ 15384(a) 5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

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 Solar Energy Research Center Project (“SERC” or “Project”) and certification of its Environmental Impact Report (“EIR”). The Regents violated the California Environmental Quality Act (“CEQA”), Public Resources Code (“PRC”) section 21000 *et seq.*, in three ways. First, its EIR erroneously concludes that the Project will have no significant impacts, and fails to adequately discuss impacts resulting from the Project’s (1) relocation of employees to a steep and unstable hillside traversed by the Hayward Fault and designated a State Earthquake-Induced Landslide Hazard Zone; and (2) use of nanomaterials, which would harm the environment if released. Second, the Regents unlawfully deferred formulation of the mitigation measures required in the EIR until after Project approval, and failed to include critical details about the Project’s contaminated groundwater management system, denying the public a chance to review and comment upon them. Third, the Regents’ unlawfully narrow Project objectives foreclosed consideration of a reasonable range of feasible alternatives such as feasible off-site locations. Therefore the Regents’ EIR and approval of the Project must be set aside.

17
18
19
20
21
22
23
24
25
26
27
28

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 the public to environmental degradation and extreme safety hazards due to (1) the Project’s placement atop a contaminated groundwater plume on unstable slopes near the highly hazardous Hayward Fault; and (2) the use of nanomaterials without adequate safety measures.

The Regents has “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 September 7, 2010, the Regents issued a Notice of Availability (“NOA”) for the Project’s Draft EIR.¹ Administrative Record, p. 21180 (“AR 21180”). Petitioner repeatedly criticized the

¹ The Project is tiered from the Regents’ previously-approved Long Range Development Plan (“LRDP”). AR 1656-57 (discussing tiering); AR 9815-9923 (LRDP), 27-1648 (LRDP Draft and Final EIRs). The LRDP EIR admitted significant impacts. AR 65-92.

1 Draft EIR. AR 2205-2229 (comment letters); 21426-21555 (attachments); 2250-2268 (comments at
2 hearing). On December 22, 2010, the Regents issued an NOA for the Final EIR; petitioner submitted
3 comments. AR 21955 (NOA); 21975-22023, 22025-22027 (comments). On January 18, 2011, the
4 Regents approved the Project and certified its EIR. AR 25-26, 2538, 2545. On January 20, 2011, the
5 Regents issued a Notice of Determination, pursuant to PRC section 21108(a). AR 1.

6 III. FACTUAL BACKGROUND

7 The Project's primary component is the SERC, a 3-story, 40,000 gsf research building. AR 1674.
8 The 21,000 gsf basement story, the largest, includes laboratory space and a mechanical room. AR 1680.
9 The 9,000 gsf ground level "would house most office and all common areas including the main lobby,
10 gathering and seminary spaces, and a small kitchen." *Id.* The 10,000 gsf top level would be primarily
11 occupied by wet chemistry laboratories, including "nano-interface and prototype development labs." AR
12 1681. The building's highest point is "approximately 70 feet above the main entrance." AR 2342.

13 The Project would be located on a site within the "Old Town" portion of Lawrence Berkeley
14 National Laboratory ("LBNL"). AR 1676; AR 1678-79 (maps). The four buildings currently on the
15 Project site would be demolished. AR 1677.

16 The LBNL site is hazardous. The Hayward Fault, the Bay Area's most dangerous, traverses the
17 western edge of LBNL. AR 313; AR 322 (map). The *Project site* is "subject to violent shaking severity"
18 in the event of an earthquake; this is "[d]ue to the proximity of LBNL to the Hayward fault." AR 1769,
19 333. (LBNL itself is subject to "Very Violent" levels of groundshaking. AR 333.) Six other active faults
20 are located within 26 miles of LBNL, including the Calaveras, San Andreas, and Concord-Green Valley
21 faults. AR 315. "The SERC project would bring approximately 50 additional persons to the LBNL hill
22 site" and would thereby expose 50 more people to these seismic risks. AR 1846.

23 "[A] majority of [LBNL] is within" designated State of California Earthquake-Induced Landslide
24 Hazard Zones. AR 317; AR 318 (map). Past LBNL geotechnical studies show the volcanic rock *on the*
25 *Project site* is part of a large-scale paleolandslide. AR 1771. "Excavation, grading, and construction
26 activities at LBNL, particularly on sloped sites, could result in soil erosion or create slope instability."
27 AR 335. High groundwater conditions cause slope instability, particularly after intense rain.

28 Other hazards abound. Expert geologists have concluded that LBNL sits on unconsolidated and

1 unstable substrate within an historic caldera (a collapsed volcano), posing significant risks of subsidence,
2 slope failure, and liquefaction in the event of an earthquake. AR 21507-21509, 21975-76; *see also* AR
3 1767 (“[g]eologic mapping shows the SERC project site underlain by volcanic rocks”). LBNL is located
4 in a wildfire-prone area. AR 349, 1829. LBNL’s natural gas line crosses the Hayward Fault; this gas line
5 poses an undisclosed risk of rupture in an earthquake. AR 2299.

6 The Regents’ past site activities have contaminated soil and groundwater at LBNL. The Project
7 would sit *atop* a volatile organic compound (VOC) contaminant plume. AR 1695. Concentrations of
8 VOCs in some wells onsite exceed drinking water standards. *Id.* Depth to groundwater is between 10
9 and 20 feet. AR 1854. Excavation for the facility’s basement “would range from about 10 to 20 feet.”
10 Because “some of the basement area is expected to be slightly below the water table,” “excavation
11 activities are expected to encounter groundwater and it is considered likely that *some of the groundwater*
12 *encountered would be contaminated.*” AR 1844, emphasis added.

13 IV. STANDARD OF REVIEW

14 CEQA is interpreted to accord the fullest possible protection to the environment within the
15 reasonable scope of the statutory language. *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d
16 247, 259; CEQA Guidelines [14 C.C.R.; “Guidelines”] §15003(f). “[T]he overriding purpose of CEQA
17 is to ensure that agencies regulating activities which may affect the quality of the environment give
18 primary consideration to preventing environmental damage.” *Save Our Peninsula Committee v.*
19 *Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117. “Full compliance with the letter of
20 CEQA is essential to the maintenance of its important public purpose.” *Resource Defense Fund v. Local*
21 *Agency Formation Com.* (1987) 191 Cal.App.3d 886, 897-898.

22 The standard of review in this case is the “abuse of discretion” test established by PRC section
23 21168 and Code of Civil Procedure (“C.C.P.”) section 1094.5(b), because under the Regents’ formally
24 adopted procedures (which “enjoy a status equivalent to that of state statutes”²), certification of the EIR
25 and approval of the Project could only occur at a “public hearing.” *Id.*; AR 6535 (hearing required).
26 Review under section 1094.5(b) is limited to “whether there was any prejudicial abuse of discretion,”

27
28 ² *Bunnett v. U.C. Regents* (1995) 35 Cal.App.4th 843, 848 n. 2 (U.C. retirement plan is “law”
for purposes of section 1094.5, but section 1094.5 did not apply absent public hearing).

1 which “is established if the [Regents] ha[ve] not proceeded in the manner required by law, the order or
2 decision is not supported by the findings, or the findings are not supported by the evidence.” *Id.*

3 CEQA’s procedural mandates are “scrupulously enforce[d].” *Vineyard Area Citizens for*
4 *Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435. Any “[f]ailure to comply
5 with the CEQA procedures is necessarily prejudicial . . .” as it “results in a subversion of the purposes of
6 CEQA.” *Rural Landowners Ass’n. v. City Council of Lodi* (1983) 43 Cal.App.3d 1012, 1023; *Sierra*
7 *Club v. Board of Forestry* (1994) 7 Cal.4th 1215, 1236-37 (“prejudice is presumed” under CEQA).

8 “Substantial evidence challenges” under CEQA “are resolved much as substantial evidence claims
9 in any other setting.” *County of Amador v. El Dorado Co. Water Agency* (1999) 76 Cal.App.4th 931,
10 945-46. “‘Substantial evidence’ is not ‘synonymous with “any” evidence. It must be reasonable,
11 credible, and of solid value.’” *Los Angeles County v. Civil Svc. Com.* (1997) 55 Cal.App.4th 187, 198-99.
12 “Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert
13 opinion supported by facts.” Guidelines § 15384(a), (b). “Argument, speculation, unsubstantiated
14 opinion or narrative, [or] evidence which is clearly erroneous or inaccurate . . . does not constitute
15 substantial evidence.” *Id.*

16 The Regents’ approval of the Project must be set aside because it failed to proceed in the manner
17 required by CEQA, and its key factual assumptions are not supported by substantial evidence. The
18 Regents (1) failed to identify, evaluate and mitigate the Project’s significant impacts on the environment,
19 (2) unlawfully deferred formulation of mitigation measures, and (3) failed to analyze a reasonable range
20 of feasible alternatives that would avoid the Project’s impacts.

21 V. ARGUMENT

22 “An EIR’s purpose is to inform the public and its responsible officials of the environmental
23 consequences of their decisions before they are made.” *Citizens of Goleta Valley v. Bd. of Supervisors*
24 (1990) 52 Cal.3d 553, 563-64; *Laurel Heights Imp. Ass’n v. Regents* (1988) 47 Cal.3d 376, 390-91, *citing*
25 *PRC* § 21061; Guidelines § 15003(b)-(e).³ “The ultimate decision of whether to approve a project, be
26 that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers
27

28 ³ “[T]he EIR must present information in such a manner that the foreseeable impacts of
pursuing the project can actually be understood and weighed.” *Vineyard*, 40 Cal.4th at 449.

1 and . . . public with the information” required by CEQA. *San Joaquin Raptor/Rescue Center v. County of*
2 *Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

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

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

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

1 requirements, the EIR fails to adequately disclose, quantify and evaluate the “existing physical conditions
2 in the affected area” and the following significant Project impacts.

3 **1. Geology and Soils Impacts**

4 **a. Seismic-Related Impacts**

5 “The EIR shall . . . analyze any significant environmental effects the project might cause by
6 *bringing . . . people into the area affected.* For example, an EIR on a subdivision astride an active fault
7 line should identify as a *significant* effect the *seismic hazard to future occupants* of the subdivision. The
8 subdivision would have the effect of attracting people to the location and exposing them to the hazards
9 found there.” Guidelines § 15126.2(a), emphasis added. Here, the Project will “increase the daily
10 population of” the seismically hazardous “LBNL hill site by about 50 persons.” AR 1692, 1769 (“the
11 project site [i]s subject to violent shaking severity”). Contrary to Guideline section 15126.2(a), the
12 Regents dismisses the seismic hazards to these additional occupants as *insignificant*. AR 1778-1780.

13 Because LBNL is crossed by the Hayward Fault (AR 313), it is an especially hazardous
14 workplace. (The Project site itself is “near the Hayward Fault” – “approximately 2,000 feet away” – and
15 also within 26 miles of 6 other faults. AR 1778, 1769.) “[T]here is a 62-percent probability of at least
16 one magnitude 6.7 or greater quake striking the San Francisco Bay Area before 2032.” AR 333.

17 Therefore “strong ground shaking is likely to occur at the site within the life of the project as a result of
18 future earthquakes.” AR 20178. Seismic hazards to LBNL workers are particularly serious because
19 LBNL is vulnerable to landslides in the event of an earthquake, and because “erosion hazard is high” in
20 the Project vicinity. AR 1767. Accordingly, “it is impossible to provide complete assurance against
21 damage” from earthquakes. AR 1779. The Project subjects 50 more people to these seismic risks.

22 Nonetheless, the EIR concludes that the Project will *not*

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

27 AR 1778-83. This astonishing conclusion is based on the Regents’ claims that (1) the Project “would
28 meet or exceed the prevailing engineering standard of care for seismic design” due to its compliance with
the California Building Code; and (2) the Project would comply with UC’s Seismic Safety Policy. AR
1779. These justifications are not substantial evidence under CEQA that the Project’s seismic risks are

1 insignificant. CEQA requires agencies to quantify environmental risks. *Cadiz*, 83 Cal.App. at 92-93;
2 *Kings County*, 221 Cal.App.3d at 736. The EIR dismisses rather than quantifies the seismic risks faced
3 by the 50 employees that will be newly exposed to LBNL's severe seismic risks.

4 Even assuming for the sake of argument that the Project meets prevailing engineering standards
5 and "is generally feasible from a . . . geotechnical hazard standpoint" (AR 20178), that does not mean that
6 the Project is *safe*, and that its geological hazards have been mitigated to *insignificance*. The EIR does
7 not purport to *wholly* eliminate the Project's seismic risks. The Regents' "design-level earthquake
8 groundshaking" was defined as the "10 percent probability of exceedance in 50 years level-of-hazard."
9 AR 15796; AR 323 (LRDP explains how this figure is used when "designing buildings in seismically
10 active areas"), 333 (LRDP admits that LBNL buildings are only designed to withstand a 7.0 magnitude
11 earthquake on the Hayward Fault), 20185 (SERC geotechnical report). This means that there is a 10
12 percent chance that the Project will be subject to an earthquake stronger than anticipated by the building's
13 design over the next 50 years. AR 323. While under "prevailing engineering standard[s]" some
14 probability of building failure each 50 years may be deemed acceptable (AR 1779), *CEQA* requires the
15 size of this risk to be disclosed and analyzed to allow the Regents and the public to determine the extent
16 to which seismic risks *remained unmitigated* as necessary to determine whether these impacts were
17 *significant*. § 15144. Such analysis is *especially* warranted in light of the fact that, as discussed below,
18 SERC employees will be using nanomaterials whose environmental effects, if released during an
19 earthquake, pose unknown hazards. The EIR's failure to quantify the Project's seismic risks violates
20 CEQA's mandate that "[t]he EIR must contain facts and analysis, not just the bare conclusions of a public
21 agency . . . [T]he public and decision-makers . . . should also have before them the basis for that opinion
22 . . . to enable them to make an independent, reasoned judgment." *Kings County*, 221 Cal.App.3d at 736.

23 CEQA's mandate for quantified seismic risks is echoed by the University Seismic Safety Policy.
24 That policy requires the "feasibility" of seismic hazard mitigations "to be determined by weighing [1] the
25 practicability and cost of protective measures against [2] the gravity and probability of injury resulting
26 from a seismic occurrence." Exhibit 1 to Petitioner's accompanying Request for Judicial Notice or
27 alternatively, Request to Augment Record, at 1. As shown below, the record is silent as to the latter
28 factor. The Regents simply dismisses seismic risks as insignificant without making any attempt to

1 ascertain “the gravity and probability of injury resulting from a seismic occurrence.” *Id.*

2 Neither the EIR nor the record contains any “facts [or] analysis” about the actual seismic risks
3 faced by new employees at LBNL. *Id.*⁴ While the EIR states that “it is impossible to provide complete
4 assurance against damage” from earthquakes, the reader is left guessing as to the environmental
5 consequences of any such “damage.” AR 1779. Rather, the EIR asks its readers to accept that seismic
6 hazards are insignificant merely because such hazards were mitigated to some undisclosed extent. AR
7 1778-79. The EIR should have *disclosed and analyzed the extent* to which the health and even lives of
8 the 50 added employees would be put at risk by approval of the Project.⁵ Armed with this essential
9 information, the Regents could have made an *informed* decision, pursuant to CEQA, as to whether the
10 Project’s benefits outweighed these risks. By failing to include “facts and analysis” regarding the
11 magnitude of the Project’s actual seismic risks in the EIR, the Regents abused its discretion.

12 The EIR’s cumulative impact assessment is also deficient. AR 1782-83. CEQA requires a
13 cumulative impacts “analysis [to] assess the collective or combined effect of” related projects. *Kings*
14 *County*, 221 Cal.App.3d at 721. The Regents made no attempt to quantify the seismic hazards and
15 impacts faced by new employees, nor ascertain whether those impacts were “cumulatively considerable . . .
16 . . . when viewed in connection with . . . the effects of other current projects and . . . probable future
17 projects,” and thus significant under CEQA. Guidelines § 15065(a)(3). The Regents violated CEQA.

18 **b. Impacts Related to Site Stability**

19 The EIR concludes that the Project site is not an unstable area. AR 1781. Yet as noted, numerous
20 experts have concluded that LBNL sits atop an unstable caldera, a collapsed volcano. AR 21507-09
21 (statement of Dr. Garniss Curtiss, Professor Emeritus, U.C. Department of Earth and Planetary Science),
22 21975-76 (supplemental statement of Dr. Curtiss), 20587 (geologist from U.S. Geological Survey). The

24 ⁴ Nor does the LRDP EIR attempt to quantify or estimate the seismic risks to LBNL employees.
25 See AR 331-337. The LRDP EIR admits that LBNL buildings are only designed to withstand
26 earthquakes below a certain threshold (AR 333), but does not disclose the probability or consequences
of an earthquake exceeding this threshold.

27 ⁵ “[A]ssuming a sophisticated technical analysis was not feasible, if some reasonable, albeit less
28 exacting, analysis of” seismic risks to new employees “could be performed, the [Regents] w[ere]
required to do so and report the results.” *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176
Cal.App.3d 421, 432.

1 EIR's "Master Comment Response" ignores critical elements of the problem. AR 2271-76. The Regents
2 never respond to Dr. Curtiss' supplemental statement, which points out that the Regents' investigations
3 do not disprove the caldera hypothesis and that LBNL's long history of landslides shows a caldera may be
4 present. AR 21975-76.

5 The EIR fails to describe the risk of a future landslide at the site. It concludes, despite contrary
6 findings in 2000, that no landslides are present. AR 1780. (The EIR's conclusion rests upon a geologic
7 study that was *not* provided with the EIR. *Id.* CEQA required this study to be appended to the EIR to
8 enable public review. Guidelines § 15147. CEQA's informational purpose was hindered because the
9 public was unable to review this critical document. AR 22025 (criticizing lack of geotechnical detail in
10 the DEIR). Dr. Curtiss' unrebutted, expert observation that further geologic analysis was needed since
11 "[a]most every excavation for a building or road has been followed by slides" warranted that further
12 review. AR 21975. The EIR's failure to provide that review violates CEQA.

13 2. Health and Safety Impacts.

14 The Project includes a "Nanoscale Photovoltaic and Electrochemical Systems Research"
15 component (AR 1675) which would "us[e] nanoscale solar cells . . . and electrical systems" to "drive
16 fuel-forming chemical reactions" (AR 1825). "Engineered nanomaterials are defined as" "intentionally
17 created" "discrete materials having structures with at least one dimension between 1 and 100
18 nanometers." AR 1827. "A nanometer is a unit of length equal to one billionth of a meter." *Id.* "A
19 human hair is approximately 60,000 nanometers in diameter." AR 2280. At LBNL, "all nanomaterials
20 . . . are treated as hazardous materials. . . ." AR 2283.

21 The environmental risks posed by the Project's use of nanomaterials are highly controversial. AR
22 1665, 1824. The health hazards are uncertain but ominous, according to the Centers for Disease Control
23 ("CDC"): "[T]here is increasing evidence to indicate that exposure to some engineered nanoparticles
24 can cause adverse health effects in laboratory animals. . . ." AR 16148. "The real risks from
25 [nano]technology are not known, and the perceived risks are undetermined." AR 16154. Nanomaterials,
26 like other extremely small particles, are particular health hazards. AR 16155, 16158-59 ("most studies
27 show that size appears to be the major factor in enhancing the toxicity of engineered nanoparticles
28 compared with . . . larger particles"). On the whole, "[a] body of scientific evidence has accrued . . .

1 suggesting that some nanoscale particles may pose a health concern.” AR 16158. Toxicity is affected by
2 “[v]arious . . . parameters” including “composition, size, shape, surface characteristics, charge, functional
3 groups, crystal structure, and solubility.” *Id.* While no studies of workplace exposure to nanomaterials
4 have been conducted, “[a]nimal studies with some types of engineered nanoparticles have caused adverse
5 lung effects.” AR 16148, 16155. “Other studies have demonstrated that” inhaled “nanoparticles may . . .
6 translocate to other organs” such as the brain or bloodstream, with unknown effects. *Id.*

7 *None of these risks or uncertainties are revealed in the EIR.* The EIR’s *entire* discussion of the
8 health risks of nanoparticles is contained in the following sentence: “No link has been established
9 between occupational exposure to engineered nanoparticles and adverse health effects.” AR 2282. The
10 clear implication is that nanoparticles are safe. The EIR then misleadingly pretends that the above-
11 discussed CDC report supports this statement. *Id.* Yet, as shown, the CDC report *acknowledges that*
12 *“nanoscale particles may pose a health concern.”* AR 16158. The EIR’s statement is misleading.
13 There is no record evidence that nanomaterials have no known health risks. There *is* record evidence that
14 they may. *Id.* CEQA requires the agency to “find out and disclose all that it reasonably can;” agencies
15 may dismiss impacts as speculative only “after thorough investigation.” Guidelines §§ 15144, 15155.
16 “CEQA does not require scientific certainty before an issue requires study.” *Planning and Conservation*
17 *League v. Department of Water Res.* (2000) 83 Cal.App.4th 892, 915. Here, the Regents failed to conduct
18 a thorough investigation about nanomaterials’ health risks and failed to disclose *anything* about them.

19 The EIR’s excuses for this omission fail. It omits a “detailed discussion about” the health impacts
20 of “nanomaterial related exposures” because such impacts are supposedly “speculative” and therefore
21 “outside the scope of . . . analysis.”⁶ AR 2282. The EIR claims that no impacts will result since “it is not
22 reasonably foreseeable that airborne nanomaterials would be released from the SERC facility” because
23 certain air filtration methods are 100% effective. AR 2280-86. Even accepting that such filters never fail
24 *on their own*, the EIR ignores the possibility – noted by public commenters – that nanomaterials could be
25 released in an earthquake, landslide, wildfire, or other natural or operator-induced disaster. Under

26
27 ⁶ The EIR wholly ignores the cumulative health hazards of nanomaterials, despite the fact that
28 the nearby Molecular Foundry uses large quantities of nanomaterials. As stated by the public,
“unbound nanomaterials are being released into the environment” at the Molecular Foundry. AR
21986. CEQA requires analysis of cumulative impacts. Guidelines § 15065(a)(3).

1 CEQA, the EIR should have acknowledged the risks posed by such accidental releases and described any
2 uncertainty about what health effects could result. Yet the Regents made no attempt to quantify or
3 estimate the risks posed by such calamities. Absent documented “assurance” that structural damage in
4 an earthquake or other disaster could not possibly occur – an “assurance” the EIR pointedly *declines* to
5 provide (AR 1779) – the Regents’ conclusion that no releases of nanomaterials could possibly occur is
6 devoid of record support. The health hazards of released nanomaterials are real – if somewhat uncertain
7 – and should have been discussed.

8 By failing to discuss the health impacts of nanomaterials, and by making statements dismissing
9 those impacts that are demonstrably misleading *at best*, the Regents violated CEQA.

10 **B. THE EIR UNLAWFULLY DEFERS THE FORMULATION OF MITIGATION**
11 **MEASURES.**

12 The EIR heavily relies upon to-be-developed measures to mitigate the Project’s soil and
13 groundwater impacts. But “requir[ing] . . . the . . . adopt[ion of] mitigation measures recommended in a
14 future study is in direct conflict with the guidelines implementing CEQA.” *Sundstrom v. County of*
15 *Mendocino* (1988) 202 Cal.App.3d 296, 306. Mitigation measures may *only* be deferred if the agency (1)
16 “recognize[s] the significance of the potential environmental effects, [2] commit[s] itself to mitigating
17 their impact, and [3] articulate[s] specific performance criteria.” *Gentry v. City of Murrieta* (1995) 36
18 Cal.App.4th 1359, 1395; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th
19 777, 793; *Sacramento Old City Ass’n v. City Council* (1991), 229 Cal.App.3d 1011, 1028 (“SOCA”).
20 Deferred mitigation is limited to the “kinds of impacts for which mitigation is known to be feasible, but
21 where practical considerations prohibit devising such measures early in the planning process (*e.g.*, at the
22 general plan amendment or rezone stage).” *SOCA*, 229 Cal.App.3d at 1029. The formulation of
23 mitigation measures may not be deferred unless the EIR *itself* “demonstrate[s] that mitigation is feasible.”
24 *League to Save Lake Tahoe v. Tahoe Regional Planning Agency* (“Lake Tahoe”) (E.D.Cal. 2010) 739
25 F.Supp.2d 1260, 1285 (applying CEQA), and cases cited therein.

26 The Regents’ EIR is replete with deferred and unknown mitigations. AR 1844, 1866-67
27 (contaminated groundwater would be “treated as necessary” using “one of several options” that are not
28 specified; “[t]herefore, there would be no impact related to encountering contaminated groundwater”);

1 1780-81 (no erosion impacts because unknown best management practices will be implemented and a
2 future project-specific Stormwater Pollution Prevention Plan [“SWPPP”] will include erosion control
3 measures); 1867 (“impact[s] to surface and groundwater quality would be below the level of significance
4 with required development and implementation of a SWPPP”). By excluding these mitigations from the
5 EIR, and thereby hiding critical elements of the Project from public view, CEQA’s informational purpose
6 was unlawfully thwarted. *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818,
7 829 (EIR did not serve CEQA’s informational purpose and was thus inadequate).

8 An essential component of the Project are the changes to the system used to manage the site’s
9 contaminated groundwater. LBNL has a long history of groundwater pollution, including chemical and
10 radioactive contamination, and polluted groundwater can migrate to the surface during seismic events.
11 AR 21455-62, 21475-76 (expert report titled “Contaminant Plumes of [LBNL]”). Yet the EIR fails to
12 describe the management system, stating instead that changes requiring additional study are subject to
13 approval by the Department of Toxic Substances Control. AR 2295. This violates CEQA. The Regents
14 does not explain why “practical considerations prohibit[ed]” it from designing the treatment system – at
15 least to *some* extent – and including *some* details in the EIR (*SOCA*, 229 Cal.App.3d at 1029). There is
16 *no* record evidence that “demonstrates that mitigation is feasible”⁷ (*Lake Tahoe*, 739 F.Supp.2d at 1285).
17 The Regents has *not* “articulate[d] specific performance criteria” such as particular groundwater quality
18 standards (*Gentry*, 36 Cal.App.4th at 1395).

19 Similarly, the Regents finds that the Project will not cause any erosion because unknown
20 mitigation measures will be implemented. AR 1780-81. The Regents does not explain why the EIR
21 could not have included erosion control measures so as to allow the public to comment on their efficacy.
22 Nor is there any evidence that erosion will in fact be controlled, and no performance criteria were
23 provided.

24 The public requested more details about the contaminant system – as is their CEQA right – but
25 without mitigation measures, the Regents could not respond. *Compare* AR 2209 (comment CMTW-3:
26

27 ⁷ AR 2206-07 (East Bay Municipal Utility District noting the absence of a “specific remedial
28 plan” for contaminated groundwater and noting that no “documentation of the effectiveness of the
remediation ha[d yet] been received and reviewed”).

1 “Will in-situ soil flushing continue? Where, exactly, in reference to the SERC building? Will there be a
2 pump-and-treat operation going on in the SERC basement?”) *with* AR 2295 (response: “The final design
3 of the modified system will depend upon results of below ground investigation results. . .”).

4 While the Regents may rely on *SOCA*, the first case to uphold a deferred mitigation plan, that case
5 and its progeny are distinguishable. 229 Cal.App.3d at 1026-30. There, the agency clearly acknowledged
6 that parking issues “ha[d] the potential . . . of causing serious environmental problems,” “the EIR offered
7 seven distinct types of alternative[parking demand management measures] to be studied, analyzed, and
8 possibly” implemented, and the EIR’s discussion of these measures was “extensive.” *Id.* at 1028, 1030.
9 Here, as discussed, the Regents disclaims any groundwater or erosion impacts, no specific mitigations are
10 identified, and mitigation plans are described only cursorily.

11 By unlawfully deferring the formulation of mitigation measures, the Regents violated CEQA.

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

13 CEQA has a “substantive mandate that public agencies refrain from approving projects for which
14 there are feasible alternatives or mitigation measures.” *Mountain Lion Foundation v. Fish and Game*
15 *Commission* (1997) 16 Cal.4th 105, 134; PRC 21002, 21081. “The range of potential alternatives to the
16 proposed project shall include those that could feasibly accomplish most of the basic objectives of the
17 project and could avoid or substantially lessen one or more of the significant effects.” Guidelines §
18 15126.6(c). Alternatives may be eliminated from detailed consideration based upon the alternative’s “(i)
19 failure to meet most of the basic project objectives, (ii) infeasibility, or (iii) inability to avoid significant
20 environmental impacts.” *Id.* Here, the Regents unlawfully rejected numerous alternatives that would
21 meet the Project’s objectives and mitigate its impacts. For example, the Regents declined to even study
22 the suggested Fremont, Alameda, and Walnut Creek locations for the Project (AR 2288-89), yet no record
23 evidence shows that such alternatives are infeasible, and an alternate site would reduce the Project’s
24 seismic impacts by not subjecting additional workers to the extraordinarily high seismic hazards present
25 at LBNL. By declining to study or rejecting feasible alternatives that would meet most of the basic
26 Project objectives and reduce the Project’s potentially significant impacts, the Regents violated CEQA.

27 The Regents may argue that offsite alternatives are infeasible because they do not meet the Project
28 objectives of (1) constructing a facility “in close proximity to the unique user facilities at the LBNL hill

1 site,” (2) “[l]ocat[ing] the SERC facility so as to optimally draw upon . . . LBNL programs and facilities,”
2 (3) “[m]inimiz[ing] travel time between the UC Berkeley campus and the LBNL hill site,” or (4)
3 “[a]void[ing] duplication of facilities.” AR 1662. Each of these four objectives is narrowly drawn to
4 preclude the feasibility of off-site alternatives. Yet CEQA requires consideration of a “reasonable range”
5 of alternatives, as “judged against a rule of reason,” and does not sanction the use of unduly narrow
6 project objectives to restrict the range of feasible alternatives. *Citizens of Goleta Valley v. Board of*
7 *Supervisors* (1990) 52 Cal.3d 553, 565, 566; *City of Santee v. County of San Diego* (as a result of unduly
8 narrow definition of project and its objectives, “the analysis of the project alternatives . . . [wa]s
9 incomplete, and, therefore, inadequate”); Guidelines § 15126.6(a).

10 The Regents’ unlawful use of narrow project objectives is particularly unwarranted in light of the
11 fact that LBNL recently proposed to add a second campus, likely at the Richmond Field Station (“RFS”),
12 which it *rejected* as an off-site location here. AR 21957 (second campus), 1955-1961 (EIR discussion of
13 RFS). This new campus would include nearly 500,000 square feet of office and laboratory space, enough
14 to fit 12 SERC buildings. AR 21957, 1674 (SERC is 40,000 square feet). SERC could be a “prime
15 anchor facilit[y]” for this new development. AR 21977.

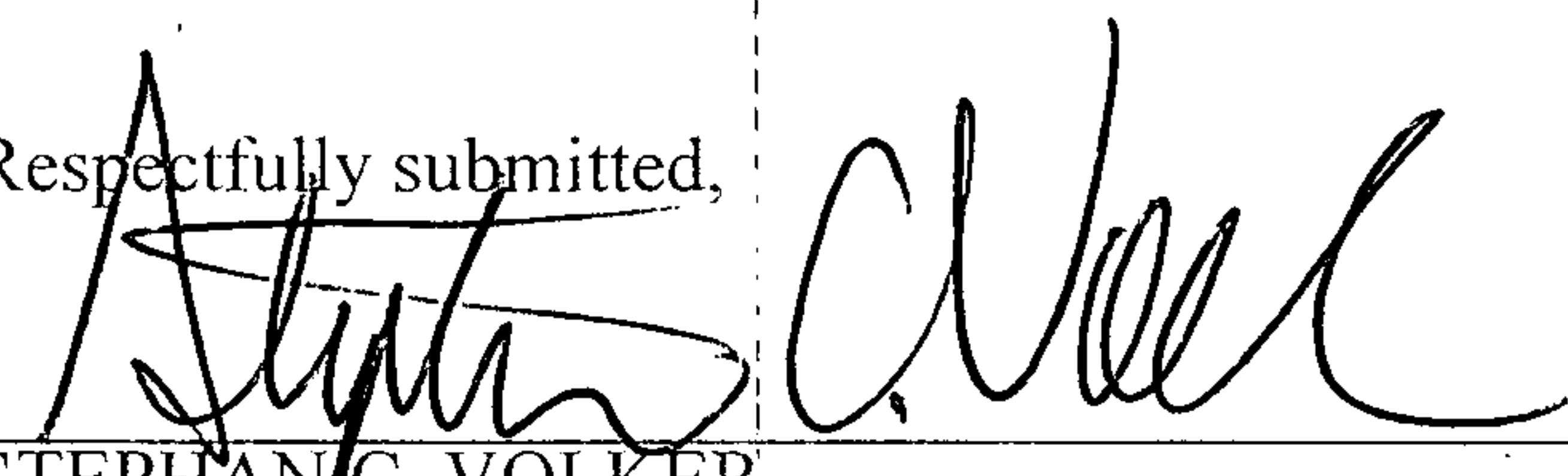
16 The Regents rejected alternative after alternative as not meeting its overly strict location-based
17 objectives. *See* AR 1950, 1956, 1962, 2287-88. By restricting alternatives to those located at LBNL via
18 the above-quoted objectives of locating the Project at LBNL, and by thereby precluding an analysis of a
19 reasonable range of alternatives, including feasible off-site alternatives, the Regents violated CEQA.

20 VI. CONCLUSION

21 For the foregoing reasons the Regents’ approval of the SERC Project violates CEQA and should
22 be set aside.

23 Dated: June 15, 2011

Respectfully submitted,

24 
25 _____
26 STEPHAN C. VOLKER
27 Attorneys for Petitioner and Plaintiff
28 SAVE STRAWBERRY CANYON

1 **PROOF OF SERVICE**

2 I am a resident of the United States and of the State of California. I am employed in the County of
3 Alameda. My business address is 436 - 14th Street, Suite 1300, Oakland, California 94612. My business
4 telephone number is (510) 496-0600, and fax number is (510) 496-1366. I am over the age of eighteen
5 years. I am not a party to the within action or proceeding. On June __, 2011, I served the following
6 document:

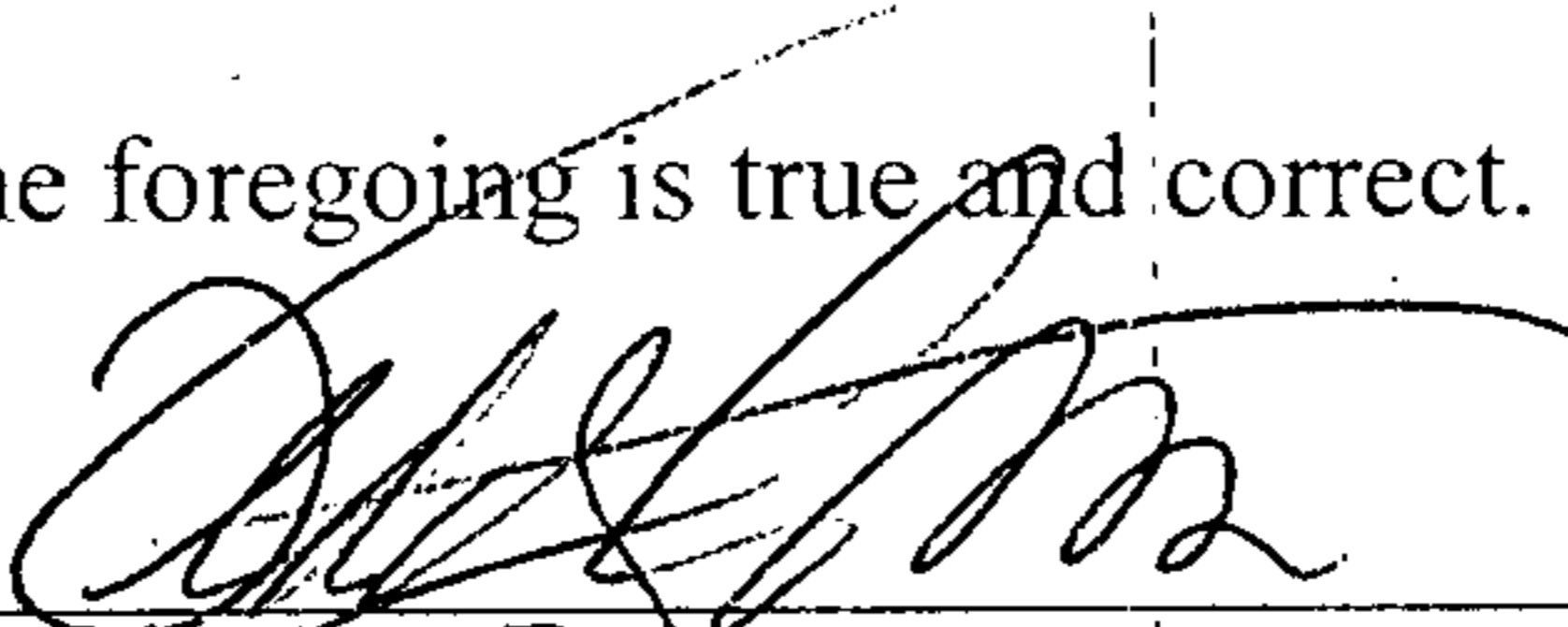
7 **PETITIONER'S OPENING TRIAL BRIEF**

8 in the above-captioned matter on each of the persons listed below by electronic facsimile transmission
9 and by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in the United
10 States mail at Oakland, California, addressed as follows:

11 Charles F. Robinson
12 Nancy M. Ware
13 The Regents of the University of California
14 Office of General Counsel
15 1111 Franklin Street, 8th Floor
16 Oakland, CA 94607
17 Fax: (510) 987-9757
18 Tel: (510) 897-9765

19 Amrit S. Kulkarni
20 Julia L. Bond
21 Meyers, Nave, Riback, Silver & Wilson
22 555 12th Street, Suite 1500
23 Oakland, CA 94607
24 Fax: (510) 444-1108
25 Tel: (510) 808-2000

26 I certify under penalty of perjury that the foregoing is true and correct. Executed on June __,
27 2011, at Oakland, California.

28 
Teddy Ann Fuss