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**FILED**  
ALAMEDA COUNTY

JUL 19 2011

CLERK OF THE SUPERIOR COURT

By Donna Curo Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF ALAMEDA

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

Petitioner and Plaintiff,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, an agency of the State of California, and DOES 1-L,

Respondents and Defendants, and

DOES L1-C,

Real Parties in Interest.

RG10531315

ORDER AND DECISION ON PETITION FOR WRIT

**I. PROCEDURAL BACKGROUND**

The Regents of the University of California (Regents) certified an Environmental Impact Report (EIR) on July 13th, 2010, approving the Seismic Life Safety, Modernization, and Replacement of General Purpose Buildings, Phase 2 Project to provide "seismically safe facilities for scientific research." (AR 94, 1693<sup>1</sup>; the Project.) Petitioner filed its writ challenging the EIR's approval on August 16, 2010, arguing that

<sup>1</sup> All references to AR are to the certified administrative record in these proceedings.

the Regents violated the California Environmental Quality Act (CEQA). The record was certified on November 29, 2010 and lodged December 6, 2010. Trial was originally set on April 18, 2011 but was continued at the parties' request to June 6, 2011. At the trial on June 6, 2011, the parties agreed orally to submit the issues on the pleadings and the court took the matter under submission on June 7, 2011 when their written stipulation to do so was filed.

## **II. FACTUAL BACKGROUND**

The Project is to be built at the Lawrence Berkeley National Laboratory, a 200-acre site owned by the University of California, and located adjacent to the University of California, Berkeley campus. (AR 102, 112.) The laboratory is a federally funded research and development center, operated by the University of California under contract with the United States Department of Energy. (AR 112.) The Hayward fault runs on the northwest edge of the laboratory, and the San Andreas fault zone is 19 miles southwest. (AR 272.) The estimated ground shaking that would result from an earthquake on the Hayward fault is anticipated to be "violent or very violent" at the laboratory site, and anticipated to be "strong" from earthquakes that may occur on other faults in the region. (AR 272.)

The 2006 Berkeley Lab Long Range Development Plan (LRDP) is the framework used by the Regents in the review of projects to be undertaken at the laboratory site. Any "major project with the potential to affect the physical environment will be assessed within th[e] framework . . . of this LRDP's EIR to determine the appropriate level of

CEQA review." (AR 4785.) An EIR was certified by the Regents when the LRDP was approved, and has subsequently been upheld by the First District Court of Appeal. (*Jones v. The Regents of The University of California* (2010) 183 Cal.App.4th 818.)

The LRDP stated "over half" of the buildings at the laboratory site required either rehabilitation or replacement in order to be seismically safe. (AR 4804, 4805.) The Project, in furtherance of the LRDP, seeks to demolish 43,000 gross square feet of on-site structures deemed seismically unfit by the laboratory, pursuant to standards set forth by the University of California's policy on seismic safety. (AR 102, 112.) Included in the demolition are Buildings 25/25B, Building 55, and a series of modular trailers associated with Building 71. (AR 102.) The buildings to be demolished have been used by the laboratory for storage, waste treatment, office space, and a chemistry laboratory, respectively. (AR 118, 119.) Following demolition, a single seismically safe new facility, the General Purpose Laboratory (GPL), of roughly equivalent size in gross square feet to the demolished structures, would be constructed on the current site of buildings 25/25B. (AR 102.) The GPL would house office space and chemistry laboratories. (AR 121.) In addition to construction of the GPL, a seismic upgrade on Buildings 85, 85A and 85B, known collectively as the Hazardous Waste Handling Facility (HWHF), which store radioactive and non-radioactive waste on-site, would be performed to further enforce those buildings in the event of an earthquake. (AR 128.)

The draft EIR for the Project was made available for review for a 45-day period. A public hearing was held following the close of the review period on January 14, 2009. (AR 1325.) Oral and written comments were received on the draft EIR that included comments about danger to the aesthetics of the area, the susceptibility of landslides

around the HWHF site, and assertions that the laboratory had contaminated surrounding soil and groundwater in the past. (AR 1325, 1326.) The draft EIR included discussion of the original estimate that 100 part-time and full-time additional occupants would relocate to the laboratory site. (AR 126.) In response to space concerns, that number was reduced in the final EIR to 30 relocated researchers, some of whom work on-site. (AR 1325.)

### **III. POTENTIAL SIGNIFICANT EFFECTS ON THE ENVIRONMENT**

An EIR must address a proposed project's "significant effect on the environment," described in section 15382 of the Guidelines as "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project." (Cal. Pub. Res. Code § 21068; Cal. Code Regs. tit. 14, or Guidelines, § 15382.)

Petitioner argues that following completion of the Project, the addition of 30 new employees would result in a significant effect on the environment. In making this argument, petitioner relies on section 15126.2(a) of the Guidelines, which provides that "an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision." (Cal. Code Regs. tit. 14, § 15126.2.) The court does not find that section 15126.2(a) applies to the facts in this case. Section 15126(a) refers to new development, whereas the Project would replace portions of an existing development, demolish and update buildings that have been ranked seismically poor, and bring those structures up to current seismic standards.

Although the EIR determined that adding employees on the laboratory site had the potential to expose a greater number of people to the risk that may occur as a result of an earthquake, that risk was deemed less than significant.<sup>2</sup> In part that finding was premised on applicability of the California Building Code, compliance with which is intended to insure seismic safety "to the maximum extent feasible." (AR 287.) Feasibility is "determined by weighing [1] the practicability and cost of protective measures against [2] the gravity and probability of injury resulting from a seismic occurrence." (AR 2386.)

Petitioner argues that the Regents did not adequately mitigate seismic risks by citing its duty to comply with the building code alone. The court finds petitioner's argument inconsistent with the decision in *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 1, 912, 916-933. In *Tracy First*, the city council approved an EIR to build a large supermarket, and petitioners argued the city had abused its discretion in claiming to have mitigated environmental risks by relying on future compliance with the California Building Energy Efficient Standard. The Court of Appeal held that reliance on state building standards was sufficient under the facts of the case. (*Tracy First, supra*, 177 Cal.App.4th at 933; Pub. Resources Code, § 21100, subd. (b)(3).)

Petitioner argues that the present case is distinguishable from *Tracy First* because the Court of Appeal opinion states that, "other than arguing that reliance on the building standards is not enough, *Tracy First* makes no argument concerning what more the EIR should have done." (*Tracy First, supra*, 177 Cal.App.4th at 934.) Petitioner

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<sup>2</sup> It is unclear whether all, some, or none of the additional employees would relocate from buildings and sites that present greater risk to their safety from seismic hazards.

argues that by pointing out the potential addition of 30 employees, they have provided the "what more" the EIR could have done, and by doing so have made the analysis in *Tracy First* inapplicable. This argument is not persuasive. There is no evidence that any risk related to the seismic and soil conditions of the land would be increased by the 30 additional employees. Indeed, there is evidence in the EIR that the Project would decrease the risk of instability from underlying landslide deposits that would occur following an earthquake. (AR 286.) The EIR also includes findings based on studies included in the EIR that, beyond compliance with the building code's geotechnical parameters, the risk of serious impact following a landslide is less than significant. (AR 274, 275.)

Finally, the court notes that a significant effect on the environment is defined as an "adverse change." (Cal. Code Regs. tit. 14, § 15382.) It does not follow that upgrading the seismic safety and stability of the buildings in which employees work would make the work environment *less safe*, even if 30 additional employees were to relocate to those buildings from other laboratory structures free of seismic danger.<sup>3</sup> (AR 1325.)

#### **IV. IMPACT FROM POTENTIAL INTENTIONALLY DESTRUCTIVE ACTS**

Petitioner argues the EIR fails to adequately analyze the risks of an intentional destructive act on the laboratory due its proximity to residential areas and its storage of radioactive and hazardous materials. This argument is not persuasive. First, it is not

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<sup>3</sup> If there are such work structures in the San Francisco Bay Area.

supported by the statutory language of CEQA, which does not require that an EIR analyze such threats. The EIR must include an analysis of the "health and safety problems caused by the physical changes" of a project. (Cal. Code Regs. tit. 14, § 15126.2.) In compliance with this requirement, the EIR analyzed emergency response and evacuation plans, fire service, and delivery of police services and found no adverse impacts. (AR 345, 429, 433.) The final EIR responded to comments regarding terrorist threats, and found that, "no specific information or concerns regarding potential terrorist or criminal acts directed at the project in particular or the UC LBNL in general have been identified," and, "a projection about the potential for 'intentionally destructive acts' at LBNL would be speculative and also outside the scope of the Seismic Phase 2 EIR." (AR 1608.)

Petitioner argues that even if the Regents did not have specific knowledge that the laboratory could be a target for a terrorist attack, the Regents still should not ignore the possibility that one may occur, and should assess the risk accordingly, citing *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344. In *Berkeley Keep Jets*, the Court of Appeal ruled that the Board of Port Commissioners of the City of Oakland failed to adequately analyze the health risks associated with toxic air contaminants when certifying an EIR for an expansion of the Oakland International Airport. (*Berkeley Keep Jets, supra*, at 1366.) Petitioner argues that the Regents, like the board in *Berkeley Keep Jets*, must "do the necessary work to educate itself about the different methodologies that are available" before deciding not to assess the risks of a terrorist attack. (*Berkeley Keep Jets, supra*, at 1370.)

The court finds this case distinguishable from *Berkeley Keep Jets*. Most important, the level of evidence that was presented to the board before it certified the EIR in *Berkeley Keep Jets* included numerous studies and "voluminous documentary evidence . . . [that existed] which would enable the Port to conduct a health risk assessment." (*Berkeley Keep Jets, supra*, at 1368.) There is nothing in this record to suggest that the Regents have been presented any evidence that the laboratory has been, or will be, a target for a terrorist act, or that the Regents has chosen to ignore any particular available methodologies for assessing that risk.

The petitioner argues further that its position on this issue is supported by the decision in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission* (9th Cir. 2006, 449 F.43 1016). The court does not find *San Luis Obispo* applicable to the facts in this case. In *San Luis Obispo*, the court held that the Nuclear Regulatory Commission's decision to grant a license for a new storage installation to be built and filled with radioactive waste at a power plant would result in a change in the physical environment, and that regardless of how remote the possibility of a terrorist attack may be, it was not beyond NEPA's requirements. (*San Luis Obispo, supra*, 449 F.43 at 1031.) The Ninth Circuit reasoned that "the presence of the Storage Installation would increase the probability of a terrorist attack on the Diablo Canyon nuclear facility" and therefore needed to be factored into the analysis of safety measures. (*San Luis Obispo, supra*, 449 F.43 at 1020.) At the laboratory site, there is no evidence of hazardous waste that will be present as a result of the Project, and therefore no change in the safety measures that have already been undertaken need be analyzed or addressed. Further, there is no evidence that the construction activity would increase the risk of an

intentionally destructive act, and there is therefore no need to analyze a speculative terrorist attack.

## V. PROJECT'S EXTENSION OF THE HAZARDOUS WASTE HANDLING FACILITY

Petitioner argues that the EIR's failure to consider the physical impacts seismic strengthening would have on extending the life of building 85/85A, the HWHF, violates CEQA. Guidelines section 15126.2(a) provides that "an EIR shall identify and focus on the significant environmental effects of the *proposed project*." (Cal. Code Regs. tit. 14 § 15126.2.) (Emphasis added.) The California Supreme Court has held that, "under CEQA, the range of alternatives that an EIR must study in detail is defined in relation to the adverse environmental impacts of the proposed project . . . the project's environmental effects, in turn, are determined by comparison with the existing 'baseline physical conditions.'" (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1167.) The baseline setting is determined by the "physical environmental conditions . . . as they exist at the time the notice of preparation is published." (Cal Code Regs. tit. 14 § 15125.) In the present case, the Project goal for the HWHF is to seismically strengthen the facility, and the EIR explicitly states that, "the proposed upgrade does not change the operation of the building or extend its intended life." (AR 128.) Petitioner's arguments to the contrary are without evidentiary support.

## VI. DEFERRAL OF MITIGATION MEASURES IN THE EIR

### A. *Exhaustion Requirement*

California Public Resource Code section 21177(a) provides that "an action or proceeding shall not be brought [under CEQA] . . . unless the alleged grounds for noncompliance . . . were presented to the public agency orally or in writing by any person during the public comment period . . . before the issuance of the notice of determination."(Cal. Pub. Res. Code § 21177.) Petitioner must show specific, demonstrable examples in the record that it presented the issue of improperly deferred mitigation to the Regents to raise the issue in this litigation. The Court of Appeal has held that "it is axiomatic that judicial review is precluded unless the issue was first presented in the administrative level," regardless of whether the plaintiffs knew the timeframe for raising such arguments or whether or not the party is a public interest group. (*Res. Def. Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894-95.)

Petitioner points to three examples in the record to establish that it has met this exhaustion requirement with regard to the claims of improperly deferred mitigation. Two are excerpts from letters by the Committee to Minimize Toxic Waste (Committee) and one is from a letter written by petitioner. The first letter from the Committee is dated January 26, 2009, and states that "it will be impossible to adequately analyze the environmental impacts" of the 17 proposed components of the Project, including the HWHF's location on an earthquake fault. (AR 1447-1455.) The second letter from the Committee is dated March 14, 2010, and details the failure of the draft EIR to

adequately describe potential legacy chemical and radioactive contamination on the laboratory site resulting from active use over the last 70 years. (AR 1384.) Finally, in the letter submitted by petitioner, the petitioner argues that the draft EIR underestimates seismic impacts with insufficient mitigation from a "below-grade system of pier foundations and tiebacks." (AR 1469.)

The court is not persuaded by petitioner's argument that the exhaustion requirement has been met by any of these three letters. None of these comments can fairly be read to assert that mitigation of environmental impacts is improperly being deferred. The agency to which claims are directed during the public comment period must be given specific notice so the agency has an opportunity and time to adequately respond. (*Evans v. City of San Jose (2005)* 128 Cal.App.4th 1123, 1139-40.) Petitioner offers no citation to a comment in the record that meets this requirement with regard to an improper deferral of measures to mitigate potential significant environmental impacts. Petitioner is thus barred from raising these issues in this action.

Notwithstanding its finding that petitioner has failed to exhaust its administrative remedies in connection with its argument that the Regents is improperly deferring measures to mitigate adverse environmental impacts of the Project, the court addresses the substance of the petitioner's arguments on this issue.

B. *Failure to Address Destabilization of Slopes and Soil During Construction*

CEQA does not require mitigation of insignificant environmental risks of a proposed project. (*Leonoff v. Monterey County Bd. of Supervisors (1990)* 222 Cal. App.3d 1337, 1347.) The EIR for this Project concludes that the environmental impacts

of the project are insignificant. (AR 278.) Petitioner disagrees with this conclusion and argues that the potential mobilization of slopes and soil during Project construction pose substantial known risks that the EIR fails to assess, and subsequently, mitigate.

The EIR includes geotechnical reports detailing the environmental impact of the proposed construction of the Project, and experts' conclusions that there will be no increased susceptibility to landslides from either the demolition of Building 25 or the construction of the GPL. (AR 283.) Petitioner misinterprets the geotechnical investigation report by Alan Kropp & Associates and argues that the report finds the GPL is incapable of supporting future foundational loads. Instead, the study concludes that "the GPL building can be supported on conventional spread footing foundations." (AR 10733.) Further, petitioner does not offer any expert testimony to counter the EIR's conclusion that the risks of soil and slope destabilization are insignificant. Without doing so, the Regents is not required to further analyze the risks of soil and slope destabilization or to provide mitigation for any such risks.

C. *Failure to Address Hydrology and Water Quality Impacts*

Petitioner argues that the EIR fails to properly evaluate mitigation measures to address hydrology and water quality impacts from construction of the Project.

The EIR discusses in detail the federal regulations for construction projects that will disturb more than one acre of land to address the potential of degrading surrounding water quality and the fact that the Regents will be required to meet these regulations for the construction of the Project. (AR 373.) Under the Environmental Protection Agency's National Pollutant Discharge Elimination Systems permit (elimination systems

permit), all of the project's construction must be in accordance with the construction general permit (general permit) (Order No. 2009-0009-DWQ, NPDES No. CAR000002), overseen by the San Francisco Regional Water Quality Control Board (San Francisco Board). AR 372-374. This general permit includes an individually tailored Stormwater Pollution Prevention Plan (SWPPP) for the Project that must be maintained on site and be made available to the San Francisco Board upon request. (AR 373.) The amended general permit that would apply (because construction would occur after July 1, 2010) includes a number of additional obligations for the SWPPP, including requirements "previously only suggested ...[for] effluent monitoring and reporting, receiving water monitoring and reporting, post-construction stormwater performance standards, and annual reporting," among others. (AR 374.)

The holding in *Tracy First, supra*, applies to petitioner's arguments concerning impacts on the site's hydrology and water quality, as it did to petitioner's arguments concerning seismic safety, discussed previously in this ruling. (*Tracy First, supra*, 177 Cal.App.4th, at 933-34.) The SWPPP is designed to reduce potential construction-related pollutants that may affect surface water quality by imposing a number of measures that must be implemented during construction to reduce potential impacts. (AR 373.) Beyond compliance with SWPPP requirements, Resolution no. 2001-046 of the State Water Resources Control Board requires the Regents to monitor pollutants not visibly detectable during construction of the Project. In addition, the 2006 LBNL soil management plan requires that excavated soil suspected of being contaminated during project demolition and construction be managed in covered bins or other sealed containers, or stockpiled and covered. (AR 373.) As in *Tracy First*, the existing

permits and standards applicable to construction-related hydrology and water quality impacts sufficiently address mitigation of any environmental effects. Petitioner has offered no evidence to the contrary.

## VII. ADEQUACY OF ALTERNATIVE SITE ANALYSIS

CEQA requires an EIR to analyze "a range of potential alternatives to the proposed project . . . that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects." (Cal. Code Regs. tit. 14, § 15126.6(c).) The court finds the EIR meets this requirement by including an analysis of five alternative sites, including two that are off-site: the Richmond field station alternative and the leased space off-site alternative. (AR 500, 501.)

Petitioner argues that its suggestion that an off-site location in Fremont be studied as an alternative site for the Project was improperly dismissed by the Regents. The court finds this argument unpersuasive and inconsistent with *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553. The California Supreme Court held in *Goleta* that a county board of supervisors did not abuse its discretion by approving a resort hotel to be built outside of Santa Barbara by the Hyatt Corporation against a claim that the board had failed to properly undertake an adequate alternatives analysis. (*Goleta, supra*, 52 Cal.3d at 559.) Following the certification of the EIR by the planning commission, petitioners in *Goleta* appealed to the board of supervisors, submitting a list of alternative sites. (*Goleta, supra*, 52 Cal.3d at 561-62.) Similar to the present case,

the alternatives at issue were proposed after the final EIR had been prepared. The California Supreme Court found "the law does not require in-depth review of alternatives which cannot be realistically considered and successfully accomplished," and that the EIR had already considered numerous project alternatives, including an off-site alternative. (*Goleta, supra*, 52 Cal.3d at 573, 575.)

In *Goleta*, although it was undisputed that alternatives may have been more "environmentally preferable . . . in certain respects" for the chosen project site, a myriad of other factors (traffic congestion, air and water quality concerns) made the alternatives inappropriate for development of a visitor-serving commercial development. (*Goleta, supra*, at 561.) In this case, the Regents seeks to "co-locate researchers and graduate students . . . to expand opportunities for instrument sharing and interacting among life scientists," and sought alternatives that would fulfill this project objective. (AR 500.)

The Regents' goal of co-locating researchers to foster a collegial environment for scientific research was upheld in *Jones v. Regents of the University of California, supra*, 183 Cal.App.4th at 818. In *Jones*, the Court of Appeal found a proposed off-site alternative "would prevent the realization of the project's primary objective of creating a more campus-like setting at the hill site." (*Jones, supra*, 183 Cal.App.4th at 827.) Further, *Jones* held that "[an EIR] does not have to identify and analyze alternatives that would not meet a project's objectives nor does it have to discuss every possible permutation of alternatives." (*Jones, supra*, 183 Cal.App.4th at 827.) The court finds that the EIR included an adequate range of alternatives.

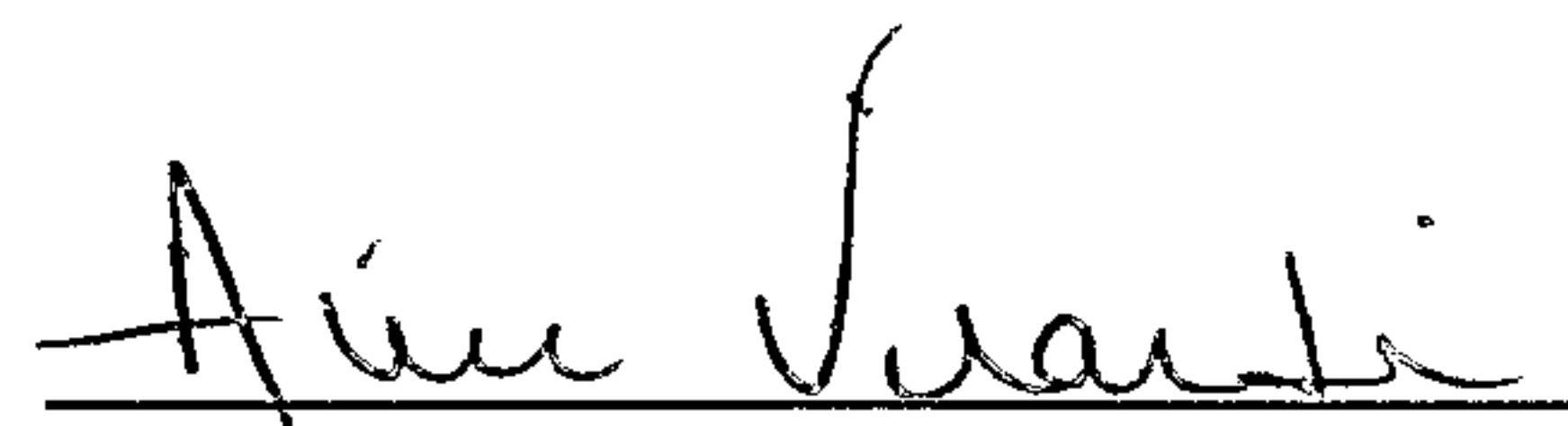
## VIII. CONCLUSION

The court denies petitioner's request to overturn the Regents' approval of the EIR for the Project. The EIR adequately analyzed the potential significant effects on the environment in compliance with CEQA and the Guidelines. The court finds that reliance on state building standards is appropriate under CEQA to mitigate seismic risks of the Project. The omission of an analysis of speculative terrorist threats does not render the EIR inadequate. Petitioner's contention that the project extends the life of the HWHF is inconsistent with the stated project goal to seismically strengthen the HWHF rather than to extend its life. The court finds that petitioner is barred from bringing claims regarding the respondents' alleged deferral of mitigation measures in the EIR because it failed to exhaust its administrative remedies as required by section 21177 of the California Public Resource Code. The court further finds that the claims of failure to address destabilization of slopes and soil, and hydrology and water quality impacts, also fail on their merits. Finally, the court finds that the Regents considered an appropriate range of potential alternatives to the project.

The petition is denied in its entirety. Counsel for the Regents shall prepare a proposed form of judgment, which shall be submitted directly to department 707.

It is so ordered.

Dated: July 19, 2011



Judge of the Superior Court

## CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk of the Alameda County Superior Court and not a party to this cause. I served this **Order** by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

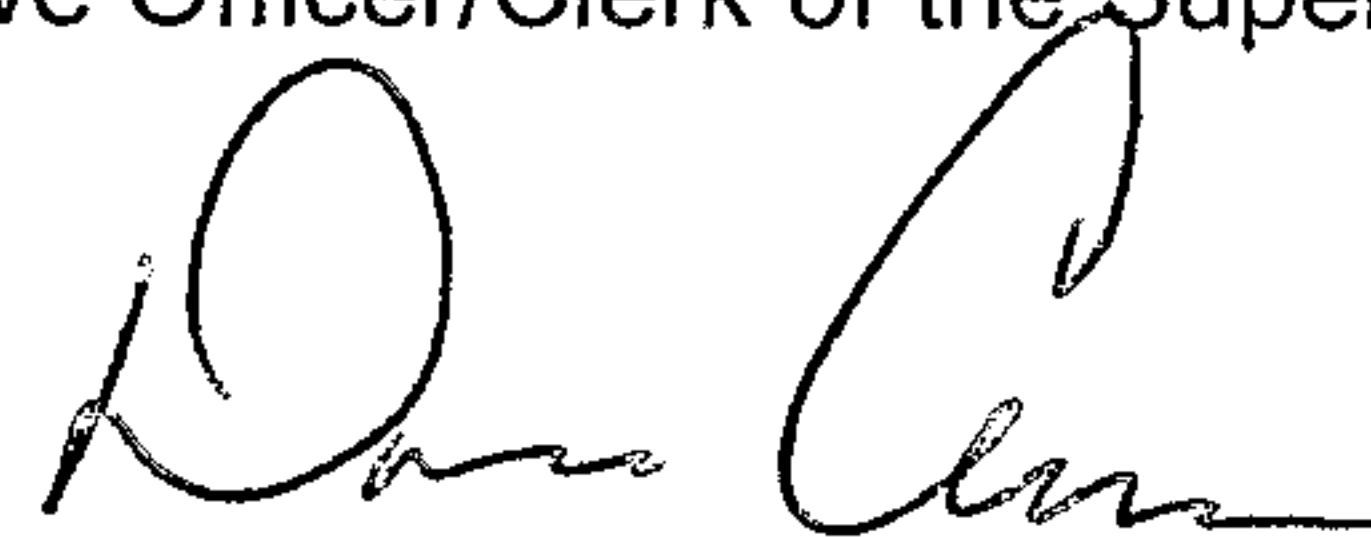
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Executive Officer/Clerk of the Superior Court

By



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