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

10 SAVE STRAWBERRY CANYON, a non-profit 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: September 2, 2011
) Hearing Time: 9:00 a.m.

) Dept: 31
) Judge: Hon. Frank Roesch

) Petition Filed: Feb 22, 2011

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21 **PETITIONER'S REPLY TRIAL BRIEF**
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1 **I. INTRODUCTION**

2 Petitioner Save Strawberry Canyon (“petitioner”) submits its Reply Trial Brief in this action to
3 overturn respondent Regents of the University of California’s (collectively, the “Regents”) unlawful
4 approval of the Solar Energy Research Center Project (“SERC” or “Project”) and certification of its
5 Environmental Impact Report (“EIR”). As shown in petitioner’s Opening Trial Brief (“OTB”), the
6 Regents’ approval of the Project violated the California Environmental Quality Act (“CEQA”), Public
7 Resources Code (“PRC”)¹ section 21000 *et seq.*, in four ways. The Regents misrepresent petitioner’s
8 arguments and the record to advance their untenable claims to the contrary.

9 First, the Regents’ EIR omits any discussion of the magnitude of seismic hazards faced by the
10 Project’s employees, who would be newly relocated to the Project’s unstable hillside location at
11 Lawrence Berkeley National Laboratory (“LBNL”). Second, the Regents’ EIR fails to acknowledge the
12 scientific uncertainty surrounding the safety of the Project’s use of nanomaterials and wrongly implies
13 that scientists are unconcerned with the health impacts of nanomaterials. By ignoring these crucial
14 aspects of the Project’s impacts, the Regents’ EIR failed in its informational role. Third, the Regents’
15 EIR unlawfully defers the formulation of mitigation measures, thereby preventing the public from
16 reviewing and commenting upon the same. Fourth, the Regents’ EIR fails to consider a reasonable range
17 of feasible alternatives, due to the EIR’s unlawfully narrow Project objectives.

18 **II. STANDARD OF REVIEW**

19 This Court reviews the Regents’ actions for abuse of discretion. § 21168. “Abuse of discretion is
20 established if the [Regents] ha[ve] not proceeded in the manner required by law, the [Regents’] order or
21 decision is not supported by the findings, or the [Regents’] findings are not supported by the evidence.”
22 *Id.* The Regents assert petitioner’s claims implicate *only* the substantial evidence standard, not the failure
23 to proceed as required by law standard. Regents’ Opposition Brief (“RB”) 3-4. Wrong. Petitioner’s
24 claims present questions of law reviewed *de novo*.

25 Petitioner’s first claim – that the Regents’ EIR fails to adequately describe the Project’s geologic
26 impacts because it fails to ascertain the magnitude of the seismic hazards faced by the Project’s new
27 employees (OTB 6-9) – presents a question of law. The Regents justify the EIR’s omission by arguing

28 ¹ Undesignated references are to the Public Resources Code.

1 that, because the Project will comply with the California Building Code (“CBC”), its seismic impacts are
2 insignificant as a matter of law. RB 5-7. The EIR does *not* attempt to estimate the injuries or loss of life
3 that would occur in the event of an earthquake, and does *not* purport to find such impacts insignificant
4 based upon any such estimation. Instead, it finds that CBC compliance would mitigate seismic impacts
5 without disclosing, estimating, or projecting their magnitude. *See, e.g.*, AR 1779 (“Although it is
6 impossible to provide complete assurance against damage, the building codes are designed to prevent
7 *major . . . loss of life*”) (emphasis added). Whether CEQA demands more specificity is a legal, not
8 factual, question.² Indeed, one of the cases relied upon by the Regents, *Tracy First v. City of Tracy*
9 (2009) 177 Cal.App.4th 912, 931, analyzed a similar question as one of *law*, not fact.

10 Petitioner also showed that the EIR is inadequate because it failed to describe the impacts of the
11 Project’s use of nanomaterials, by ignoring their potential release in the event of an earthquake. OTB 10-
12 12. This claim also presents a question of law. The Regents contend that CEQA did not require the EIR
13 to include such information, arguing, “An EIR is not required to engage in speculation to analyze such a
14 ‘worst case scenario.’” RB 9. To what extent CEQA requires EIRs to disclose the impacts of foreseeable
15 disasters is a question of law. *See* CEQA Guidelines [14 C.C.R; “Guidelines] §§ 15064(d)(3), 15144.

16 Next, the question of whether the EIR unlawfully defers the formulation of mitigation measures,
17 thereby depriving the public of an opportunity to review and comment upon the same, is also a question
18 of law. OTB 12-14. The EIR relies upon various Long Range Development Plan (“LRDP”) EIR³
19 mitigation measures to mitigate the Project’s impacts. *E.g.*, AR 1839 (“the level of impact reflects
20 project outcomes with all applicable LRDP mitigation measures in place”). But as set forth in
21 petitioner’s OTB, the EIR does not specify the content of many of these mitigation measures. Whether a
22 second-tier EIR – which is supposed to contain site-specific detail (Guidelines § 15152(c)) – may rely on
23 mitigation measures whose substance is deferred until later is also a question of law, not fact.

24 ² Contrary to the Regents’ claims, the underlying question of whether an EIR that omits essential analysis
25 nonetheless satisfies CEQA is one of law, not fact. *Association of Irrigated Residents v. County of*
26 *Madera* (2003) 107 Cal.App.4th 1383, 1392 (“the existence of substantial evidence supporting the
27 agency’s ultimate decision on a disputed issue *is not relevant* when one is assessing a violation of the
information disclosure provisions of CEQA”) (emphasis added).

28 ³ SERC is tiered from the previously approved Long Range Development Plan (“LRDP”). AR 1656-57
(discussing tiering); AR 9815-9923 (LRDP), 27-1648 (LRDP Draft and Final EIRs).

1 Petitioner has also shown that the Regents' EIR violated CEQA by utilizing an unlawfully narrow
2 set of project objectives and thereby skewing the alternatives analysis. OTB 14-15. Petitioner
3 demonstrated that by choosing such narrow objectives, the Regents precluded the study of the "reasonable
4 range" of alternatives required by CEQA. Guidelines § 15125.6(a). Contrary to the Regents' claims,
5 petitioner does *not* argue that an unstudied alternative would best meet the Project objectives as a factual
6 matter. Petitioner's legal claim was left open by *Jones v. UC Regents*. (2010) 183 Cal.App.4th 818, 829
7 ("plaintiffs' challenge to the project objectives is not properly before this court").

8 To the extent substantial evidence questions are presented, petitioner reminds the Court that
9 "[s]ubstantial evidence' is not 'synonymous with "any" evidence. It must be reasonable, credible, and of
10 solid value.'" *Los Angeles County Office of the Dist. Atty. v. Civil Svc. Com.* (1997) 55 Cal.App.4th 187,
11 198-99. "Argument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly
12 erroneous or inaccurate . . . does not constitute substantial evidence." Guidelines § 15384.⁴

13 III. ARGUMENT

14 A. THE EIR FAILS TO FULLY DISCLOSE THE PROJECT'S SIGNIFICANT IMPACTS

15 1. Geology and Soils Impacts

16 a. Seismic-Related Impacts

17 As shown in petitioner's opening brief, the Project will "increase the daily population of" the
18 seismically hazardous "LBNL hill site by about 50 persons." OTB 7-9 (citing AR 1692). The EIR
19 admits that the Project "could expose future facility users to risks associated with structural damage due
20 to seismic groundshaking." AR 1778; *see also* AR 333 (LRDP EIR admitting that groundshaking "could
21 expose people to the risk of injury"). The Project's EIR further admits that "the [P]roject site [i]s subject

22 ⁴ The Regents argue that petitioner's "failure to acknowledge the copious record evidence in support of
23 the EIR's significance determination is fatal to its argument." RB 4. Yet nowhere do the Regents cite
24 any *relevant* evidence supposedly omitted by petitioner. For example, the Regents cite approximately
25 1,800 pages of "seismic guidelines, data and reports" on page 5, in footnote 4. Yet the Regents do not
26 explain the particular relevance of these documents, which include, for example, a 110-year-old scholarly
27 paper. AR 2547-2656. Nor do the Regents – in that footnote or elsewhere – point to anywhere in the
28 record where there is an estimate of potential injury and death in the event of an earthquake at LBNL.
(The *only* estimates cited relate to structural damage, not personal injury.) The parties' dispute concerns
whether such quantification is required, or whether mere compliance with the California Building Code
mitigates such impacts as a matter of law. Petitioner raises narrow *legal* claims and does not seek to bury
this court in an avalanche of irrelevant citations.

1 to violent shaking severity” and that “it is impossible to provide complete assurance against damage” in
2 the event of an earthquake. AR 1769. Yet the EIR wholly fails to quantify or substantiate this risk to
3 Project employees, in violation of CEQA. Instead, the EIR concludes that environmental impacts related
4 to strong seismic ground-shaking are insignificant based on compliance with the California Building
5 Code, the UC Seismic Safety Policy, and a geotechnical investigation’s recommendations. AR 1779.

6 Neither the EIR nor the record contains *any* information whatsoever regarding the impacts of a
7 likely earthquake upon Project employees. Respondents do not and cannot cite any such evidence. *See*
8 RB 4-7.⁵ As shown by petitioner, there is a ten percent chance that the Project will experience an
9 earthquake whose magnitude exceeds design standards during the next 50 years. *See* OTB 8:7-17, citing
10 and explaining AR 323, 3333, 15796, 20185. (The Regents ignore, thereby conceding, this point.) But
11 because the EIR contains no analysis, neither the Regents nor the public have any idea how such an
12 earthquake will affect employees.

13 For the EIR to fulfill its informational function, CEQA requires such an analysis. *Cadiz Land*
14 *Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 92-93; *Kings County Farm Bureau v. City of*
15 *Hanford* (1990) 221 Cal.App.3d 692, 736; Guidelines § 15144 (“an agency must use its best efforts to
16 find out and disclose all that it reasonably can”). Had the EIR attempted to quantify possible injury to
17 employees in the event of an earthquake, the Regents and public could have made an informed decision
18 about the relative costs and benefits of utilizing CBC standards, rather than more stringent design
19 standards, to mitigate that risk of injury. Instead, as the Regents admit, “the EIR did not weigh seismic
20 mitigations for their feasibility.” RB 5 n. 5. Under their own Seismic Safety Policy (“Policy”), the
21 Regents *could not* weigh seismic mitigations for their feasibility without any information about “the
22 gravity and probability of injury resulting from a seismic occurrence.” Petitioner’s Request for Judicial
23

24
25 ⁵ Instead, respondents argue that the EIRs’ use of the Modified Mercalli Intensity Scale (“MMIS”)
26 obviates the need to quantify such impacts. RB 5 n. 5 (citing AR 313-316 (LRDP EIR)). But as shown
27 in the cited pages, the MMIS provides *only* examples of expected *structural* damage, and does *not*
28 include *any* estimate of likely personal injury at the various levels of intensity. As discussed below, the
case relied upon by the Regents is also distinguishable on this ground. The Regents’ other citation (AR
1768) is even farther afield; that page of the SERC EIR quantifies only the *chance* that an earthquake will
occur, not the *risk* to employees if such an earthquake *does* occur.

1 Notice or Alternatively Request to Augment Record, filed June 15, 2011, at 1.⁶

2 The Regents' entire argument rests upon the recent case *Oakland Heritage Alliance v. City of*
3 *Oakland* (2011) 195 Cal.App.4th 884 ("*Oakland Heritage*").⁷ *Oakland Heritage*, while superficially
4 similar to the case at bar, is of limited relevance here, as it addresses *only* seismic impacts to structures
5 and *does not address* seismic impacts to people. *E.g.*, 195 Cal.App.4th at 895 ("the Alliance contends the
6 City violated CEQA by failing to evaluate the risk of seismic damage to structures").⁸ The *Oakland*
7 *Heritage* court concluded that because even petitioner's evidence indicated that structural damage "would
8 be reparable" "even in a major earthquake," the Alliance's argument that the California Building Code is
9 "inadequate to protect structures from the effects of earthquakes" must fail. *Id.* at 905. Here, by contrast,
10 the EIR *admits* that "it is impossible to provide complete assurance against damage" from earthquakes
11 and only promises to mitigate against "*major* structural damage and loss of life." AR 1779 (emphasis
12 added). Additionally, as discussed above, while there is a ten percent chance that the Project will
13 experience an earthquake whose magnitude *exceeds design standards* during the next 50 years, the effects
14 of such an earthquake on people are wholly unknown. Unlike the petitioners in *Oakland Heritage*, who
15 focused their arguments on reparable structures, petitioner here argues that the EIR failed to quantify the
16 *admitted* risk that the Project will kill or maim its workers in the event of an earthquake. Such impacts
17 are *not* "reparable." 195 Cal.App.4th at 905.

18 The Regents' EIR violated CEQA by preventing the Regents and the public from making an
19 informed decision as to the Project's seismic impacts and mitigation measures as discussed above.

20 ⁶ The Regents argue that "[p]etitioner's reasons for citing to th[e Policy] are inscrutable." RB 5 n. 5. The
21 EIR relies upon the Policy in its seismic impacts analysis (AR 1779), but the Regents omitted it from the
22 AR. The Policy is relevant because it shows that the Regents' own policies demand they determine "the
23 gravity and probability of injury" from earthquakes when deciding how to mitigate against such injuries.

24 ⁷ The Regents argue that petitioner "inexplicably ignore[d]" *Oakland Heritage*. RB 5. Petitioner did not
25 cite *Oakland Heritage* because it was not a final decision at the time petitioner filed its opening brief on
26 June 15, 2011. *See* 195 Cal.App.4th at 884 (opinion filed May 19, 2011); *cf.* Cal. Rules of Court §§
27 8.264(b) (opinions final 30 days after filing), 8.264(c) (opinion may be modified until final), 8.500(e)(3)
28 (petition for review by Supreme Court cannot be filed until opinion is final).

⁸ The Regents argue that the *Oakland Heritage* Court actually *did* address impacts to people. RB 6-7.
Wrong. The *only* mention of the word "people" in *Oakland Heritage* arises in the background portion of
the case; the case substantively analyzes only the above-quoted "damage to structures" issue (as well as a
deferred mitigation claim). 195 Cal.App.4th at 889 (summarizing contents of EIR).

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

2 Petitioner has demonstrated that the Regents' site stability analysis is deficient. OTB 9-10. The
3 Regents failed to provide critical geologic studies along with the EIR. Under Guidelines section 15147,

4 [an EIR] *shall include* summarized technical data, maps, plot plans, diagrams, and similar
5 relevant information *sufficient to permit full assessment of significant environmental impacts*
6 *by reviewing agencies and members of the public.* Placement of highly technical and
specialized analysis and data in the body of an EIR should be avoided through *inclusion of*
supporting information and analyses as appendices to the main body of the EIR.

7 Here, the DEIR references "site specific geotechnical studies completed for the [P]roject" but does not
8 describe the studies, summarize their conclusions, or include the studies (or a summary thereof) as an
9 appendix to the EIR. AR 1779; *see* AR 20161-20252 (cited study). The public was thus prevented from
10 reviewing and commenting on the studies as part of the public review process. The Regents try to excuse
11 this deficiency by pointing to a 9-line summary (of nearly 150 pages of reports) in the FEIR. RB 7. But
12 by excluding the studies from the *DEIR*, the Regents prevented public comment upon the studies and
13 their conclusions. This "precluded informed public participation and decision making" and thus violated
14 CEQA. *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal.App.4th 1184, 1221.⁹

15 Additionally, as shown, the Regents violated CEQA by failing to provide the supplemental
16 geologic analysis recommended by unrebutted expert testimony. OTB 9-10.

17 **2. Health and Safety Impacts.**

18 Petitioner has shown that the Regents' EIR fails to adequately examine the environmental risks
19 posed by the Project's use of nanomaterials, in the event of an accidental release. OTB 10-12. The
20 Regents argue that (1) any release is "speculative," so no analysis is required; and (2) in any event, the
21 EIR accurately described existing scientific knowledge about the health effects of nanomaterials. Wrong.

22 First, the Regents cannot avoid their obligation to ascertain the Project's environmental effects by
23 labeling an effect "speculative" and excluding further analysis. The Regents claim CEQA does not
24 require them to analyze the "worst case scenario" of a disaster that occurred while nanomaterials were in
25 use, relying on *Napa Citizens for Honest Gov't v. Napa County Bd. of Sup's* (2001) 91 Cal.App.4th 342,
26 373 ("*Napa Citizens*"). But *Napa Citizens* – concerning whether an EIR needed to address "speculative"

27 _____
28 ⁹ The Regents also rely upon Guidelines section 15148, which allows "citation" of "engineering project
reports and . . . scientific documents." RB 7. Section 15148 does not purport to supersede section 15147.

1 disruptions in future water supply – recognizes that “the [EIR] also cannot simply label the possibility
2 that [future supplies] will not materialize as ‘speculative,’ and decline to address it.” The Regents
3 “should be informed if [a release of nanomaterials is possible], and be informed, in at least general terms,
4 of the environmental consequences of” such a release. *Id.* “While foreseeing the unforeseeable is not
5 possible, an agency must use its best efforts to find out and disclose all that it reasonably can.”
6 Guidelines § 15144. The Regents must at least attempt to ascertain the risk of a release of nanomaterials.

7 The Regents further argue that the EIR conducted such an analysis but nonetheless determined
8 that “exposure to nanomaterials is not reasonably anticipated to occur – even in the worst case,” based on
9 factors like the small volume of nanomaterials and atmospheric dispersion. RB 9. Wrong. The EIR
10 states instead that *if* a release *did* occur, that no “evacuations or other precautions would be expected”
11 because “small volumes” of nanomaterials “would be in use” and, allegedly, “[n]o link has been
12 established between occupational exposure to engineered nanoparticles and adverse health effects.” AR
13 2282. The EIR plainly concluded, not that *no* release *could* occur, but instead that if an allegedly
14 “speculative” release *were* to occur, no adverse health impacts would be anticipated. *Id.* This conclusion
15 is not supported by the record. Again, “[a] body of scientific evidence has accrued . . . suggesting that
16 some nanoscale particles may pose a health concern.” OTB 10-11 (quoting AR 16158). By failing to
17 share *any* of this “body of scientific” record “evidence” with the public, the Regents violated CEQA.¹⁰

18 **B. THE EIR UNLAWFULLY DEFERRED FORMULATION OF MITIGATION**
19 **MEASURES.**

20 The Regents’ EIR heavily relies upon yet-to-be developed mitigation measures to mitigate the
21 Project’s impacts.¹¹ Under CEQA, mitigation measures may *only* be deferred if the agency (1)
22 “recognize[s] the significance of the potential environmental effects, [2] commit[s] itself to mitigating

23 ¹⁰ The EIR’s statement that “no link has been established between occupational exposure to engineered
24 nanoparticles and adverse health effects” is demonstrably misleading in light of this “body of scientific
25 evidence.” AR 2282 (first quote), 16158 (second). The Regents argue that the “no link” quote is an
26 “almost verbatim quote” of the statement, “the real risks from [nano]technology are not known, and the
27 perceived risks are undetermined.” RB 10 (citing AR 16154). Yet the “no link” quote clearly provides
28 the public with the impression that there is no need to be concerned about the safety of nanomaterials –
unlike its “almost verbatim” source, which clearly expresses scientific uncertainty – and gives *no*
indication whatsoever that “nanoscale particles may pose a health concern.” AR 16158.

¹¹ *See, e.g.*, OTB 12:26-13:4 (citing and quoting AR 1780-81, 1844, 1866-67).

1 their impact, and [3] articulate[s] specific performance criteria.” *Gentry v. City of Murrieta* (1995) 36
2 Cal.App.4th 1359, 1395; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th
3 777, 793; *Sacramento Old City Ass’n v. City Council* (1991) 229 Cal.App.3d 1011, 1028. Here, the
4 Regents did *not* recognize the significance of groundwater and erosion impacts, and did *not* commit to
5 any particular performance criteria, so the Regents’ use of deferred mitigation was unlawful.

6 The Regents try to excuse their erosion-related deferred mitigation scheme by arguing that it is not
7 “mitigation,” relying on the fact that no *project-level* mitigation measures were imposed in the EIR.¹² RB
8 10-12. But the Regents ignore the fact that the SERC EIR’s “level of impact reflects project outcomes
9 with all applicable LRDP EIR mitigation measures in place.” AR 1777; *see also* AR 1862-63 (listing
10 possible best practices and mitigation measures that could be imposed “where feasible” to manage
11 runoff). The SERC EIR, a second-tier EIR (AR 1656-57), “must examine in detail site-specific
12 considerations,” including mitigation measures. *In re Bay-Delta PEIR* (2008) 43 Cal.4th 1143, 1167
13 (citing Guidelines § 15161).¹³ Here, no such detail was included. The Regents provide no explanation
14 why they could not determine *which* of the LBNL-wide erosion control measures described in the LRDP
15 EIR were feasible to implement on the SERC site.

16 With regard to groundwater, the Regents argue that Project “has absolutely no potential to affect
17 existing contamination,” so no mitigation measures were required, but this is false. The Project’s
18 basement is below the groundwater table, so “excavation activities are expected to encounter groundwater
19 and it is considered likely that some of the groundwater encountered would be contaminated.” AR 1844.
20 Neither the Regents nor the public have any idea what the planned “modification/relocation of some
21 portions of the existing Building 25A *in-situ* soil flushing groundwater remediation system” will look

22 ¹² The Regents also argue that petitioner failed to exhaust its administrative remedies because no
23 members of the public used the words “deferral” or “performance standards.” This “magic words”
24 approach to exhaustion finds no support in case law. “[L]ess specificity is required to preserve an issue
25 for appeal in an administrative proceeding than in a judicial proceeding,” because commenters “generally
26 are not represented by counsel.” *Citizens Association for Sensible Development of Bishop Area v. County
of Inyo* (1985) 172 Cal.App.3d 151, 163. The public adequately preserved this issue for review by
commenting on the lack of detail regarding these mitigation measures. AR 2209 (comment CMTW-3).

27 ¹³ For this reason, the Regents’ observation that petitioner may not challenge the adequacy of the LRDP’s
28 mitigation measures is inapposite. Petitioner argues that the *SERC* EIR did not include the required
additional “site-specific considerations” regarding the Project’s mitigation measures. *Id.*

1 like; the Regents can only promise vaguely that “DTSC would approve any such modifications to ensure
2 continued compliance with existing cleanup standards.” RB 11; *see* AR 1844 (same).¹⁴ Because the EIR
3 provides *no* discussion of “possible mitigation measures,” neither the Regents nor the public have any
4 idea whether or not the Project will “result in a significant hazard to the public or the environment by
5 disturbing groundwater remediation activities.”¹⁵ AR 1843; *Oakland Heritage*, 195 Cal.App.4th at 911.
6 As “no possible mitigation measures ha[ve] been developed, no performance standards ha[ve] been set,
7 and there [i]s no reason to conclude either that the measures recommended . . . w[ill] be feasible or that
8 they w[ill] mitigate the impacts,” deferred mitigation was prohibited. *Id.*

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

10 By narrowly defining the Project objectives to preclude the consideration of feasible off-site
11 alterantives, the Regents violated CEQA, which does not sanction the use of unduly narrow project
12 objectives to restrict the range of feasible alternatives.¹⁶ The Regents argue that “an argument *identical* to
13 Petitioner’s was rejected in *Jones*,” but this is objectively false.

14 The Regents failed to study a reasonable range of *feasible* alternatives, as required (Guidelines §
15 15125.6(a)), by virtue of their excessively narrow set of project objectives. The Regents repeatedly¹⁷

17 ¹⁴ The Regents again accuse petitioner of misrepresenting the record. RB 12-13. But the Regents’
18 voluminous citations simply describe the *existing* contaminant management system and do not purport to
19 give *any* description of how the system might be *modified* to accommodate SERC. *See id.*

20 ¹⁵ The Regents’ reliance upon *Oakland Heritage* is misplaced because in that case a variety of particular
21 required mitigations were discussed (*see, e.g., id.* 909-910 (discussing “deep foundation systems”)).
22 Here, by contrast, it is wholly unknown what the planned “modification/relocation” will entail.

23 ¹⁶ The Regents argue that petitioner failed to exhaust its administrative remedies regarding the project
24 objectives. False. Commenters repeatedly objected that the project objectives were unsupportable in
25 light of modern means of long-distance collaboration (*e.g., AR 2287* [Master Comment Response]
26 (“Some commenters argued that project objectives identified in the Draft EIR, including consolidation of
27 similar research in order to promote collaboration and interaction among researchers and minimization of
28 travel could be achieved via other means”)) and further commented about the lack of off-site alternatives
29 (*e.g., AR 2253* (comment PH-12) (“I would also like to know why you did not include alternative sites”)).

30 ¹⁷ The Regents’ claim that “[o]nly one off-site alternative was rejected for failing to achieve Project
31 objectives” is blatantly false. *All* off-site alternatives were rejected for this reason. *See AR 1950*
32 (“Alternative 2 [*sic*, 3] would not achieve the project objective of consolidating existing LBNL and UC
33 Berkeley solar energy research programs in one facility in close proximity to the unique user facilities at
34 . . . LBNL”), 1956 (same, for Alternative 4), 1962 (same, for Alternative 5).

1 rejected off-site alternatives as *infeasible* because they did not meet the objective of locating everyone at
2 LBNL. Yet CEQA does not sanction the use of unduly narrow project objectives to restrict the range of
3 feasible alternatives. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 565, 566;
4 *City of Santee v. County of San Diego* 214 Cal.App.3d 1438, 1455;¹⁸ Guidelines § 15126.6(a).

5 Federal decisions interpreting the National Environmental Policy Act (“NEPA”), which are
6 persuasive authority,¹⁹ explicitly recognize this point. In *Nat’l Parks & Conserv. Ass’n v. Bureau of Land*
7 *Mgmt.* (9th Cir. 2009) 606 F.3d 1058, 1072, the Ninth Circuit observed that NEPA “forbid[s] the BLM to
8 define its objectives in unreasonably narrow terms. The BLM may not circumvent this proscription by . . .
9 draft[ing] a narrow purpose and need statement that excludes alternatives that fail to meet specific private
10 objectives. . . .” Otherwise “the EIS would become a foreordained formality.” So too here, the Regents
11 may not render the EIR a foreordained formality by adopting location-based objectives that precludes the
12 consideration of feasible off-site alternatives that otherwise meet Project objectives.

13 The Regents argue that “an argument *identical* to petitioner’s was rejected in *Jones*.” RB 14.
14 Wrong. The *Jones* Court dismissed plaintiff’s challenge to the LRDP’s project objectives as “not
15 properly before th[e] court.” *Jones* is no authority for a point not considered.

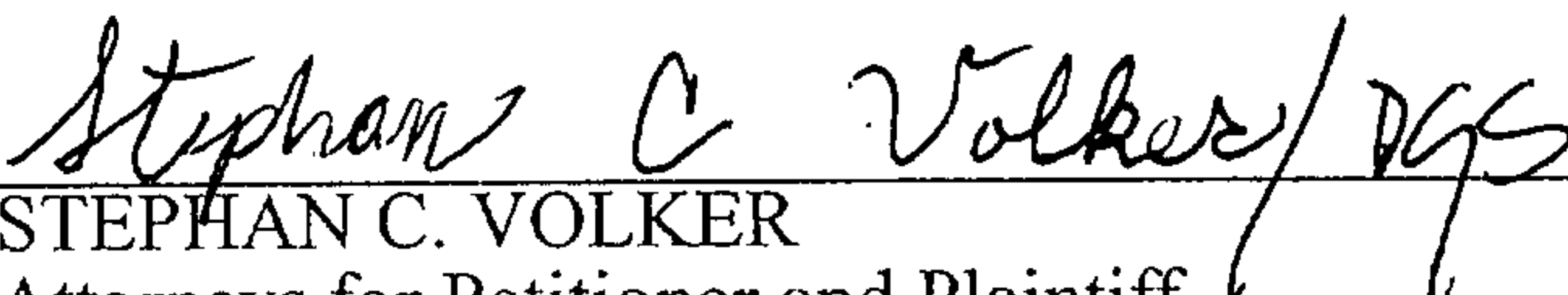
16 The Regents violated CEQA by failing to study a reasonable range of feasible alternatives.

17 VI. CONCLUSION

18 For the foregoing reasons the Regents’ approval of the SERC Project must be set aside.

19 Dated: August 4, 2011

Respectfully submitted,

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21 
22 STEPHAN C. VOLKER
23 Attorneys for Petitioner and Plaintiff
SAVE STRAWBERRY CANYON

24 ¹⁸ The Regents assert that *City of Santee* is inapposite. Yet the authoritative CEQA treatise *Guide to*
25 *CEQA* (11th ed. 2007, p. 589) recognizes that *City of Santee* supports the argument that “[w]hen a project
26 and its objectives are defined too narrowly, an EIR’s treatment of alternatives may also be inadequate.”

27 ¹⁹ “Since the California act was modeled on [NEPA], judicial and administrative interpretation of the
28 latter enactment [NEPA] is persuasive authority in interpreting” CEQA. *No Oil v. City of Los Angeles*
(1974) 13 Cal.3d 68, 86 n. 21. NEPA requires agencies to prepare an environmental impact statement
 (“EIS”) prior to undertaking a major federal action. 42 U.S.C. § 4332(c).

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 August 4, 2011, I served the following
6 document:

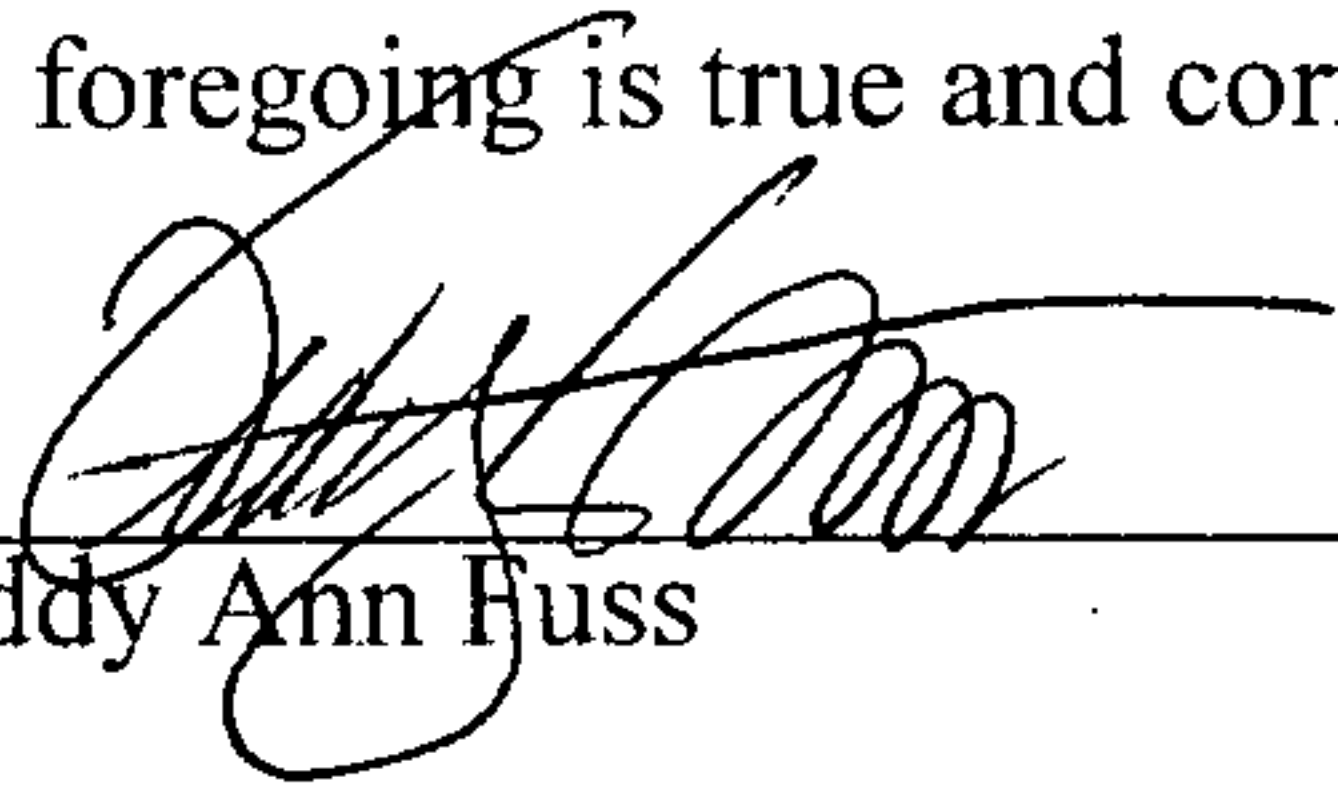
7 **PETITIONER'S REPLY TRIAL BRIEF**

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 August 4,
27 2011, 2011, at Oakland, California.

28 
Teddy Ann Huss