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Michael R. Lozeau (CA Bar No. 142893)
e-mail: michael@lozeaudrury.com
Richard T. Drury (CA Bar No. 163559)
e-mail: richard@lozeaudrury.com
LOZEAU DRURY LLP
410 12th Street, Suite 250
Oakland, CA 94607
Tel: (510) 836-4200
Fax: (510) 836-4205

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAVE STRAWBERRY CANYON, a non-profit corporation,	)	Case No.: C11-01564 WHA
Plaintiff,	)	**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**
vs.	)	
DEPARTMENT OF ENERGY, a federal agency; et al.	)	Hearing Date: October 20, 2011
Defendants.	)	Time: 8:00 a.m.
	)	Courtroom: 9, 19th Floor
	)	Judge William H. Alsup

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INTRODUCTION

Defendants' primary defense that the issues addressed by Plaintiff were waived during the Department of Energy's comment period is without merit. Defendants completely ignore the plain rule for cases brought under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, that, to the extent an issue must be exhausted at all, the issue may be raised by any person during the administrative process and need not be raised by a person ultimately pursuing a legal challenge including that issue. For NEPA challenges, the exhaustion requirement is applied leniently. Each of the issues included by Plaintiff in their motion for summary judgment was raised either by them or another participant in DOE's comment process sufficiently to put DOE on notice of the concern. In addition, Plaintiff's noise and traffic concerns were obvious to DOE given the previous conclusion by its LBNL partner, the University of California, that the noise and traffic impacts from the CRT Project would be significant and unavoidable. All of the issues raised by Plaintiff were exhausted and Plaintiff did not waive any issues.

As to the merits of Plaintiff's arguments, Defendants cannot explain how a predicted noise level of 66 dB at a property dedicated to meditation practice that currently experiences an average noise level of 48 dB does not raise a substantial question that the Project may have a significant noise impact. DOE has never conducted an analysis of the cumulative traffic impacts from reasonably foreseeable projects in the area and the CRT Project, choosing instead to treat its list of foreseeable projects as part of the existing baseline and then only considering the incremental impact of the CRT Project against that artificially inflated baseline. Such incremental analyses that isolate the project being reviewed rather than adding up the cumulative impacts of all the related projects have been universally rejected by the courts. Given the CRT Project's central role in the existing long range development plan for the Lawrence Berkeley National Laboratory ("LBNL") and its planned growth, it is readily apparent that the CRT Project is related to other actions with cumulative impacts and may establish a precedent for future actions with significant effects. As for the Project's tripling of LBNL's current power consumption and the resulting greenhouse gas emissions, despite their post-hoc efforts, DOE cannot refute the substantial question raised by the Project's massive exceedance of the significance threshold established by the Bay

Area Air Quality Management District ("BAAQMD") and fails to rebut the absence of any evidence in the record substantiating its assumption that WAPA power emits 20 percent less GHG emissions than PG&E's power, improperly skewing its comparison of alternatives toward those located at LBNL. Lastly, it is unreasonable for DOE to claim that its failure to address Professor Emeritus Garniss Curtis' then over two year-old expert comments raising concerns about the geologic stability of the CRT Project's proposed site only after the close of public comments somehow diffuses the significant controversy aired by Dr. Curtis. Dr. Curtis' concern that the site poses a significant risk of landsliding during an earthquake, especially during the rainy season, is sincere and informed by decades of direct experience in this area of the Berkeley hills, raising serious doubt and identifying significant uncertainty about the safety of the proposed project location. For these and other reasons discussed below, the Court should grant Plaintiff's motion for summary judgment.

STANDARD OF REVIEW

Defendants' brief for the most part ignores the standards applied to determine the need for an agency to prepare an EIS under NEPA. As noted in Plaintiff's opening brief, where an agency decides it does not need to prepare an EIS, "it must supply a 'convincing statement of reasons' to explain why a project's impacts are insignificant." *Blue Mountains Biodiversity Proj. v. Blackmore*, 161 F.3d 1208, 1212 (9th Cir. 1998). "Whether an action may 'significantly affect' the environment requires consideration of 'context' and 'intensity.'" *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008); 40 C.F.R. § 1508.27. "Context" includes "[f]or instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole." 40 C.F.R. § 1508.27(a). And "intensity" is guided by a list of ten factors that should be considered by an agency, a number of which are addressed by Plaintiff. § 1508.27(b); 538 F.3d at 1185-86. "An action may be 'significant' if one of these factors is met." 538 F.3d at 1220. "An EIS must be prepared if 'substantial questions are raised as to whether a project…may cause significant degradation of some human environmental factor.'" *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864-65 (9th Cir. 2005). To trigger an EIS, "a plaintiff need not show that significant effects will in fact occur, but raising substantial questions whether a

project may have a significant effect is sufficient." *Id*. at 865. "This is a low standard." *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006); *Cal. Wilderness Coal. v. DOE*, 631 F.3d 1072, 1097 (9th Cir. 2011).

ARGUMENT

I. DOE Had Sufficient Notice of Each of the Concerns Plaintiff Raises in its Summary Judgment Motion.

Defendants argue that Plaintiff waived most of its objections to the EA and FONSI because Plaintiff failed to put DOE on notice of these issues during the administrative notice and comment period. Defendants' Brief ("Def. Br."), pp. 6-8. "Whether a court should require administrative issue exhaustion depends on the nature of the administrative proceeding; the rationale for exhaustion is strongest in adversarial proceedings, but weaker in non-adversarial proceedings." *Or. Natural Desert Ass'n v. McDaniel*, 751 F.Supp.2d 1151, 1157-1158 (D. Or. 2011), citing *Sims v. Apfel*, 530 U.S. 103, 110 (2000).[1] The Ninth Circuit "has declined to adopt 'a broad rule which would require participation in agency proceedings as a condition precedent to seeking judicial review of an agency decision." *'Ilio 'Ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006), citing *Kunaknana v. Clark*, 742 F.2d 1145, 1148 (9th Cir. 1984). "We have interpreted the NEPA exhaustion requirements leniently because '[r]equiring more might unduly burden those who pursue administrative appeals unrepresented by counsel, who may frame their claims in non-legal terms.'" *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1048-49 (9th Cir. 2007), citing *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 900 (9th Cir. 2002). "[A]lerting the agency in general terms to a particular issue will be sufficient for exhaustion if the agency is given the opportunity to 'bring its expertise to bear to solve the claim.'" *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010). "[T]he agency bears the primary responsibility to ensure that it complies with NEPA, … and an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *DOT v. Public Citizen*, 541 U.S. 752, 765 (2004); *See also Or.*

[1] Accordingly, a number of courts have ruled that no exhaustion is required to challenge an EA. *Sierra Club v. Bosworth*, 352 F. Supp. 2d 909, 927 n. 27 (D. Minn. 2005) (holding that issue exhaustion is not required under NEPA in order to challenge EA); *Dine Citizens Against Ruining Our Env't v. Klein*, 676 F.Supp.2d 1198, 1208 (D. Colo. 2009).

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Natural Desert, 751 F.Supp.2d at 1158. The "so obvious" standard is triggered "where the agency had independent knowledge of the issues that concerned Plaintiffs. . . ." *'Ilio'Ulaokalani*, 464 F.3d at 1092, citing *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 558-559 (9th Cir. 2000). Where the agency has independent knowledge, "there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *'Ilio'Ulaokalani*, 464 F.3d at 1093. *See also Ctr. for Food Safety v. Vilsack*, 2009 U.S. Dist. LEXIS 86343, 19-20 (N.D. Cal. 2009); *Ctr. for Biological Diversity v. Lubchenco*, 758 F.Supp.2d 945, 961 (N.D. Cal. 2010) (no waiver where "the issue was considered sua sponte by the agency or was raised by someone other than the petitioning party").[2]

To the extent a claim or issue must be exhausted in order to pursue a court challenge, the issue may be raised by any person during the administrative process and need not be raised by the person ultimately filing a legal challenge. *Lubchenco*, 758 F.Supp.2d at 961. "[S]o long as the agency is informed of a particular position and has a chance to address that particular position, any party may challenge the action based upon such position whether or not they actually submitted a comment asserting that position." *Wyo. Lodging & Rest. Ass'n v. U. S. DOI*, 398 F. Supp. 2d 1197, 1210 (D. Wyo. 2005), citing *Benton County v. U.S. DOE*, 256 F.Supp.2d 1195, 1198-99 (E.D. Wash. 2003); *WildWest Inst. v. Rainville*, 2008 U.S. Dist. LEXIS 103390*13 (D. Idaho 2008) (citations omitted). *See also Conservation Cong. v. U. S. Forest Serv*., 555 F.Supp.2d 1093, 1106 (E.D. Cal. 2008).

Each of the issues presented by Plaintiff in its motion for summary judgment either was such an obvious flaw in the EA of which DOE was aware that there was no need for Plaintiff to point them out prior to filing suit or each issue was raised by one or more commentators during the agency process.

A. The flaw in the EA's noise analysis is obvious and, in any event, comments notified DOE of concerns that the agency had not correctly considered noise impacts.

DOE plainly had independent knowledge of the noise concerns addressed by Plaintiff in its

[2] The Ninth Circuit also has distinguished the cases relied upon by Defendants, including *DOT v. Public Citizen*, 541 U.S. 752, *Vt. Yankee Nuclear Power Corp v. NRDC.*, 435 U.S. 519 (1978) and *Havasupai Tribe v. Robertson*, 935 F.2d 32 (9th Cir. 1991): "The rationale of *Vermont Yankee* has been applied in those instances in which an interested party suggests that certain factors be included in the agency analysis but later refuses the agency's request for assistance in exploring that party's contentions"). *Kunaknana*, 742 F.2d at 1148; '*Ilio'Ulaokalani*, 464 F.3d at 1091-92 (distinguishing *Public Citizen* and

summary judgment because its partner in the CRT Project – the University of California – already prepared an environmental impact report that concludes that noise impacts from the CRT Project's construction will be significant and unavoidable. AR 7955.

Aware of the University's conclusion, DOE attempted to refine the noise levels from the CRT Project's construction with more detailed lists of the equipment that would be used. AR 148-49. That effort still showed an exceedance of the Berkeley noise ordinances at the Nyingma Institute. AR 150. More importantly, DOE also knew that the University measured much lower noise levels in the rear of the Nyingma Institute in or around the Institute's quiet meditation garden, identifying that very data in the EA. AR 95-96 ("The average daytime noise level at this site was 48 dB(A), and noise levels ranged from 46 dB(A) L90 to 57 dB(A) Lmax"). *See also* AR 9034; AR 5192; AR 357 (in response to comments, DOE acknowledges the quieter noise levels of the northeastern side of the Institute's buildings). Hence, DOE had independent knowledge of the drastic difference in noise levels measured at the Nyingma Institute and the levels projected for the CRT Project's construction – a 9 to 20 decibel increase in noise levels within the grounds of the Institute. *See infra*, pp. 11-13 *Compare* AR 150 with AR 95-96. Despite that knowledge, DOE in its EA concludes by only comparing the CRT Project's expected 66 dB noise level to noise levels experienced in front of the Institute along Hearst Avenue. *See* AR 150; AR5192. This obvious flaw obviates the need for members of the public to point out that blatant error. *'Ilio'Ulaokalani*, 464 F.3d at 1093.

Even assuming that the CRT Project EA's noise issues are not obvious, both the Nyingma Institute and others raised the noise concern in a manner that put DOE on notice of the noise issue and gave the agency an opportunity to resolve its deficient noise analysis. The Institute specifically informed DOE of its significant concern that the CRT Project's noise would have highly detrimental effects on its residents and others "ability to experience the peaceful enjoyment of our facilities - residences, a meditation garden, and meditation rooms, among others." AR 1571. After summarizing its understanding of existing noise levels on Hearst Avenue, the Institute described the impacts of expanding construction noise levels at its facility. AR 1572 ("With the added truck traffic and

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Havasupai). *Wilson v. Hodel*, 758 F.2d 1369 (10th Cir. 1985) is distinguishable on similar grounds. *Id.*

construction noise, these problems will be compounded"). Likewise, Plaintiff expressly raised its concern that noise from the CRT project was significant and not mitigable. AR 773 ("The cumulative effect of expanding LBNL's high-tech presence (replacing eucalyptus with constant noise from cooling towers, lights, user growth, traffic and risk) into this location cannot be mitigated. Less damaging alternatives must be analyzed." *See also* AR 774 ("the construction noise is surely not calculated in your traffic study. At 10 to 15 cubic yards per truck, 60,000 cubic yards, that is between 6,000 and 4,000 round trips. And 85 decibels of noise? All that bone-jarring compaction? All those nasty truck-in-reverse beeps? … These damaging impacts need to be disclosed and seriously analyzed"). Save Strawberry Canyon's comments to DOE also attached and incorporated its previous comments on the CRT Project submitted to the University. AR 798, 773. Those comments go on at some length about Plaintiff's noise concerns, questioning the distance to sensitive receptors, the decibel levels, and the impacts to surrounding land uses. AR 798 ("Please provide noise sampling at various radii from the project site so as to accurately estimate the range of noise impact impacts. Please also disclose the locations sampled. … How many decibels will be heard at various distances from the source? Which off-site locations have been studied?"). *See id*. ("What will (this project) do differently to ensure that no new or reflected noises are generated by the project, or to mitigate any such noises if they occur?"). AR 800 ("the proposed construction and operation of the CRT Facility project will add a very large building to a scenic vista which is the Berkeley hills, … ***will harm sensitive receptors with added noise*** …") (emphasis added). Plaintiff also pointed out the inconsistency between DOE's noise claims and the University's conclusion that construction noise would be significant and unavoidable, noting that "[the CRT] [b]eing the computer infrastructure for all that follows, this first building has growth-inducing impacts which are acknowledged to some limited degree in the Revised Draft EIR text which identifies three cumulative impacts, specifically, for air quality, transportation, and noise." AR 779.

These good faith efforts by concerned members of the public to articulate their concerns regarding noise are more than sufficient to exhaust or avoid waiving the issue in a subsequent legal challenge. Comments need only generally raise the concern at issue and members of the public are not

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at 1372 (involving a non-NEPA, adversarial IBLA proceeding).

required to anticipate the full contents of the agency's administrative record, to comment on documents that were not available during the public comment or to prepare a thorough legal analysis of their concerns. *Native Ecosystems*, 304 F.3d at 900. The Nyingma Institute's and Plaintiff's comments easily surpass the level of detail and notice held by the Ninth Circuit as sufficient to notify the agency of plaintiffs' NEPA claims in *Navajo Nation*, 479 F.3d 1024.[3] The public comments submitted to DOE on the CRT Project's noise impacts easily surpassed the detail excepted by the Ninth Circuit.

B. The flaws in the EA's traffic analysis are obvious and several individuals, including Plaintiff, raised concerns about increased traffic that would result from the Project.

A number of comments submitted to DOE during the comment period raised the traffic concerns pursued by Plaintiff. However, because the flaws in the EA's traffic analysis are obvious, Plaintiff had no obligation to point out those flaws to DOE. Again, DOE's own partner found that cumulative traffic impacts from the CRT Project would be significant and unavoidable. *See* Pl. SJ Brief, p. 9. That alone placed DOE on notice that cumulative traffic impacts including the CRT Project was a serious concern. Likewise, basic facts such as whether or not traffic data from 2002 versus data collected in 2007, 2008 and 2009 should be used to evaluate incremental traffic changes from the Project or whether or not a particular parking garage was already constructed or indefinitely delayed by the CRT Project's co-sponsor also are obvious flaws in the EA that do not require the general public to point out to DOE in order to cure those flaws through a court challenge. *See* Pl. SJ Brief, pp. 11-13. *See also* AR 2466 (DOE aware of more recent traffic data); AR 156-57 (DOE aware of parking garages). Lastly, DOE was aware of the existing vehicle/capacity calculations for the existing intersections (though it did not disclose those to the public in the EA itself - *compare* AR 2467 and 158) as well as the much higher vehicle/capacity ratios that would be present in 2018 after implementation of the CRT Project and a

[3] The Ninth Circuit noted in that case that "[t]he core of Appellants' claim is that the FEIS has insufficiently analyzed the risk of ingestion – particularly by children – of artificial snow made from treated sewage effluent." 479 F.3d at 1049. General comments were noted by the Court. *See, e.g., id.* ("If concerns about wildlife and adult human health are not sufficient to justify prudence…, then perhaps concerns for child health might dictate a more conservative approach"). Such general comments were deemed sufficient to put the agency on notice of concerns about snow ingestion and the flaws in the agency's NEPA analysis of that issue. Notably, no specific cites to any specific page of the NEPA document at issue or to any documents that ultimately were included in the record. All of the comments raise the general concern.

number of the related projects. *See* Pl. SJ Brief, p. 10. These are obvious flaws for which issue exhaustion is not required. *'Ilio'Ulaokalani*, 464 F.3d at 1093.

Even assuming DOE's mistakes were not obvious, Plaintiff and others brought their traffic concerns to the attention of DOE. A commenter specifically wrote that "[t]he city planning issues have been long debated. ***How can the traffic from so many more employees be dumped into already stressed residential neighborhoods***?" AR 1462 (emphasis added).[4] Likewise, Plaintiff squarely stated that "[t]he cumulative effect of expanding LBNL's high-tech presence (replacing eucalyptus with constant noise from cooling towers, lights, user growth, ***traffic*** and risk) into this location cannot be mitigated. Less damaging alternatives must be analyzed." AR 773 (emphasis added). Contrary to DOE's assertion, Plaintiff also resubmitted to DOE its comments to the CRT Project made during the University's EIR process. *See* Def. Br., p. 8 n. 10. Plaintiff stated under the heading "Transportation":

> The CRT DEIR acknowledges there will be cumulative impacts at intersections. The Level of Service ratings at several intersections are already at the worst rating, which is "F." We agree with the City of Berkeley's comments in the 2006 LRDP in which the City makes clear that the Berkeley Lab is not doing all it could do to reduce transportation impacts. Fundamentally though, it is bad planning to intensify development in an area with limited access. Vehicular traffic will expand, but number of roadways in this already developed area will not.

AR 799. *See also* AR 1349 (commenter advocates alternative sites because "[t]his is the only way to mitigate the ***horrendous traffic*** and diesel exhaust impacts along the corridor from the northeast to the southeast corners of the UC Berkeley Campus"). These comments were sufficient to put DOE on notice that its traffic analysis was questioned by the public. *Native Ecosystems*, 304 F.3d at 900.

C. Plaintiff and others submitted comments stating their concern that the CRT Project would establish an undesirable precedent increasing development at LBNL.

Defendants argue that "Plaintiff and its members … never suggested DOE should have assessed the impacts from the University's LRDP document as part of the EA." Def. Br., p. 7. DOE's argument attempts to reframe the issue raised by Plaintiff in its opening brief. Plaintiff's reference the LRDP document as evidence that the CRT Project establishes a precedent for future development at the LRDP. 40 C.F.R. § 1508.27(b). Save Strawberry Canyon expressly raised this concern to DOE stating:

> The CRT Facility project is also significant because it represents the first step in the next wave of the Lab's new construction - 980,000 gsf- that was approved by the DC Regents on July 19, 2007. Being the computer infrastructure for all that follows, this first building has growth-inducing impacts which are acknowledged to some limited degree in the Revised Draft EIR text which identifies three cumulative impacts, specifically, for air quality, transportation, and noise.

AR 779. Contrary to Defendants' argument, the Regents' July 19, 2007 decision was the LBNL LRDP referenced by Plaintiff. *See* DOE Supp. AR 199-307; AR 10593; Pl. 2nd RJN, Ex. A (pp. 52 & 59). Plaintiff's concern with the precedential role the CRT Project will play for future development at LBNL is reiterated several times. They comment, for example, that the agencies "please disclose the range of projects which and partners whom could participate in the CRT Facility and NERSC missions as there may be relevant growth-inducing impacts." AR 778. Plaintiffs likewise aired their concern that:

> all of the researchers [at LBNL] must be clustered around each other and "mindful of future expansion." ***From an environmental standpoint, the inevitability of expansion at this natural resource intense, aesthetically sensitive, and geologically complex site is extremely disturbing****….* [Suggesting another alternative], even this alternative is unsuitable given the cumulative impacts from this project at presumably any LNL hill site location and ***given the enormous growth-inducing impacts from this development***.

AR 780 (emphasis added). The issue of the CRT Project's precedential effect on increased development at LBNL was clearly raised by Plaintiff during the comment period.

D. The BAAQMD made several comments raising concerns regarding the air agency's threshold and the significance of the Project's GHG emissions.

Lastly, DOE claims that Plaintiff did not exhaust its concerns regarding the EA's analysis of the CRT Project's greenhouse gas ("GHG") emission impact. Although Plaintiff did not raise this issue, BAAQMD did raise it. BAAQMD specifically commented on DOE's decision not to apply BAAQMD's threshold as well as the significant GHG emissions impact the CRT Project would have, including jeopardizing California's ability to achieve its GHG emission reduction goals:

> Our comment is basically: BAAQMD developed thresholds to ensure that new development helps California meet AB32 goals and implements appropriate and feasible emission reduction measures to mitigate cumulative air quality impacts. This Project's operation emissions could potentially hinder the State's ability to reach goals set forth in AB32 and therefore we recommend mitigation measures to decrease the Project's GHG emissions.

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[4] DOE's response to this comment acknowledges that the comment questioned the EA's conclusion that traffic would meet the significance standards for traffic. AR 370.

AR 1579. Defendants do not even acknowledge this comment by the BAAQMD. *See* Def. Br., p. 7 n. 8. BAAQMD reiterated its concerns:

> The EA determined that there would be no potential significant impacts, including no impacts due to greenhouse gas (GHG) emissions, from the Project. This determination was not based on BAAQMD thresholds because the Project analysis began before the BAAQMD Board of Directors adopted these thresholds on June 2, 2010. However, the Project will still have a large energy demand and associated GHG emissions. Staff urges the DOE to commit to all possible steps to minimize these impacts. In order to further reduce the Project's GHG emissions, staff recommends that DOE commit to the following additional measures as a condition of Project approval: [providing a list of feasible GHG mitigation measures].

AR 754. DOE obviously was on notice of concerns about significant impacts of the CRT Project's GHG emissions and the importance of the State's significance standard, spending considerable effort in its response to comments to justify why it chose to ignore that standard. AR 347-348, AR 144-45.[5]

In addition, the specific argument by Plaintiff in its summary judgment that DOE has no evidence that WAPA power is cleaner from a GHG emission perspective than PG&E power, could not be discerned by a commentator until the administrative record was available. On March 8, 2011, Plaintiff's council requested that DOE provide all of the documents that would be included in the administrative record. Pl. 2nd RJN, Ex. B. On March 10, 2011, the agency responded that the record was not available at that time. *Id*. If it was not available on March 10, 2011, the record was not available to people attempting to comment on the EA. Nor does the EA or its accompanying attachments mention at all that DOE was assuming a GHG emission credit of either 20 percent or 50 percent for WAPA as compared to PG&E derived power. *See* AR 1711-12, 2115, 2123, 2131, 2139, 2147. This assumption was first identified by DOE in the final EA, ***after*** the comment period closed. AR 144, AR 348; AR 449-452 (memo dated Jan. 24, 2011). *Compare* AR 1711-12. It would be an unreasonable obstacle to apply an exhaustion requirement that would have commenters have to guess at the contents of an unavailable administrative record or to comment on an assumption that DOE failed to disclose in its draft EA. *See American Forest & Paper Ass'n v. U. S. EPA*, 137 F.3d 291, 295 (5th Cir.

[5] The EA itself mentions the presence of a BAAQMD GHG emissions threshold but does not bother to inform the reader what the BAAQMD significance standards actually are but anticipates concerns that DOE was not applying that standard. AR 1710.

1998) (plaintiff allowed to pursue claims associated with changes to agency's initial proposal).

Moreover, the record shows that DOE was independently aware of the issue that it was lacking in evidence to substantiate the GHG emission credit it wished to apply to WAPA power and all alternatives to be located LBNL. After the close of the comment period on Oct. 15, 2010 (AR 1589), DOE noted that their estimates were not substantiated and had to be changed from 50% to 20% in the final EA. AR 449-450; AR 660 ("We had thought to modify the factors using the slightly better WAPA power mix but cannot establish a defensesble [sic] calculation"). The various e-mails also disclose that the agency's staff and consultant knew that PG&E's percentage of GHG emissions was critical to their assumption but when asked whether they had that information, no response is forthcoming in the record. AR 490; Supp. AR 001; AR 450-452. Because DOE had independent knowledge of this concern, and it arose after the public's opportunity to comment had ended, the issue is an obvious one and did not require the public or BAAQMD to provide a specific critique of their WAPA vs. PG&E calculations in order to make that argument now in the litigation. *'Ilio'Ulaokalani*, 464 F.3d at 1093.

II. DOE Must Prepare an EIS Because the CRT Project May Have a Significant Effect on the Environment.

Plaintiff raises a number of substantial questions that the CRT Project may have significant impacts, all of which DOE fails to refute.

A. Defendants do not refute that the EA's noise impacts discussion fails to compare the Project's noise levels to the currently quiet noise levels at the Nyingma Institute.

In response to Plaintiff's observation that the EA's noise analysis never actually compares the 61 to 66 dB of construction noise estimated to occur at the Nyingma Institute's property line to the existing 46 to 57 dB (48 dB average) noise levels found on the north side of the Institute's buildings in the vicinity of its meditation garden, DOE offers no rebuttal. *See* Pl. Br., pp. 6-8. DOE admits that the "entire Nyingma Institute, including the outdoor spaces such as the meditation garden as well as indoor spaces" is a sensitive receptor. Def. Br., p. 10. DOE admits that not all portions of the Institute grounds are exposed to traffic noise. *Id*. DOE admits that the eastern property line of the Institute, which includes the edge of the meditation garden, has a direct line of site with the CRT Project. *Id*. DOE admits that increases in noise greater than 3 dB are perceptible. *Id*., p. 11. DOE does not refute the

University's and hence LBNL's use of a noise significance level as "[a]n increase of 5 dBA DNL, where the noise levels without the project are 50 to 65 dBA DNL for residential uses" and standards are currently met. Pl. Br., p. 7 (citing AR 9039). And, most importantly, DOE acknowledges that it only compared the noise levels resulting from construction activities for the CRT Project with noise levels in front of the south side of the Nyingma Institute fronting Hearst Avenue. DOE does not claim nor could it that the EA compares those high noise levels to the existing quiet noise levels that occur on the northside of the building including the meditation garden whose fence line lies closest to the CRT Project. As DOE's brief explains:

> the EA discloses that the ***southerly and southeasterly aspects of the Institute are affected by Hearst Avenue traffic noise*** and ***it is with respect to these aspects*** that the EA notes that the estimated construction noise levels would fall within the range of existing noise levels.

Def. Br., p. 10 (emphasis added). This response effectively admits Plaintiff's point – the EA does not address the obvious impact of upwards of 66 dB levels of construction noise on the meditation garden and other areas on the north side of the Institute which currently experience very quiet noise levels as low as 46 dB. A potential 20 dB increase in the Institute's meditation garden and rooms facing these quiet areas is obviously significant.

Defendants preface their noise argument asking the Court to defer to DOE. Def. Br., p. 8. But, as Defendants acknowledge, such deference is only due where an issue "require[s] a high level of technical expertise" and where the agency has applied its "informed discretion." *Id*. No expertise at all is required to see that the EA does not compare the dB levels calculated by DOE's consultant for the CRT Project's construction noise at the Institute to the dB levels present on the quiet north side of the Institute. Hence, the potential significant effect of the construction noise on those quiet areas was simply not addressed by the EA.

Defendant's brief then confuses the upper bounds of the City of Berkeley's noise ordinance (65 dB) with the existing noise levels at the Institute. Def. Br., p. 11. Defendants claim that the only relevant increase in noise from construction of the CRT Project would be the 1 dB exceedance of the 65 dB limit in the noise ordinance. *Id*. ("A 1 dB difference between the City's threshold and the highest noise level of 66 dB at the fenceline would not be perceptible"). Of course, the City's 65 dB threshold is

not the actual noise levels measured near the Institute's garden and areas away from Hearst Avenue. AR 95-96 (average daytime noise level of 48 dB(A)). Thus, the impact of the Project is not a 1 dB change in noise levels but a change upwards of 20 dBs. Nor is it fair of DOE to characterize an almost two-year construction project as a "very brief period of time" during which noise levels will be exceedingly high for users of the currently quiet areas of the Institute. Def. Br., p. 11; AR 52; AR 9373 (construction schedule estimated to be 27 months). *See also* 40 C.F.R. § 1508.27 ("Significance cannot be avoided by terming an action temporary…").[6]

Defendants also argue that because DOE's consultant re-running of the noise estimates erases the University's previous determinations that noise from the CRT Project as well as LBNL construction in general under the LRDP would be significant and unavoidable and eliminates any substantial question that the CRT Project may have a significant noise impact. Def. Br., p. 9. However, the reanalysis still predicts an ***exceedance*** of an applicable noise limit eliminates any question makes little sense to Plaintiff. AR 150. The standard is whether a substantial question exists of a potential significant impact. A reanalysis that still concludes an ***exceedance*** of the noise limit may occur does not entirely refute the University's prior formal determination that the same project would have significant and unavoidable impacts. Taken together, that evidence demonstrates that a substantial question exists that the CRT Project may have a significant noise impact. *See* AR 5192.[7]

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[6] DOE cites *Fuel Safe Wash. v. FERC*, 389 F.3d 1313, 1330 (10th Cir. 2004) for the proposition that construction impacts are of short-term duration. That case is most notable for the fact that the noise impacts were discussed in an EIS, not an EA. *Id.* Moreover, unlike the marine wildlife evaluated in *Fuel Safe*, the Nyingma Institute and its users are not "mobile" and cannot "avoid the area while any construction takes place." *Id*. at 1331.

[7] Lastly, Defendants attempt to focus the Court on and inflate the importance of a point made in a footnote of Plaintiff's brief questioning the existence of evidence in the administrative record substantiating the distances estimated between the Institute and the Foothill Housing Complex and the CRT Project site. *See* Pl. Br., p. 6 n. 3. Defendants' brief argues that "DOE analyzed noise levels using the actual slant distance from the CRT site to the noise-receiver locations rather than the simple horizontal distance. AR05:196, AR114:5192." p. 9-10. A review of pages 196 and 5192 of the record, however, does not disclose anything about how the distance estimates were actually measured by anyone. Nor does an elevation difference of 200 feet explain a difference in distance between the Google maps and the EA estimates of 300 feet to the Foothill Student Complex or about 170 feet to the Nyingma Institute. An increase in elevation of 1 foot would not add 1 foot of distance. In any event, the point remains that the record does not have any evidence documenting how or if the distances between the CRT Project and the sensitive receptors were actually measured.

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B. DOE does not acknowledge or discuss the cumulative traffic impacts of the CRT Project and the other identified reasonably foreseeable projects.

DOE's evaluation of traffic impacts does not address the cumulative impacts of the CRT Project combined with other expected projects. It simply adds all of the traffic impacts of other future projects to the "existing" traffic baseline and then asserts that the CRT Project's incremental change to that increased baseline is nominal. Def. Br., p. 13. A true cumulative impact analysis adds up the impacts of all such future projects and compares those impacts to the baseline. The cumulative projects are part of the impact not the environmental baseline. "NEPA requires that where 'several actions have a cumulative . . . environmental effect, this consequence must be considered in an EIS.'" *Neighbors of Cuddy Mt. v. U. S. Forest Serv.*, 137 F.3d 1372, 1378 (9th Cir. 1998), quoting *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990).

Defendants claim to glean support from the plain language of the CEQ regulations and guidance. However, the regulations are clear that the Project's incremental impact must be ***added*** to the impacts of other "past, present, and reasonably foreseeable future actions" and those total impacts to the environment then considered. 40 C.F.R. § 1508.7. The regulation makes clear that the single project at issue must be considered collectively, not separately with the other future projects: "Cumulative impacts can result from individually minor but ***collectively significant actions*** taking place over a period of time." *Id*. (emphasis added). Nor do defendants address the complimentary language of 40 C.F.R. § 1508.27(b)(7) which specifically requires the agencies to consider whether the impacts of other related projects are themselves cumulatively significant:

> Whether the action is ***related to other actions with individually insignificant but cumulatively significant impacts***. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

§ 1508.27(b)(7) (emphasis added). An EA fails to comply with NEPA's procedures where there is "no meaningful cumulative impact analysis of 'reasonably foreseeable future actions' that, in combination with the proposed project, could constitute 'collectively significant actions … over a period of time.'" *Preserve Our Island v. U.S. Army Corps of Eng'rs*, 2009 U.S. Dist. LEXIS 71198, 55-56 (W.D. Wash. 2009) (quoting 40 C.F.R. § 1508.27(b)(7)). The CEQ guidelines adhere to this simple requirement,

emphasizing that "cumulative effects must be evaluated along with the direct effects and indirect effects (those that occur later in time or farther removed in distance) of each alternative." AR 14810.

The courts addressing the contents of a proper cumulative impact analysis have unanimously rejected DOE's solely incremental approach. The Supreme Court in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), made clear that a cumulative impact was not only the proposed project but the impact ***taken together*** of all other reasonably foreseeable related projects: "when several proposals for [] actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, ***their environmental consequences must be considered together***." *Id*. at 410 (emphasis added). The D.C. Circuit also outlines the proper analysis:

> a meaningful cumulative impact analysis must identify (1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected in that area from the proposed project; (3) other actions – past, present, and proposed, and reasonably foreseeable – that have had or are expected to have impacts in the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

Grand Canyon Trust v. FAA, 290 F.3d 339, 345-346 (D.C. Cir. 2002). In defending the CRT Project EA, DOE would never reach step 5. Instead of accumulating the impacts of the other reasonably foreseeable projects and comparing those total impacts to the current environmental baseline, DOE instead assigns all of the foreseeable projects' traffic impacts to the baseline, isolating the CRT Project's traffic impacts from those other cumulative impacts.

The D.C. Circuit expressly rejected the argument now made by DOE that the use of the term "incremental" in 40 C.F.R. § 1508.7 authorizes the agency "to consider only the incremental impact of any project." *Id*. at 345. As the Court explains, **"**[t]he difficulty with this position is that it ignores the rest of the sentence in § 1508.7 directing an agency to consider that incremental impact 'when added to other past, present, and reasonably foreseeable future actions regardless of what agency … or person undertakes such other actions.'" *Id*. "The analysis in the EA, in other words, cannot treat the identified environmental concern in a vacuum, as an incremental approach attempts." *Id*. *See also Tomac v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006); *Sierra Club v. U. S. DOE*, 255 F. Supp. 2d 1177, 1185 (D. Colo. 2002) (in accordance with CEQ regulations, "an agency 'must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum'). "Even a slight increase in

adverse conditions that form the existing environmental context may threaten significant harm: 'one more factory . . . may represent the straw that breaks the back of the environmental camel.'" *Ga. River Network v. U. S. Army Corps of Eng'rs*, 334 F. Supp. 2d 1329, 1338-1339 (N.D. Ga. 2003), *quoting Hanly v. Kleindienst*, 471 F.2d 823, 831 (2nd Cir. 1972). Addressing noise impacts, the Court rejected the EA in *Grand Canyon Trust* because "[t]he analysis in the EA does not address the accumulated, or ***total, incremental impacts*** of various man-made noises. . .[,]" not only the incremental impact of the one project under review. 290 F.3d at 346 (emphasis added). *See also id*. at 345 (agency's EA analysis "may, in fact, be a splendid incremental analysis, but it fails to address what is crucial if the EA is to serve its function").

Defendants' reliance on *Public Citizen*'s passing reference to the CEQ regulation's use of the term "incremental" has also been addressed by the Ninth Circuit. Def. Br., p. 14. *Public Citizen* did not rule on any faulty cumulative impact analysis by the Federal Motor Carrier Safety Administration ("FMCSA') but instead relied upon the agency's lack of authority to take any other action given an Executive Order mandate. As the Ninth Circuit has held: "The [Supreme] Court emphasized twice that its analysis and holding were limited to the 'critical feature' of the case – i.e., that FMCSA lacked authority to countermand the presidential order allowing Mexican carriers into the United States, [citing *Public Citizen*, 541 U.S.] at 766, 770. at 766, 770 – and subsequent Ninth Circuit cases have limited their application of *Public Citizen* on that basis." *League of Wilderness Defenders v. U.S. Forest Serv.*, 549 F.3d 1211, 1217 (9th Cir. 2008); *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1134 n. 20 (9th Cir. 2007). "*Public Citizen*'s limitation on NEPA does not apply where an agency has statutory authority to prevent the relevant effects." *League of Wilderness Defenders*, 549 F.3d at 1217. DOE has ample control over the fate of the CRT Project as well several other of the reasonably foreseeable projects DOE lists in the EA.[8] *Public Citizen* does not support the agency's position" that a legally sufficient cumulative impact analysis only considers the project's incremental impact over other foreseeable projects.

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[8] Defendants' claim that the foreseeable projects would occur with or without the CRT Project ignores the fact that DOE controls the fates of the User Test Bed Facility and BELLA projects and the Solar Energy Research Center has not completed environmental review. AR 5:179-180; *See* Def. Br., p. 14.

The idea that a cumulative traffic impacts analysis properly treats the traffic impacts of as yet to be built projects as part of the current environmental baseline makes a mockery of NEPA's cumulative impact analysis requirement. Simply because a project already has achieved some momentum but has not yet been built does not means its traffic in combination with other similar future projects will not have cumulative traffic impacts as compared to the current baseline. If an agency always gets to discount its cumulative analysis to exclude the traffic impacts from future projects that are the most likely to occur, then no true cumulative traffic impact will ever be analyzed – only the traffic impact of the specific project being reviewed will ever be reviewed in isolation from all of those other projects. "Although the impact of a particular project maybe inconsequential when considered in isolation, if the cumulative impact of a given project and other planned projects is significant, an applicant can not simply prepare an EA for its project, issue a FONSI, and ignore the overall impact of the project on a particular neighborhood." *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 180 (3d Cir. 2000) (citing 40 C.F.R. § 1508.27(b)(7)). *See also Preserve Our Island*, 2009 U.S. Dist. LEXIS 71198*50-51.

Applying the correct cumulative impact analysis that combines the traffic impacts of all of the reasonably foreseeable future projects and that of the CRT Project and then comparing those accumulated impacts to the current environmental baseline readily demonstrates that DOE's continued assertion that no cumulative traffic impacts can occur is erroneous. The existing volume to capacity ratios ("v/c") at the LOS F Bancroft Way/Piedmont Avenue intersection of 0.95 during the morning commute and 0.84 during the evening commute will be increased, respectively, to 1.02 and 0.88 by the total traffic impacts "considered together" of all the reasonably foreseeable projects identified by DOE. AR 2467 (Table 1); AR 158. Those cumulative increases of the existing ratios by .07 and 0.04 easily exceed the Berkeley traffic standard prohibiting v/c ratios from increasing by greater than 0.01. *See* AR 156. Traffic at Stadium Rim Way and Gayley Road, rated by Fehr & Peers during the morning commute at LOS D with an average 30 second delay will degrade to LOS F with a greater than 60 second delay and a v/c of 1.15 once the impacts of all the foreseeable projects are added in. AR 2467, AR 158. Lastly, at Hearst Avenue and Gayley Road, traffic will go from the current LOS D with a 49

second delay to LOS E and 57 seconds of delay once the foreseeable projects are in place. AR 2467, AR 158. That degradation is significant under Berkeley's ordinance. AR 156. These violations of DOE's selected traffic threshold by the aggregated impacts ***taken together*** of all of the foreseeable related projects identified by DOE in the EA raise a substantial question that the CRT Project's cumulative traffic impacts will be cumulatively significant and an EIS is required.

Defendants stick to the faulty assertion of the EA that applying higher baseline traffic counts from 2002 was more conservative than applying the real up-to-date but lower traffic counts available from 2007 through 2009. Def. Br., p. 15. Given the incremental nature of the significance standards for traffic applied by Berkeley and DOE, it is simply not true that artificially inflated baseline traffic counts would more likely disclose higher incremental increases by any one project or the accumulated traffic impacts of future foreseeable projects. If one starts with a higher traffic count, any incremental increases from that higher number will by definition be lower than if you started from a lower baseline traffic count. DOE admits that by starting with the higher 2002 traffic counts resulted in longer delays and higher v/c ratios in the existing traffic baseline. Def. Br., p. 15. Assuming the agency's list of reasonably foreseeable projects is accurate, by starting at a higher traffic baseline, any incremental increases of delay or v/c ratios were dampened and inaccurate.

The arbitrariness of the EA's traffic analysis is further exacerbated by DOE's admission that its list of future project's was inaccurate. *See* Dec'l of Peter Whitfield, Ex. B. DOE's post-hoc memorandum should be ignored or stricken by the Court. *See Rybachek v. U.S. Envtl. Prot. Agency*, 904 F.2d 1276, 1296 n. 25 (9th Cir. 1990). However, the re-analysis undermines DOE's contention that their traffic analysis was conservative and no cumulative traffic impacts would result from the CRT Project and the other foreseeable projects. In fact, applying a legally sufficient cumulative analysis as described above to DOE's new analysis shows greater impacts using accurate traffic data and a more accurate list of projects. For example, at the Bancroft Way/Piedmont Avenue intersection, the traffic from the CRT Project and the reasonably foreseeable future projects increases the v/c ratio during the afternoon rush hour by an astonishing .11 – a dramatic increase from the previous cumulative degradation of 0.04 and 0.07 (*see supra*, p. 17) and well over the significance standard of a 0.01 increase in v/c ratio. Thus,

where Defendants urge that their new analysis shows less traffic is not true and fails to acknowledge the clear cumulative impact of the CRT Project and the actual related future projects. Def. Br., p. 16.

DOE's resort to inaccurate data which understates cumulative traffic impacts is inconsistent with 40 C.F.R. § 1500.1(b) ("Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA"). And the conclusions reached in *N.C. Alliance for Transp. Reform, Inc. v. United States DOT*, 151 F.Supp.2d 661, 688 (M.D.N.C. 2001) and *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005) are fully applicable.

Combining all of the above errors, DOE's traffic analysis in the EA was arbitrary and capricious and Plaintiff has established a substantial question of significant cumulative traffic impacts from the Project. As the Ninth Circuit and other courts have noted, "[t]he importance of analyzing cumulative impacts in EAs is apparent when we consider the number of EAs that are prepared. . . . "in a typical year, 45,000 EAs are prepared compared to 450 EISs…. Given that so many more EAs are prepared than EISs, adequate consideration of cumulative effects requires that EAs address them fully." *Preserve Our Island*, 2009 U.S. Dist. LEXIS 71198, *54-55 (citing CEQ Guidelines at 4, AR 14813**;** *Kern v. U. S. BLM*, 284 F. 3d 1062, 1076 (9th Cir. 2002). Plainly, DOE did not live up to that guideline.

C. Defendants Fail to Rebut The Evidence That the CRT Project "May Establish a Precedent For Future Actions With Significant Effects" and is "Related to Other Actions With Individually Insignificant but Cumulatively Significant Impacts."

Instead of addressing Plaintiff's argument applying the record evidence to 40 C.F.R. § 1508.27(b)(6)-(7), Defendants attempt to recast the argument as a claim for DOE to prepare a separate EIS for LBNL's Long Range Development Plan ("LBNL LRDP"). Although Plaintiff believes such a claim may have merit, no such claim is made in Plaintiff's complaint or their summary judgment motion.[9] The CEQ regulations require agencies, in determining whether an EIS is necessary, to consider whether a project "may establish a precedent for future actions with significant effects" and is "related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(6)-(7). Defendants do not contest any of the evidence discussed by Plaintiff. Pl. Brief, pp. 13-14. Although Defendants protest that the LRDP is not itself an implementation plan (a point that

Plaintiff did not assert and does not contest), they do not dispute that the CRT Project is itself implementing a portion of the LBNL LRDP. Defendants cannot refute their own statement that the "[t]he 2006 LRDP is now the governing land use plan for the LBNL site." AR 33. Nor can they dispute the significant growth called for by the LRDP and accompanying impacts. Pl. Brief, pp. 13-14; AR 11078 (adding 1000 employees over the next 14 years); AR 11079; AR 10740; AR 10602-605, 10613, 10617, 10626, 10632, 10635. The CRT Project is an integral part of that Plan. "[T]he CRT facility is an element of the growth projected under the 2006 LRDP." AR 33.

The only argument by Defendants in response to the overwhelming evidence that the CRT Project is an integral component of the LBNL LRDP and establishes a precedent that facilitates the realization of the LRDP is that the future development planned in the LRDP "is by no means certain, and the approval of one project listed as a potential development does not constitute a commitment to develop all potential growth under the LRDP or make such growth reasonably foreseeable." Def. Br., p. 17. The CEQ regulations do not require a ***commitment*** that future related projects be built. Rather the regulations ask whether the CRT Project sets a precedent for future actions with significant effects. As the LBNL LRDP makes plain, the CRT Project is not an isolated building but an integral component of a concerted plan to further develop the LBNL campus. The LRDP is adopted and, indeed, referenced with approval by DOE in its approval of LBNL's Ten Year Site Plan for LBNL, which specifically incorporates the LBNL LRDP. AR 16484. DOE has committed itself to the LBNL LRDP. *Id*. This level of planning is more than sufficiently concrete to establish the precedential effect of the CRT Project in implementing those development plans. And given the significant cumulative traffic, scenic vista, toxic air emission, and noise impacts identified by the University in the EIR prepared for the LBNL LRDP, there can be little doubt that the CRT Project is related to other development planned for LBNL that will have cumulatively significant impacts. AR 10613, 10617, 10632, 10635-37, 10641.

D. Defendants' response does not eliminate the substantial questions of a significant impact raised by BAAQMD's GHG significance threshold and the absence of evidence in the record supporting a credit for WAPA power.

Plaintiff believes that its opening brief amply addresses DOE's arbitrary handling of the CEQ's

[9] Hence, Defendants' discussion of laches is entirely irrelevant. Def. Br., p. 17. Certainly, laches does

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draft guidance document as well as the Bay Area Air Quality District's adopted significance threshold for greenhouse gas emissions. Pl. Br., pp 14-19. Contrary to Defendants' assertion in their brief that BAAQMD "in their comments to the EA also did not find that the Project's GHG emissions would have significant impact," BAAQMD did indeed comment on the significance of the GHG emissions expected for the CRT Project. *See supra*, pp. 9-10. Def. Br., p. 18. Given the CRT Project's massive exceedance of that threshold and its importance to the State achieving its GHG emission standards, it is readily apparent that Plaintiff (and BAAQMD) have raised a substantial question that the CRT Project may have a significant impact from its GHG emissions. Nor does the legal fact that BAAQMD's threshold is not binding on DOE detract from the substantial question raised by the fact that the Project's GHG emissions exceed that adopted expert standard by more than 11 times. *See* Def. Br., p. 20.[10]

Defendants speculate that BAAQMD somehow took the emissions of the CRT Project into account as existing "baseline emissions." Def. Br., pp. 20-21. Of course, no such notion is evident from BAAQMD's comments on the Project which state that agency's concern that the CRT Project by itself threatens the State's efforts to achieve their GHG reduction goals. AR 1579 ("This Project's operation emissions could potentially hinder the State's ability to reach goals set forth in AB32 and therefore we recommend mitigation measures to decrease the Project's GHG emissions"). Thus, BAAQMD refutes Defendants' suggestion.

DOE's post-hoc declaration by Eric Bell only manages to underscore the absence of evidence in the record to support its self-serving assumption that the power mix from the Western Area Power Administration ("WAPA") has 20 percent less greenhouse gas emission than PG&E's power mix. The Bell Declaration is the first document provided by DOE that identifies PG&E's report to the California Climate Action Registry ("CCAR") and the unspecified "data" regarding power mixes. Bell Dec., ¶¶ 3 ln. 18-27; 5 ln. 10-12. The Bell Declaration cites for the first time a single document – PG&E's 2008

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not apply to Plaintiff's challenge to CRT Project's EA. *See Klamath Siskiyou*, 468 F.3d at 555.

[10] Nor does Plaintiff contend that DOE must apply the BAAQMD standard as suggested by Defendants. Def. Br., p. 21 n.22. Plaintiff does contend that standard, adopted by an expert agency, and the CRT Project's exceedance of that standard raises a substantial question the CRT Project may have a significant impact. As a result, there is nothing inconsistent in Plaintiff's position that DOE self-

report to the CCAR – to substantiate its assessment. *See* Bell Dec., ¶¶ 3, 4, 5, 12. According to Mr. Bell, any actual comparison of PG&E's power sources and WAPA's purchased power was based on undisclosed "data." Bell Dec., ¶ 12. Neither the PG&E report nor the referenced "data" are referenced or provided in the EA or the administrative record. The record is simply devoid of documentation demonstrating how DOE calculated and compared PG&E's or WAPA's power mixes or non-GHG emitting power sources. The only mention of this issue in the record is Mr. Bell's January 24, 2011 letter (three months after the close of the public comment period), which states that because "there is no publicly-reported emissions factor for the WAPA", the "published and verified emissions factor for PG&E was used." AR 450. Nothing in the January 24, 2011 letter points to the actual "published and verified" report for PG&E. Nor is there any rationale or evidence cited to support the assumption that WAPA's purchased power from the open market somehow is identical to PG&E's power mix. Nothing in the record supports Mr. Bell's new statement that "PG&E was 'in the middle' of the western area energy suppliers." Bell Dec., ¶ 12. As requested by Plaintiff in reply to their motion to augment, the Court should strike Mr. Bell's declaration as a post-hoc litigation position. *See* Pl. Reply Brief in Support of Motion to Augment, pp. 9-10 (July 22, 2011); *Kunaknana*, 742 F.2d at 1149. Even if the Court includes the Bell Declaration in its review, the declaration fails to remedy the lack of evidence underscoring DOE's 20 percent GHG reduction credit for the CRT Project in the EA.[11]

E. Defendants' arguments do not eliminate the controversy or the uncertainty regarding the geologic hazards at the Project site.

Plaintiff does not rely on the mere existence of opposition as evidence of the heightened controversy and uncertainty surrounding the proposed location and safety of the CRT Project. *See* Def. Br., p. 22. The record includes statements by a seasoned expert with long-standing familiarity with the LBNL site – Dr. Garniss Curtis, a professor emeritus of geology at the University of California-

servingly relies upon the draft CEQ guidance and misstates its contents while affirmatively ignoring the substantive question raised by BAAQMD's final threshold determination. *See* Def. Br., p. 21.

[11] Nor do the proposed green building elements of the CRT building – emphasized in Defendants' brief – come close to compensating for the Project's GHG emissions resulting from its massive electrical power needs. *See* Def. Br., pp. 2-3, 20; AR 144-145. As Plaintiff noted in its opening brief, those design elements are certainly appropriate but any resulting GHG emission reductions are dwarfed by the GHG emissions relating to the Project's power supply. Pl. Br., p. 19-20 n. 14; AR 349.

Berkeley. *See* AR 1469-71; 7589-90; 768; 5023. Dr. Curtiss' expert comments raise a substantial dispute "as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use.'" *Humane Soc'y of the United States v. Locke*, 626 F.3d 1040, 1057 (9th Cir. 2010). Given Dr. Curtiss' expertise and DOE's failure to address Dr. Curtiss' comments in the draft EA, relegating their response to the final EA free from public scrutiny or critique, Dr. Curtiss' comments "cast serious doubt upon the reasonableness of the agency's conclusions" and DOE fails to remove the uncertainty raised by those expert comments. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001) (emphasis added); *See id*. at 731-32.

Defendants' argument regarding this issue starts with another strawman argument, misstating Dr. Curtis' comments and Plaintiff's argument, claiming that Plaintiff argues the proposed location of the CRT Project "sits atop a collapsed caldera." Def. Br., p. 21. What Dr. Curtiss states, and what Plaintiff's correctly summarize, is that the proposed location of the CRT Project is located on the hillside ***below*** an ancient collapsed caldera. Pl. Br., p. 21 ("a collapsed, ancient volcanic caldera at LBNL above the CRT Project's proposed location"). And that ancient caldera would not be immediately evident to the naked eye because, as Dr. Curtiss explains, it is collapsed and has been hidden by uplifting and other geologic changes over millions of years:

> The volcanic rocks underlying most of the Lawrence Lab complex fill an old crater, a collapsed caldera. The old volcano that once rose above these rocks collapsed after the expulsion of a very large amount of rhyolite ash, now largely removed by erosion. The volcanic rocks broke up as the collapse occurred and many show crushing and deformation and are mixed with large amounts of ash and volcanic fragmental debris. [AR 1469].

A USGS geologist's comments indicate that Dr. Curtis' opinion is consistent with his observations at LBNL. *See* AR 3288 ("I don't have any information that would verify or deny the presence of an ancient caldera in the LBL area"); *Id*. ("[p]resumably the caldera would largely be filled by subsequent volcanic deposits, and ***that matches my scattered observations in the LBL area***") (emphasis added); *Id*. ("[i]nstability could be caused by thin layers of mudstone within the volcanic pile if the local orientation was unfavorable in relation to the local slope, but again that is a site specific question"). And the USGS geologist concurs with Dr. Curtis that there is no "undeformed body of caldera" but rather a ***collapsed*** and ancient caldera. AR 3279; AR 1469-71.

A Kleinfelder report prepared in January 2011 – well after the close of public comments – reviews Dr. Curtis' ***2008*** comments as well as a video prepared by Save Strawberry Canyon in 2009. AR 741.[12] Kleinfelder does not address the presence or absence of a collapsed caldera above the CRT site, but limits its comments to Dr. Curtis' concern that the strike of the sandstone bedrock at and near the site was steep and dipping westward based on Dr. Curtis' observations of outcroppings in the area. AR 768. As Dr. Curtis states, "At the location of the planned construction of the CRT, it is not the strength of the foundations that is my concern, but the strength of the westward dipping shale rocks which the building will rest on, particularly during a strong earthquake when the rocks are water-soaked." *Id*. In 2008, Dr. Curtis also described his concern in detail:

> I recently saw a map of planned construction on the LBNL hill campus. One site on the west side of the present buildings is on Great Valley Sequence Cretaceous beds. There are fine-grained sandstones interbedded with shale beds ranging from a few inches thick to a foot or more in thickness. The shale is composed of altered flakes of mica and silt grains. The beds at this locality dip westward at angles of 30 to 40 degrees as can be seen in outcrops in the gullies. The slope here is very steep, and scars of small landslides are numerous, the landslide debris having been washed away quickly. Two factors are involved in causing this slope to be so steep: one is the slow uplift of the rocks on the east side of the Hayward Fault, leaving a fault scarp, and the other is the steep westward dip of the strata composing the slope. …

AR 768. Although Kleinfelder's map shows numerous bedrock outcroppings at and below the CRT site, no effort was made during the two and half years the agencies had Dr. Curtis' comments to review those outcroppings to determine whether they corroborate Dr. Curtis' observations. AR 746. Kleinfelder acknowledges Dr. Curtis' description of the bedrock at the site as consisting of sandstone. *See* AR 506 ("The bedrock was described as a siltstone that is completely to moderately weathered, extremely weak to weak with very close fractures"). Likewise, the presence of landslides on and near the CRT Project site, is documented. AR 337; AR 503. Kleinfelder does not share Dr. Curtis' concern that westward dipping bedrock is present at the site but also notes that although "'[t]he strike of the bedrock in the immediate vicinity of the proposed CRT building is generally perpendicular to the slope direction,"

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[12] DOE's claim that it was only aware of Dr. Curtis' comments after the draft EA was issued is not supported by the record. Def. Br., p. 22 n. 25. Dr. Curtis submitted his comment initially to LBNL in 2008 and Plaintiff publicly circulated a related video in 2009. AR 768, 7589-90, 7578, 5022. Rather than tackle the issue head on in the draft EA, DOE opted to cut off the debate and ensure itself the last word by only addressing the controversy after the close of public comments in the final EA. AR 741.

“there may be some local variations on bedrock orientation. . . .” AR 742. *See also* AR 532 (“It is possible that soil, rock or groundwater conditions could vary between or beyond the points explored”). Thus, although the outcroppings that informed Dr. Curtis’ opinion are present at the site, and local variations consistent with Dr. Curtis’ observations may be present, no one bothered to look.

Plaintiff does not need to prove which scientist’s conclusion is correct. Plaintiff need only demonstrate under this criterion that the CRT Project’s location gives rise to geologic impacts that are highly uncertain and the subject of substantial scientific controversy. Under Defendants’ application of the “highly controversial” criterion, even expert disagreement would not indicate any controversy. Of course, by definition, the term “controversy” means there is a disagreement. *See* The New Oxford American Dictionary, p. 371 (Oxford University Press 2005, 2d ed.) (defining “controversial” as “giving rise or likely to give rise to public disagreement”). The only limitation placed on this criterion by the Court’s is that unsubstantiated opposition not be enough to establish a controversy. Where as here the public disagreement stems from good faith scientific debate, that is precisely the type of controversy that warrants the preparation of an EIS.

CONCLUSION

For all of the above reasons, the Court should DENY Defendants’ cross-motion for summary judgment and GRANT plaintiff’s motion for summary judgment and order appropriate injunctive relief.

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Respectfully submitted,

LOZEAU DRURY LLP

/s/ *Michael R. Lozeau*
Attorneys for Plaintiff Save Strawberry Canyon