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8

9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
11

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

14 Plaintiff, )

15 v. )

16 )  
17 STEVEN CHU, Secretary of the United States )  
Department of Energy; AUNDRA RICHARDS, )  
18 Site Office Manager, United States Department )  
of Energy Berkeley Site Office; and UNITED )  
19 STATES DEPARTMENT OF ENERGY, a )  
federal agency, )  
20 )

21 Defendants. )  
22 )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

Civ. No. CV 10-00797 VRW

**PLAINTIFF'S REPLY IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT**

Honorable Vaughn R. Walker

Date: December 9, 2010  
Time: 10 a.m.  
Courtroom: 6

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## I. INTRODUCTION

1  
2 As demonstrated in plaintiff Save Strawberry Canyon's ("plaintiff's") Motion for Summary  
3 Judgement ("MSJ"), the Federal Defendants' (collectively, "DOE's") approval of the proposed Berkeley  
4 Lab Laser Accelerator (the "project" or "BELLA") failed to comply with the National Environmental  
5 Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"). DOE's opposition to plaintiff's motion does not show  
6 that the Environmental Assessment ("EA") prepared for the project sufficiently addressed potentially  
7 significant environmental impacts that would occur from construction and operation of the project.  
8 DOE's EA failed to "insure that environmental information" of "high quality" was "available to public  
9 officials and citizens before decisions [were] made and before actions [were] taken," as required by  
10 NEPA. 40 C.F.R. § 1500.1(b). Thus, plaintiff asks this Court to grant its motion and to require DOE to  
11 conduct further environmental review of BELLA prior to any reconsideration of the project approval.

12 NEPA case law has long held that bald conclusions that a project will have no significant impacts  
13 do not provide the public and decisionmakers with adequate information about the project's impacts. As  
14 stated by the Ninth Circuit, "mere[] . . . asserti[ons] that an activity . . . will have an insignificant effect"  
15 do not satisfy NEPA; agencies must instead "supply a *convincing statement of reasons* why potential  
16 effects are insignificant." *Alaska Center for Environment v. U.S. Forest Serv.*, 189 F.3d 851, 859 (9th  
17 Cir. 1999) (emphasis added). As the Deepwater Horizon calamity made clear, inadequate environmental  
18 review of experimental facilities can have truly devastating consequences. Now, more than ever, it is  
19 clear that environmental review requirements are not merely procedural hurdles for agencies to overcome.  
20 Robust, public analyses of a project's potentially significant impacts can and do protect the environment  
21 and the health and safety of people who work at or reside near a potentially hazardous facility.

22 Here, DOE's EA provided nothing but the barest of assurances that BELLA would be operated in  
23 a manner that would avoid significant effects on workers and nearby members of the public. Despite the  
24 fact that the whole purpose of preparing the EA was to analyze radiological emissions and their resultant  
25 impacts, the EA failed entirely to provide, for example, any radiation calculations that would demonstrate  
26 the reliability of the measures being taken to protect the workers and the public during normal operations  
27 or any explanation that adequate safeguards had been put in place to avoid accidental releases.

28 In an attempt to cover over these EA deficiencies, DOE has insinuated explanations and *ad hoc*,

1 back-of-the-envelope calculations into its briefing. The question facing this Court, however, is not  
 2 whether DOE can come up with post-decisional, non-public, non-peer-reviewed rationalizations for  
 3 foregoing the preparation of an Environmental Impact Statement (“EIS”). Rather, the Court’s inquiry  
 4 only pertains to the EA itself, which was devoid of critical information related to radiological impacts.

5 Despite the inescapable informational gaps in its environmental review, DOE claims that its EA  
 6 and FONSI do not “hide the ball” but instead “read like an open playbook.” DOE Opposition (“Opp.”),  
 7 p. 1. As discussed throughout plaintiff’s motion for summary judgement, Lawrence Berkeley National  
 8 Laboratory (“LBNL”) employees repeatedly reported that the EA lacked important information.<sup>1</sup> Instead  
 9 of including the information in the EA, DOE *ignored* the deficiencies and decided to wait to see if  
 10 members of the public could ferret out the potential significant impacts on their own – at which point  
 11 DOE would (apparently) be willing to provide some level of analysis of the potentially significant  
 12 impacts. *Id.* For example, a DOE representative admitted, in writing, that “the EA does not do a very  
 13 good job” analyzing accidental release impacts, but refused to “revise the EA” to fix the problem.  
 14 Administrative Record, Tab 19, p. 459 (“AR19:0459”). Instead, DOE planned to provide the information  
 15 only “[i]f the public comments on the lack of accident analysis” and then – and *only* then – would DOE  
 16 “provide [such] analysis in the response to the comment.” *Id.* This information-deprivation tactic reveals  
 17 a classic case of hide-the-ball and belies any notion that the EA reads like an open playbook. Instead the  
 18 EA reads like Agatha Christie minus the final chapter. DOE’s attempts to defend the gnawing  
 19 inadequacies in the EA fail, as discussed fully below.

## 20 II. ARGUMENT

### 21 A. The EA Fails to Acknowledge Potentially Significant Impacts

#### 22 1. The Potential Radiation Impacts Are Controversial

23 DOE argues that the impacts of the project are not controversial. Opp., p. 2. It first cites the EA’s  
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25 <sup>1</sup> Pltf. MSJ, pp. 7 (accidental release analysis inadequate), 8-9 (seismic analysis ignores  
 26 previously identified faults underlying the site), 13 (EA must, but does not, contain any of the  
 27 radiological calculations), 14 (EA fails to address the project’s radionuclide emissions). These  
 28 type of admissions have previously been considered conclusive evidence of legal inadequacies of  
 NEPA documents. *Ilio’ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1096, 1099 (9th Cir.  
 2006).

1 statement that the amount of radiation to which the public would be exposed is “no[t] measurable.” *Id.* at  
2 3, citing the EA (AR7:132). Yet immediately following that conclusory assertion from the EA, DOE  
3 produces an unsupported calculation of radiation it expects the public to be exposed to when the project is  
4 up and running. *Id.* DOE’s argument heightens, rather than diminishes, the plaintiff’s (and the public’s)  
5 concern that the EA simply passed off unfounded speculation regarding the facility’s radiological effects  
6 as scientific fact. Further, there is nothing in either DOE’s motion or in its opposition that confirms the  
7 accuracy of its newly-produced calculations. Def. MSJ, p. 11; Opp., p. 3. DOE’s recently conceived  
8 calculations thus have little to do with the adequacy of the EA or the level of controversy related to the  
9 project – except that they *demonstrate* that this critical information could have been provided in the EA,  
10 but was omitted to the detriment of the both the public and DOE’s decisionmakers.<sup>2</sup>

11 DOE also ignores the evidence in the record that shows a substantial controversy over the health  
12 impacts of long-term, low-dose radiation exposure. Opp., p. 2-6. Yet a June 2005 report from the  
13 National Academy of Sciences, cited by multiple parties in their comments on the project, explains that  
14 “even very low doses of radiation pose a risk of cancer or other health problems and there is no threshold  
15 below which exposure can be viewed as harmless . . . .” AR7:0189; *see also* AR7:0223 (Comments of  
16 Mark McDonald, July 17, 2009). Thus, even if DOE’s post-decisional calculations were relevant, they  
17 still would not address the controversial nature of the project’s plan to expose the public to long-term  
18 radiation produced by the project.

19 DOE also attempts to tamp down any notion of controversy by advancing soothing assurances  
20 regarding the project’s features and operation. Opp., p. 3-5. It claims, for example, that the “the laser  
21 itself is not uniquely powerful.” Opp., p. 3. DOE, however, does not then explain its own admission in  
22 the record that the “experimental” project will “require a laser at or beyond state-of-the-art” technology.  
23 AR14:0337. The fact that the laser required may be “beyond state-of-the-art” directly undercuts DOE’s  
24 claim here that the laser will be run-of-the-mill (as far as 10 GeV lasers go). *Id.* Consequently, DOE’s

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25  
26 <sup>2</sup> Adding injury to insult, DOE ignored plaintiff’s requests for this specific information.  
27 Plaintiff asked DOE to “clarify the basis for estimates of radioactive emissions” and “provide  
28 evidence” supporting “the basis for estimated radioactive emissions.” AR7:0229-230. DOE  
failed to provide in the EA the type of analysis and specific data that it now belatedly seeks to  
proffer to the Court as legal argument to excuse its omission from the EA. AR7:0270.

1 argument merely underscores, rather than resolves, the extent of the controversy surrounding the laser by  
2 highlighting the unknown quality of the laser that will be used at the facility.

3 Further, DOE cites the EA's assertion that there are other similar accelerators in operation  
4 "[t]hroughout the world" that have not resulted in adverse impacts. Opp., p. 5, citing AR7:0081, 237,  
5 253, and 254. As explained fully in plaintiff's opposition to defendants' cross motion (pp. 2-3), this blind  
6 reliance upon the ostensible performance of other unnamed accelerators: (1) provides little to no  
7 information related to the significance of *BELLA*'s radiological impacts on nearby residents and  
8 schoolchildren; (2) ignores the fundamental NEPA standards for measuring the significance of impacts,  
9 intensity and context; and (3) therefore does nothing to reduce the controversial nature of the project.

10 Rather than dispelling the controversy surrounding the project, DOE's opposition demonstrates  
11 such controversy by producing contradictory information on the project, whose deficient EA already lacks  
12 critical, specific details regarding its operation and safety.

## 13 **2. The EA Does Not Adequately Address the Project's Radiation Impacts**

### 14 **a. Accidental Releases**

15 DOE contends that the EA adequately analyzed the potential for accidental releases of radiation.  
16 Opp., p. 6-11. In support of its argument, DOE provides the court with various assertions related to the  
17 project design and functionality. *Id.* DOE's explanations, however, do not pertain to the question at  
18 hand, whether the EA adequately addressed the potential impacts from accidental releases. For example,  
19 DOE argues that it conducted an analysis of "the consequences of an operational accident." *Id.* at 7. It  
20 then discusses the contents of its purported analysis, *without once mentioning that the analysis – or any*  
21 *summary thereof – was not included in the EA itself.* *Id.* at 7-8. The analysis referred to can be found  
22 only in a three-page memorandum that was *never* made available to the public or even to the  
23 decisionmakers prior to the approval of the project. AR31:671-73. Further, DOE's counsel extrapolates  
24 from the internal memorandum's numbers, its own set of numbers that allegedly demonstrate how many  
25 hours it would take for an accidental release to exceed regulatory limits. Opp., p. 8. NEPA requires that  
26 this analysis be contained *in the EA*, not in the briefing on the merits of a subsequent NEPA challenge.  
27 *Alaska Center*, 189 F.3d at 859 (agencies must "supply a convincing statement of reasons why potential  
28 effects are insignificant"). The EA here does not meet this standard, and DOE's unprecedented attempts

1 at *post hoc* rationalization of its decision demonstrate that the EA itself lacked any substantive analysis of  
2 accidental releases of radiation.<sup>3</sup>

3 DOE also argues that it adequately addressed accidental releases due to earthquakes and that the  
4 “EA’s description of seismic conditions was not ‘sanitized.’” Opp., p. 9. DOE then admits, however,  
5 that an administrative draft EA for BELLA stated that “[a]n active fault parallel to the Hayward Fault is  
6 thought to intersect the southwest corner of Building 71, and another at right angles is located at the  
7 northeast corner.” Opp., p. 9, *citing* AR23:0572, *citing* 1996 LBNL Site Environmental Report. DOE’s  
8 counsel argues, without an iota of support, that “this statement is incorrect and was most likely based on a  
9 misinterpretation of a map in the 1996 Report.” Opp., p. 9. In response, plaintiff requests judicial notice  
10 of Figure 2-13 of the 1996 Site Environmental Report – the map in question – authenticated as Exhibit 1  
11 to the accompanying Declaration of Stephan C. Volker. Figure 2-13 clearly shows two faults underlying  
12 Building 71 (compare with AR7:0083). DOE produces no evidence that affirmatively refutes its own  
13 detailed seismic map of the building site, and directs the Court’s attention only to a regional-scale map of  
14 earthquake faults (AR2:0021) that does not even include the Wildcat Canyon Fault that DOE admits *is*  
15 adjacent to the project site! AR7:0099. The presence of two earthquake faults under the project site is a  
16 significant factor in the analysis of the project’s potential for accidental, radiological release. The EA’s  
17 treatment of seismic hazards as an “[i]ssue[] [d]etermined not to [w]arrant [f]urther [d]iscussion” (*id.*),  
18 based in part on DOE’s sanitized earthquake fault mapping, therefore violates NEPA by ignoring  
19 “substantial question[s] whether an action ‘may have a significant effect’ on the environment,” which  
20 questions require “the agency [to] prepare an Environmental Impact Statement (EIS).” *Center for*  
21 *Biological Diversity v. National Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008),  
22 *citing Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir.1998).

23 Finally, DOE claims that plaintiffs misrepresented the record by stating that the project site is  
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25 <sup>3</sup> Similarly, DOE’s counsel’s unsupported statement that “[j]iggling the focusing  
26 components of the laser apparatus . . . would cause the laser beam to come out of alignment . . .  
27 [and] thereby terminat[e] the production of the electron beam,” has no place in an administrative  
28 record review case. DOE’s explanation of its conclusions in the EA must be substantiated with  
reference to the *administrative record*, not created from whole cloth by DOE’s counsel. *Stop*  
*H-3 Ass’n v. Dole*, 740 F.2d 1442, 1450 (9th Cir. 1984).

1 located in an area that is affected by hazardous slope stability conditions. Opp., p. 9. Consequently, DOE  
2 claims that the EA's short-shift analysis of the accidental releases due to landslides satisfies NEPA. To  
3 the contrary, DOE's *own experts* stated that "most of Building 71 is located within an official hazard zone  
4 for earthquake-induced landsliding." The experts' conclusion was based on the official State of  
5 California Landslide Inventory Map, which "shows a landslide that extends from the hills upslope of the  
6 site, beneath most of the Building 71 and into the valley below." AR2:0009. DOE's failure to address  
7 the consequence of its admitted landslide hazard is a per se violation of NEPA.

8 As privately conceded by DOE itself, the EA did "not do a very good job of accidental analysis."  
9 AR19:0459. The fact that DOE must resort here to reference to analyses and post-decisional calculations  
10 that were not contained in the EA to explain its position that accidental releases will not cause significant  
11 impacts shows that the EA was inadequate. Unwittingly, DOE demonstrates plaintiffs' case.

#### 12 **b. Sabotage**

13 DOE ignores plaintiff's argument related to sabotage and again relies on post-decisional  
14 rationalizations that are nowhere to be found in the EA itself. Opp., p. 11. First, plaintiff demonstrated in  
15 its motion (pp. 11-12) that the "Intentional Destructive Acts" section of the EA only pertained to threats  
16 from external entities and did not address acts undertaken by people with full access to the facilities, or  
17 internal threats. *See* AR7:0124. DOE focuses on the term "internal" and argues that "someone could not  
18 manually control the laser from *inside* the Experimental Cave." Opp., p.11 (emphasis added). This  
19 overly literal misinterpretation of plaintiff's argument fails to explain how the EA addresses sabotage  
20 committed by lab workers with expertise in using the high-powered laser and associated accelerator.

21 DOE also relies on the same unsubstantiated analysis of the project's potential to create radiation  
22 in its attempt to dispel accidental release concerns. *Id.* Yet, here again, DOE does not refer the Court to  
23 the EA's discussion of the impacts of a potential saboteur. *Id.* Instead, it advances for the first time its  
24 counsel's post-decisional analysis of the project, claiming without support in the EA that an act of  
25 sabotage could not have any radiological impacts whatsoever on employees or members of the public.  
26 *Id.*, pp. 11-12. First, NEPA requires this analysis be presented in DOE's EA, not the Justice  
27 Department's brief. *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016,  
28 1030-31 (9th Cir. 2006) (agency's failure to include analysis of the impacts of a terrorist attack violated

1 NEPA); *see also*, AR:EAFN:26:2085-86. Second, DOE's explanation does not address many potential  
2 destructive acts, including removal of the accelerator, its operation outside the cave, or operation of the  
3 10 GeV laser in a manner that would maximize its destructive power. AR7:124. Furthermore, DOE's  
4 recent memorandum requiring agencies to address intentional destructive acts specifically discourages  
5 relying on accidental analyses, stating "accidental scenarios may not fully encompass potential threats  
6 posed by intentional destructive acts." Administrative Record: Environmental Assessment Footnotes,  
7 Tab 25, page 2086 ("AR:EAFN:25:2086"). DOE's simplistic dismissal of the threats that an act of  
8 sabotage on BELLA may pose, which is heavily reliant on its post-decisional accidental release  
9 calculations, does not excuse DOE's failure to provide an adequate analysis of the impacts of an  
10 intentional destructive act in an EA (or EIS). NEPA requires more.

11 **c. Radiation Hazard Reports Not Yet Conducted**

12 DOE asserts that its deferral of the preparation of the Safety Analysis Document ("SAD") and  
13 Acceleration Safety Envelope ("ASE") report did not violate NEPA. AR7:0095. Yet, the EA clearly  
14 relies on these two future documents to "ensure the facility's safe operation" (AR7:0095) by calculating  
15 maximum exposures and implement measures based thereon. AR7:0245 (EA states that the SAD report  
16 will identify the "Maximally Exposed Individual" and base the "exposure calculation" on "the largest  
17 event that could occur once the accelerator is operational"). Without these calculations and mitigation  
18 measures, the EA fails as an informational document. Indeed, as stated in plaintiff's motion (p. 12),  
19 DOE's rationale for conducting review in the first place was to specifically address the "exceptionally  
20 large amount of energy" and associated "radiation that must be shielded from other users of the building."  
21 AR26:0611; *see also*, AR0460-461 (EA required based on "the electron beam energy"). By deferring the  
22 actual analysis of the radiation impacts, however, DOE failed to produce an EA that addresses the very  
23 topic that spurred its analysis in the first place.

24 DOE's argument that the safety documents "are not prepared until the facility has been  
25 completed" is unsupported by any citation to any evidence in the administrative record or other authority  
26 and therefore must be ignored. *Opp.*, p. 12.

27 DOE's argument that the EA actually contained the required analysis, despite its deferral of the  
28 SAD and ASE, fails to cite the EA and concentrates again on analysis contained in internal DOE

1 documents. Opp., p. 13. Just as above, DOE’s attempt to prove that the EA contained specific analyses  
2 through citation to *other* documents fails to demonstrate that the EA was adequate.

3 **d. Radiation from Normal Operations**

4 DOE first claims that the EA contained adequate calculations pertaining to the radiological  
5 impacts of normal operations of the project. Opp., p. 13. But it then refers the Court to nothing more  
6 than the EA’s bare conclusions that the project will have no effects. *Id.* “[M]ere[] . . . asserti[ons] that an  
7 activity . . . will have an insignificant effect” do not satisfy NEPA. *Alaska Center*, 189 F.3d at 859.  
8 Without any data to support its conclusions, DOE’s refusal to prepare an EIS was error.

9 DOE also argues that there is no requirement for the radiation calculations to be included in the  
10 EA because the “calculations were performed using computer code and could not be easily included in an  
11 EA.” Opp., p. 14. DOE’s assertion is nothing more than unsupported speculation. *Id.* Furthermore  
12 DOE ignores its own attempts to provide radiation calculations in the briefs it submits to this Court. *Id.*,  
13 *see e.g.*, Opp., p. 8, fn 13. If DOE’s lawyers can digest the radiation impacts information and attempt to  
14 explain it – albeit in an unsupported and procedurally inadequate manner – then surely its scientists at the  
15 lab could have prepared a discussion of concrete radiation estimates for inclusion in the EA. Then and  
16 only then, would the EA have satisfied NEPA’s requirement that agencies “supply a *convincing statement*  
17 *of reasons* why potential effects are insignificant.” *Alaska Center*, 189 F.3d at 859 (emphasis added).<sup>4</sup>

18 DOE also argues that the Court should defer to DOE’s presumed expertise in this matter and  
19 uphold the EA’s conclusion that the radiological impacts of the project will be minimal. Opp., p. 15-16.  
20 But the Court cannot defer to an agency’s decision not to include information that is required by NEPA:  
21 “[courts] are not compelled to defer – indeed, [courts] are compelled not to defer – when an agency has  
22

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23 <sup>4</sup> DOE again claims that “[n]one of the commenters on the draft EA requested the  
24 radiation calculations themselves and if they had, the agency would have certainly responded to  
25 that request.” Opp., p. 14. Not so. As demonstrated above, plaintiff asked DOE to “provide  
26 evidence” supporting “the basis for estimated radioactive emissions.” AR7:0229-230.  
27 Furthermore, it is not the public’s responsibility to ask for evidence supporting an agency’s  
28 conclusion to forego preparation of an EIS; the agency has the affirmative duty to provide such  
information in the first instance. *Sierra Club v. Babbitt*, 69 F.Supp.2d 1202, 1218 (E.D.Cal.  
1999) (EA provided “insufficient detail” to “allow the public a meaningful opportunity to  
comment on the project during the planning stages”).

1 acted arbitrarily and capriciously.” *Center for Biological Diversity v. U.S. Dept. of Interior*, — F.3d —,  
2 2010 WL 3704200, \*16 (9th Cir. 2010). Omitting required information without explanation is arbitrary  
3 and capricious and thus requires no deference. *Id.*

4 **e. Radionuclide Emissions**

5 As stated in plaintiff’s motion (p. 14), an LBNL employee admitted that the facility will  
6 “[p]robably” produce radionuclide emissions, but DOE thereafter chose to ignore such impacts and again  
7 resorted to its tactic of hiding pertinent information from the public unless the public specifically raised  
8 concerns about such emissions. AR22:0544. DOE unconvincingly responds that the EA adequately  
9 addressed the radionuclide emissions impact in its responses to comments. *Opp.*, p. 16, citing AR7:0248.  
10 But the information that DOE references only talks about hydrogen gas and does not even mention  
11 radionuclide emissions. It does not address, for example, tritium, nor alpha-, and beta-emitting  
12 radionuclides, the main types of emissions of concern for LBNL. AR:EAFN:9:1360 (internal pagination:  
13 pp. 5-2 to 5-4). Furthermore, DOE’s argument by implication that *no* radionuclide emissions will be  
14 emitted from BELLA is contradicted in the record not only by the LBNL’s employee’s admission  
15 referenced above, but also by LBNL’s 2008 Site Environmental Report, which states: “Charged-particle  
16 accelerators [] generate radioactive materials [that] result in small amounts of airborne radionuclide,  
17 which are typically emitted through building exhaust systems.” *Id.* (internal pagination: p. 4-3). Because  
18 the EA lacks any discussion of the impacts of the project’s radionuclide emissions, a potentially  
19 significant impact, it does not comply with NEPA standards.

20 **f. Cumulative Impacts**

21 DOE asserts that the EA adequately addresses cumulative radiological impacts during normal  
22 operations, but again cites only a bare conclusion in the EA that the project will have no cumulative  
23 impacts. *Opp.*, p. 17, citing AR7:0132. As discussed above, unsupported conclusions that a project will  
24 have no significant impacts does not satisfy NEPA’s disclosure requirements. *Alaska Center*, 189 F.3d at  
25 859. Without providing any data to support its conclusion, the EA is inadequate.

26 DOE also argues that mitigation measures will decrease the cumulative impact of the project to  
27 insignificance. *Opp.*, p. 17. It states that the project will comply with various regulations and therefore  
28 no significant impacts are anticipated. *Opp.*, p. 17. Perfunctory listings of applicable regulations, alone,

1 however, do not demonstrate that mitigation measures will fully address significant impacts. *Nat'l Parks*  
2 *& Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001) (“A perfunctory description or mere  
3 listing of mitigation measures, without supporting analytical data” is inadequate); *Okanogan Highlands*  
4 *Alliance v. Williams*, 236 F.3d 468, 475 (9th Cir. 2000) (listing of regulations *coupled with measures* that  
5 would be taken if the project exceeded regulatory limits held adequate). DOE’s bare promises to comply  
6 with regulatory limits do not demonstrate the project will have no cumulative impacts.

7 In arguing that the EA adequately addressed cumulative radiological impacts resulting from  
8 potential catastrophic events, DOE relies again on its post-decisional analysis of BELLA’s capacity to  
9 emit radiation during accidents. As discussed above, this information was not included in the EA and  
10 furthermore does not fully address BELLA’s capacity to emit radiation. The Justice Department’s  
11 reliance here on the same analysis outside of the EA yields similarly unconvincing results; the EA  
12 inadequately addressed cumulative impacts of catastrophic events.

### 13 **3. Hazardous Waste**

14 Confusingly, DOE argues that removal of hazardous waste from the construction site “is not a  
15 mitigation measure.” Opp., p. 19. Alleged compliance with unnamed regulations during such removal is,  
16 however, a mitigation measure that is meant to minimize or avoid the potential significant impacts of  
17 demolition of a facility that has been used for decades as the site for radiological experimentation and is  
18 admittedly contaminated with many known hazardous materials. AR7:0102 (project site currently  
19 contains asbestos, lead, beryllium, poly-chlorinated biphenyls, radioactive materials, Americium-241,  
20 Cesium-137, and Curium-244). The EA mitigation plan for removal of hazardous materials reads simply,  
21 “hazardous waste removal, transport, and disposal would follow all applicable federal, state, and  
22 environmental, health, and safety regulations and protocols.” AR7:0094. As discussed in plaintiff’s  
23 motion (p. 16), a “‘perfunctory description,’ or ‘mere listing of mitigation measures, without supporting  
24 analytical data,’ is insufficient to support a finding of no significant impact.” *Nat’l Parks & Conserv.*  
25 *Ass’n, supra*, 241 F.3d at 734, quoting *Okanogan Highlands Alliance, supra*, 236 F.3d at 473 (citations  
26 omitted). Because the EA’s mere recitation of a generalized commitment to comply with all applicable  
27 regulations does not contain any supporting analytical data or explanation, it fails to ensure that the  
28 project’s hazardous waste impacts will be rendered “so minor as to not warrant an EIS.” *Id.*, citing

1 *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir.1992). DOE’s argument that its  
2 commitment to comply with regulations is not a mitigation measure is unavailing.

3 **B. The EA Lacks Consideration of Offsite Alternatives**

4 DOE argues that it was not required to consider siting BELLA at another DOE laboratory,  
5 because none of its 21 other national laboratories represents a “reasonable alternative.” Opp., p. 20.  
6 DOE explains this conclusion by stating that “the particular scientists that will be performing the BELLA  
7 research have unique skills, knowledge, experience, and already work and conduct other ongoing research  
8 at the Lab.” Opp., p. 20. DOE’s argument is unpersuasive. First, DOE’s explanation – even if valid –  
9 was not included in the EA and as such does not support the adequacy of DOE’s review of alternatives.  
10 *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of Interior*, 608 F.3d 592, 601-602 (9th Cir.  
11 2010) (EAs must “give full and meaningful consideration to all reasonable alternatives”). Second, DOE  
12 fails to cite any authority that permits an agency to limit consideration of alternatives based on where  
13 certain employees are currently located. Opp., p. 20. And finally, a 30-second web search reveals that a  
14 viable alternative national laboratory site is located just a short drive from LBNL. The SLAC National  
15 Accelerator Laboratory (originally known as the Stanford Linear Accelerator Laboratory) (hereinafter  
16 “SLAC Lab”) in Palo Alto “is home to a two-mile linear *accelerator* – the longest in the world” and  
17 currently houses “a multipurpose laboratory for astrophysics, photon science, *accelerator and particle*  
18 *physics research.*”<sup>5</sup> The SLAC Lab thus already houses accelerators and employs scientists with the same  
19 or similar knowledge and expertise as DOE claims is only located at LBNL. *Id.* Furthermore, even if  
20 BELLA required LBNL scientists only, they could easily travel to the SLAC Lab to conduct their  
21 experiments. Thus, even if DOE were constrained by the location of its employees, the nearby SLAC  
22 Laboratory presents a reasonable alternative site for the project that was not considered.

23 DOE also argues that its failure to consider any offsite alternatives should be reviewed under a  
24 “narrow and highly deferential standard of review.” Opp., p. 21. DOE, however, fails to cite any cases  
25 that discuss review of an agency’s selection of alternatives. *Id.* Contrary to DOE’s position, agencies  
26 “must ‘[r]igorously explore and objectively evaluate all reasonable alternatives’ to” the proposed action.

27  
28 <sup>5</sup> <http://www6.slac.stanford.edu/AboutSLAC.aspx>

1 *Center for Biological Diversity, supra*, 2010 WL 3704200 at \*8, *citing* 40 C.F.R. § 1502.14(a). Further,  
2 “[t]he existence of reasonable but unexamined alternatives renders” environmental review inadequate.  
3 *Id.*, *citing Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir.1998); *Te-Moak*  
4 *Tribe*, 608 F.3d at 601-602 (same standard applies to both EAs and EISs). Thus, contrary to a “highly  
5 deferential” review of alternatives, courts have repeatedly ruled that failure to conduct a complete  
6 evaluation of all reasonable alternatives violates NEPA.

7       Here, the EA’s minimal justifications for refusing to analyze any offsite alternatives does not  
8 demonstrate that no “reasonable but unexamined alternatives” exist. AR7:0097. DOE fails to explain  
9 away the blatant contradiction in the record between (1) its justification for refusing to consider any  
10 offsite locations because a “large perimeter around the building” could be required and (2) the EA’s  
11 statement that “[a] large perimeter is not required around Building 71 because adequate protection is  
12 provided by the shielding from the cave and beam dump.” AR7:0245. DOE seems to argue that there is  
13 something special about Building 71 that makes a large perimeter unnecessary, unlike potential offsite  
14 alternative buildings. *Opp.*, p. 22. It states: “Building 71 has features that lend it to housing an  
15 accelerator like BELLA . . . that would not likely be available at commercial sites.” *Id.*, *citing* AR7:0082,  
16 0097. The referenced pages do not support DOE’s special-features theory – nor does anything else in the  
17 record. Further, the statement from the EA directly contradicts DOE’s unsupported theory by  
18 highlighting that it will be the “the shielding from the cave and beam dump” that eliminates the purported  
19 need for a perimeter. AR7:0245. The “shielding” is not an inherent or unique component of Building 71;  
20 it is part of the new construction that will take place at Building 71 as part of this project and could just as  
21 easily take place at any other industrial building in the area. AR7:0104. Thus, the EA’s elimination of  
22 other offsite locations based on the claimed need for a large perimeter rests on a false premise.

23       DOE does not address and thus concedes plaintiff’s challenge to the EA’s second justification for  
24 its lack of offsite alternative analysis, namely, that “vacant accelerator facilities in the area are  
25 uncommon.” *Opp.*, p. 20-22. If BELLA’s experimental nature is merely the accelerator’s vastly reduced  
26 size as DOE contends, then why would it need a vacant accelerator facility, such as the two-mile linear  
27 accelerator at the SLAC Lab, to house the new accelerator? *See supra* n. 5. DOE’s misleading pretexts  
28 for eliminating offsite alternatives are not only false, they also clearly violate NEPA’s call to

1 “[r]igorously explore and objectively evaluate all reasonable alternatives” to the proposed project.  
 2 *Center for Biological Diversity, supra*, 2010 WL 3704200 at \*8, *citing* 40 C.F.R. § 1502.14(a).

3 **C. The EA Fails to Respond to Comments**

4 DOE provides no further argument related to the EA’s Response to Comments. *Opp.*, p. 22-23. It  
 5 therefore fails to address DOE’s refusal to provide radiation calculations per plaintiff’s clear request in its  
 6 comment letter to “clarify the basis for estimates of radioactive emissions” and “provide evidence”  
 7 supporting “the basis for estimated radioactive emissions.” AR7:0229-230. DOE’s statement that  
 8 “[n]one of the commenters . . . requested the radiation calculations” is simply wrong and merely  
 9 underscores DOE’s continued refusal to acknowledge plaintiff’s request. Furthermore, DOE has not  
 10 adequately explained its refusal to acknowledge and address the conclusions in the BEIR Report that even  
 11 low doses of radiation can cause adverse health effects. *Opp.*, p. 22, *citing* Def. MSJ, p. 21-22.

12 **D. The EA’s Project Description Is Inadequate**

13 As discussed in plaintiff’s motion for summary judgement (p. 18), the project description in the  
 14 EA is insufficient. Nothing in DOE’s opposition refutes plaintiff’s analysis.

15 **E. The EA Improperly Defers Formulation of Mitigation Measures**

16 DOE does not provide any further argument related to deferral of migration measures. *Opp.*, p.  
 17 24. As explained in plaintiff’s opposition to DOE’s motion (p. 19-21), the deferral of the SAD and ASE  
 18 as well as the Soil Management Plan constituted an improper deferral of mitigation measures.  
 19 AR7:0095; AR7:0092.

20 **F. The EA Improperly Incorporates Documents by Reference**

21 As amply demonstrated in plaintiff’s MSJ and plaintiff’s Opposition to Defendants’ MSJ, the EA  
 22 unlawfully incorporates documents by reference. Defendants decline to respond to plaintiff’s arguments  
 23 on this point, asserting that “[n]othing in” plaintiff’s opening “brief refutes” their “analysis.” *Opp.*, p. 24.  
 24 Plaintiff amply refuted DOE’s baseless arguments in both its motion (pp. 19-21) and opposition (pp. 12-  
 25 17). DOE made two erroneous arguments in its motion for summary judgment.

26 First, DOE implied, but did not assert, that it did not “incorporate” *anything* “by reference” into  
 27 the EA; rather, it “mere[ly] reference[d]” pertinent outside documents. *E.g.*, Def. MSJ at 16 & n. 16.  
 28 But, as discussed in plaintiff’s opposition (pp. 12-13), the EA did not “merely reference” outside

1 documents. Instead, the EA repeatedly relies upon the *unstated conclusions* of these documents to  
2 support its finding that the project will not have any significant impacts. *See* Pltf. Opp., p. 13 (*citing, e.g.,*  
3 AR7:0105-06 (“please refer to . . . the LBNL 2006 Long Range Development Plan [“LRDP”] EIR” “[f]or  
4 further details” about how LBNL’s fire management procedures will “minimize the risks associated with  
5 wildland fire” and thereby ensure that the project “does not increase the likelihood . . . of a potential  
6 wildland fire at LBNL); 7:0061 n. 31 (referring to unstated “significance thresholds” used to determine  
7 the significance of the Project’s traffic impacts). Because the EA relied upon these documents’ unstated  
8 conclusions, the documents were incorporated into the EA.

9         Second, DOE incorrectly argued that incorporation by reference actually *is* permissible in the  
10 context of an EA and that the incorporation used here meets the relevant legal standards. No federal  
11 regulation allows the incorporation by reference of documents into an EA (as distinct from an EIS).  
12 *Compare* 40 C.F.R. § 1502.21 (describing when incorporating documents by reference into an *EIS* is  
13 proper) *with* 40 C.F.R. § 1508.9 (regulation describing contents of EA and omitting any mention of  
14 incorporation by reference). Lacking textual support for its argument, DOE relies upon the CEQ’s “Forty  
15 Questions” document and asserts that this document is “entitled to judicial deference.” Def. MSJ, p. 18.  
16 DOE’s “reliance on this document is misplaced because courts uniformly have held that the CEQ [F]orty  
17 [Q]uestions document is not a regulation, but merely an informal statement and is not controlling  
18 authority.” *Friends of the Earth v. Hintz*, 800 F.2d 822, 837 n. 15 (9th Cir. 1986). DOE’s “assertion that  
19 the [Forty Q]uestions document is entitled to substantial deference in this circuit is incorrect.” *Id.*

20         Moreover, even assuming contrary to applicable law that the strict requirements applicable to  
21 incorporation by reference of documents into an EIS also apply to EAs, the incorporation used here fails  
22 to meet these requirements, because (1) the material incorporated by DOE is not “reasonably available”;  
23 (2) the EA is not “understandable without undue cross-reference”; and (3) the incorporation “fails to meet  
24 a general standard of reasonableness.” *See* Pltf. Opp., pp. 15-17 (*citing Natural Resources Defense*  
25 *Council v. Duvall* (1991) 777 F.Supp. 1533, 1539 (E.D. Cal. 1991).

26         For these reasons, the EA’s incorporation by reference is unlawful.

27 ///

28 ///

1 **G. Plaintiff Adequately Exhausted Administrative Remedies and Therefore Did Not Forfeit**  
 2 **Any Claims**

3 DOE continues to wrongly insist that plaintiff failed to exhaust its administrative remedies. Def.  
 4 MSJ at 25. DOE is mistaken for two reasons.

5 First, “procedural” claims are not subject to the exhaustion requirement, because DOE is  
 6 presumed to be aware of the legal requirements of NEPA. *Ilio’ulaokalani Coalition, supra*, 464 F.3d at  
 7 1092. A claim is “procedural” unless it “involve[s] the failure to raise a specific *factual* contention  
 8 regarding the substantive content of an [environmental document] during the NEPA public comment  
 9 process.” *Id.* at 1092. DOE asserts plaintiff waived its sabotage argument. Df. MSJ at 25. Plaintiff  
 10 argues that DOE failed to satisfy NEPA’s *legal* requirements regarding sabotage, and does not raise a  
 11 “specific *factual* contention regarding the substantive content of” the EA. *See, e.g.*, Plaintiff’s MSJ at 11-  
 12 12. Furthermore, where an EA’s flaws are “so obvious” that its inadequacy is clear, “there is no need for  
 13 a commentator to point them out specifically in order to preserve its ability to challenge a proposed  
 14 action.” *Ilio’ulaokalani Coalition, supra*, 464 F.3d at 1092 (quoting *Dep’t of Transp. v. Public Citizen*,  
 15 541 U.S. 752, 765 (2004)). As such, the exhaustion requirement is inapplicable.

16 Second, and regardless of any claimed omission from plaintiff’s comments, DOE was  
 17 “independently aware” of the deficiencies asserted by plaintiff. Each issue DOE claims was waived was  
 18 raised in public comments. *See* Pltf. Opp., pp. 21-22 (citing and quoting AR:7:0169, 0170, 0180, 0181,  
 19 0220, 0223, 0225, 0230).

20 Because DOE was “independently aware” of plaintiff’s claims or because those claims are  
 21 procedural in nature, DOE’s exhaustion argument is meritless.

22 **III. CONCLUSION**

23 For the foregoing reasons, this Court should grant plaintiff’s motion for summary judgement.

24 Dated: October 29, 2010

Respectfully submitted,

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/s/ Stephan C. Volker

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