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8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10
11 SAVE STRAWBERRY CANYON, a non-)
12 profit corporation,)

13 Plaintiff,

14 vs.

15 DEPARTMENT OF ENERGY, a federal)
16 agency; et al.)

17 Defendants.)

) Case No.: C11-01564 WHA

) **PLAINTIFF’S NOTICE OF MOTION**
) **AND MOTION TO AUGMENT THE**
) **ADMINISTRATIVE RECORD AND FOR**
) **JUDICIAL NOTICE**

) Hearing Date: October 20, 2011

) Time: 8:00 a.m.

) Courtroom: 9, 19th Floor

) Judge William H. Alsup
18)

1 **NOTICE OF MOTION**

2 NOTICE IS HEREBY GIVEN that on October 20, 2011 at 8:00 a.m., or as soon thereafter as
3 counsel may be heard by the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco,
4 California, Plaintiff SAVE STRAWBERRY CANYON will and hereby does move the Court to
5 augment the administrative record with or, alternatively, to take judicial notice of certain documents
6 relevant to Defendants DEPARTMENT OF ENERGY and STEVEN CHU (“DOE”) approval of the
7 Computational Research and Theory Facility Project (“CRT Project”) and Plaintiff’s motion for
8 summary judgment.

9 **ARGUMENT**

10 **I. THE RECORD SHOULD BE AUGMENTED TO INCLUDE INFORMATION THAT**
11 **DEMONSTRATES THAT THE DEPARTMENT OF ENERGY DID NOT CONSIDER**
12 **RELEVANT FACTORS IN ITS ANALYSIS IN THE ENVIRONMENTAL**
13 **ASSESSMENT.**

14 Plaintiff requests that the Court augment the record to consider the below-listed documents,
15 which demonstrate that Defendant United States Department of Energy (“DOE”) failed to consider all
16 relevant factors and relied on fictional or speculative assumptions in developing its Environmental
17 Assessment (“EA”) and Finding of No Significant Impact for the CRT Project:

- 18 (1) PG&E. 2011. *Clean Energy Solutions*. Available at
19 <http://www.pge.com/about/environment/pge/cleanenergy/> (last accessed June 28, 2011) attached
20 as Exhibit 6 to the Declaration of Michael R. Lozeau, filed herewith.
- 21 (2) PG&E. 2011. *2009 Power Mix Delivered to Retail Customers*. Available at
22 <http://www.pge.com/myhome/edusafety/systemworks/electric/energymix/> (last accessed June
23 28, 2011) attached as Exhibit 7 to the Declaration of Michael R. Lozeau, filed herewith.
- 24 (3) PG&E. 2011. *Hydroelectric System*. Available at
25 <http://www.pge.com/myhome/edusafety/systemworks/hydro/> (last accessed June 28, 2011)
26 attached as Exhibit 8 to the Declaration of Michael R. Lozeau, filed herewith.
- 27 (4) Marin County Civil Grand Jury 2009-2010. *Marin Clean Energy: Pull the Plug*. (December 2,
28 2009) Available at http://www.co.marin.ca.us/depts/GJ/main/cvgrjr/2009gj/clean_energy.pdf
(last accessed June 28, 2011), attached as Exhibit 9 to the Declaration of Michael R. Lozeau,
filed herewith

1 **A. Legal Standard**

2 The Ninth Circuit Court of Appeals has recognized four exceptions to the general rule that court
3 review should be restricted to the agency record at the time the agency rendered its decision. *Ctr. for*
4 *Biological Diversity v. United States Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. Cal. 2006). The
5 exceptions apply:

6 (1) “if necessary to determine whether the agency has considered all relevant factors and has
7 explained its decision”;

8 (2) “when the agency has relied on documents not in the record”;

9 (3) “when supplementing the record is necessary to explain technical terms or complex subject
10 matter”; or

11 (4) “when plaintiffs make a showing of agency bad faith.”

12 *Id.* (citing *Southwest Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1450
13 (9th Cir. 1996) (internal quotation marks omitted)). Extra-record evidence is also appropriate where it
14 is demonstrated that the lead agency “proceeded upon assumptions that were entirely fictional or utterly
15 without scientific support” *Association of Pacific Fisheries v. EPA*, 615 F.2d 794, 812 (9th Cir.
16 1980).

17 Specifically, the court may consider extra-record evidence in order to “ascertain whether the
18 agency considered all the relevant factors or fully explicated its course of conduct or grounds of
19 decision.” *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980). The role of the court is not to
20 question the wisdom of the agency’s determination but rather to assess “whether the process employed
21 by the agency to reach its decision took into consideration all the relevant factors.” *Id.* at 1159. Even
22 where the agency employed adequate fact-finding procedures, the court may look at evidence outside
23 the record to evaluate the agency’s action and for background purposes. *Id.* at 1159-1160.

24 **B. Argument**

25 The documents in Exhibits 6-9 to the Lozeau Declaration demonstrate that DOE did not consider
26 all “relevant factors” and instead relied on entirely fictional or speculative assumptions when it
27 erroneously concluded in the EA that Western Area Power Administration (“WAPA”) power uses more
28 non-greenhouse gas (“GHG”) emitting power sources than Pacific Gas and Electric Company
 (“PG&E”). *See Association of Pacific Fisheries v. EPA*, 615 F.2d 794, 812 (9th Cir. 1980). *See*

1 Plaintiff's Summary Judgment Brief ("Plaintiff's SJ"), pp. 19-21 (July 1, 2011). At a minimum, DOE
2 either ignored readily-available information about PG&E's non-GHG emitting power sources or it
3 considered the information but did not include supporting documents in the record. *See Tri-Valley*
4 *Citizens against Radioactive Env't v. Department of Energy*, 1992 U.S. Dist. LEXIS 20111 (N.D. Cal.
5 Dec. 23, 1992) (stating that the district court may review materials outside the record where there is
6 reason to believe that agency officials "ignored an issue altogether" or considered "directly or
7 indirectly" materials outside the record).

8 In *Asarco*, a district court considered extensive extra-record evidence when reviewing an appeal
9 to an administrative decision rendered by the U.S. Environmental Protection Agency ("EPA").
10 Although the Ninth Circuit Court of Appeals overturned the district court's ruling to the extent that it
11 relied on extra-record evidence to substitute its wisdom for that of the agency, the Court emphasized that
12 it was "unrealistic and unwise to straightjacket" the district court with the administrative record when
13 the court is attempting to determine whether the agency took into consideration "all relevant factors" in
14 its deliberations. *Asarco*, 616 F.2d at 1160. The Court also concluded that some of the extra-record
15 evidence considered by the district court was appropriate, particularly where it provided "background
16 material" on relevant operations. *Id.* at 1161.

17 Here, Plaintiff is not asking the court to substitute its wisdom for that of the DOE. Rather, the
18 submitted documents are intended to fill in gaps in the administrative record and which clearly
19 demonstrate that DOE failed to consider all relevant factors in its deliberations. In the EA, DOE
20 acknowledged that the percentage of non-GHG emitting power generation sources from the WAPA and
21 PG&E were "relevant factors" to its assessment.¹ Despite repeated, and failed, efforts to adequately
22 document the WAPA non-GHG emitting power mix, DOE apparently made no effort to acquire or
23

24 ¹ Specifically, in the EA, the DOE calculates WAPA power used at LBNL will emit
25 approximately 20 percent less greenhouse gases per unit of power produced than that power obtained
26 from PG&E because WAPA derives 20 percent of its power from hydropower dams. *See* AR 144. DOE
27 uses PG&E's "published and verified [GHG] emission factor for the existing Oakland Science Center"
28 but then reduces it by 20 percent to account for the assumed 20 percent of WAPA's power that comes
from hydropower. *See id.* In doing so, DOE assumed that PG&E has no hydropower (or other non-
GHG emitting power sources) to match WAPA's 20 percent hydropower. *See* Plaintiff's SJ, pp. 19-21.
The effect of crediting WAPA with the alleged 20 percent greenhouse gas reduction compared to PG&E
is to tip the scale toward locating the CRT Project at the LBNL campus rather than off-site.

1 review the readily-available information on PG&E's non-GHG power generation sources. Plaintiff's SJ,
2 p. 20, n. 15. Exhibits 6 through 9 provide the court with background information about PG&E's non-
3 GHG emitting power sources showing a highly relevant factor left unconsidered or deliberately left out
4 by DOE, and are appropriately considered when deciding whether DOE acted arbitrarily and
5 capriciously in estimating the GHG-emission savings gained from relying on the WAPA.

6 DOE's determination that information about PG&E's non-GHG emitting power sources is
7 relevant is clear from the record. *See* AR 144, 490. In *Rock Creek Alliance v. United States Fish &*
8 *Wildlife Serv.*, 390 F. Supp. 2d 993 (D. Mont. 2005), the district court admitted extra-record documents
9 that shed light on the Fish & Wildlife Service's ("FWS") interpretation of data regarding grizzly bear
10 populations because the documents "illuminate[d] whether FWS considered all relevant factors in
11 issuing a new Biological Opinion under the Endangered Species Act." *Id.* at 999. The district court
12 concluded that because FWS considered the factors identified in the studies as "relevant" but had failed
13 to review the documents, the court could consider the documents in its review of the agency's action.
14 *Id.* Here, the documents submitted to augment the record show that DOE failed to analyze any
15 documents about PG&E's non-GHG power sources or at least to include such documents in the record.

16 Moreover, in estimating reductions that would result from relying on power from the WAPA,
17 DOE clearly "proceeded upon assumptions that were entirely fictional and without scientific support."
18 *See Association of Pacific Fisheries*, 615 F.2d at 812. In *Association of Pacific Fisheries*, the Court of
19 Appeals refused to use extra-record documents in its review because the documents at issue did not alter
20 the Court's conclusion that the effluent limitations in question were "the products of reasoned
21 decisionmaking." *Id.* Here, unlike in *Association of Fisheries*, the agency failed to document the
22 assumptions it relied upon in its analysis. Specifically, DOE failed to document the percentage of non-
23 GHG emitting power sources operated by PG&E. DOE either ignored readily-available documents
24 regarding PG&E's non-GHG emitting power sources (*see, e.g.*, Exhibits 6-9), or it "directly or
25 indirectly" considered them, but failed to include them in the record. Under either scenario, the
26 documents presented by Plaintiff here are appropriate for review. *See Tri-Valley Citizens against*
27 *Radioactive Env't v. Department of Energy*, 1992 U.S. Dist. LEXIS 20111 *5 (N.D. Cal. Dec. 23, 1992).

28 DOE's failure to consider this information, or to include documentation of it in the record, is particularly arbitrary given that one of its consultants requested information on PG&E's hydropower

1 generation sources in an e-mail. *See* AR 490 (“Is there a percentage of hydropower in the PG&E
2 calculation?”). The question was not answered in subsequent e-mails or any other documents contained
3 in the record. *See* AR Supp. 0001. DOE’s failure to provide any estimate of PG&E’s non-GHG
4 emitting power sources is notable given its repeated, yet unsuccessful, efforts to quantify the percentage
5 of WAPA’s power generated from hydroelectric sources. In fact, as Exhibits 6-9 demonstrate, PG&E
6 has sizeable hydropower resources in California. PG&E’s public reports indicate that it generates up to
7 48% of its power from non-GHG emitting sources. *See* Exhibits 6, 7 and 9.

8 **1. PG&E’s *Clean Energy Solutions* [EXHIBIT 6]**

9 According to PG&E’s web page entitled “Clean Energy Solutions,” in 2009, “[o]n average,
10 approximately half of the electricity PG&E delivers to its customers comes from a combination of
11 renewable and greenhouse gas-free resources.” Exhibit 6. PG&E’s energy mix included “non-emitting
12 nuclear generation (20.5 percent), large hydroelectric facilities (13.0 percent) and renewable resources
13 (14.4 percent), such as wind, geothermal, biomass and small hydro...natural gas (34.6 percent), coal (1.3
14 percent), unspecified sources (15.0 percent), and other fossil-based resources (1.2 percent).” Exhibit 6 is
15 offered to demonstrate the information about PG&E’s power mix was readily available to DOE as it was
16 preparing the EA and that it either ignored relevant information or directly or indirectly considered the
17 information without including documentation in the record.

18 **2. PG&E’s *2009 Power Mix Delivered to Retail Customers*. [EXHIBIT 7]**

19 Exhibit 7 is PG&E’s web page entitle “PG&E’s 2008 Power Mix Delivered to Retail Customers”
20 states that in 2009 PG&E delivered energy from natural gas (34.6%), nuclear (20%), “eligible
21 renewable” (14.4%), large hydroelectric (13%), coal (1.3%), unspecified sources (15%), and other fossil
22 sources (1.2%). The “eligible renewable” sources consisted of biomass and waste generators (30.1%),
23 geothermal (29.7%), wind (22.3%), small hydroelectric (17.8%), and solar (0.2%). *Id.* Exhibit 7 is
24 offered to demonstrate the information about PG&E’s power mix was readily available to DOE as it was
25 preparing the EA and that it either ignored relevant information or directly or indirectly considered the
26 information without including documentation in the record.

27 **3. PG&E’s *Hydroelectric System* [EXHIBIT 8]**

28 Exhibit 8 is PG&E’s web page “Hydroelectric System”, which states that PG&E has “largest
investor-owned hydroelectric system in the nation”, along 16 river basins in California and feeding “68

1 powerhouses” capable of producing 3896 megawatts. The web page states that PG&E “currently holds
 2 26 Federal Energy Commission (FERC) licenses. Exhibit 8 is offered to demonstrate the information
 3 that PG&E utilizes extensive amounts of hydropower was readily available to DOE as it was preparing
 4 the EA and that it either ignored relevant information or directly or indirectly considered the information
 5 without including documentation in the record.

6 **4. Marin County Civil Grand Jury 2009-2010. *Marin Clean Energy: Pull the Plug***
 7 **[EXHIBIT 9]**

8 Exhibit 9 is a report from a civil grand jury in Marin County, California, which found that when
 9 nuclear and large hydroelectric plants are included in the calculation, emission-free sources account for
 10 more than 50% of PG&E’s power generation. Exhibit 9, Marin County Civil Grand Jury 2009-2010,
 11 *Marin Clean Energy: Pull the Plug*, at 14. Exhibit 9 is offered to demonstrate the information about
 12 PG&E’s power mix was readily available to DOE as it was preparing the EA, that other regulatory
 13 bodies and agencies had in the past relied on such information, and that DOE either ignored relevant
 14 information or directly or indirectly considered the information without including documentation in the
 15 record.

16 **II. JUDICIAL NOTICE OF EXHIBIT 9.**

17 If the Court elects to not augment the record, Plaintiff requests that in the alternative the Court
 18 take judicial notice of the fact that PG&E’s power-generation portfolio includes non-GHG emitting
 19 sources including hydroelectric dams, wind and solar power generation facilities, and non-emitting
 20 nuclear reactors based on Exhibit 9.

21 **A. Standard**

22 Federal Rule of Evidence 201 provides that a court shall take judicial notice of facts “not subject
 23 to reasonable dispute in that it is either (1) generally known with the territorial jurisdiction of the trial
 24 court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot
 25 reasonably be questioned.” Fed. R. Evid. 201(b), (d). A court may take judicial notice of matters of
 26 public record. *United States v. 140.2 Acres of Land More or Less in Fresno County*, 547 F.3d. 943, 955
 27 (9th Cir. 2008) (upholding the district court’s taking of judicial notice of a Dept. of Energy report as
 28 “background material”); *Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F.2d 380, 385
 (9th Cir. Cal. 1953) (holding that the court may take judicial notice “of records and reports of

1 administrative bodies”); *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1223 n.2 (9thCir. 2004) (“We may
 2 take judicial notice of a record of a state agency not subject to reasonable dispute.”); *O’Toole v.*
 3 *Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) (“It is not uncommon for courts to take
 4 judicial notice of factual information found on the world wide web.”)

5 **B. Basis for Granting Judicial Notice**

6 Exhibit 9 was produced by a Marin County Civil Grand Jury and provided to the Marin County
 7 Board of Supervisors, and is available on the Marin County website. Declaration of Michael R. Lozeau,
 8 filed herewith, Exhibit 9 (also available at
 9 http://www.co.marin.ca.us/depts/GJ/main/cvgrjr/2009gj/clean_energy.pdf (last accessed June 28, 2011)).
 10 As such, Exhibit 9 is a “record or report” of an administrative body and is appropriately taken under
 11 judicial notice. *See Interstate Natural Gas Co.*, 209 F.2d at 385. Exhibit 9 demonstrates that PG&E
 12 delivers power generated in part from non-GHG emitting sources. The court need not take judicial
 13 notice of these documents as facts of the specific amount of non-GHG emitting power generation
 14 provided by PG&E. Rather, the Court could elect to take notice of the fact that PG&E’s energy mix
 15 portfolio includes non-GHG emitting sources, which would assist the Court in assessing whether DOE
 16 considered that relevant factor and should have acquired such information in drafting the EA.

17 **III. CONCLUSION**

18 For the reasons set forth above, Plaintiff respectfully requests that the Court augment the official
 19 record to consider Exhibits 6 through 9 and/or in the alternative requests that the Court take judicial
 20 notice of Exhibit 9.

21
 22 DATED: July 1, 2011

Respectfully submitted,

LOZEAU DRURY LLP

/s/ Michael R. Lozeau

Michael R. Lozeau

Attorneys for Plaintiff Save Strawberry Canyon