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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAVE STRAWBERRY CANYON, a non-profit corporation, Plaintiff, v. U.S. DEPARTMENT OF ENERGY, et al. Defendants.	Case No. 11-01564-WHA **DEFENDANTS' CONSOLIDATED OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT** Hearing Date: October 20, 2011 Time: 8:00 a.m. Courtroom: 9, 19th Floor Judge William H. Alsup

TABLE OF CONTNETS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

I. INTRODUCTION

Pursuant to this Court's order in *Save Strawberry Canyon v. DOE,* 613 F. Supp. 2d 1177 (N.D. Cal. 2009), the United States Department of Energy (DOE) undertook an environmental analysis of the University of California's (University) Computational Research and Theory Facility (CRT) to be constructed by the University at the Lawrence Berkeley National Laboratory (LBNL) site. Following a study of 14 potential environmental impacts (AR05:69-111), with multiple opportunities for public comment and input, and in a document over 400 pages in length, DOE issued a Finding of No Significant Impact (FONSI). DOE engaged expert consultants to perform studies related to noise, traffic and (GHG) emissions impacts and relied on those studies in reaching its conclusions. DOE engaged and relied upon the local geotechnical expertise at LBNL to study the possible impacts of building on the site given its proximity to the Hayward fault. DOE incorporated or responded to the public comments made during the course of the preparation of the environmental assessment (EA). AR05:326-90. [1]

The University had previously conducted its own environmental review of the CRT facility under the California Environmental Quality Act (CEQA). AR141. Plaintiff Save Strawberry Canyon challenged that action in state court but abandoned the challenge on the eve of briefing. *Save Strawberry Canyon v. Regents of the Univ. of Calif.*, No. RG08395209 (Cal. Superior Court, Alameda Cnty, Filed June 26, 2008).[2] Plaintiff then filed suit in this Court claiming that a NEPA analysis was required in addition to that performed by the University under CEQA. *Save Strawberry Canyon v. DOE,* No. 3:08-cv-03494-WHA, 2009 U.S. Dist. LEXIS 72431 (N.D. Cal. Aug. 17, 2009). Plaintiff argued that CEQA was not a substitute for NEPA. *Save Strawberry Canyon,* 613 F. Supp. 2d at 1188 ("Plaintiff emphasizes various differences between environmental reviews under NEPA and CEQA"). As this Court

[1] In citing to the administrative record, Defendants will use the abbreviation "AR" followed by the document number and the page number. So for example AR05:29 refers to Document 5 at bates numbered page 29.

[2] Attached as Exhibit 1 is Plaintiff's request for dismissal and a subsequent order acknowledging the dismissal of the case.

acknowledged, CEQA and NEPA are different statutes with different requirements. *Id*. Accordingly, DOE is not required to reach the same conclusions made by the University.[3]

In its Motion for Summary Judgment [ECF No. 33] (cited as "Pl.'s Br. at __"), Plaintiff raises five points in challenging the EA FONSI: three points challenge technical methodology and analysis underlying findings related to noise, traffic and greenhouse gas (GHG) emissions; one point asserts DOE should have analyzed the University's Long Range Development Plan (LRDP), a document required by University policy, completed in 2006 and challenged unsuccessfully by the very same Plaintiff through the California Court of Appeals; and a final point asserts that because LBNL is near a major fault, an Environmental Impact Statement (EIS) is required under NEPA. As explained below, DOE has fully complied with NEPA in this case, and Defendants[4] are entitled to judgment in their favor.

II. BACKGROUND AND PROCEDURAL HISTORY

The proposed action includes: the construction of a new state of the art "green building" designed to meet Leadership in Energy and Environmental Design (LEED) Gold standards. AR05:144.; the relocation of DOE's National Energy Research Scientific Computing Center (NERSC)—which includes two supercomputing systems as well as associated data storage systems and staff—from leased space in downtown Oakland, CA, to the CRT facility; and relocation of LBNL's Computational Research Division and the joint UC Berkeley/LBNL Computational Science and Engineering programs to the CRT facility. AR05:29.

The Project's design features incorporate numerous measures to reduce GHG emissions that are consistent with California's Global Warming Solutions Act of 2006 (AB 32). *Id.* These features reduce the Project's GHG emissions by substantially more than 29% compared to business-as-usual (BUA)[5] emissions, and result in the facility being more than 30% better than

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[3] As explained below, DOE actually refined the analysis with more current data in some instances. AR05:148.

[4] Defendants consist of all named defendants in this litigation from both the University of California and the federal government.

[5] BAU (business-as-usual) is generally defined as development without any measures to reduce GHG emissions. AR05:144.

California's energy efficiency standards for residential and nonresidential buildings. AR05:144-45. In fact, the CRT has been designed with a power use efficiency that is better than any data center benchmarked to date. AR05:145, 349. In relocating NERSC from its current location in downtown Oakland, LBNL will be reducing GHG emissions from electrical consumption by approximately 20 percent for each kilowatt/hour of electricity used. AR05:144.

Throughout the decision-making process, DOE engaged and involved the public. The draft EA and many record documents were made available for public review and comment on September 14, 2010. AR64:1589. DOE held a public information meeting to discuss the project on September 20, 2010. AR62:1585, AR63:1587. DOE carefully addressed the comments it received on the draft EA before issuing a final EA. AR05:323-390. Based on the analysis performed, DOE issued a FONSI, concluding that the anticipated impacts of the CRT Project to the environment would not be significant.

III. STATUTORY BACKGROUND

NEPA is a procedural statute requiring the federal government to consider the potential environmental impacts of, and possible alternatives to, decisions that constitute major federal actions significantly affecting the environment. 42 U.S.C. §§ 4321, 4331, 4332; 40 C.F.R. § 1501.1. Its dominant purpose is to ensure that federal agencies take a "hard look" at the environmental consequences of their proposed actions in advance of a final decision to proceed with that action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978). Although NEPA establishes procedures by which agencies must consider the environmental impacts of their actions, it does not dictate the substantive results of agency decision making. *Robertson*, 490 U.S. at 350; *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989); *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000). Instead, NEPA exists so "that [an] agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh*, 490 U.S. 371.

NEPA requires the preparation of an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). Under NEPA's

implementing regulations, promulgated by the Council on Environmental Quality ("CEQ"[6]) and codified at 40 C.F.R. Parts 1500–1517, federal agencies can comply with NEPA in one of several ways. An agency may always prepare an EIS. 40 C.F.R. § 1501.3. To determine whether an EIS is required, an agency may prepare an EA. 40 C.F.R. §§ 1501.4(b), 1508.9. An EA is a concise public document that briefly describes the proposal, examines alternatives, considers environmental impacts, and provides a list of individuals and agencies consulted. 40 C.F.R. § 1508.9. "If the agency concludes there is no significant effect associated with the proposed project, it may issue a FONSI in lieu of preparing an EIS." *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1009 (9th Cir. 2006); *see also* 40 C.F.R. § 1508.9(a)(1).[7]

IV. LEGAL STANDARD

A. The Administrative Procedure Act

NEPA does not contain a specific judicial review provision; instead, NEPA cases are reviewable under the Administrative Procedure Act (APA). *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882–83 (1990). Under the APA, this Court must decide whether the agency action challenged by Plaintiff was arbitrary and capricious. *Dep't of Transp. v Pub. Citizen*, 541 U.S. 752, 763 (2004); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1331–32, 1336 (9th Cir. 1992). Plaintiff bears the burden of proving the agency decision violated the APA. *Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994).

The "arbitrary and capricious standard" is necessarily a deferential one. As the Ninth Circuit has reaffirmed, a court

> will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. In other words, there must be a clear error of judgment.

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[6] The CEQ is established under sections 202–209 of NEPA, 42 U.S.C. §§ 4342–4347. Its regulations govern implementation of the statute by all federal agencies.

[7] A third way is via categorical exclusion, which is not pertinent here. 40 C.F.R. §1501.4(a)(2).

League of Wilderness Defenders v. U.S. Forest Serv., 549 F.3d 1211, 1215 (9th Cir. 2008) (citations and internal quotation marks omitted). The Court's role is not to pass on the technical merits of that material, but merely to assess whether DOE has given sufficient consideration to the relevant factors and arrived at a plausible decision, giving due deference to DOE's choice of methodologies. *See Earth Island Inst. v. Carlton*, No. 2:09-cv-02020 FCD-EFB, 2009 U.S. Dist. LEXIS 74066, at *15–19, 31–32, 37–38, 41 n.15, 48–51, 63–67, 71–72 (E.D. Cal. Aug. 20, 2009) (denying preliminary injunction to halt salvage project).

As explained more fully below, in determining whether DOE's methodologies were arbitrary or capricious, the Court is not to decide whether Plaintiff's, or even the Court's, suggested methods are preferred over those used by DOE. *See WildWest Inst. v. Bull*, 547 F.3d 1162 (9th Cir. 2008); *see also Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir. 2005). Accordingly, to satisfy its obligations under the NEPA and the APA, DOE need only "cogently explain why it has exercised its discretion in a given manner . . . ." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983).

B. Summary Judgment

Courts may resolve APA challenges via summary judgment. *Karuk Tribe v. Kelley*, No. C 10-02039 WHA, 2011 U.S. Dist. LEXIS 62645, at *9 (N.D. Cal. June 13, 2011). Summary judgment under Rule 56 of the Federal Rules of Civil Procedure is appropriate where there are no genuine issues as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987). Summary judgment is especially appropriate in the context of a case such as this one involving review under the APA, as such cases generally contain no genuine issues of material fact. *See, e.g., Nw. Motorcycle Ass'n. v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir. 1994). "The court's role in such cases is not to resolve contested fact questions which may exist in the underlying administrative record, but rather the court must determine the legal question of whether the

agency's action was arbitrary and capricious." *Natural Res. Def. Council, Inc. v. U.S. Forest Serv.*, 634 F. Supp. 2d 1045, 1054 (E.D.Cal. 2007) (citation and internal quotation marks omitted).

V. ARGUMENT

Plaintiff's five claims are meritless because they are not supported in law or in fact. Plaintiff's arguments lack legal support because Plaintiff's failure to raise four of them during the administrative process bars those claims under the doctrine of waiver. Additionally, all of Plaintiff's arguments lack factual support because the record shows that DOE reasonably concluded that impacts from noise, traffic, GHG emissions, and the Project's location were properly calculated and not potentially significant. Accordingly, this Court must deny Plaintiff's motion.

A. By Failing to Comment During the Administrative Comment Period, Plaintiff Has Waived Its Claims Regarding GHGs, Traffic, Noise Impacts, and the LRDP

Plaintiff has waived the right to bring claims challenging the analysis contained in the EA related to noise, traffic, and GHG emissions and related to the LRDP because it failed to put DOE on notice of these claims during the administrative notice and comment period. Under the APA, "Persons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *DOT v. Public Citizen*, 541 U.S. 752, 764 (U.S. 2004) (citing *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 533 (1978)). The principle behind the waiver doctrine is "to allow the administrative agency in question to exercise its expertise over the subject matter and to permit the agency an opportunity to correct any mistakes that may have occurred during the proceeding, thus avoiding unnecessary or premature judicial intervention into the administrative process." *Daly-Murphy v. Winston*, 820 F.2d 1470, 1476 (9th Cir. 1987); *see also McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). This means that during the NEPA comment period plaintiffs must submit comments that are "significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern." *Vt. Yankee*, 435 U.S. at 533 (citation and

quotations omitted). Where the agency affords the public the opportunity to participate in the decision making process, plaintiffs have an obligation, absent a showing of "exceptional circumstances," to present their criticisms of a proposed project at that point. *See Havasupi Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991); *see also Wilson v. Hodel*, 758 F.2d 1369, 1372 (10th Cir. 1985) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but erred against objection made at the time appropriate under its practice."). Accordingly, when plaintiffs have failed to raise claims with specificity relating to an agency action, the Supreme Court has deemed those claims waived. *Public Citizen*, 541 U.S. at 764-65.

Plaintiff and its members freely commented on the draft EA, offering substantial comments, each of which was considered and addressed in the Response to Comments. AR05:359-63. But Plaintiff and its members were completely silent respecting their current claims regarding the process used to calculate GHG emissions,[8] noise levels, or traffic impacts, and never suggested DOE should have assessed the impacts from the University's LRDP document as part of the EA. Significantly for the present motion, at no point in time was DOE's methodology regarding the calculation and analysis of GHG impacts, noise calculations (or anything related to the Nyingma Institute[9]) or traffic levels or traffic methodology ever questioned by Plaintiff and its members.[10]

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[8] In fact, the only comments received at all relevant to GHG emissions were submitted by the Bay Area Air Quality Management District (BAAQMD). AR31:754-55. These comments, however, were related only to the existence of draft proposed guidelines applicable to CEQA analysis regarding threshold levels of GHG emissions. *Id.*

[9] The Nyingma Institute did submit comments related to noise levels, expressing concern that the Project would impact their facility because existing noise levels already exceed noise levels. AR50:1571-72. The Institute also asked DOE to institute noise mitigation measures. AR50:1572. None of these comments express dissatisfaction with or object to DOE's calculations, nor do they allege that portions of their property are not impacted by noise from current traffic.

[10] The single direct reference from Plaintiff related only to noise during construction, specifically the number of trips that construction trucks would take during the site grading for the CRT. AR41:774. While Plaintiff also appended 686 pages of attachments to its comment letter,

The policy underlying the above-cited waiver authorities is particularly apt here. As is explained in this brief, DOE's GHG, noise and traffic methodologies and findings are fully supported. Plaintiff failed to present its concern to DOE and may not do so for the first time here. Nevertheless, the supporting declarations submitted by DOE addressing GHG emissions and traffic fully respond to the allegations Plaintiff failed to raise in a timely fashion. These declarations demonstrate that the methodology used for GHG emissions and for traffic were meticulously conceived and executed, and that Plaintiff's non-expert challenges to them are meritless.

B. The CRT Project's Noise Impacts are not Significant

The noise analysis was conducted by an experienced acoustical expert. AR114:5192 Plaintiff offers no contrary expert opinion that the noise results are inaccurate. Instead, Plaintiff itself attempts to challenge the construction noise measurements using lay tools such as Google Earth ruler. Pl.'s Br. at 6, n.3.[11] On its face, these arguments fail because DOE is entitled to rely on reasonable opinions of its own qualified experts. *Pac. Coast Fed'n of Fishermen's Ass'ns*, 426 F.3d at 1090 ("Courts defer to the evaluations of agencies when the evidence presents conflicting views because 'an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.'" (citation omitted). Instead, when deciding disputes that involve primarily issues of fact that "'require[] a high level of technical expertise,' [the court] must defer to 'the informed discretion of the responsible federal agencies.'" *Marsh*, 490 U.S. at 377 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)); *see also Balt. Gas & Elec. Co. v. Natural Res. Def.*

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including its prior comments made in reference to the draft CEQA EIR, there was no reference to any section or comment from those attachments that Plaintiff asked DOE to consider. AR41:775. In any event, none of the comments to the Draft CEQA EIR referenced or questioned the methodology or technical findings of the noise, traffic or GHG emissions consultants; they could not have, as those studies had not yet been performed.

[11] Importantly, at the conclusion of construction activities, there will be no permanent impacts to noise levels as operational impacts are projected to not add appreciably to existing noise levels. AR05:151.

Council, 462 U.S. 87, 103 (1983) ("When examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential").

Plaintiff also cross-references citations to noise results from the EA and the University's CEQA Environmental Impact Report (EIR), which, as noted above, the Plaintiff challenged in state court but abandoned. As discussed, DOE was not required to, nor should it have necessarily relied upon prior calculations from the EIR. As explained in the EA, the noise data cited by Plaintiff from the CRT EIR prepared by the University were based on generic construction noise data because, at that time in 2007, detailed phase-by-phase construction information was not available regarding the types and quantities of equipment expected at the construction site. AR114:5192. The allegedly conflicting numbers disclosed by DOE do not contradict those in the EIR, but rather reflect a greater degree of specificity because the EA analysis takes into account the quantity and type of equipment expected at the construction site during each phase, as well as the number of days that the equipment would be present on the construction site. AR05:148; AR114:5192.

On account of the additional detailed information, AR05:148; AR114:5192, DOE's calculations forecast construction noise levels at the Nyingma Institute property line to range from 61 to 66 dB and at the Foothill Student Housing Complex to range from 59 to 62 dB, as opposed to the 65 to 70 dB range estimated and reported in the EIR. AR 5193.[12] Plaintiff does nothing to refute these newer, more precise measurements, but merely suggests the distance measurements are incorrect. Further, Plaintiff's use of Google Earth is flawed since that program does not take into account changes in elevation such as the 200-foot drop in elevation between CRT and the Nyingma Institute and Foothill Housing.[13] DOE analyzed noise levels

[12] For means of comparison, the noise of normal speech from a distance of 1 meter is between 60 to70 dBs , and the noise level of a large business office is between 50 to 60 dBs. AR 196:15449; AR141:9030.

[13] According to Google, the ruler measurement tool works as follows: "[m]easuring is calculated using the lat/lon coordinates from point to point and does not consider elevation." http://ecoo2010-mindsonmedia.wikispaces.com/file/view/Getting+to+Know+Google+Earth.pdf (last visited Aug. 1, 2011).

using the actual slant distance from the CRT site to the noise-receiver locations rather than the simple horizontal distance. AR05:196, AR114:5192.

Plaintiff also asserts that the "EA claims that the meditation uses at the Nyingma Institute are presumed to occur in the middle of Hearst Avenue…" Pl.'s Br. at 6, and that people using the Nyingma's meditation garden hear traffic noise "as if they were sitting on the curb of" Hearst Avenue. *Id.* at 7. These assertions are not supported by any expert calculation and fail to acknowledge what the EA actually states. The EA accurately depicts the orientation of Nyingma Institute relative to the project site. AR05:97. The EA distinguishes the lower noise levels on the north side of the Institute from the higher noise levels on the south and southeast portions of the Institute that are oriented towards Hearst Avenue and therefore exposed to existing traffic noise. AR05:95-96. The EA does not suggest, as Plaintiff claims, that all portions of the Institute are exposed to traffic noise. Rather, 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. *Id.*

The EA also addresses the Institute's grounds and meditation garden. The EA treats the entire Nyingma Institute, including the outdoor spaces such as the meditation garden as well as indoor spaces, as a sensitive receptor. AR05:149. The EA acknowledges that there would be a direct line of sight between the eastern and southern aspects of Nyingma Institute and the CRT construction site, and reports the estimated construction noise levels that would be experienced on the portion of the Institute's property line nearest to the CRT site. AR05:149. At this location, noise levels are estimated to range from 61 to 66 decibels depending on the type of construction activity that is underway. *Id.*

The noise calculations contained in the EA represent a conservative "worst case" scenario. This scenario was calculated by measuring noise impacts assuming the theoretical "acoustic center" is a location on the Project site with an unobstructed view of the receivers. AR114: 5192. The EA does reference that a 66-decibel rating (one decibel rating over the City's threshold) at the Nyingma Institute might occur sporadically over a very brief period of time

(four and one half months) if *all* of the construction equipment was running simultaneously from that theoretical unobstructed "acoustical center." AR05:150-51. But the FONSI also concludes that temporarily exceeding the City of Berkeley's noise ordinance (however theoretical) over a very brief period of time would *not* result in a significant impact to the environment. AR03:10. Generally, "[w]hen ordinary noises are heard, we can just detect level changes of 2-3 dB." AR196:15501; AR141:9039 ("It should be noted that a noise increase of 3 dB is generally regarded as the minimum perceptible increase."). A 1 dB difference between the City's threshold and the highest noise level of 66 dB at the fenceline would not be perceptible. *Id.* On our very different facts from those presented in *Sierra Club* and *Davis,* Pl. Br. at 8, those cases are immaterial.[14]

Finally, the Project also incorporates measures designed to minimize construction noise impacts that will further reduce the effect of construction noise on nearby receptors. AR05:232-33 (noting that standard Project features will include mitigation measures listed in SPF NOISE-1a and SPF NOISE-1b, such as limiting the activities to a schedule that minimizes noise disruptions and using sound muffling devices). Because of the brief, intermittent period of time when this exceedance would occur, if at all, and the fact that it may not be detectable by an ordinary human, the FONSI reasonably concludes that this temporary imperceptible one decibel increase would not be significant. *Cf. Fuel Safe Wash. v. FERC*, 389 F.3d 1313, 1330 (10th Cir. 2004) (finding the agency's analysis of noise impacts to be reasonable when it concluded that noise impacts would be temporary).

C. The CRT's Traffic Impacts are not Significant

The record reflects that DOE took a hard look at projected traffic impacts resulting from the CRT Project and reasonably concluded that Project related traffic to the study area would not

[14] Plaintiff's cites to an unpublished order in *Sierra Club v. U.S. Department of Transportation*, No. C-86-3384 RFP, 1990 U.S. Dist. LEXIS 7811 (N.D. Cal. Apr. 2, 1990) to support its noise related argument. This case is inapplicable, however, because it involved a situation where an agency admitted it made incorrect noise measurements. *Sierra Club*, 1990 U.S. Dist. LEXIS 7811, at *8-10. In this case, however, the agency measurements are admittedly correct, not misleading, and Plaintiff does not challenge them.

produce an increase in either vehicle delay or the volume to capacity (v/c) ratio by an amount that is greater than the thresholds set forth by the City of Berkeley. Plaintiff's four challenges to these conclusions are not persuasive because they do not demonstrate that DOE's calculations are unreasonable.

Plaintiff first argues that the traffic analysis in the EA conflicts with that in the CRT EIR because the EIR found that significant impacts on traffic and transportation would occur as a result of the CRT Project and other future development. Pl.'s Br. at 9. There is no merit in this argument because, as explained in the EA, DOE used a different methodology to evaluate cumulative impacts in the EA that was equally reasonable to that used by the University in making a similar analysis in the EIR.

As stated in the CRT EIR, the University evaluated cumulative impacts for the year 2025 using an approach that assumed a substantial amount of additional development on the LBNL site and UC Berkeley campus. AR141:7808, AR141:7990, AR141:9160. The assumptions incorporated into the University's analysis were derived from the LBNL 2006 Long Range Development Plan (LRDP) and other relevant sources. AR141:8039. As stated in the EA, DOE did not use the 2006 LRDP projections to conduct the cumulative impact analysis. AR05:156. This decision is reasonable because the 2006 LRDP merely provides guidance for future development without the assurance that such development is reasonably expected to occur. LBNL growth projections include projects that would be implemented *only if* funding becomes available. AR05:173. To achieve an accurate traffic assessment, therefore, DOE's analysis factored into account recently completed, ongoing, planned, pending, and/or reasonably foreseeable proposed actions in the surrounding area and in the same general timeframe as the CRT Project (between 2010 and 2018). AR05:156, AR05:173.[15] The EA makes clear that, in developing the list of future projects, the DOE included only those future projects that had reached Critical Decision – 0 approval (or where funding is otherwise anticipated) and were appropriately considered reasonably foreseeable. AR05:173. Based on the timelines for

[15] The projects include DOE projects, UC projects proposed at LBNL and UC Berkeley projects.

completion of these reasonably foreseeable projects, the horizon year of 2018 was used for cumulative impacts in the EA. AR05:173.

The EA traffic analysis disclosed that by 2018, three of the four study intersections would operate poorly. AR05:156-58. The EA noted, however, that the impacts from the CRT Project would not add a sufficient amount of traffic to any of the three intersections, such that it would exceed the City's thresholds for traffic impacts. AR05:158. Plaintiff challenges this conclusion with respect to the Hearst Avenue/Gayley Road intersection, claiming that the traffic increase would be significant. Pl.'s Br. at 9. The record does not support Plaintiff's conclusion. For an intersection operating at LOS E,[16] the City's significance threshold is a project-related increase in delay of more than 3 seconds. AR05:156. As shown in Table 5.0-6 in the EA, the delay at this intersection would remain unchanged with the addition of project traffic. AR05:158. Accordingly, no noticeable impact would occur at this intersection as a result of the CRT Project.

Plaintiff 's second argument is equally unavailing. Plaintiff claims, without citation to legal authority, that it is improper to measure the cumulative impact of the Project as its incremental impact in relation to other projects. Pl.'s Br. at 10. Plaintiff misconstrues the plain language of the applicable regulation, which defines a cumulative impact as "the impact on the environment which results from *the incremental impact of the action* when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7.

The CEQ has provided an interpretation of its regulation. AR183:14810.

> [C]umulative 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. The range of alternatives considered must include the no action alternative as a baseline against which to evaluate cumulative effects. The range of actions that must be considered includes not only the project proposal but all connected and similar actions that could contribute to cumulative effects.

[16] LOS stands for level of service, and is an is a general measure of traffic operating conditions, whereby a letter grade from A (the best) to F (the worst) is assigned to roadway intersections. AR05:99. These grades represent the comfort and convenience associated with driving from the driver's perspective. *Id.* The LOS standard for City of Berkeley intersections is LOS D. *Id.*

Id. The CEQ guidance also describes the concept of "baseline." "[T]he baseline condition of the resource of concern should include a description of how conditions have changed over time and how they are likely to change in the future without the proposed action." AR183:14848. *See also Public Citizen*, 541 U.S. at 769-770 ("The 'cumulative impact' regulation required [the agency] to consider the 'incremental impact' of the safety rules themselves, in the context of . . . other relevant circumstances.").

Consistent with the CEQ's interpretation of cumulative impacts, DOE properly measured the Project's incremental contribution to cumulative impacts by comparing the estimated 2018 traffic conditions with-Project-conditions to the estimated 2018 traffic conditions without-Project-conditions. The 2018-without-project conditions are the traffic conditions that would exist if the Project is not implemented. The incremental impact or the contribution of the Project is the change that would result when Project traffic is added to the 2018-without-project conditions. This is exactly what the EA calculated. AR05:158. Based on the fact that the Project's incremental impact on traffic conditions would not exceed the City standards, DOE's determination that there would be no significant impact to traffic levels was reasonable.

Plaintiff argues in its third traffic related argument that DOE based its traffic analysis on an improper baseline that inflated traffic numbers. Plaintiff cites *Am. Rivers v. FERC*, 201 F.3d 1186, 1195 (9th Cir. 1999), for support to argue that DOE's use of a more conservative specific baseline improperly diluted traffic impacts by impacting volume to capacity ratios. Pl.'s Br. at 11-12. *American Rivers* actually supports DOE's analysis, however, because the court found that agency's "choice of baseline and analysis of alternatives complied with the substantive and procedural requirements of both the FPA and NEPA." 201 F.3d at 1195. To the extent Plaintiff cites to the case referenced in *American Rivers*, that case is inapplicable because it involved a situation where no baselines was determined by the agency, and thus the impacts could not be properly assessed. *See Half Moon Bay Fishermans' Marketing Asso. v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988). Here, DOE did use a reasonable baseline, as explained below, and produced an analysis that conservatively estimated traffic impacts. Because DOE's methodology was

reasonable, it is entitled to deference. *See Pac. Coast Fed'n of Fishermen's Ass'ns*, 426 F.3d at 1090.

In selecting an appropriate baseline by which to measure traffic impacts, DOE determined that the 2002 traffic data would most accurately reflect a *worst-case scenario* and allow the agency to best determine the potential for significant environmental impacts because these numbers showed *greater* levels of traffic than the data gathered in 2006. Accordingly, use of the 2002 data provides a more conservative traffic estimate. Plaintiff's assertion, that the use of such a baseline dilutes rather than exacerbates traffic impacts, is misplaced. The City of Berkeley's LOS classifications are based on the total volume of traffic utilizing an intersection. Impacts to intersections are measured based on a change in the delay or v/c ratio resulting from increased usage. This means the fewer the cars that pass through an intersection, the less the delay or v/c ratio. Conversely, the more cars passing through an intersection, the greater the delay experienced at the intersection and the higher the v/c ratio.

DOE's use of the 2002 data shows *more* congestion at the study intersections, and as a result, is *more likely* to identify potential impacts. As shown in Defendants' Exhibit 2, the incremental increase in delay and/or v/c ratio caused by the Project is similar at the study intersections regardless of whether the 2002 data or most recent data is used for the analysis; though the 2002 data results in *more* congestion (higher delay and v/c ratio and worse LOS) at the study intersections. Thus, using the higher and older traffic counts is considered more conservative because it is more likely to result in an intersection operating at deficient level and therefore, there would be a higher likelihood of identifying a significant impact.[17]

Lastly, Plaintiff challenges DOE's traffic calculations alleging that DOE arbitrarily inflated traffic numbers because it added traffic numbers to the 2002 data rather than using the most current data. Plaintiff's argument fails not only because DOE's reasonable use of an expert calculation deserves deference, but also because DOE did not use inaccurate or overstated

[17] Because the use of higher traffic counts inflates the potential impacts of the Project on traffic conditions, Plaintiff's argument that DOE "padded" the traffic numbers is meritless.

estimates of traffic projections. Plaintiff's citation to *N. C Alliance for Transp. Reform, Inc. v. U.S. Dept. of Transp.*, 151 F. Supp. 2d 661 (M.D.N.C. 2001), is wholly out of context. Pl. Br. at 13. That matter involved a finding the agency inflated traffic data so it could establish a need for that project. *N. C Alliance*, 151 F. Supp. 2d at 668. In this case, the traffic consultant used the higher traffic data to the agency's *disadvantage* to show how the CRT facility would impact traffic in Berkeley based on a worst-case scenario.

In analyzing traffic impacts, DOE used actual traffic counts taken in 2002. The EA explains that it uses 2002 traffic counts as a starting point and incrementally adds-in traffic from projects that were constructed and became operational since then in order to reflect existing conditions. AR05:99. One of those projects that Plaintiff claims should not be included, the Maxwell Field Family parking structure, was included in the analysis as a near-term project because at the time that the EA analysis was conducted it was reasonably foreseeable. After preparation of the draft EA, the project was subsequently put on hold in September 2010. To clarify the point, DOE asked the same traffic consultant to analyze traffic impacts the way the Plaintiff suggests it should have been done. Whitfield Declaration, Ex. 2. Not surprisingly, the study shows *less traffic at the study intersections resulting in improved intersection operations and less delay and lower v/c ratio at the study intersections and no significant impacts as a result of the Project.* This is precisely because DOE's conservative calculations used a higher baseline (the 2002 data) rather than the lower, albeit more recent, traffic data. *Id.*[18]

D. The CRT Project Does Not "Implement" the LRDP

Subsection III of Plaintiff's brief makes an unsubstantiated assertion that DOE is required to undertake an EIS study of the University's 2006 LRDP. The claim is well beyond the scope of this NEPA challenge and should be rejected for that reason alone.

[18] As with the other technical arguments, had Plaintiff properly raised them during the comment period, DOE would have been able to explain the expert findings and, for example, have conducted the attached analysis and included it within the EA Administrative Record.

First, to the extent Plaintiff believes that DOE was obligated to review the University's LRDP under NEPA, such a claim is waived because, as stated above, Plaintiff failed to raise this issue during the comment period. Perhaps more significantly, it is also barred by laches.[19] The equitable defense of "laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced . . ." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (citation and internal quotations omitted). Laches bars a claim when there is a showing that the defending party suffered prejudice on account of a claimant's unreasonable delay. "To demonstrate laches, a party must establish (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Apache Survival Coal. v. United States*, 21 F.3d 895, 905 (9th Cir. 1994) (citation, internal quotations, and emphasis omitted). Laches is an available defense where claims are brought under environmental statutes such as NEPA. *Id.*; *see also Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 854 (9th Cir. 1982).

As Plaintiff indicated, the LRDP was promulgated by the University over 4 years ago. Members of the Plaintiff organization challenged the LRDP under CEQA and lost. Additionally, in the predecessor case to this matter, Plaintiff had the opportunity to raise a NEPA challenge to the LRDP as well. Plaintiff's lack of diligence has prejudiced DOE because it is now forced to litigate against a claim that could have been made many years ago during the time the same Plaintiff was challenging the same or similar projects. Accordingly, Plaintiff's claim should be barred.

Second, there is no factual basis for, or record evidence supporting, the statement that "the CRT Project is designed to implement that Plan," Pl.'s Br. at 13. As the EIR for the LRDP makes clear, the LRDP itself is not an "implementation plan." AR153:10597, AR153:11075. As Plaintiff admits, the CRT facility represents but an element of the growth projected under "the

[19] In 2007, individual members of the Plaintiff, Leslie Emmington Jones, Syvlia McLaughlin, Janice Thomas, Anne Paxton Wagley, and Henry Gehman challenged the Regents' 2007 approval and certification, respectively, of the LRDP for the 202- acre LBNL main hill site and the LRDP EIR. Jones *et al* lost, in an appellate decision (certified for partial publication) entitled *Jones v. The Regents of the University of California*, 183 Cal. App. 4th 818 (2010).

Plan." Pl.'s Br. at 14. The LRDP is a University Regents' land use plan for potential development at the 202- acre Regents-owned LBNL site adjacent to the UC Berkeley campus. AR153:10740. As stated in the LRDP, an LRDP is a planning document that establishes a general framework for the physical development of an institution over time. *Id.* This potential development 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. As stated in the LRDP EIR, the Plan does not define specific buildings or site development, nor commit the institution to any specific project. AR153:10740. Instead, the LRDP provides Laboratory management, facilities staff, and the UC Regents with decision-making guidance for future projects. *Id.* It is not an implementation plan, and adoption of the LRDP does not constitute a commitment to, or a final decision to implement, any specific project, construction schedule, or funding priority. *Id.* Accordingly, Plaintiff's claim must be rejected.

E. The CRT Project's GHG Emissions are not Significant

Plaintiff contends that the CRT Project may significantly impact the environment on account of the GHG emissions produced through the Project's anticipated power consumption. Plaintiff makes the following arguments: (1) DOE used the CEQ draft guidance incorrectly, (2) DOE did not analyze indirect emissions, (3) DOE did not attempt to analyze alternatives, including additional GHG mitigation measures, (4) The exceedance of BAAQMD threshold raises a question that the CRT project may have a significant environmental effect, and (5) the EA underestimates the CRT project's GHG emissions. These arguments fail, however, because DOE performed an analysis of GHG emissions and reasonably concluded that they would not result in a significant impact to the environment. Furthermore, BAAQMD in their comments to the EA also did not find that the Project's GHG emissions would have significant impact. AR:05:392-93.

DOE's reference to the CEQ guidance to determine whether the CRT would have a significant effect on the environment vis-à-vis climate change was reasonable. The EA expressly acknowledges that CEQ has not established a particular GHG threshold for significance.

AR05:143 (As noted earlier, the CEQ has not proposed this threshold to evaluate whether the impact of a project would be substantial."). The EA notes, however, that both the CEQ guidance as well as the CARB GHG reporting requirements suggest that a level of 25,000 metric tons of CO2-equivalent (MTCO2e) is a reasonable threshold by which to judge significance of GHG emissions because emitting less than this quantity means that a facility is not a major emitter of GHGs. AR05:142; *see also* AR117:5199 ("The reference point of 25,000 metric tons of direct CO2-equivalent GHG emissions may provide agencies with a useful indicator – rather than an absolute standard of insignificant effects -- for agencies' action-specific evaluation of GHG emissions and disclosure of that analysis in their NEPA documents."). DOE's approach is supported by the CEQ Guidance statement that it "is intended to help explain how agencies of the Federal government should analyze the environmental effects of GHG emissions and climate change when they describe the environmental effects of a proposed agency action in accordance with Section 102 of NEPA." AR117:5199; s*ee also* AR117:5201 n.2 ("25,000 metric tons may provide a useful, presumptive, **threshold** for discussion and disclosure of GHG emissions because it has been used and proposed in rule-makings under the Clean Air Act." (emphasis added)). Because there was no formally adopted numeric threshold for evaluating GHG impacts at the time of DOE's analysis, DOE's reference to the CEQ Guidance for both direct and indirect impacts of GHGs was reasonable.[20]

Relying on the 25,000 MTCO2e reference point, DOE's conclusion that the CRT Project would not significantly impact the environment is reasonable. The EA demonstrates that the CRT would result in net emissions of 12,473 MTCO2e, a figure 50% below the 25,000 MTCO2e

[20] Plaintiff's citation to *Sierra Club v. U.S. Department of Transportation,* No. C-86-3384 RFP, 1990 U.S. Dist. LEXIS 7811, (N.D. Cal. Apr. 2, 1990) is not relevant to DOE's use of the CEQ Guidance. In *Sierra Club*, the Court required the agency to prepare a supplemental EIS because in the original EIS, the agency presented a "figure as a 'Federal standard' without indicating the source of that 'standard.'" 1990 U.S. Dist. LEXIS 7811, at *13. Here, DOE clearly disclosed that the 25,000 MTCO2e reference point was not a "Federal Standard," and disclosed that CEQ was the source of the reference point.

level. AR05:144.[21] This net number includes both direct and indirect GHG emissions, even though the CEQ Guidance states that a reasonable reference point is "25,000 metric tons of **direct** CO2-equivalent GHG emissions." AR117:5199 (emphasis added). This analysis, however, was not the sole basis of DOE's finding that the effect was not substantial. As explained in the EA, numerous design features are already included in the project that would substantially minimize the project's GHG emissions. AR05:144. The features include meeting the LEED Gold standards for green building design, and putting in place recycling and waste management practices as well as utilizing clean energy sources. AR05:144-45, AR05:349. In fact, "the [P]roject's electricity consumption would be more than 30 percent better than the state's energy efficiency standards for residential and nonresidential buildings." AR05:144-45. Additionally, the project's high performance computer has been designed with a power usage efficiency that is better than any data center benchmarked to date. AR05:145. Accordingly, DOE reasonably concluded that CRT emissions would not be significant.

Plaintiff's allegation that the BAAQMD thresholds of significance raise a substantial question that CRT's greenhouse gas emissions are significant is without merit and not supported by substantial evidence. As Plaintiff concedes, the BAAQMD recommended thresholds are not binding on DOE. Pl.'s Br. at 19. Even using the BAAQMD thresholds as a reference, DOE's conclusion are still reasonable.

BAAQMD's published guidance on assessing greenhouse gas emissions is based upon meeting the goals of AB 32, the state law providing for reductions in greenhouse gas emissions to 1990 levels by the year 2020. AR92:4782. BAAQMD's guidance provides that such goals will be met in the Bay Area land use sector through application of BAAQMD's greenhouse gas significance thresholds to *new* projects; i.e., projects for which the environmental analysis commenced or a notice of procedure (NOP) under CEQA was issued AFTER the date on which the BAAQMD guidelines became final. AR92:4873. Emissions from projects whose

[21] As detailed in the EA, DOE analyzed direct and indirect emissions both individually and cumulatively. AR05:144.

environmental review was initiated prior to the date on which the BAAQMD CEQA guidance became final were already taken into account as baseline emissions. According to BAAQMD's own explanation, AB 32 goals should be achieved by the Bay Area land use sector through application of the standards of significance to new projects, i.e., projects for which an environmental analysis was commenced or an NOP was issued after the June 2010 date on which the guidance became final, as opposed to "baseline" projects such as CRT.[22] DOE's conclusion that CRT GHG emissions would create a less than significant climate change impact was based on substantial evidence and was not arbitrary and capricious.

F. The EA Reasonably Estimated its GHG Emissions

Plaintiff contends that the EA arbitrarily calculated GHG emissions by making an improper assumption that Western Area Power Administration (WAPA) power uses more non-GHG emitting power sources than PG&E. This contention is also misplaced. As explained in the Defendants' Opposition to Plaintiff's Motion to Augment the Record and supporting Declaration of Eric Bell, the GHG calculations prepared by DOE do account for the hydroelectric and other non-GHG emitting power sources included in the mix of power provided by PG&E, and they properly compare the emissions attributable to the power provided by PG&E to the power provided to LBNL by WAPA. Because this approach was reasonable, Plaintiff's argument should be rejected.

G. The CRT Facility Site is neither Highly Controversial nor Geologically Unstable

The record does not support Plaintiff's argument that the CRT Facility site sits atop a collapsed caldera[23] as previously theorized by Dr. Garniss Curtis, or unstable ground. Instead, the record shows that the decision to site the CRT at its proposed location was reasonable because DOE performed thorough tests of the area and concluded there was no factual support

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[22] Plaintiff seems to advocate both sides of this issue claiming that DOE cannot rely on a threshold of a different agency when referencing the CEQ, Pl.'s Br. at 16 n.11, then claiming that that BAAQMD's threshold should be applied, Pl.'s Br. at 18. Plaintiff cannot have it both ways, and this Court should not hold the DOE to one standard over another. Instead, the Court should view DOE's consideration of both standards reasonable.

[23] A caldera is the center crater of a volcano.

for a conclusion that the area was unstable or that there is a collapsed caldera. Dr Curtis himself, in his comments on the draft EA, AR 39:768, does not propose the existence of a collapsed caldera beneath the CRT site. Accordingly, Plaintiff's claim that the CRT is a highly controversial action is unsubstantiated.

The mere existence of opposition to a proposed action does not establish a substantial public controversy requiring an EIS. *See Presidio Golf Club v. Nat'l Parks Serv.*, 155 F.3d 1153, 1162 (9th Cir. 1998). Rather, substantial public controversy only exists where the proposal is "highly controversial" – i.e., where there is a "'"*substantial dispute* [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use."'" *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005) (citations omitted) (emphasis added).[24] Measured against these standards, Plaintiff fails to establish that the experimental plan was "highly controversial."

Plaintiff first contends that the fact DOE retained a technical expert to address the caldera issue demonstrates that the Project is highly controversial.[25] DOE's decision to conduct a thorough analysis on a particular issue does not make that issue controversial. *See id* at 1240. Otherwise, any thorough response to a comment would suggest that an action is highly controversial. DOE's analysis instead shows that no controversy exists as to the existence of a collapsed caldera beneath the CRT site.

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[24] Courts have "long ago rejected the suggestion that 'controversial' must necessarily be equated with opposition. Otherwise, opposition, and not the reasoned analysis set forth in an environmental assessment, would determine whether an environmental impact statement would have to be prepared. The outcome would be governed by a 'heckler's veto.'" *North Carolina v. FAA*, 957 F.2d 1125, 1133-1134 (4th Cir. 1992) (quotations and citations omitted).

[25] Plaintiff mischaracterizes the point in time at which DOE retained a geotechnical expert. The DOE had retained independent geotechnical experts to assist with the CRT project design and with preparation of the CRT EA. An additional geotechnical consultant was retained to assist with preparation of the CRT Final EA. Moreover, the correspondences between LBNL Geologist Dr. Preston Jordan and United States Geological Survey geologist Dr. Russell Graymer took place prior to CRT Draft EA completion and not after the DOE had received Dr. Curtis' Draft EA comments. Dr. Graymer's correspondences affirmed the opinions of LBNL and outside experts that Dr. Curtis' theories about caldera and slope stability at LBNL were without merit.

In response to Dr. Curtis' theory that the LBNL site is underlain by an ancient caldera and that the presence of such a feature could make the LBNL hillsides less stable during large seismic events, both DOE and the University have on *numerous* occasions carefully analyzed and refuted these theories with substantial evidence.[26] This evidence includes physical sampling in the form of data gathered from hundreds of borings and excavations taken throughout the LBNL site, as well as fault investigations and other subsurface site exploration conducted by outside experts. *See* AR05:330-39. These data have been analyzed and the results disclosed to the public through several forums, including the *Seismic Life Safety, Modernization, & Replacement of General Purpose Buildings Phase 2B*, Final EA, August 2010 AR76:3079-84; and *Seismic Life Safety, Modernization, and Replacement of General Purpose Buildings Phase 2 Project*, Final EIR, June 21, 2010 AR89:3819-22. DOE's analysis of the data thus specifically refutes Plaintiff's claim that Dr. Curtis' were ignored. Pl.'s Br. at 22.

DOE's analysis of the geological features of the CRT site show that its decision that the site location is stable was reasonable and not controversial. As stated in the EA, the results of the geotechnical analysis, which was based on actual scientific exploration rather than a mere theory, show that there is not a substantial dispute as to the geology and slope stability of the CRT site. E.g., AR05:73-79; AR05:113, AR05:118; AR05:229-30. In fact, the studies refute the statements made in Dr. Curtis' video. AR05:330 (Studies show that no volcanic masses are "in contact with Cretaceous strata as portrayed in the video, but rather are underlain by the Tertiary Orinda Formation."). Additionally, the studies showed that the "geomorphic features indicate this material generally has higher strength and erosion resistance than the surrounding materials rather than lower strength, as presumed by some commenters." AR05:331. Consultation with the U.S. Geological Survey also undercut Dr. Curtis' theory or the comments that the site is unstable. AR84:3280 ("[T]o answer your original question in a straightforward way, no, I don't

[26] It is important to note that Dr. Curtis' (LBNL-specific caldera and Cretaceous strata) theories are not known by DOE to be supported by any expert other than himself, and he presents little or no supporting data or evidence. On the other hand, explanations refuting Dr. Curtis' theories are supported by several experts and are based on copious amounts of data, much of which was gathered from hundreds of soil borings and excavations taken at the LBNL site. AR05:330-39.

think that there is a preserved caldera geometry at LBL."). Because DOE did not find any evidence to support Dr. Curtis' theory, it was reasonable to conclude that the CRT site location was stable.

VI. CONCLUSION

As stated above, DOE's determination that the CRT Project would not produce significant impacts to the environment was reasonable. Accordingly, the agency's use of an EA instead of an EIS was entirely appropriate. For this reason and those stated above, the Court should grant Defendants' Joint Motion for Summary Judgment and deny Plaintiff's motion for summary judgment. In the event the court rules in favor of the Plaintiff, Defendants request a separate hearing on whether any injunctive relief should or should not be granted.

Respectfully submitted this 1st day of August, 2011.

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