Filed 3/12/10 Modified and certified for partial publication 4/7/10 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

LESLEY EMMINGTON JONES et al., Plaintiffs and Appellants, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Appellant.	A123948 (Alameda County Super. Ct. No. RG07341224)

A group of concerned citizens (plaintiffs) filed a petition for writ of mandate under the California Environmental Quality Act (CEQA or Act; Pub. Resources Code, § 21000 et seq.), challenging the certification of an environmental impact report (EIR) by the Board of Regents of the University of California (the Regents) regarding projected development of the Lawrence Berkeley National Laboratory (the Lab or LBNL). The trial court ruled partly in favor of plaintiffs and partly in favor of the Regents. Each party has appealed. Based on our de novo review, we reverse in favor of the Regents.

I. BACKGROUND

The Lab is a special research campus operated by the University of California (UC), "but it is owned and financed by the federal government and as such is distinct from the UC-owned Berkeley campus." The Lab occupies a 202-acre site (main site or hill site) on land owned by the Regents, which is located in the eastern hills of Berkeley and Oakland. The Lab also occupies and uses space on the UC Berkeley campus

(campus site), and in various leased locations mostly in Berkeley, Oakland, and Walnut Creek (off-site spaces).

In January 2007, the Regents published a draft EIR for its 2006 Long Range Development Plan (LRDP or 2006 LRDP),[1] which serves as the comprehensive land use plan to guide physical development of the Lab's main site. The proposed 2006 LRDP[2] "does not constitute a commitment to any specific project . . . ." Rather, the 2006 LRDP EIR is a program-level EIR that evaluates the effects of implementation of the entire LRDP, which describes the development program for the main site through 2025.

A program EIR is defined by the Guidelines[3] as "an EIR which may be prepared on a series of actions that can be characterized as one large project and are related either: [¶] (1) Geographically, [¶] (2) As logical parts in the chain of contemplated actions, [¶] (3) In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program, or [¶] (4) As individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways." (Guidelines, § 15168, subd. (a).)

The LRDP establishes four land use zones at the main site. The zones are: (1) Research and Academic (121 acres), (2) Central Commons (6 acres), (3) Support Services (19 acres), and (4) Perimeter Open Space (56 acres). The LRDP also "calls for developing clusters of research and academic uses close to one another and creating usable, attractive plazas and other open spaces that would function as 'commons' for nearby buildings. This clustering of development would allow the Lab to evolve into a more campus-like setting, fostering interaction and informal encounters among Lab

---

[1] Public Resources Code section 21080.09, subdivision (a)(2) defines a long-range development plan as "a physical development and land use plan to meet the academic and institutional objectives for a particular campus . . . ." Subdivision (b) specifies that "the approval of a long-range development plan . . . require[s] the preparation of an environmental impact report."

[2] The Lab's existing LRDP and EIR were approved in 1987.

[3] All references to "Guidelines" are to the CEQA Guidelines, which implement the provisions of the Act. (Cal. Code Regs., tit. 14, § 15000 et seq.)

staff . . . ." "These clusters will be known as individual 'hill towns' with their own unique character and themes."

Under the proposed LRDP, "the total building area at the main . . . site could increase from 1.76 million gross square feet (gsf) of occupiable space to as much as 2.42 million gsf of occupiable space, for an overall increase over the life of the LRDP of 660,000 net new gsf." The Lab's total adjusted daily population (ADP) at all locations is projected to increase by 1,000 for an ADP of 5,375.[4] Additionally, "parking on the hill site would increase by approximately 500 net new spaces for a total of 2,800 parking spaces."

The LRDP EIR considers five alternatives to the proposed LRDP. The alternatives are: (1) "No Project Alternative" (as required by CEQA); (2) "Reduced Growth 1 Alternative"; (3) "Reduced Growth 2 Alternative"; (4) "Preservation Alternative with Non-LBNL Use of Historical Resources"; and (5) "Off-Site Alternative." The No Project Alternative "would result in development at the main . . . site pursuant to the existing 1987 LRDP, and the proposed 2006 LRDP would not be implemented." Under this alternative, "the amount of occupiable building space would increase up to approximately 2 million gsf, or roughly 13 percent above existing conditions, and the ADP would increase by about nine percent, to 4,750. No increases in the parking supply would occur." The Reduced Growth 1 Alternative "would represent about 63 percent of the net new occupiable building space, about 76 percent of the new ADP, and 75 percent of the net new parking spaces proposed under the 2006 LRDP." The Reduced Growth 2 Alternative "represents 102.5 percent of the new ADP, about 89 percent of the net new occupiable building space, and 75 percent of the net new parking spaces." Under the Non-LBNL Use of Historical Resources, "a limited number of key historical resources, when determined to be no longer of feasible use to the . . . Lab, would be dedicated to non-LBNL uses and could be managed by another public agency, such as the National Park Service." This alternative "would avoid the proposed 2006

[4] The ADP calculation represents "the Lab's full-time-equivalent employment plus 40 percent of annual guests . . . ."

LRDP's significant, unavoidable effects on cultural resources but would result in the same impacts of the proposed project in other respects, as the development program would otherwise be the same." The Off-Site Alternative "proposes that all development under the 2006 LRDP, including increases in ADP, occupiable building space and parking spaces," would be divided between the hill site and at an off-site location, specifically the Richmond Field Station. At the Richmond Field Station, "an ADP of 390 would be accommodated, and 383,800 square feet of new occupiable building space and 225 new parking spaces would be constructed." Development at the hill site "would accommodate the remaining projected growth under the 2006 LRDP, and would be the same as the Reduced Growth 1 Alternative."

The draft EIR for the 2006 LRDP was published on January 22, 2007. Comments on the draft EIR were accepted through March 23, 2007. A public hearing on the draft EIR was held on February 26, 2007. On July 19, 2007, the Regents certified the EIR, adopted the accompanying mitigations and findings, and issued a statement of overriding considerations. On July 20, 2007, a "Notice of Determination" was filed with the Governor's Office of Planning and Research.

Plaintiffs petitioned the trial court for a writ of mandate challenging the approval of the 2006 LRDP and the certification of the associated EIR. On October 27, 2008, the trial court issued a statement of decision granting the petition in part and denying it in part. In so ruling, the trial court entered judgment against the Regents and in favor of the plaintiffs on the limited grounds that the Regents had failed to recirculate a portion of the final EIR that was added in response to comments to the draft EIR. Plaintiffs and the Regents timely appealed.

II. DISCUSSION

A. Standard of Review

"In reviewing an agency's compliance with CEQA in the course of its legislative or quasi-legislative actions, the courts' inquiry 'shall extend only to whether there was a prejudicial abuse of discretion.' (Pub. Resources Code, § 21168.5.) Such an abuse is established 'if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.' (§ 21168.5; see *Western States Petroleum Assn. v. Superior Court* [(1995) 9 Cal.4th 559,] 568*; Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392-393.) [¶] An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: the appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo. [Citations.]" (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426-427, fn. omitted.) We therefore resolve the CEQA issues by independently determining whether the administrative record demonstrates any legal error by the Regents and whether it contains substantial evidence to support the Regents' factual determinations.

B. Plaintiffs' Appeal

The plaintiffs' appeal concerns two issues, the project alternatives and water quality impacts.

1. Alternatives

Plaintiffs argue that the Regents abused their discretion in two ways with regard to consideration of alternative plans: first, that a so-called "true off-site" alternative was not considered; and, second, that alternatives were improperly rejected based on "undefined" project objectives. Neither contention withstands analysis.

a. Range of Alternatives

"The purpose of an EIR is to give the public and government agencies the information needed to make informed decisions, thus protecting ' "not only the environment but also informed self-government." ' ([*Citizens of*] *Goleta* [*Valley v. Board of Supervisors* (1990)] 52 Cal.3d [553,] 564 [(*Goleta*)].) The EIR is the heart of CEQA, and the mitigation and alternatives discussion forms the core of the EIR. (*Ibid.*)" (*In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1162 (*Bay-Delta*).)

The basic framework for analyzing the sufficiency of an EIR's description of alternatives is set forth by the Guidelines and by the California Supreme Court in *Goleta, supra,* 52 Cal.3d 553 and *Bay-Delta, supra,* 43 Cal.4th 1143. (*Id*. at pp. 1162-1163.) Specifically, "CEQA requires that an EIR, in addition to analyzing the environmental effects of a proposed project, also consider and analyze project alternatives that would reduce adverse environmental impacts. (Pub. Resources Code, § 21061; see also *id.*, §§ 21001, subd. (g), 21002, 21002.1, subd. (a), 21003, subd. (c); *Goleta, supra*, 52 Cal.3d at pp. 564-565.) The CEQA Guidelines state that an EIR must 'describe a range of reasonable alternatives to the project . . . which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project . . . .' ([Guidelines] § 15126.6, subd. (a).) . . . [¶] 'In determining the nature and scope of alternatives to be examined in an EIR, the Legislature has decreed that local agencies shall be guided by the doctrine of "feasibility." ' (*Goleta, supra,* 52 Cal.3d at p. 565.) CEQA defines 'feasible' as 'capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.' (Pub. Resources Code, § 21061.1; see also [Guidelines] § 15364.) [¶] 'There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason.' ([Guidelines] § 15126.6, subd. (a).) The rule of reason 'requires the EIR to set forth only those alternatives necessary to permit a reasoned choice' and to 'examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project.' (*Id.*, § 15126.6, subd. (f).) An EIR does not have to consider alternatives 'whose effect

cannot be reasonably ascertained and whose implementation is remote and speculative.' (*Id.*, § 15126.6, subd. (f)(3).) [¶] The process of selecting the alternatives to be included in the EIR begins with the establishment of project objectives by the lead agency. 'A clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers in preparing findings . . . . The statement of objectives should include the underlying purpose of the project.' ([Guidelines] § 15124, subd. (b).)" (*Bay-Delta, supra*, 43 Cal.4th at p. 1163.)

Here, the LRDP identified six objectives and an underlying purpose for the development plan. The six objectives are: (1) "Expand partnerships and collaborations to enhance [the] Lab's scientific and technical base"; (2) "Provide flexibility to return staff from its off-site facilities leased in Berkeley and Oakland to the main site in order to enhance collaboration, productivity, and efficiency"; (3) "Expand the capacity of existing high-demand advanced facilities and provide broader functionality"; (4) "Rehabilitate facilities that have outlived their intended purpose and can be cost-effectively adapted for use in new regions of scientific discovery"; (5) "Replace single-purpose facilities with new facilities programmed to accommodate multiple disciplines with advanced infrastructure suitable for future endeavors"; and (6) "Construct new scientific facilities to support future research initiatives and continued growth in existing programs."

The underlying purpose of the LRDP "is to guide the physical development of land and facilities and to provide a framework for implementing the [Lab's] mission and scientific goals." Consistent with this purpose, the LRDP is founded on "four fundamental principles," two of which are to " 'build a more campus-like research environment' "; and to " 'improve access and connections to enhance scientific and academic collaboration and interaction.' " In turn, these "fundamental principles" underscore the importance of physical proximity in realizing the overall objectives of enhancing "collaboration, productivity, and efficiency."

In keeping with these objectives, the LRDP proposes the development of "clusters," which "would allow the Lab to evolve into a more campus-like setting," by "creating clusters of research and academic uses close to one another," thereby "fostering

interaction and informal encounters among Lab staff and supporting the 'team-science' heritage of the Lab."

In light of the foregoing, the EIR concluded that the off-site alternative "would not meet the project objectives to expand functionality of Lab facilities, provide for cross-disciplinary research or foster collaborative work environments among researchers, since it would result in a division of resources between locations."

We are not persuaded by plaintiffs' contention that the Regents should have considered a so-called "true no hillside growth" alternative, where all growth under the 2006 LRDP would occur at a satellite campus, such as the Richmond Field Station. "An EIR need not consider every conceivable alternative to a project or alternatives that are infeasible. ([Guidelines, § 15126.6, subd. (a).]; see also *Goleta, supra,* at p. 574.)" (*Bay-Delta, supra,* 43 Cal.4th at p. 1163.) " 'Absolute perfection is not required; what is required is the production of information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned.' [Citation.]" (*Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1029.) "When the alternatives have been set forth in this manner, an EIR does not become vulnerable because it fails to consider in detail each and every conceivable variation of the alternatives stated. [Citations.]" (*Residents Ad Hoc Stadium Com. v. Board of Trustees* (1979) 89 Cal.App.3d 274, 287-288.)

In *Save San Francisco Bay Assn. v. San Francisco Bay Conservation etc.* (1992) 10 Cal.App.4th 908 (*Save San Francisco Bay*), the court reviewed the approval of an EIR to build an aquarium on the San Francisco waterfront that involved placing pilings in the bay. (*Id.* at p. 916.) Opponents of the project objected that the EIR was deficient because it failed to consider an alternative waterfront location that did not require placing new fill in the bay. (*Id.* at p. 921.)

In affirming the administrative approval of the aquarium construction, the appellate court noted that the California Supreme Court in *Goleta, supra,* 52 Cal.3d 553, "stressed that the range of alternatives to be included in an EIR should focus on those that could 'feasibly' attain the basic objectives of the project, and that CEQA does not require

the examination of alternatives that are so speculative, contrary to law, or economically catastrophic as to exceed the realm of feasibility. [Citation.] This principle is important for this case because the requirements for the aquarium project were very specific and limited in scope (waterfront access, proven attendance base, transportation and parking), which in turn severely limited the 'feasible' alternatives." (*Save San Francisco Bay, supra,* 10 Cal.App.4th 908 at p. 922.)

As in *Save San Francisco Bay*, the size and scope of the 2006 LRDP for the Lab limits the number of alternatives that are both feasible and would accomplish most of the goals of the project. The Regents considered an off-site alternative that would have reduced some of the significant environmental impacts of the project to a less-than-significant level while still accomplishing at least some of the goals of the project. Under this alternative, all development under the 2006 LRDP would be divided between the hill site and at the Richmond Field Station. The EIR, however, concludes that "this alternative would not meet the project objectives to expand functionality of Lab facilities, provide for cross-disciplinary research or foster collaborative work environments among researchers, since it would result in a division of resources between locations."

Indeed, the so-called true off-site alternative proposed by plaintiffs would prevent the realization of the project's primary objective of creating a more campus-like setting at the hill site, and would nullify most, if not all, of the other project objectives as well. Specifically, a complete off-site alternative would eliminate the project's objectives of expanding the capacity of existing hill site facilities, as well as the rehabilitation and replacement of outdated hill site facilities. Arguably, the project objective of constructing new facilities could be supported at an off-site location, but the related goal of promoting "continued growth in existing programs" necessarily relates to development at the hill site. By reason of the previously approved project (i.e., the project approved under the 1987 LRDP), the vast majority of the facilities and staff are located at the hill site. The objectives of the current project are to expand and update the hill site even further and to consolidate Lab staff, all with the overarching goal of creating a more campus-like setting at the hill site. A complete off-site alternative, however, would result

in the division of facilities and staff and would be contrary to the objective of creating a more cohesive Lab atmosphere.[5]

Although an EIR must consider a reasonable range of potentially feasible alternatives and compare their environmental impacts, it does not have to identify and analyze alternatives that would not meet a project's objectives nor does it have to discuss every possible permutation of alternatives. (See *Bay-Delta, supra,* 43 Cal.4th at p. 1162 [EIR for management plan for bay-delta water not deficient for failing to analyze alternative of reducing exports from delta where reduced export alternative would have prevented implementation of other plan objective of water supply reliability]; *Sierra Club v. Napa* (2004) 121 Cal.App.4th 1490, 1502-1503 [EIR not required to identify and analyze alternatives that would not meet project's objectives]; *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 715 [EIR for subdivision not required to analyze density alternative that was legally infeasible].) Here, if a partial off-site alternative would not meet the project objectives of creating a more campus-like setting and fostering a collaborative work environment, we fail to see how the EIR was deficient in failing to consider a complete off-site alternative. The range of alternatives was sufficient to fulfill CEQA's requirements.

b. Project Objectives

We likewise conclude that the Regents' rejection of the off-site alternative was supported by substantial evidence. According to plaintiffs, the "Regents violated CEQA by rejecting alternatives for failing to meet project objectives that were inadequately described and too narrowly defined." (Capitalization altered.) To the extent plaintiffs seek to challenge the EIR's description of the project objectives, this issue was raised in neither the administrative proceedings nor the trial court. Accordingly, plaintiffs' challenge to the project objectives is not properly before this court. (See Pub. Resources

---

[5] It does not appear that plaintiffs are suggesting that the "true off-site" alternative would encompass moving the existing facilities and staff to another location. However, to the extent they advocate moving the entire Lab to avoid interference with the project's objective of creating a cohesive, campus-like setting, such a suggestion presents obvious infeasibility concerns regarding financial and logistical issues.

Code, § 21177; *Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 897.) However, to the extent this claim seeks to challenge the sufficiency of the evidence supporting the EIR's rejection of the off-site alternative, we conclude that substantial evidence supports the determination that the off-site alternative would not achieve the Lab's objectives of creating a more campus-like setting with the goal of enhancing collaboration, productivity, and efficiency.

Fostering collaboration and team-science is an integral goal of the 2006 LRDP. There is ample evidence in the record supporting the conclusion that physical proximity is a key to meeting the project's objectives. Statements made by the Lab's current and former directors underscore the importance of creating a campus-like setting with common areas to promote the free exchange of ideas. For example, in the Lab's 2005/2006 annual report, former director Steve Chu, explained that in "a culture of interdisciplinary problem-solving," it is beneficial to have the opportunity to "spontaneously" form "research partnerships . . . over lunch in the cafeteria, after seminars, and in social events." Chu further explained that, in a light of the Lab's history of maintaining a collaborative approach to science, he a viewed a "major" part of his job was making the "collaborative environment even better."

Consistent with the goal of ameliorating the collaborative environment, the 2006 LRDP adopted project objectives and design guidelines based on the fundamental principle of bringing research and academic personnel together at the main hill site. As such, the project calls for the creation of six acres of central commons, including the development of research clusters to enable the Lab to evolve into a more campus-like setting.

Based on these facts, we conclude that substantial evidence supports the EIR's conclusion that the off-site alternative "would not meet the project objectives to expand functionality of Lab facilities, provide for cross-disciplinary research, or foster collaborative work environments among researchers, since it would result in a division of resources between locations."

2. Water Quality

Plaintiffs assert that the trial court erred in concluding that they had not exhausted their administrative remedies with respect to their water quality argument.

" ' "Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action." [Citation.] Subdivision (a) of [Public Resources Code] section 21177 sets forth the exhaustion requirement [the trial court applied] here. That requirement is satisfied if 'the alleged grounds for noncompliance with [CEQA] were presented . . . by any person during the public comment period provided by [CEQA] or prior to the close of the public hearing on the project before the issuance of the notice of determination." ' [Citation.] [¶] The purpose of the rule of exhaustion of administrative remedies is to provide an administrative agency with the opportunity to decide matters in its area of expertise prior to judicial review. [Citation.] The decisionmaking body " 'is entitled to learn the contentions of interested parties before litigation is instituted.' " ' [Citation.] [¶] To exhaust administrative remedies, '[m]ore is obviously required' than 'generalized environmental comments at public hearings.' [Citation.] 'On the other hand, less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding. This is because " '[i]n administrative proceedings, [parties] generally are not represented by counsel. To hold such parties to knowledge of the technical rules of evidence and to the penalty of waiver for failure to make a timely and specific objection would be unfair to them.' [Citation.] It is no hardship, however, to require a layman to make known what facts are contested." ' [Citation.]" (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 615-616 (*California Native Plant Society*).)

In reaching its conclusion that administrative remedies were not exhausted on plaintiffs' argument relating to water quality, the trial court explained that generalized environmental comments about the EIR's water quality analysis were not sufficient to put the Lab on notice of plaintiffs' claims that: (1) the EIR failed to consider "numerical benchmarks and standards"; and (2) the EIR's conclusion that the LRDP would not result

in significant impacts to water quality is not supported by substantial evidence because the Lab is allegedly violating stormwater discharge limits.

Nothing in the plaintiffs' argument on appeal convinces us the trial court erred. Plaintiffs made numerous comments on the draft EIR as it related to water quality, including the comment that the EIR's water quality impacts analysis was deficient because substantial evidence did not support the EIR's conclusion that there would be no significant cumulative impact to stormwater quality resulting from the Lab's use of the pesticide diazinon. Plaintiffs further commented that the EIR's alleged failure to recognize potential water quality impacts that would be caused by increases to impervious surfaces. Nothing in these comments, however, suggested that the draft EIR's water quality analysis was deficient for failing to consider "numerical benchmarks and standards" or challenges the sufficiency of the evidence supporting the EIR's conclusion that the project would not result in significant impacts to water quality because of stormwater discharges exceeding such standards.

On appeal, plaintiffs attempt to draw support for their challenge to the trial court's conclusion on the exhaustion issue from several cases, but none is helpful to plaintiffs. In *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745 (*SORE*) a nonprofit group of property owners and residents challenged the adequacy of an EIR relating to a five-story residential care facility for senior citizens to be built in the City of West Hollywood. (*Id.* at p. 1748.) The central issue was "whether the EIR for the Project was required to examine alternative sites outside the territorial limits of the City, since the EIR found no feasible alternative sites within the City." (*Ibid.*) The City contended the group had not exhausted its administrative remedies on that issue because it "did not specifically object to the legal adequacy of the EIR's alternative site analysis." (*Id.* at p. 1750.) Rejecting this argument, the appellate court concluded that the group's "objections to the Project, while not identifying the precise legal inadequacy upon which the trial court's ruling ultimately rested, fairly apprised the City and [the developer] that [the group] believed the environmental impacts of developing the Project on the . . . site would be deleterious to the surrounding community." (*Ibid.*) Here, unlike the comments

in the *SORE* case, plaintiffs' comments did not fairly apprise the Regents about the specific issue of numerical water quality standards and the Lab's alleged violation of those standards.

Equally unavailing is plaintiffs' reliance on cases acknowledging the general principle that citizens who object during an administrative process need not be held to the same degree of specificity as would be required during a judicial action, because they are often not represented by counsel. (*East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, 176-177.) The rationale for this rule is that to hold them "to knowledge of the technical rules of evidence and to the penalty of waiver for failure to make a timely and specific objection would be unfair for them." (*Id.* at p. 177.) In the *East Peninsula* case, the court found that comments about the absence of any mention of the " 'the most basic concern' " of residents regarding " 'traffic and safety' " was sufficient notice for exhaustion purposes as to those specific issues even though the residents failed to cite the precise statute or the specific statutory language. (*Id.* at pp. 176-177.) (See also *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1395 [developer repeatedly voiced concerns about project's impacts on air quality, public services, traffic, congestion, parking, aesthetics, and lighting that provided agency with opportunity to receive and respond to articulated factual issues and legal theories prior to judicial review]; *McPherson v. City of Manhattan Beach* (2000) 78 Cal.App.4th 1252, 1264 [plaintiff adequately exhausted administrative remedies by raising precise issue at every administrative hearing even though plaintiff failed to cite to specific municipal code section]; *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 162-163 [plaintiffs raised failure to consider cumulative effects in administrative proceeding through oral objections and letter to agency prior to its decision].)

Here, unlike the cases cited by plaintiffs, the general comments about water quality did not fairly apprise the Regents about the specific issue of numerical water quality standards and the Lab's alleged violation of those standards. Moreover, plaintiffs' were not precluded from raising this issue due to a technical failure to cite a

statute or failure to identify a precise legal inadequacy. Rather, plaintiffs failed to raise the issue at all, thereby preventing the Regents from learning of their contentions prior to the commencement of litigation and denying the Regents an opportunity to act and render the litigation unnecessary. (See *McPherson v. City of Manhattan Beach, supra,* 78 Cal.App.4th at p. 1264.)

Accordingly, we conclude that plaintiffs did not exhaust their administrative remedies on the issues of whether the draft EIR's water quality analysis was deficient for failing to consider "numerical benchmarks and standards" and whether substantial evidence supports the EIR's conclusion that the project would not result in significant impacts to water quality because of alleged stormwater discharges exceeding such standards.

D. The Regents' Appeal

In their appeal, the Regents challenge the trial court's finding that it violated CEQA by amending the draft EIR in response to public comments about greenhouse gas (GHG) emissions without recirculating the final EIR for public review.

The draft EIR did not discuss the project's potential for climate change as result of GHG emissions.[6] In response to public comments regarding the effect of the 2006 LRDP on the climate, the final EIR added a discussion about the project's potential for increasing GHG emissions. The final EIR concluded that the project's "contribution to GHG emissions . . . would not be cumulatively considerable, and the cumulative impact of the project would therefore be less than significant."

Despite the fact that plaintiffs did not raise the issue of recirculation in the administrative proceedings, the trial court ruled that plaintiffs were not required to exhaust these claims because the Regents "did not provide for any clear public process

---

[6] Nearly two years after the final EIR was certified, the California National Resources Agency initialized the formal rule-making process to amend the Guidelines to address how lead agencies should evaluate GHG emissions under CEQA. (See 1 Manaster & Semli, Cal. Environmental Law and Land Use Practice (1989) Special Alert: Cal. Natural Resources Agency Initiates Rule-Making on CEQA Guidelines Amendments Addressing Greenhouse Gas Emissions, p. SA20-1 (rel. 51-10/2009).)

after release of the final EIR." The trial court faulted the Regents for failing to give adequate notice of the final EIR by: failing to invite comments and further public participation; failing to reference the time and location of any public meetings regarding further public comments; and failing to publish notice of the final EIR in any of the local newspapers. On the merits, the trial court concluded that the newly recognized climate change impact constituted "significant new information" requiring recirculation.

As discussed, "[i]t is axiomatic that judicial review is precluded unless the issue was first presented at the administrative level. [Citations.]" (*Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894 (*Resource Defense Fund*).) That said, the exhaustion requirement does not apply to "any alleged grounds for noncompliance with [CEQA] for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project, or if the public agency failed to give the notice required by law." (Pub. Resources Code, § 21177, subd. (e).)

In the instant case, the Lab sent out a letter on July 5, 2007, which expressly notified the public and the commenting agencies that the final EIR was complete and would "be considered for certification by the UC Regents on July 17, 2007." The notice also advised that the final EIR could be reviewed or downloaded "from the web at: www.lbl.gov/Community/envrev-docs.html," and that hard copies of the final EIR were available at the Berkeley Public Library. In the event anyone had questions (or wanted a compact disc version of the EIR), the notice provided the name and contact information for the Lab's planning coordinator, as well as the Lab's community relations officer.

In response to the July 5, 2007 notice, the City of Berkeley and the Sierra Club submitted comments on the final EIR. However, neither suggested that the draft EIR should be recirculated in light of the GHG discussion.

A similar issue was addressed in *Resource Defense Fund, supra*, 191 Cal.App.3d 886, where a different division of this district held that a public interest group was barred from raising the issue whether the failure to recirculate a final EIR violated CEQA. (*Id.* at p. 895.) There, as here, written comments regarding the final EIR were submitted, but

there was no mention of the failure to recirculate the EIR after redrafting. (*Ibid.*; see also *California Native Plant Society, supra*, 172 Cal.App.4th at pp. 617-619 [organization failed to exhaust administrative remedies regarding recirculation argument].)

Plaintiffs argue that *Resource Defense Fund* is not dispositive because there, unlike here, a public meeting was held. (See *Resource Defense Fund, supra,* 191 Cal.App.3d at p. 895.) We are not persuaded. A lead agency *may*, but need not, provide an opportunity for the public to review a final EIR. (Guidelines, § 15089, subd. (b); see Remy et al, Guide to CEQA (11th ed. 2007) The EIR Process, p. 374) Indeed, public hearings, although encouraged, are "not required as an element of the CEQA process." (Guidelines, § 15087 (i); see also § 15202, subd. (a) [CEQA "does not require formal hearings *at any stage* of the environmental review process . . . .[,]" italics added.]) Rather, what is required is an opportunity for the public to be fully apprised of an impending project and to voice its concerns. (See Guidelines, § 15201.) To that end, the Guidelines instruct that "[e]ach public agency should include provisions in its CEQA procedures for wide public involvement, formal and informal, consistent with its existing activities and procedures, in order to receive and evaluate public reactions to environmental issues related to the agency's activities. Such procedures should include, whenever possible, making environmental information available in electronic format on the Internet, on a web site maintained or utilized by the public agency." (*Ibid.*)

In the present case, the procedures employed by the Lab and the Regents provided for wide public involvement and did not run afoul of CEQA. Although the July 5, 2007 notice failed to a include the time and the location of the final EIR's certification, the notice referenced the date of such determination, provided several methods for obtaining a copy of the final EIR, and listed the name and contact information of the Lab's planning coordinator and its community relations officer. Moreover, unlike the cases relied on by plaintiffs, the public was given adequate notice about the project from its inception (see *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 702 [public had no means to challenge approval of initial study when received notice after "environmental review was effectively complete"] and was

not otherwise precluded from commenting on the project (see *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1210-1211 [where agency declared project exempt from CEQA, objectors not barred from challenging exemption as this determination did not involve public and regularly scheduled meeting of lead agency was not public hearing where challengers were required to raise objections]).

Accordingly, we conclude that plaintiffs failed to exhaust their administrative remedies on the issue of whether the Lab was required to recirculate the draft EIR after adding a discussion about GHG emissions, which was made in response to public comments.[7]

III. DISPOSITION

The judgment is reversed and the trial court is instructed to enter, consistent with this opinion, a new and different judgment denying plaintiffs' petition for writ of mandate. The Regents are entitled to recover their costs on appeal.

_____
Sepulveda, J.

We concur:

_____
Ruvolo, P.J.

_____
Reardon, J.

---

[7] By reason of this holding, we need not address whether the Lab's implicit decision not to recirculate the EIR (i.e., the decision that the new information was not "significant") was supported by substantial evidence. (*Laurel Heights, supra,* 6 Cal.4th at pp. 1131-1135.)

Filed 4/7/10

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

LESLEY EMMINGTON JONES et al., Plaintiffs and Appellants, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Appellant.	A123948 (Alameda County Super. Ct. No. RG07341224) ORDER MODIFYING OPINION AND CERTIFYING FOR PARTIAL PUBLICATION [NO CHANGE IN JUDGMENT]

BY THE COURT:

The opinion filed March 12, 2010, is modified to change heading "II.D. The Regents' Appeal" to "II.C. The Regents' Appeal."

The opinion has now been certified for partial publication pursuant to rules 8.1105(b) and 8.1110 of the California Rules of Court, and it is ordered so published in the Official Reports.

Dated: _____ _____P.J.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part II.C.

Trial Court:	Alameda County Superior Court.
Trial Judge:	Honorable Frank Roesch.
Counsel for Appellant:	Michael Lozeau.
Counsel for Respondent:	Cox, Castle & Nicholson, Michael H. Zischke; Lawrence Berkeley National Laboratory, Nancy M. Ware.