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10 CLAREMONT CANYON CONSERVANCY.

11 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **IN AND FOR THE COUNTY OF ALAMEDA**

13
14 CLAREMONT CANYON CONSERVANCY,
a California nonprofit corporation,

15 Petitioner

16 v.

17 THE REGENTS OF THE UNIVERSITY OF
18 CALIFORNIA, a California public
corporation, and DOES 1-20 inclusive,

19 Respondents

20
21 HILLS CONSERVATION NETWORK, Inc., a
public benefit corporation,

22 Petitioner and Plaintiff

23 v.

24 CAROL T. CHRIST, in her official capacity as
Chancellor of the University of California,
Berkeley; and THE REGENTS OF THE
25 UNIVERSITY OF CALIFORNIA, an agency of
26 the State of California,

27 Respondents and Defendants

Consolidated Cases

Case No. RG21091666 (lead case)

Case No. RG21091977

(Assigned for all purposes to Dept. 17,
Hon. Frank Roesch)

(Actions filed under California Environmental
Quality Act)

**OPENING BRIEF OF PETITIONER
CLAREMONT CANYON CONSERVANCY**

Date: December 10, 2021

Time: 2:00 PM

Department: 17

Judge: Hon. Frank Roesch

Filing Date: March 13, 2021

Trial Date: December 10, 2021

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

TABLE OF CONTENTS..... 2

TABLE OF AUTHORITIES..... 3

INTRODUCTION..... 5

STATEMENT OF FACTS..... 9

I. The Plan Area and its Fire History..... 9

II. The Wildland Vegetative Fuel Management Plan 11

III. The Approval Process for the Plan and its EIR. 12

STANDARD OF REVIEW 13

ARGUMENT..... 15

I. The EIR fails to adequately present the effects and potential impacts of the FHR projects. 15

II. The EIR does not adequately or accurately address the impacts of implementing the FHR projects..... 19

A. The EIR fails to adequately address the potentially significant impacts of leaving substantial numbers of eucalyptus trees within the fhr project areas. 19

B. The EIR’s estimates of wind speeds under diablo wind conditions are inaccurate, leading to underestimating the expected severity of wildfires and their impacts with or without the project under diablo wind conditions. 21

III. The FEIR failed to adequately address the environmental setting for the plan, including the future effects of climate change on the project area..... 23

A. The EIR does not adequately address how climate change will change the impacts from implementing the plan over the next ten years. 23

B. The EIR cannot simply defer consideration of the effects of climate change on project impacts to future periodic reviews of the identified treatment projects. 25

IV. HCN’s alternative proposal, calling for removing underbrush and minimal thinning, while leaving virtually all large mature eucalyptus trees in place, would be both prohibitively expensive and ineffective in preventing catastrophic wildfires under diablo wind conditions. 25

CONCLUSION 28

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Center for Biological Diversity v. California Dept. of Fish & Wildlife (2015) 62 Cal.4th 204 17

Center for Biological Diversity v. Department of Fish & Wildlife (2016) 1 Cal.App.5th 452 15

Chaparral Greens v. City of Chula Vista (1996) 50 Cal.App.4th 1134 14

Citizens for a Sustainable Treasure Island v. City and County of San Francisco ("Treasure Island") (2014) 227 Cal.App.4th 1036 16, 18

Citizens to Preserve the Ojai v. County of Ventura (1985) 176 Cal.App.3d 421 14

City of Antioch v. City Council (1986) 187 Cal.App.3d 1325 25

County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185..... 14, 16

In re Bay-Delta et al. (2008) 43 Cal.4th 1143 19

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Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692..... 14

Laurel Heights Improvement Association v. Regents of the University of California ("Laurel Heights I") (1988) 47 Cal.3d 376 13, 15

Poet, LLC v. State Air Resources Bd. (2017) 12 Cal.App.5th 52 15

Save Round Valley Alliance v. County of Inyo (2007) 157 Cal.App.4th 1437 14

Schoen v. Department of Forestry & Fire Protection (1997) 58 Cal.App.4th 556..... 14

Sierra Club v. County of Fresno (2018) 6 Cal.5th 502..... passim

Stanislaus Natural Heritage Project v. County of Stanislaus (1996) 48 Cal.App.4th 182 13

Stopthemillenniumhollywood.com v. City of Los Angeles (2019) 39 Cal.App.5th 1 15

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova ("Vineyard")(2007) 40 Cal.4th 412 14, 23

Washoe Meadows Community v. Department of Parks & Recreation (2017) 17 Cal.App.5th 277..... 16

California Statutes

Public Resources Code

§ 21000 et seq. 6

§ 21061 23

§ 21168.5 13

§ 21168.9 15

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6
7
8
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California Regulations

California Code of Regulations, Title 14 (CEQA Guidelines)
§ 15064 17
§ 15126.2 15

1 **INTRODUCTION**

2 Petitioner Claremont Canyon Conservancy (“Conservancy”) challenges the adequacy of
3 the Environmental Impact Report (“EIR”) prepared by Respondent Regents of the University of
4 California (“UC”) for the Wildland Vegetative Fuels Management Plan (“WVFMP” or “Plan”).
5 The Plan’s purpose is to reduce the wildfire risk posed by previously inadequately managed
6 vegetation on UC Berkeley’s Hill Campus. That large, roughly 800 acre area, located just east
7 of the Berkeley main campus in the Oakland/Berkeley Hills, is also adjacent to, but does not
8 include, the campus of the Lawrence Berkeley National Laboratory. It consists mostly of
9 undeveloped wildland. (AR 002361¹ [map, showing area and existing buildings within area –
10 2% of total area].)

11 Petitioner challenges the EIR for not providing a clear project description, including the
12 effects of the Plan’s various vegetation treatments, particularly the extent to which the Plan’s
13 three Identified Fire Hazard Reduction (“FHR”) Projects potentially allow retention of a
14 significant population of Monterey pine and eucalyptus trees, which the record shows are
15 primary drivers of current and future wildfire risk. While the EIR acknowledges the high fire
16 risk posed by these non-native species, planted in the area starting over 100 years ago, it does not
17 adequately disclose that the Plan may not achieve its goal of reducing fire risk, but may, by
18 allowing these trees to remain and multiply, in fact allow that risk to increase.

19 The Hill Campus and its surrounding areas have a long history of wildfires. (AR
20 001881.) Two major wildfires occurred in the general area during the 20th Century, one in 1923
21 and the other the notorious “Tunnel Fire” of 1991, which destroyed over 3,000 homes for a loss
22 of over two billion dollars. (AR 002235-6, 002357-8, 002966.) Both of those fires involved
23 “Diablo winds,” winds that come from the northeast during hot, dry conditions, with sustained
24 winds as high as 50-70 miles per hour and gusts even higher, and which can persist for as long as
25 several days. (AR 002967, 029359 et seq.) The Tunnel Fire made clear, especially when
26 combined with the growing evidence that climate change is increasing and will continue to
27 increase the frequency and perhaps the duration and ferocity of Diablo wind events, that
28 reducing the risk of a major wildfire in the Hill Campus needs to be a very high priority.

29 In partnership with two other organizations concerned about fire safety in the East Bay

30 ¹ The Administrative record for the case has been certified by UC and lodged with the Court.
31 All references to it will be by the term “AR”.

1 Hills: the Hills Emergency Forum and the Diablo Firesafe Council, UC began work on
2 developing the WVFMP. Along with that Plan, UC also prepared an EIR under the California
3 Environmental Quality Act (“CEQA,”)² to assess the environmental impacts the Plan might have
4 and how such impacts, if significant, could be mitigated or avoided.

5 The Plan and its EIR included both long-term and short-term aspects. In the long term,
6 the Plan looked for strategies that would reduce the likelihood of a disastrous wildfire that might
7 not only destroy much of the woodlands in the Hill Campus, but also invade adjoining urban
8 areas of Oakland and Berkeley, where it could wreak havoc on homes and businesses. In the
9 short term, the Plan proposed several specific “Identified Treatment Projects.” The aim of these
10 projects, over the next five to ten years, would be to provide a faster and safer response to
11 wildfires as well as reduce the likelihood of a severe wildfire, especially one ignited during a
12 period of Diablo winds, getting out of control as did the 1923 Berkeley Fire and the 1991 Tunnel
13 Fire.

14 These projects include (1) enhancing the safety and efficiency of evacuation routes from
15 the Hill Campus by removing fire-prone vegetation and vegetation that could disrupt evacuation
16 (e.g., by blocking the roadway) along those routes, (2) developing four temporary refuge areas
17 that could shelter evacuees and firefighters if a wildfire posed an immediate threat, (3) creating
18 two major fuel breaks – areas that would be largely cleared of flammable material to aid in fire
19 containment and control, and (4) implementing three Identified FHR Projects (“IFHRP”)
20 intended to reduce the degree of hazard in some of the current areas of highest fire risk, thereby
21 reducing both the intensity and the speed of spread of a fire that might develop in these areas.
22 Those three initial IFHRPs were: Strawberry, Frowning Ridge, and Claremont; each
23 corresponding to an area where quickly reducing fire risk would be particularly important. (AR
24 001938, 001942-1946.)

25 As with the Plan, the EIR for the Plan also looked programmatically at the expected
26 environmental impacts of the long-term strategies, while examining in finer detail the effects of
27 the short-term projects. However, for the three IFHRPs, given the relatively large areas
28 involved, the EIR did not provided adequate descriptions of how the projects would play out.
29 Instead, it simply called for “variable density thinning” of the existing woodlands, based on sets

30 _____
31 ² Public Resources Code § 21000 et seq. Unless otherwise specified, all further statutory
references are to the Public Resources Code.

1 of qualitative criteria for evaluating individual trees and deciding the extent to which trees (and
2 surrounding underbrush) would be allowed to remain or be trimmed, thinned, or completely
3 removed.

4 It was, in part, the concept of variable density thinning that provoked responses from
5 both the Conservancy and Petitioner and Plaintiff Hills Conservation Network (“HCN”). Both
6 organizations complained that the EIR’s use of the criteria did not adequately describe the
7 expected results and resultant impacts of the IFHRPs included in the Plan, and consequently
8 failed to allow the public, or the decision makers, to evaluate those potential impacts, their
9 significance, and, if significant, the degree to which they could be mitigated or avoided.

10 That said, the Conservancy and HCN differ dramatically in what they consider the
11 potential impacts and risks of the Plan and its alternatives. The Conservancy points to evidence
12 in the record providing strong support for removing most, if not all, of the eucalyptus in the Plan
13 area, as well as most of the Monterey pine. This evidence shows that the removal of these highly
14 flammable and fire-dangerous species would greatly reduce the risk of an uncontrolled wildfire,
15 particularly if coupled with strategic removal of underbrush in the areas of highest fire risk,
16 ensuring that trees that regrew in FHR areas had lower fire risk, and establishing effective fuel
17 breaks that would limit spread of a wildfire, even under the worst Diablo wind conditions. These
18 principles (plus additional measures beyond vegetation management) were represented in what
19 the EIR designated as “Alternative A,” also known as the “McBride Plan.” That alternative was
20 based on a proposal submitted to UC by UC Berkeley Forestry Professor Emeritus Joe McBride.
21 (AR 002966 et seq.)³

22 HCN, by contrast, has asserted that the Plan greatly overstates the risk from allowing
23 most mature eucalyptus and Monterey pine to remain in the Plan area. It claims that the
24 evidence it has presented shows that a much more modest program, aimed primarily at reducing
25 the density of mature trees, trimming their lower branches, removing pathways a fire could use
26 to climb from the ground into tree crowns, and removing surrounding “fine fuels” such as
27 grasses and underbrush, would be adequate to make future wildfires controllable. UC also
28

29 _____
30 ³ The McBride proposal included elements beyond pure vegetation control, including adding
31 surveillance and firefighting elements, making it more of a global wildfire management plan.
(See, AR 002339 [distinguishing vegetation control from other actions].)

1 included an alternative, “Alternative B” that was based on HCN’s proposed principles.⁴

2 From the Conservancy’s standpoint, the EIR has three main deficiencies. First, the EIR
3 does not provide sufficient information about what UC will *actually* do in implementing its
4 future variable density thinning in the IFHRPs. That vagueness prevents an adequate evaluation
5 of what the IFHRPs’ significant impacts will be, and whether those projects’ effectiveness
6 justifies any resulting significant and unavoidable impacts. Second, the EIR does not adequately
7 evaluate the potentially significant impacts that would result from the IFHRPs, both from
8 retaining significant numbers, and especially groves, of eucalyptus (and to a lesser extent
9 Monterey pine) within the IFHRP areas, as well as from significantly underestimating the
10 prevailing wind speed of the foreseeable future Diablo wind events. Evidence in the record
11 shows that those wind speeds, as modeled in a recent wildfire, approach 70 mph – more than
12 50% greater than the speed used in the EIR’s analysis. Third and finally, the EIR failed to
13 adequately consider how future expected changes to the Plan area will affect the Plan and its
14 impacts. More specifically, while the Plan and its EIR make a bow in the direction of climate
15 change, neither the Plan nor the EIR adequately address how the Plan’s implementation, and
16 specifically the IFHRPs, will be affected by climate change, and whether that will change the
17 Plan’s future impacts.

18 The Conservancy also has a broad concern about what might happen if HCN is
19 successful in *its* challenge. Based on HCN’s past record of litigation, against both UC and other
20 public agencies, the Conservancy expects that HCN will insist that the Court order UC to go
21 “back to the drawing board” and redo both the Plan and its EIR *before beginning any treatment*
22 *work*. In the past, it has used that same technique, *and the consequent threat of delay*, to force
23 other agencies, notably the East Bay Regional Park District and the Federal Emergency
24 Management Agency (“FEMA”), to settle litigation through agreements that greatly pared back
25 the agencies’ programs for reducing fire risk by removing eucalyptus trees from projects they
26 control along East Bay hillsides. (See, Exhibits C and D to the Conservancy’s Request for
27 Judicial Notice (“Conservancy RJN”) [settlement agreements settling litigation between HCN
28 and the East Bay Regional Park District and between HCN and the Federal Emergency
29 Management Agency (“FEMA”) and other agencies].)

30 _____
31 ⁴ HCN complained, however, that UC’s Proposal B limited vegetation control to manual
methods only, artificially reducing the effectiveness of Alternative B. (AR 001540-1.)

1 The Conservancy's goals are far more modest and reasonable. It believes that the EIR is
2 adequate to support most of the Plan's proposed work as presented. Only in the IFHRPs does
3 the Conservancy see deficiencies requiring major revisions to the EIR. Even there, the
4 Conservancy's position is that the current projects may do too little, not too much.
5 Consequently, while the Conservancy seeks to have the EIR revised to provide a clearer view of
6 the risks (and benefits) of the current Plan versus alternatives, it feels that even the IFHRPs
7 should be allowed to move forward in the interim, subject to modification if a revised EIR shows
8 that more stringent steps are needed to accomplish the Plan's stated goal of reducing wildfire
9 risk in the Hill Campus.

10 **STATEMENT OF FACTS**

11 **I. THE PLAN AREA AND ITS FIRE HISTORY**

12 As noted, the Hill Campus, which coincides with the area covered by the Plan, lies
13 almost directly east of the University of California Berkeley's main campus. (AR 002340
14 [map].) It encompasses approximately 800 acres, with roughly 200-300 acres of that area
15 planned to be treated annually by the Plan. (AR 000002, 001932, 002339.) Almost all of the
16 Plan area lies in Alameda County, except for a very small portion in Contra Costa County. (AR
17 001938.) 85 percent of the Plan area is located within the City of Oakland, and almost all the
18 remaining area is within the City of Berkeley. (*Id.*) The Plan area consists primarily of
19 woodlands, although there are also significant areas of coastal scrub vegetation, grasslands
20 mixed with coastal scrub, and disturbed, developed, or landscaped areas. (AR 002048 [table].)
21 Of the woodlands, roughly 1/3 is oak-bay woodlands, 1/3 coniferous/non-native coniferous
22 (primarily Monterey pine), and 1/3 eucalyptus. (AR 002048-050) There are also two perennial
23 creeks running through the Plan area, as well as smaller tributaries, all of which are home to
24 riparian vegetation. (AR 002050.)

25 The Plan area includes known habitat for the federally listed Alameda whipsnake and
26 possible habitat for the federally listed California red-legged frog, as well as known occurrences
27 of the moderately rare, but not federally or state listed Western leatherwood. (AR 002056,
28 002057, 002053.) California bay forest has been identified as a sensitive natural community
29 found in the three treatment project areas as well as the East-West firebreak area. Other
30 sensitive natural communities are found within the Plan area, but not in project areas. (AR
31

1 002065-067.) There are also likely to be protected wetland areas along the creeks that run
2 through the various project areas, but have not yet been delineated. (AR 002067.)

3 The history of the Hill Campus area involves pronounced changes in its landscape. Prior
4 to the arrival of Europeans, it appears the area had large amounts of perennial bunch grasses.
5 With the introduction of livestock and then housing came replacement of the native vegetation;
6 first with exotic annual grasses, and then, at the instigation of speculators and real estate
7 developers, with large numbers of non-native trees, notably eucalyptus, Monterey pine, and
8 cypress. (AR 021110.) These changes, in turn, resulted in a significantly greater fire hazard
9 than had been the case in pre-European California.⁵ (Id.)

10 There have been many significant fires in the East Bay Hills over the past 120 years.
11 (AR 002359 [map].) The two most large-scale and devastating wildfires were the 1923 Berkeley
12 fire north of the U.C. Berkeley Campus and the 1991 “Tunnel Fire” south of the campus.⁶ (AR
13 012636 [map].) Between those two “bookends,” there were another thirteen significant fires in
14 the Oakland/Berkeley Hills. Of those fifteen fires, eight accompanied Diablo winds⁷, including
15 all of those that burned over 1000 acres. (*Id.*; See also AR 6067 [project area is in a “very high
16 fire hazard zone...due to the vegetation, topography and climatic conditions, ... responsible for
17 the rapid spread of the 1991 Oakland Tunnel Fire that killed 25 people and consumed 3,276
18 homes and apartments.”].)

19 With the prevalence of wildfires, there have also been repeated attempts to improve fire
20 safety and reduce fire risk. These include plans prepared by the City of Oakland, East Bay
21 Regional Park District, East Bay Municipal Utility District, Alameda County, and
22 CALFIRE/Santa Clara unit. (AR 001934.) In addition, UC has also prepared multiple plans to
23

24 ⁵ The Native American inhabitants of the area had use periodic burning as a vegetation
25 management method. This ceased with their displacement by Europeans. (AR 021111.)

26 ⁶ Complicating matters was a major freeze in the Hill Campus area in 1973, which killed off the
27 tops of many eucalyptus trees. However, these trees, which were cut down in 1974 with
ineffective herbicide treatment of the stumps, resprouted to yield even denser eucalyptus
woodlands. (AR 002241, 002346.)

28 ⁷ Diablo winds are very strong winds from the northeast that occur primarily in the spring and
29 fall along Bay Area western hillsides. They appear to be caused by a combination of high
30 pressure to the east of the Sierra Mountains and low offshore pressure. The combination pushes
31 air westward over the mountain ranges, and the air compresses, warms, and speeds up as it flows
[explanation and modeling of Diablo winds].)

1 reduce fire risk through vegetation management and treatment. (AR 001941-2; see also AR
2 002240-2241.)

3
4 **II. THE WILDLAND VEGETATIVE FUEL MANAGEMENT PLAN**

5 The Plan (Exhibit A to the FEIR, AR 002332 *et seq.*) was developed to address the use of
6 vegetation control and treatments to reduce the wildfire risk in the Hill Campus. It explicitly
7 does not include other aspects of improving the area’s fire safety, including ignition detection,
8 improved fire suppression, or pre-placement of necessary equipment (e.g., water tanks). (AR
9 002339.) It also assumes there is no need for replanting after vegetation removal because
10 “natural” revegetation will occur. (AR 001385.)

11 As mentioned earlier, the Plan includes both long-term programmatic components and
12 more near-term specific projects. The latter include projects to improve evacuation routes,
13 prepare temporary refuge areas, clear firebreaks to reduce the extent of wildfire spread, and
14 conduct fuel hazard reduction in specific areas (IFHRPs). (AR 001938 [overview].)

15 The plan calls for five different methods to achieve vegetation control depending on the
16 situation: manual treatment (*i.e.*, hand-held equipment), mechanical treatment using various
17 motorized devices to cut down or otherwise remove vegetation, livestock grazing, herbicide
18 application, and prescribed burns. The latter is not proposed to be used in any of the current
19 short-term projects, and herbicide treatment is limited to hand application of a specific herbicide
20 (garlon) to freshly-cut eucalyptus stumps to prevent resprouting and potential hand-held ground
21 spraying to help remove underbrush. (AR 001943 [table], 001946-55.)

22 The crucial element in implementing the projects, and indeed the Plan as a whole, is
23 determining which vegetation, and how much, is removed, as well as how to maintain treated
24 areas once vegetation treatments have been completed. For the evacuation support, temporary
25 refuge areas, and firebreaks, the answers are fairly simple. In each of those situations, one wants
26 to minimize the potential hazards or obstructions – *i.e.*, achieve defensible space. (AR 002350
27 [standards for defensible space].) Put simply, that means close to full clearance, which is what is
28 called for in the Plan. (AR 002352-3.) However, things get more complicated for the IFHRPs.
29 For one thing, these involve much larger areas. (See AR 002391 [chart of acreage involved].)
30 Further, unlike fuel breaks or evacuation route improvements, the Plan includes no categorical
31 imperatives for the FHR areas. Instead, and specifically for the IFHRPs, the Plan provided a

1 series of criteria that would be used on a case-by-case basis to evaluate the relative benefits of
2 retaining, trimming, thinning, or removing the specific vegetation involved. (AR 002394.) The
3 criteria would include:

4 for removal, flammability/fire hazard, consideration of tree health, structure,
5 height, potential for failure/falling, and competition with other trees (including for
6 water, space, and light), and high fuel volume production of small diameter fuels.
7 Criteria for retention of trees includes fuel characteristics (flammability, fuel
8 volume, amount of dead material), consideration of ability to slow spreading of
9 invasive species and surface fuels, protection of understory, encouragement of
10 nesting and improvement of flight patterns of raptors, prevention of erosion, and
11 cost of removal. (*Id.*)

12 Determination of possible actions would also take into account whether a group of trees
13 would have torching⁸ potential due to vertical connectedness, in which case thinning of the
14 group might apply, with retention of healthier trees being preferred. (*Id.*) Treatment would also
15 include removing shrubs from under and within six feet of tree canopy, and shrubs and small
16 trees would be removed from under tall trees to create a vertical separation of 2.5 times the
17 height of the understory vegetation between it and the overstory tree canopy. (AR 001946.)
18 Once treated, the IFHRP areas would be periodically reassessed and, if necessary, retreated, and
19 would be maintained so as to keep the fire safety improvements. (AR 002417.) In addition, the
20 Plan itself would be reevaluated and potentially modified after ten years to adjust to changes
21 such as climate change.⁹ (AR 001956; see also 002421, 002423.)

22 **III. THE APPROVAL PROCESS FOR THE PLAN AND ITS EIR.**

23 The first public indication of the Plan within the certified Administrative Record is a map
24 created on October 15, 2018 showing projects in the Hill Campus undergoing CEQA review.
25 (AR 007704.) That map showed two fuelbreak treatments, roadside evacuation support
26 treatments, and several fuel treatments (compare with AR 002254 [map of ongoing fuel fire
27 management treatments in Hill Campus], AR 002392 [map of all projects considered], 002392
28 [map of Proposed Areas of Treatment], 001940 [map of Identified Treatment Projects].)

29 In April of 2019, UC received final approval from the California Dept. of Forestry and
30 Fire Protection for a \$3.621 million grant to treat 250 acres of vegetation in the Hill Campus to
31 achieve wildfire hazard reduction. (AR 006325-6370.) Over the next few months, UC

⁸ Torching is the travel of fire from the ground to a tree's crown – i.e., its top branches.

⁹ Such modifications might also involve further CEQA review.

1 contracted for several supporting technical reports related to possible wildlife impacts of Hill
2 Campus fire hazard reduction projects. (AR 006047, 006203 [woodrat nest locations], 006006
3 [special status plant species], 006371 [red-legged frog habitat].)

4 On November 20, 2019, UC released a Notice of Preparation for the EIR for the Plan.
5 (AR 004646.) On December 2, 2019, UC held a public scoping meeting for the EIR. (AR
6 003254-3267 [PowerPoint presentation], 003199-3042 [transcript].) On August 14, 2020, UC
7 issued its Notice of Availability for the DEIR for the Plan for a public comment period extending
8 from August 14th to September 28th, 2020, with an on-line session¹⁰ on September 14, 2020 to
9 receive oral public comments. (AR 003590-3593.) On January 27, 2021, UC released the Final
10 EIR (“FEIR”) consisting of two volumes. Volume I consisted of responses to comments
11 received, plus appendices of the comment letters (Appendix A), mitigation monitoring and
12 reporting program for programmatic elements (Appendix B1), and mitigation monitoring and
13 reporting program for identified treatment projects (Appendix B2). Volume 2 consisted of the
14 EIR itself, as revised in response to comments, plus appendices A through I [the same as in the
15 DEIR except where modified in response to comments]. On January 30, 2021, UC prepared a
16 staff report to the Chancellor of UC, Berkeley (AR 000002-15), along with a set of proposed
17 CEQA findings (AR 000016-88) and a proposed mitigation monitoring and reporting program
18 for the programmatic elements (AR 000090-124) and the identified treatment projects (AR
19 000126-157). On February 9, 2021, the staff report and findings were brought before the
20 Chancellor of U.C., Berkeley, and on January 10, 2021 the Chancellor approved the entire
21 package, with a notice of determination being filed that same day. (AR 000001.)

22 STANDARD OF REVIEW

23 In reviewing the EIR for the Plan, this Court must determine whether the Respondent
24 abused its discretion. (Public Resources Code § 21168.5; *Laurel Heights Improvement*
25 *Association v. Regents of the University of California* (“*Laurel Heights I*”) (1988) 47 Cal.3d
26 376, 392; *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512.) The court will find the
27 agency prejudicially abused its discretion if either: 1) the agency failed to proceed in a manner
28 required by law, or 2) its determination or decision was not supported by substantial evidence.
29 (*Laurel Heights I, supra*, 47 Cal.3d at 392, fn. 5; *Stanislaus Natural Heritage Project v. County*

30 _____
31 ¹⁰ Due to the COVID-19 pandemic, all in-person meetings had been cancelled.

1 of Stanislaus (1996) 48 Cal.App.4th 182, 192; Public Resources Code § 21168.5.)

2 “Certification of an EIR which is legally deficient because it fails to adequately address
3 an issue constitutes a prejudicial abuse of discretion” (*Citizens to Preserve the Ojai v.*
4 *County of Ventura* (1985) 176 Cal.App.3d 421, 428.) A prejudicial abuse of discretion also
5 occurs if the EIR omits relevant information and thus precludes informed decision-making.
6 (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.)

7 If an agency has failed to proceed in the manner required by law, the inquiry ends there
8 and the decision must be set aside. The court does not apply the “substantial evidence” standard
9 of review if the agency fails to act in accordance with the law or with CEQA. (*Schoen v.*
10 *Department of Forestry & Fire Protection* (1997) 58 Cal.App.4th 556, 565.) “Conclusions of
11 law . . . are reviewed independently.” (*International Brotherhood of Electrical Workers v. Aubry*
12 (1996) 42 Cal.App.4th 861, 868.)

13 When reviewing an agency’s compliance with the statute, “a reviewing court must adjust
14 its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly
15 one of improper procedure or a dispute over the facts.” (*Vineyard Area Citizens for Responsible*
16 *Growth, Inc. v. City of Rancho Cordova* (“*Vineyard*”)(2007) 40 Cal.4th 412, 435.) Where an
17 EIR fails to address an issue or omits relevant information, courts will consider, *de novo*,
18 whether the agency violated the statute’s disclosure requirements. (*Sierra Club v. County of*
19 *Fresno, supra*, 6 Cal.5th 512-513 [EIR discussion of health impacts was inadequate where the
20 EIR failed to correlate the increase in emissions that the project would generate to the adverse
21 impacts to human health]; *Citizens to Preserve the Ojai v. County of Ventura, supra*, 176
22 Cal.App.3d at 428 [“Certification of an EIR which is legally deficient because it fails to
23 adequately address an issue constitutes a prejudicial abuse of discretion.”].) By contrast, courts
24 use the “substantial evidence” test to review an agency’s “substantive factual conclusions.”
25 (*Vineyard, supra*, 40 Cal.4th at p. 435.)

26 In general, when an agency prepares an EIR, its determinations will be upheld if the
27 required processes were followed and the conclusions were supported by substantial evidence.
28 (*Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1143.) Even if there is a
29 difference of opinion among experts, the agency’s choice of expert will be deferred to unless the
30 expert’s opinion is shown to be “clearly inadequate or unsupported.” (*Save Round Valley*
31 *Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1467-1468.) “Substantial evidence” is

1 “evidence of ponderable legal significance, reasonable in nature, credible, and of solid value,
2 evidence that a reasonable mind might accept as adequate to support a conclusion.” (*American*
3 *Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145
4 Cal.App.4th 1062, 1070.)

5 If the Court finds that the agency abused its discretion in its environmental review of the
6 project, it has a choice of remedies as provided for in Section 21168.9. That section calls for the
7 Court to take one or more action to provide for the correction of the defects in the CEQA
8 process, including potentially issuing one or more writs of mandate to address the deficiencies in
9 the environmental review process. The Court has a significant amount of discretion in
10 determining what actions to take, although it is directed to “include only those mandates which
11 are necessary to achieve compliance with this division and only those specific project activities
12 in noncompliance with this division,” (*id.*, subsect.(b)) but only if the noncompliant actions or
13 activities are severable from the remainder of the project. (*Id.*, see, *Poet, LLC v. State Air*
14 *Resources Bd.* (2017) 12 Cal.App.5th 52, 91- 93 [factors governing severability], *Center for*
15 *Biological Diversity v. Department of Fish & Wildlife* (2016) 1 Cal.App.5th 452, 459-464
16 [legislative history of Section 21168.9 as regards courts’ powers in fashioning a remedy].)

17 As discussed below, the EIR does not provide adequate information regarding the nature
18 of the fuel reduction that will take place and associated impacts, including the extent to which
19 UC proposes to remove or simply “thin” eucalyptus, as well as how future changes in the Plan
20 area due to climate change will affect the Plan’s impacts. If the Court agrees that UC abused its
21 discretion, under § 21168.9 the Court will have considerable discretion in deciding what
22 corrective actions are appropriate. It should be noted that a challenge to an EIR under CEQA is
23 an equitable action, and consequently the Court may access any of its equitable powers to
24 fashion an appropriate remedy. (*Laurel Heights I, supra*, 47 Cal.3d at p. 423.)

25 ARGUMENT

26 I. THE EIR FAILS TO ADEQUATELY PRESENT THE EFFECTS AND 27 POTENTIAL IMPACTS OF THE FHR PROJECTS.

28 To be adequate, an EIR must provide an accurate and stable description of the project.
29 (*Stopthemillenniumhollywood.com v. City of Los Angeles* (2019) 39 Cal.App.5th 1, 16.) It must
30 also identify and describe each of the project’s potentially significant impacts. (CEQA
31 Guidelines § 15126.2; *Sierra Club v. County of Fresno, supra*, 6 Cal.5th at p. 520.) “A curtailed,

1 enigmatic or unstable project description draws a red herring across the path of public input.”
2 (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 198.) As was stated in
3 *Washoe Meadows Community v. Department of Parks & Recreation* (2017) 17 Cal.App.5th 277,
4 288, a defective or incomplete project description “impairs the public’s right and ability to
5 participate in the environmental review process.”

6 Here, the Plan, in its three IFHRPs, proposes to implement a “variable thinning” strategy
7 to reduce forest density and wildfire risk. It proposes to do this by applying species-neutral
8 criteria in an on-the-ground, tree-by-tree analysis. The EIR attempts to evaluate the potential
9 impacts of that analysis and the resulting treatments. There is a problem, however, with the
10 EIR’s approach. Because the Plan’s criteria cannot be applied except in an on-the-ground, tree-
11 by-tree manner, the EIR makes almost no predictions of what the results of those on-the-ground
12 evaluations will be; nor does it identify any associated potentially significant impacts.
13 Consequently, the decision makers, and the public, are left having to compare the impacts of the
14 Plan and its alternatives in treating the IFHRP areas with little idea of what the Plan’s effects and
15 impacts will be as applied to those areas. This flies in the face of CEQA’s basic principle - that
16 decision makers, and the public, should be told and understand how a project, and its
17 alternatives, will impact the environment *before* a decision is made on whether to approve the
18 project.

19 In the EIR, UC responded to concerns about the lack of detail by referring to *Citizens for*
20 *a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036,
21 1054, where the court of appeal held that because the type of development to be constructed
22 depended on soil characterization, and those characterizations would not be available until after
23 the project’s approval, such details would, of necessity, be indefinite and subject to revision.
24 (AR 001381.) Here however, unlike *Treasure Island*, the existing types of vegetation, as well as
25 the general location of eucalyptus groves and pine plantations, are not unknown, even if the
26 location and condition of individual trees remain to be noted and evaluated.

27 As the EIR itself acknowledges (see, AR 001338-001339), and the evidence in the record
28 makes abundantly clear, some tree species, notably eucalyptus and Monterey pine, carry with
29 them a much higher risk of wildfire than others. There is close to unanimous agreement among
30
31

1 knowledgeable experts¹¹ that the general characteristics of blue gum eucalyptus – its high
2 content of highly-flammable volatile oils (AR 029326), its tendency to “take over” an area and
3 produce a very dense forest of trees (AR 029238), its prolific shedding of leaves, branches, and
4 bark to quickly produce a thick layer of debris on the forest floor that can provide abundant and
5 energy-dense fuel to promote a wildfire (AR 029338),¹² its tendency to leave strips of bark
6 hanging down from its trunk that can serve as a “ladder” to allow a ground fire to transition to a
7 much more dangerous crown fire (AR 029327), its ability to crowd out other species by a
8 combination of prolific asexual reproduction and producing allelopathic substances (See, AR
9 029237, 029238; more generally, see AR 001338-001341 [FEIR’s master responses on “Fire
10 Risk of Eucalyptus” and “Proposed Treatment of Eucalyptus”]) – all lead to the almost
11 inescapable conclusion that eucalyptus trees carry with them a large wildfire risk. UC also
12 knows roughly how much eucalyptus there is, compared to other tree species (AR 002048-050);
13 information that can be used to provide at least a rough idea of where different treatment
14 scenarios would lead.

15 Leaving substantial eucalyptus groves in place, a potential result of the Plan’s proposed
16 “variable thinning,” would require inordinately expensive and almost continuous – essentially
17 impracticable – maintenance to avoid actually increasing the fire risk above its already high level
18 in the Plan area. (See, e.g., AR 001425 [last paragraph of response to comment O9-34 –
19 treatment of eucalyptus without use of herbicides would be inordinately expensive, and hence
20 infeasible, as applied to an area as large as the 800 acre Hill Campus], AR 002978 [estimated
21 cost for treatment and maintenance of treated eucalyptus plantations].) UC frankly admits that it
22 cannot guarantee funding for future long-term treatment of large areas of eucalyptus. (AR
23 001342 [master response including cost of maintaining treated areas], 001345 [“implementation

24 ¹¹ Like anything, even climate change or the efficacy of vaccination, one can still often find one
25 or two “experts” who will have the opposite opinion. (See Section IV infra.) However, under
26 CEQA, expert opinion is only substantial evidence if it is supported by facts. (CEQA
27 Guidelines, § 15064, subd. (f)(5) [“evidence that is clearly inaccurate or erroneous, or evidence
28 that is not credible, shall not constitute substantial evidence.”]; *Center for Biological Diversity v.*
California Dept. of Fish & Wildlife (2015) 62 Cal.4th 204, 228 [agency may not rely on
unsubstantiated method as substantial evidence to support finding of no significant impact].)

29 ¹² See AR 6072 [chart showing vegetation type fuel loading as 60 tons per acre for eucalyptus
30 plantations; over 16 times as much fuel loading as for oak-bay woodland and 40 times more than
31 annual grassland.]

1 of treatments would be contingent on availability of current and future funding”). To allow
2 such an increase to happen without discussion in the EIR would be to have the EIR close its eyes
3 to a potentially significant adverse impact of the Plan, hiding it from the public and decision
4 makers. The same is also true of a few other plant species, including specifically French broom
5 and Monterey pine. (See, *e.g.*, AR 004815 [broom species as fire-prone invasive species], AR
6 004812 [Monterey pine as fire-prone species].)

7 UC may have felt it important that the Plan take into account the characteristics of each
8 individual tree and shrub, as opposed to making categorical determinations based on the general
9 characteristics of each species – as proposed under Alternative A. Even so, the Plan could have,
10 and the EIR needed to provide information on the expected results of its variable thinning
11 strategy. It could do that by weighting the criteria to be applied to individual plants based on
12 well-documented attributes of the plants’ species. That information would have provided the
13 public with a basic understanding of what results the “on the ground” evaluations would give
14 and the associated impacts, even if the specifics of those results could not yet be known. With
15 weighted criteria, based on the fire risks posed by different species, the public would know that,
16 for example, eucalyptus and Monterey pine would be much more likely to be removed, thinned,
17 or trimmed than much lower fire risk tree species such as coastal live oak, all other factors being
18 equal.¹³ As a result, even without the on-the-ground analysis results, the public would
19 understand, based on the revealed weighting, that, for example, there would be a vast reduction
20 in the percentage of highly fire-prone vegetation in the FHR project areas. The impacts from
21 such reductions, both adverse and beneficial, could be evaluated and compared with those of the
22 other Plan alternatives. While UC’s identified criteria do provide some relevant information, the
23 lack of links between the criteria and the species involved made it difficult if not impossible for
24 the public to understand how the effects and impacts of the FHR treatments would play out.
25 Making connections between criteria and specific species would make the Plan’s effects and
26 impacts much clearer and more transparent, rather than being hidden behind “neutral”
27 descriptors.

28
29 ¹³ In the case of *Treasure Island*, a comparable method might have been to disclose what
30 building types were most compatible with which soil compositions, along with general
31 information on the types of soil compositions likely to be encountered, and perhaps roughly
where.

1 Another possible approach to providing adequate information on treatment results and
2 associated impacts would have been to keep the Plan’s species-neutral criteria, but for the EIR to
3 provide several specific examples of their application in different local areas within the IFHRP
4 areas. For example, looking at a four square-acre area near the ridgetop (e.g., the area just below
5 landing #21 in the Frowning FHR area – see AR 001940 [map of Identified Treatment Projects])
6 and another four square-acre area much lower down the hillside (e.g., the area the west-most
7 segment of the Claremont FHR area, just east of the western boundary of the Hill Campus – Id.).
8 The results from even two such small sample areas in disparate parts of the IFHRPs would have
9 given the public a far better understanding of the potential effects and impacts of the Plan on the
10 IFHRP areas as a whole.

11 While UC has discretion in formulating the methodology used for its decision-making,
12 nevertheless, CEQA demands transparency in decision-making. The ultimate decision-makers
13 themselves, as well as the public, are entitled to know what the environmental effects of a chosen
14 decision-making protocol will be *before* the project is approved; especially when the decision
15 will result in the application of the protocol on a large scale at the project level *without any*
16 *further environmental review*. (See as a counterexample, *In re Bay-Delta et al.* (2008) 43
17 Cal.4th 1143, 1170-1171 [program-level EIR could permissibly defer formulating specific
18 mitigation to the more specific CEQA analysis of project-level impacts in later EIRs].) The EIR
19 needs to be revised to provide the required transparently available information.

20 **II. THE EIR DOES NOT ADEQUATELY OR ACCURATELY ADDRESS THE**
21 **IMPACTS OF IMPLEMENTING THE FHR PROJECTS.**

22 A. THE EIR FAILS TO ADEQUATELY ADDRESS THE POTENTIALLY
23 SIGNIFICANT IMPACTS OF LEAVING SUBSTANTIAL NUMBERS OF
24 EUCALYPTUS TREES WITHIN THE FHR PROJECT AREAS.

25 As explained above, the EIR, with its requirement of on-the-ground evaluation of
26 vegetation before any decisions could be made on how (if at all) the vegetation would be treated,
27 left the resulting treatment results unknown and unknowable. This would pose a particular
28 problem with respect to even partial retention of eucalyptus plantations within the Project area.
29 The evidence in the record indicates that such populations can continue to pose a severe fire risk.
30 (See *infra*.) Further, the remaining plantation trees may actually expand the area covered by
31 eucalyptus, particularly if other vegetation has been cleared out by treatment activities. Thus the

1 EIR failed to address potentially significant impacts from treatment (or lack thereof) of
2 eucalyptus in the IFHRP areas. This omission is particularly problematic for eucalyptus due to
3 its high flammability, high fuel load, and persistence (and even spreading) following thinning.
4 (See, e.g., AR 006072 [“A special type of fuel ladder exists in many eucalyptus plantations due
5 to a build-up of dry leaves on the ground and strips of exfoliating bark that hang on tree
6 branches. These highly flammable materials provide continuous fuel from the ground into the
7 canopy of the trees. In mature oak woodland stands fuel ladders are uncommon.”].)

8 Leaving the results of the HFR treatments undefined thus left a huge question mark about
9 the potential impacts from the treatments. The EIR therefore needed to discuss the effects and
10 potential impacts of the different possible results, particularly the possibility of an expanded
11 eucalyptus population. More specifically, the EIR should have disclosed the potentially
12 significant wildfire impacts if the on-the-ground evaluation resulted in leaving untouched
13 significant populations of mature eucalyptus trees.

14 Even assuming that the IFHRPs are successfully completed, with most of the underbrush
15 and immature eucalyptus being removed, the mature eucalyptus thinned according to the
16 specified standards, and the removed trees’ stumps successfully treated to prevent regrowth or
17 formation of “suckers” from the remaining roots, that would only reduce the fire risk in the short
18 term.

19 In addition to setting and releasing seed, mature eucalyptus also tend to continue to
20 sprout new plants from existing trees. (See, AR 29326 [asexual vegetative reproduction of
21 eucalyptus].) Thus, unless there was near-continuous monitoring and retreatment – a practical
22 impossibility for the 800 acres of the entire Hill Campus (see, e.g. AR 002978 [estimated cost for
23 treatment and continued control of eucalyptus]) – regrowth of eucalyptus beyond the standards
24 for variable thinning would be almost inevitable, along with a concomitant increase in wildfire
25 risk. The past history of failed attempts by UC to reduce eucalyptus demonstrates the difficulty
26 of controlling eucalyptus without their full removal.

27 [UC] has not been able to properly manage their eucalyptus plantations in the
28 past. Funding for maintenance operations to include removal of eucalyptus litter
29 will be costly and will need to continue as long as there are thinned eucalyptus
30 stands in Strawberry and Claremont canyons. Furthermore, eucalyptus canopies in
31 thinned stands are still functionally continuous in Diablo winds and hanging
leaves and bark can produce fire brands that can be carried by the wind.
(AR 002976 [J. McBride comments on UC’s past attempt to control eucalyptus].)

1 The potentially significant impact of treating, but not fully removing, eucalyptus groves
2 in the IFHRP areas, where they could again become a major wildfire threat, should have been,
3 but was not, identified and discussed. Nor was the impact of the loss of plant and animal
4 diversity in the monoculture eucalyptus groves that would result due to eucalyptus trees’
5 allelopathy. (See, *e.g.*, AR 001385, 001676, 020022, 025468, 024600 [U.S. Fish & Wildlife
6 Service consultation report letter].) In short, reasonably foreseeable impacts that would result
7 from leaving significant populations of mature eucalyptus in place in the IFHRP areas were
8 neither disclosed nor analyzed, in violation of CEQA.

9 **B. THE EIR’S ESTIMATES OF WIND SPEEDS UNDER DIABLO WIND
10 CONDITIONS ARE INACCURATE, LEADING TO UNDERESTIMATING
11 THE EXPECTED SEVERITY OF WILDFIRES AND THEIR IMPACTS WITH
12 OR WITHOUT THE PROJECT UNDER DIABLO WIND CONDITIONS.**

13 In evaluating the effects and impacts of the Plan and its alternatives, the DEIR uses two
14 scenarios: one with 20 mph winds from the west (“upslope”) – “normal” wildfire conditions; the
15 other with 40 mph winds from the northeast (“downslope”) – “Diablo wind” wildfire conditions.
16 (AR 000589.) The DEIR provided no evidence to support its choice of a 40 mph wind speed.
17 The analysis of wildfire effects and impacts was done using the FlamMap fire behavior
18 prediction model. (*Id.*)

19 The Conservancy, in its comments in the DEIR, pointed to evidence that choosing a 40
20 mph wind speed underestimated the ferocity of Diablo winds, which have been clocked at up to
21 100 mph. (AR 001347.) In response, the EIR authors noted that generally wind gusts can be up
22 to 50-100% stronger than the underlying sustained wind speed. (*Id.*) Thus if gusts were 100
23 mph, the sustained winds might be “only” 50 to 70 mph. The EIR authors also admitted that
24 even a 40 mph sustained wind speed “is testing the limits of the [FlamMap] model’s capabilities;
25 model outputs using winds stronger than 40 mph cannot be relied upon.” (*Id.*)

26 This admission brings to mind a joke about a man searching at night, under the light of a
27 streetlight, for his wallet, which had fallen out of his pocket. A passer-by stops to help, and after
28 searching for several minutes, asks the man if he knew roughly where the wallet fell out. The
29 man points to a park across the street and says, “It was somewhere over there.” The passer-by
30 then asks why the man is searching under the streetlight, instead of where it fell out. The man
31

1 answers, “Because the light is better here.”¹⁴

2 Similarly, modeling 40 mph winds for a Diablo-wind-driven fire may allow more
3 accurate modeling than using a higher wind speed, but if that wind speed does not accurately
4 reflect actual current (or future) Diablo wind conditions, the results of such modeling will be
5 nothing short of misleading. In fact, the record contains information on modeled wind speeds
6 during the 2017 Tubbs Fire at Coffey Park in Santa Rosa.¹⁵ (AR 002967 [McBride submission,
7 noting sustained velocities of 50 mph], 002989 [citation], 029359-029361.4 [cited article with
8 captured gif wind speed chart frames, showing sustained surface winds from the east between 8
9 pm and 11 pm of at least 30 meters per second = 67 mph], 029361.5 [gif file from website article
10 showing chart of changing wind speeds at Coffey Park over time].)

11 This evidence indicates that in that recent fire, which occurred under Diablo wind
12 conditions within the Bay Area, there were sustained surface wind speeds of at least 67 mph,
13 more than 50% higher than the 40 mph used in the EIR modeling. While modeling fire behavior
14 at those higher wind speeds may be challenging and the results might be subject to large error
15 bars, using a 40 mph wind speed is no more likely to give an accurate characterization of fire
16 behavior during Diablo winds than looking under the streetlight was to find the man’s wallet.

17 Obviously, with sustained wind speed as much as 50% higher than those used in the
18 EIR’s modeling of a wildfire driven by Diablo winds, the effects of that fire are likely to be far
19 more severe than were disclosed in the EIR. One must expect, therefore, that to be effective in
20 controlling the spread of such a fire, more stringent measures would almost certainly be needed
21 than those proposed by the Plan. Indeed, rather than the “variable thinning” of eucalyptus
22 proposed by the Plan in FHR project areas, it might well be that what is needed is the type of
23 complete replacement measure proposed in the McBride Alternative, Alternative A.

24 In order to choose between these alternatives, or others, one must first have a reasonably
25 accurate estimate of how severe the wildfire’s effects under Diablo wind conditions are likely to
26 be, based on accurate information on the prevailing wind speed. The use of inaccurate and
27 unsupported wind speeds in the EIR invalidated the resulting analysis. As a result, the public

28 _____
29 ¹⁴ See, D.H. Freedman, *The Streetlight Effect* Discover Magazine, Dec. 9, 2010.
30 (<https://www.discovermagazine.com/the-sciences/why-scientific-studies-are-so-often-wrong-the-streetlight-effect> accessed 8/22/2012)

31 ¹⁵ The modeling’s accuracy was validated against measured wind speeds for various Diablo wind events.

1 was precluded from obtaining the information it needed to comment intelligently, in itself a
2 violation of CEQA. (*Sierra Club v. County of Fresno, supra*, 5 Cal.5th at p. 515.)

3 **III. THE FEIR FAILED TO ADEQUATELY ADDRESS THE ENVIRONMENTAL**
4 **SETTING FOR THE PLAN, INCLUDING THE FUTURE EFFECTS OF**
5 **CLIMATE CHANGE ON THE PROJECT AREA.**

6 The fundamental goal of an EIR is to inform decision makers and the public of any
7 significant adverse effects a project is likely to have on the physical environment. (§ 21061;
8 *Vineyard, supra* 40 Cal.4th at p. 428.) To the extent that the Plan is envisaged to be a long-term
9 plan, it must consider not only the present environment of the Plan area, but also how that
10 environment will change over the life of the Plan. (*Id.* at p. 431.) While no specific limit is
11 placed on the Plan’s lifetime, the EIR states that the Plan would be reevaluated, and likely
12 modified, after ten years. (AR 001956.) At that point, while the primary goal of the Plan,
13 reducing the risk of catastrophic wildfires, would likely remain unchanged, the methods for both
14 treatment and maintenance of treated area might well change. (*Id.*; see also AR 002153 [the
15 Plan’s flexibility allows treatments to change over time in response to the effect of climate
16 change]) That being said, the EIR must consider how conditions are likely to change over that
17 first ten-year period, and how those changes will affect the impacts from the Plan’s
18 implementation.¹⁶

19 A. THE EIR DOES NOT ADEQUATELY ADDRESS HOW CLIMATE CHANGE
20 WILL CHANGE THE IMPACTS FROM IMPLEMENTING THE PLAN OVER
21 THE NEXT TEN YEARS.

22 Implicit in the Plan’s design is the assumption that the Plan’s overall direction and focus
23 will not change within the next ten years. (AR 001956.) However, as the EIR acknowledges,
24 climate change will continue to occur, and in all probability accelerate, over those ten years.¹⁷
25 (AR 002156.) Nevertheless, the Plan’s identified treatment projects are all evaluated based on
26 current information on vegetation and climate in the Plan Area. (See, e.g., AR 002367 [map of
27 existing vegetation – as of 2016]; 002369 [map of fuel models]; 002383 [map of flame length,

28 ¹⁶ If the ten-year reevaluation concluded that significant changes to the Plan were required,
29 supplemental environmental review would be in order to address those changes and their
30 impacts.

31 ¹⁷ Obviously, the long-term *degree* of increase in climate change impacts will depend in large
measure on the effectiveness of attempts to decrease or reverse human-caused increases in
greenhouse gases. (See AR 002153-002156.)

1 assuming Diablo winds at 40 mph]; 002385 [map of rate of fire spread – same assumptions];
2 002387 [map of crown fire activity – same assumptions]; 002389 [map of maximum spotting
3 distances – same assumptions].) Yet it cannot be denied that at least some of these parameters
4 will almost certainly change as climate change advances – e.g., Diablo winds will occur over a
5 longer annual season, will occur more often within that season, and will likely reach higher
6 prevailing wind speeds as extreme weather become more common; temperatures, particularly
7 summer temperatures, will increase over current levels; rainfall can be expected to continue to
8 decrease, and vegetation moisture during summer and fall months will decrease accordingly
9 from current levels, as will relative humidity. (See, AR 002155-6; see also AR 006067 [study
10 indicates that by 2100 Oakland will average 16 days per year with temperatures over 100° F.]

11 Nonetheless, the Plan contains no estimates for those expected changes, nor any
12 provisions for revising evaluation of treatments at less than a ten-year interval. Nor does the
13 Plan look prospectively at how expected climate change impacts will, in turn, affect the
14 conditions of vegetation in the future. For example, while eucalyptus do very well in warmer
15 weather (AR 029330) and are able to use fog-drip to survive with relatively low rainfall (20 in.
16 per year) (AR 029337), eucalyptus roots absorb most of that fog drip (AR 029346, 029328), and
17 its leaves add allelopathic chemicals to the drip, inhibiting other plants (*Id.*). Thus, assuming the
18 progression of climate change over the first ten years of the Plan’s implementation proceeds
19 apace, the eucalyptus that remain will likely not only survive, but even expand their area, while
20 other plant species in those areas will likely suffer more and be more likely to be replaced by a
21 eucalyptus monoculture. (See, AR 029343 [eucalyptus tends to expand its growing area and
22 displace native vegetation].)

23 Eucalyptus is far from the only species that will be affected by climate change in the Plan
24 area, even in the relatively short period of the next ten years. But neither the Plan nor its EIR
25 pay any attention to how those changes will affect the impacts generated by the Projects’
26 implementation. One cannot predict a priori whether the effects of climate change will increase
27 or decrease the Projects’ environmental impacts – or, for that matter, leave them unchanged, but
28 given the expected advance of climate change, those effects should have been analyzed.

29 While an EIR is not required to engage in speculation, reasonable prediction of potential
30 future events and impacts is part and parcel of an EIR’s duties. (*City of Antioch v. City Council*
31 (1986) 187 Cal.App.3d 1325, 1336-1337.) Here, prediction of climate change and its impacts in

1 the Bay Area, while perhaps not exact, are available and would inform the public of how the
2 impacts of the Plan, or alternatives, are likely to change over the course of the first ten years.

3 B. THE EIR CANNOT SIMPLY DEFER CONSIDERATION OF THE EFFECTS
4 OF CLIMATE CHANGE ON PROJECT IMPACTS TO FUTURE PERIODIC
5 REVIEWS OF THE IDENTIFIED TREATMENT PROJECTS.

6 UC may argue that, because the Plan calls for periodic review of the results from
7 implementing its projects, those reviews can be used to take stock of, and potentially modify, the
8 treatment strategies to address climate change effects on vegetation in the Plan area, and the Plan
9 specifically calls for “adaptive management” of the Plan area over time. (AR 001357; see also
10 001956 [incorporation of adaptive management in maintenance of treated areas].) Yet neither
11 the Plan nor the EIR provide any information on what such “course corrections” might entail.
12 The public has a right to know, before the Plan is approved, what is being approved, and what
13 the impacts that go along with that approval will be. If the Plan is to be modified every year or
14 every two years, the public must be told that fact, as well as being told, at least in general terms,
15 what kind of modifications are likely to occur, what the corresponding changes in impacts might
16 be, and at what point further environmental review might be needed. As it stands, none of that is
17 known.

18 **IV. HCN’S ALTERNATIVE PROPOSAL, REMOVING UNDERBRUSH WITH
19 MINIMAL THINNING, WHILE LEAVING MATURE EUCALYPTUS TREES IN
20 PLACE, WOULD BE PROHIBITIVELY EXPENSIVE AND INEFFECTIVE.**

21 In its comments on the DEIR, HCN, like the Conservancy, also argues that UC’s Plan,
22 and specifically its FHR projects, are unacceptably vague in identifying the effects of its FHR
23 treatments and the resultant impacts. However, HCN then goes on to claim that UC’s FHR
24 projects will “Remove Large Swaths of Trees.” (AR 001532 [section heading].) In doing so, it
25 attempts to put words into UC’s mouth and create as “straw man” it can attack. In fact, however,
26 as UC explains in its response, its FHR projects aim to produce a “variable density canopy,” not
27 clear-cutting or removing “large swaths of trees.” (AR 001412 [response O9-19].) HCN also
28 attempts to attack UC’s FHR projects as being disguised attempts to remove non-native trees
29 while ignoring hazards posed by native trees.¹⁸ However, UC explicitly avoids identifying

30 ¹⁸ As UC points out, and the evidence in the record substantiates, even the most fire-prone of the
31 native species present in the Hill Campus, California bay, has far less hazardous characteristics
than eucalyptus or even Monterey pine. That being said, there are certainly fire-prone California

1 specific species in its specification of criteria for tree removal or retention. It has, perhaps
2 wisely, learned that even acknowledging the fire-prone nature of eucalyptus and Monterey pine
3 will bring down upon it HCN's wrath, as has happened previously with UC's prior
4 FEMA/CalOES grants. (See Conservancy RJN, Exhibit D at pp. 2, ¶ 1.a [HCN settlement
5 agreement with FEMA and CalOES, defunding UC's FEMA and CalOES grants for vegetation
6 management].)

7 Notwithstanding UC's reticence about identifying eucalyptus and Monterey pine as
8 "target" species, those species' characteristics speak for themselves. Calling a spade a spade is
9 neither discriminatory nor improper. It is simply naming a self-evident fact. As the evidence in
10 the record overwhelmingly shows, certain species, notably Tasmanian blue gum eucalyptus and
11 Monterey pine, and well as French broom and Italian thistles, will promote wildfires by
12 increasing their intensity and facilitating their spread. (See, e.g., AR 002972 [description of fire
13 spread by eucalyptus and Monterey Pine; 002971 [table showing fuel load of eucalyptus
14 plantation is 16 times that of oak/bay woodland].) Focusing vegetation management on
15 removing such species, while maintain the forest's integrity and decreasing the overall fuel load,
16 is the most cost-effective way to improve fire safety and reduce the risk of damaging wildfires,
17 especially those occurring under Diablo wind conditions.

18 HCN has attempted to counter the evidence presented in the EIR on the extreme fire
19 hazard presented by Monterey pine and especially blue gum eucalyptus by relying extensively
20 on comments from wildfire "experts" David Maloney (AR 001554-001561 [Declaration of Mr.
21 Moloney in HCN v FEMA lawsuit]) and Kelly Close (AR 001598- 001633) and on a 2013 report
22 prepared by the U.S. Forest Service addressing the proposed removal of eucalyptus *without*
23 *replacement by less fire-prone tree species* (AR 001545- 001548). (AR 001521- 001543.)
24 However, neither of these "experts" appears to have relevant experience in dealing with the
25 eucalyptus and Monterey pine as fire risks in a hillside area subject to Diablo winds, or, for that
26 matter, with the problems of the Wildland/Urban Interface ("WUI").

27 While both Mr. Maloney and Mr. Close have professional experience with firefighting,
28 most of Mr. Maloney's experience was as Chief of Fire Prevention at the Oakland Army Base in
29

30 native plants. (See, Exhibit E to Conservancy RJN [FireSafe Marin 2017 list of fire-prone
31 plants].) These plants, to the extent they are present and meet the Plan's criteria for treatment,
should also be addressed. Nothing in the Plan says otherwise.

1 West Oakland, a very flat and not particularly fire-prone area, and as an urban firefighter in the
2 Oakland Fire Department. (AR 001555:4-10.) While he did participate as a firefighter in trying
3 to stop the Tunnel Fire, he presents no other experience or special expertise in addressing
4 hillside wildfires on the WUI, especially in the presence of strong Diablo winds.

5 Mr. Close, who authored a study commissioned by HCN attacking a prior Environmental
6 Impact Statement (“EIS”) prepared by FEMA, certainly has many years’ experience with
7 wildfires. However, much of that experience was in rural Montana, where there is neither a WUI
8 nor any eucalyptus. In addition, the EIS he analyzed, unlike the current EIR, proposed total
9 clearance, rather than thinning, and, also unlike the current EIR, did not propose any long-term
10 maintenance of the treated areas. As a result, his critique is little short of irrelevant to the current
11 UC proposal. UC’s proposal, and specifically the FHR projects, call for selective and variable
12 thinning followed by long-term maintenance. That protocol is designed to prevent the type of
13 underbrush establishment that both Mr. Moloney and Mr. Close identify as the main culprit in
14 increasing wildfire risk.

15 Further, Both Mr. Maloney and Mr. Close focus on flame length as the major determinant
16 of wildfire risk and danger. Not so. As the Plan explains at length, there are multiple factors that
17 affect the risk of wildfire as well as the extent of the threat they pose. (See, AR 002358-002374
18 [in depth discussion of issues around wildfires].) They include not only flame length but also
19 total fuel load, fuel density, amount of “fine fuels” (easily ignited and fast-burning fuel), flame
20 temperature, ignition temperature of fuels, tendency to produce “firebrands” – airborne embers
21 that can be caught by the wind and spread the fire to cause “spotting” in the downwind direction,
22 etc. While a grass fire may produce impressive flame length, the amount of fuel in a field of dry
23 grass is small, and quickly exhausted, and the resulting fire temperatures are low. Consequently,
24 a grass fire may not be that easy to put out, but it is also very short-lived. (See, AR 013519,
25 018829, 021163, 022516.) By contrast, structure fires may be harder to start, but once started
26 they involve large amount of fuel, generate intense heat, and, because of that heat, can spread
27 quickly in a strong wind. In short, HCN’s reliance of flame length as the primary predictor of
28 fire risk is simple-minded. (See, AR 001414 – 001415 [explanation of inadequacy of HCN
29 analysis of UC’s FHR projects].)

30 HCN’s distorted view of fire risks has led it to conclude, erroneously, that there is no
31 need to seriously reduce the current prevalence of eucalyptus in the Hill Campus and elsewhere

1 in the East Bay Hills. The Conservancy strongly opposes that view. The Conservancy, like UC,
2 asserts that the evidence strongly supports measures, including greatly reducing the amount of
3 fire-prone trees and underbrush, to reduce both the fuel load and the type of fire-prone trees
4 typified by eucalyptus, so that when the next fire happens (which it undoubtedly will), it does not
5 result in a catastrophe.

6 **CONCLUSION**

7 CEQA does not require perfection, but it does require “adequacy, completeness and a
8 good-faith effort at full disclosure.” (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 515.)
9 Here, perhaps because UC did not wish to frankly acknowledge the need to greatly reduce the
10 current prevalence of eucalyptus, and to a lesser extent Monterey pine and other fire-prone
11 vegetation in its Hill Campus, it has failed to clearly disclose what its Plan will do, and what
12 impacts that Plan is likely to have. Further, UC’s perhaps unintended but still inaccurate
13 understatement of the potential strength of future Diablo winds has resulted in also understating
14 the risks from future wildfires as well as potentially the severity of treatments that will be needed
15 to reduce those risks. Unlike HCN, however, the Conservancy does not seek to impede UC’s
16 efforts to reduce those risks. The Conservancy supports having the Plan’s implementation move
17 forward. However, it urges that the Court require, in parallel, that UC revise and correct its EIR
18 and reconsider whether the Plan needs modification to best achieve its stated objective of
19 reducing the wildfire threat in the Hill Campus.

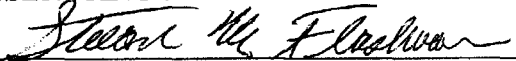
20 Dated: August 27, 2021

21 Respectfully submitted,

22 Stuart M. Flashman
23 LAW OFFICES OF STUART M. FLASHMAN

24 Michael Graf
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26 Attorneys for Petitioner CLAREMONT CANYON
27 CONSERVANCY

28 By: 
29 Stuart M. Flashman

PROOF OF ELECTRONIC SERVICE

I am a citizen of the United States and a resident of Alameda County. I am over the age of eighteen years and not a party to the within above titled action. My business address is 5626 Ocean View Drive, Oakland, CA 94618-1533.

On August 27, 2021, I served the within OPENING BRIEF OF PETITIONER CLAREMONT CANYON CONSERVANCY; PETITIONER CLAREMONT CANYON CONSERVANCY'S REQUEST FOR JUDICIAL NOTICE on the parties listed below via electronic service as email attachments, converted to pdf format, from my email address at stu@stuflash.com to the email addresses listed below. None of the emails were returned as non-deliverable.


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I, Stuart M. Flashman, hereby declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, California on August 27, 2021.


Stuart M. Flashman