



NEPA Lessons Learned from *Save Strawberry Canyon v. DOE, et al.*

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Background

- ❑ Plaintiff Environmental Group “Save Strawberry Canyon” (SSC) brought an action against DOE and the University of California in U.S. District Court for failure to comply with the National Environmental Policy Act (NEPA) in connection with the construction of the Computational Research and Theory (CRT) building by the University of California, Berkeley.
- ❑ The University had prepared an analysis of the environmental impacts of the construction and operation of the facility under the California Environmental Quality Act. See www.universityofcalifornia.edu/regents/regmeet/may08/gb5attach1.pdf
- ❑ DOE had not prepared an analysis of the environmental impacts because the building was to be fully funded by, and located on land owned by, the University of California.



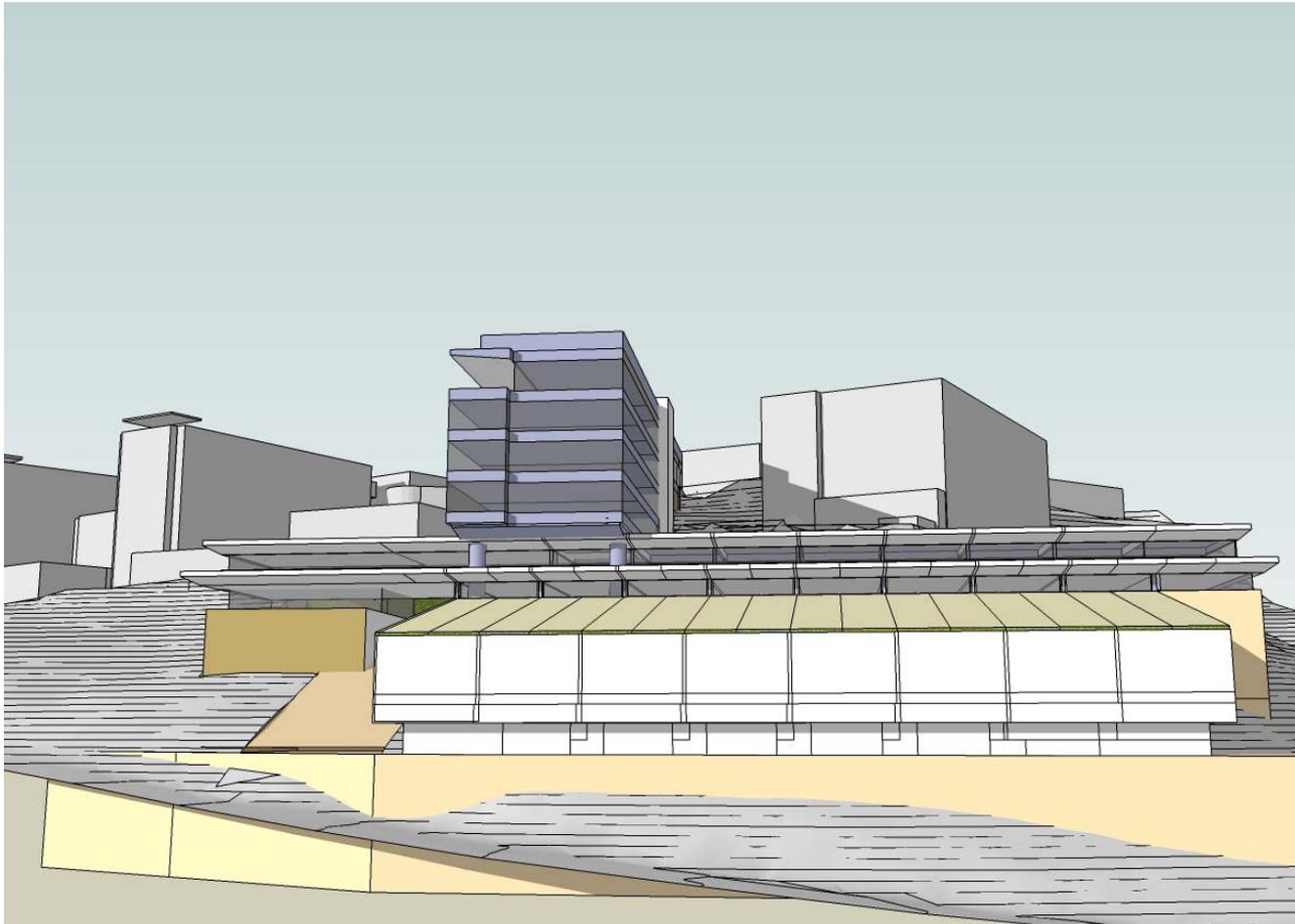
Background (con't.)

- ❑ The CRT had originally been proposed as an LBNL project funded by DOE. Subsequently, the Program informed LBNL that insufficient funding was available. At that point, LBNL approached the University's governing body about going forward with the project independent of DOE.
- ❑ Portions of the site inside the LBNL fence are leased by DOE for the Laboratory; however, some areas within the fence are not leased by DOE.
- ❑ UC Regents decided to go forward with the project, at their own expense. The benefit to UC was to return the supercomputers to a location contiguous to the University for ease of access by student and staff.

NERSC



CRT (purple building)



The Procedural History

- ❑ SSC provided notification to DOE of its intent to sue in January, 2008. DOE was unable to resolve the dispute at that time.
- ❑ SSC filed a lawsuit in July 2008 in the United States District Court for the Northern District of California (ND CA) Plaintiff asserted that a NEPA review was required because the construction of the CRT was inseparable from the NERSC, and therefore the “CRT Project” was a major federal action.
- ❑ A preliminary injunction was issued by the assigned District Judge, Judge William Alsup, that halted all work on the project until the NEPA issue was addressed in federal court.



The Procedural History (con't.)

- ❑ After extensive discovery, the parties filed cross motions for summary judgment.
- ❑ On August 17, 2009, Judge Alsup issued an Order Regarding Cross Motions for Summary Judgment.
- ❑ The Order granted Plaintiff's motion and denied Defendants' cross motions, putting construction of the CRT project on hold until proper NEPA review is completed by DOE.

Judge Alsup's Holding



- ❑ Judge Alsup indicated that there was no existing authority that presented a precise analogy to the facts of the case. Order at 5.
- ❑ However, based on existing case law, he defined the issue as whether a NEPA review was warranted was whether “limited federal financing or a limited federal advisory role were sufficient to federalize the project.” Order at 5.

Judge Alsup's Holding (con't.)

- Judge Alsup ultimately held that “the record leaves no doubt that the federal government has a goal – a new home for the NERSC supercomputing program – and has actively *prepared* to make a decision on means of accomplishing that goal (even if no final, binding decision has been reached),” warranting NEPA review. Order at 15.



Judge Alsup's Factual Findings

- Judge Alsup considered the following 6 findings in making his decision that NEPA review was warranted for the CRT:

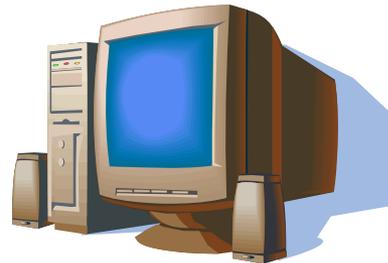


1. DOE Obligated the University to Provide Facilities Like the CRT

“The federal contract provided that LBNL and its contractor ‘shall conduct computational research including the management and operations of the [NERSC] Center.’” It also required the University to upgrade its facilities for programs like the NERSC. Order at 7.

2. DOE had, in 2004, Issued a CD-0 for a CRT Facility for the Next NERSC Generation.

- By the year 2004, DOE recognized that the NERSC supercomputer would outgrow its current facility in one or two (computer) generations.
- In 2004, LBNL prepared a “project charter” that included plans to provide cost effective mechanism to finance infrastructure as DOE “would like to relocate [NERSC] back to the Berkeley Site.”
- In 2005, DOE issued a mission need statement (CD-0) for a CRT, to be located at LBNL, even though there was a predicted shortfall of funding by a factor of 8 in 2008 for DOE’s computational resources. Order at 8-9.



3. DOE Maintained Project Oversight

- ❑ Under the M&O contract, DOE enforced the LBNL contract through performance-based outcomes and indicators.
- ❑ DOE specifically targeted the CRT project as a DOE priority in its performance evaluations of the contractor, which provided the direction of the contract. For instance, in DOE's 2007 evaluation, DOE noted that the "CRT facility *will house* the NERSC . . .which *will be relocated back* to the LBNL."
- ❑ Thus, the performance evaluations "provided DOE a powerful tool to guide the project and ensure that the federal objectives were being met." Order at 9-10.



4. DOE Provided Key Input

- ❑ The M&O contract identified specific individuals as “key personnel” who were “considered essential to the work being performed under [the] contract.”
- ❑ Although LBNL employees are employees of the University, (LBNL is not an independent agency or entity with employees of its own), the federal government pays their salaries through the prime M&O contract, which grants DOE some control over decisions to remove or transfer them.
- ❑ These LBNL “key personnel” exercised important decision making roles for the CRT project. Order at 10-11.



5. DOE Agreed to Provide Cheap Federal Power

- ❑ The CRT project proposes to derive its power from the Western Area Power Administration, a federal source of power that is less expensive and in the control of DOE.
- ❑ Such discounted power amounts to federal funding for the project and is further evidence of DOE participation in the project. Order at 12.



6. Other Federal Financing Implicates DOE Involvement



- ❑ DOE involvement in the project was evidenced by the hundreds of millions of dollars of that flow from the M&O contract to LBNL for operation. The record “presents an unambiguous understanding” that the federal government will ultimately provide further funding specifically to cover CRT’s project costs.
- ❑ The project would initially be funded by the University via debt financing. Then, “if and when” DOE and LBNL relocate the NERSC to the CRT, the federal government will cover the debt financing through federal LBNL funds. Order at 12-13.

Other Federal Financing Implicates DOE Involvement (con't.)

- Evidenced by:
 - LBNL's operating budget was projected to increase, indicating that under the budget approved by UC "the federal government will ultimately pay for not only use of the facility, but also for construction.
 - E-mails among LBNL personnel confirmed that LBNL personnel received back-channel assurances from DOE that the expected federal financing would be coming."
 - Eight days before project's budget was submitted to the UC regents for approval, the LBNL Lab Director received a letter from DOE expressing support for the project.

Order at 12-13.

Why did the Judge get it wrong?

- ❑ There was no proposal from DOE to Construct or Occupy the CRT facility.
 - University cannot bind DOE absent DOE's approval.
 - The CD-0 is not a proposed action under NEPA as it is not a final agency decision.
- ❑ The CD-0 is not a proposed action under NEPA.
 - DOE has no role in the CRT facility.
 - DOE has no control over the CRT by the provision of electrical power.
 - DOE has not committed funding to CRT facility.

Why did the Judge get it wrong? (con't.)

- The work performed by key personnel is not an action by DOE.
 - LBNL key personnel are not agents of DOE, and their actions do not federalize the project.



Lessons Learned

- ❑ A mission need statement (CD-0) is evidence of federal involvement, even if determination is made subsequently to suspect further DOE action on the project.
 - If DOE determines not to pursue a project that has a mission need statement, revoke or terminate the CD-0.
- ❑ When changing a project from Federal to Private, don't keep the same name, and DO scrutinize publicly available information. Laboratory websites still listed the CRT, and the UC CEQA document connected the CRT and NERSC.

Lessons Learned



- ❑ Beware of the implication of using M&O contractor personnel (especially if their time is not segregated for billing purposes) for non-federal projects. Contractor personnel are not DOE agents, but some types and levels of involvement can be construed as DOE control that federalizes a non-federal project.

[Also, involvement of Lab personnel creates issues in discovery, e.g. who owns the records, who is responsible for production, etc.]

Lessons Learned (con't.)

- ❑ Beware of contract provisions and performance expectations that incentivize voluntary Contractor contributions that benefit DOE missions; they can be construed to be “back door” DOE actions.
- ❑ Know your public! In cases of extreme controversy, consider alternatives. E.g., Can the project be built in another area where there are fewer sensitivities?



Questions????
