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I. INTRODUCTION

This appeal challenges a decision by the National Nuclear Security Administration (“NNSA”), an agency within the United States Department of Energy (“DOE”) that manages development of nuclear weapons (collectively, “defendants”), to construct and operate at Lawrence Livermore National Laboratory (“LLNL”) facilities to test poisons that might be used in bio-warfare (“bio-agents”). The facility would attempt to replicate terrorist attacks by testing on live animals different ways to deliver lethal doses of many of the most dangerous organisms and related toxins known to man, including live bacteria such as Anthrax, Tularaemia, Plague, Q fever, Botulism, Brucellosis, Rickettsia, Tuberculosis, Staphylococcus and Salmonella, and live viruses such as HIV, Herpes, Hantavirus, Influenza, and Hepatitis. 1 Excerpts of Record (ER) Tab 2: pages A-24-38.

Plaintiffs do not challenge defendants’ decision to engage in this biodefense research. The wisdom of doing so is a matter committed to defendants’ sound discretion and is not a question before this Court. The only issue raised here is whether, in reaching this decision, defendants properly followed the procedures required by the National Environmental Policy Act, 42 U.S.C. §4321 *et seq.* (“NEPA”) and the Freedom of Information Act, 5 U.S.C. §552 *et seq.* (“FOIA”). Defendants departed from these statutorily-mandated procedures in two respects.

First, defendants violated NEPA by failing to prepare an EIS even though this statute requires “that an EIS be prepared for all [federal] actions that may significantly affect the environment.” *Foundation for North American Wild Sheep v. U.S. Forest Service*, 681 F.2d 1172, 1179 (9th Cir. 1982). 1ER2:ii-58. Second, defendants failed to provide plaintiffs with defendants’ documents underlying their approval of this facility, in violation of FOIA. Defendants’ failure to comply with NEPA and FOIA, in turn, violates the Administrative Procedure Act, 5 U.S.C. §706 (“APA”), because defendants’ final agency action approving the facility is “not in accordance with law,” 5 U.S.C. §706(2)(A), and “without observance of procedure required by law,” *id.* at §706(2)(D).

This facility could have a potentially significant effect on the environment in a number of ways. First, an earthquake on the nearby Greenville and Las Positas faults could cause structural damage resulting in the release of bio-agents to the environment. In January 1980, the Greenville Fault experienced a magnitude 5.9 earthquake in the Livermore area, injuring 44 people and causing \$10 million damage to the LLNL including fallen ceiling tiles, fallen bricks from chimneys, broken gas and water lines, broken windows, and displacement of mobile structures (such as the proposed BSL-3 modular facility) from supporting foundations.

3ER8(Curry)(SP)¹:¶¶6-9. In rejecting public requests for an EIS addressing this hazard, defendants told the public that there were no “active faults in proximity to the location of the proposed facility.” 1ER2 (Environmental Assessment (“EA”):36.

Second, in this post-9/11 world, the potential for a terrorist attack cannot be ignored, particularly since the facility is intended to replicate the kinds of biological weapons of mass destruction, such as Anthrax, that terrorists might desire.

Paradoxically, defendants never addressed the possibility that a terrorist attack on this facility might release these same bio-agents into the environment.

1ER2(EA):49-54(analysis of “abnormal events and accident scenarios” omits consideration of terrorist attacks or employee sabotage). Yet according to a number of government reports, the most likely cause of the October 2001 Anthrax attacks on the East Coast was a disgruntled employee utilizing “technology and techniques developed as part of the United States’ defensive biological weapons program.” 3ER12(Ritter)(SW):¶15; 5ER35(Ritter)(SW):¶4. This omission’s significance is heightened by DOE’s notable history of security lapses, at both

¹Where a reference to Appellants’ Excerpts of Record is to a declarant’s testimony, the declarant’s name is included for the sake of clarity. Where this Brief references testimony stricken by the district court, that fact is noted in parentheses (stricken in whole = “SW”; stricken in part = “SP”). The grounds for plaintiffs’ appeal from the district court’s rulings striking certain of plaintiffs’ declarations are addressed

LLNL (3ER14(Zipoli)(SW):¶¶5-16; 4ER29(Zipoli)(SW):¶¶4-7;
6ER49(Zipoli)(SW):¶¶4-14) and its sister defense lab, the Los Alamos National
Laboratory (“LANL”) (3ER15(Stockton)(SW):¶¶4-46; 4ER32(Stockton)(SW)¶¶3-
6.

Third, defendants assumed that any inadvertent releases of bio-agents –
whether by accident, natural disaster or otherwise – would be contained by the
facility’s High Efficiency Particulate Arrestor (“HEPA”) filters through which the
facility would exhaust its spent air. 1ER2(EA):42-43, 51-52 (defendants’ Maximum
Credible Event (“MCE”) assumes a small spill of Q Fever bacteria would pass
“through two sets of HEPA filters” before leaving the building). But “[m]ost HEPA
filters at LLNL are flimsy, weak, fiberglass, paper and glue structures mounted in
wood or metal frames” that “can fail completely when wet, plugged, hot and over-
pressured from fires, explosions, blowers and even severe storms,” resulting in an
overall failure rate at DOE facilities of “approximately 12%.” ER3:9(Fulk):¶¶12-30);
5ER34(Fulk)(SW):¶¶6-12; 6ER47(Fulk)(SW):¶¶5-33).

Fourth, if these bio-agents are released to the environment in significant
quantities, they could cause massive human mortality within the densely populated
San Francisco Bay Area, a scenario never modeled nor considered by defendants.

on pages 21-36 of this Brief.

1ER2(EA):51-52 (defendants' MCE does not model significant release because it assumes any poisons would pass through "two sets of HEPA filters");

3ERC10(McKinzie):¶¶2-12. Defendants assumed no structural damage would allow direct release of bio-agents to the environment, based on engineering standards that understate the anticipated g-forces and do not apply to the containment of hazardous materials. 6ER50(Curry)(SW):¶¶5-8. Defendants assumed that any fire at the facility would destroy, rather than release, all bio-agents present (1ER3:A9-57), and that "members of the public would usually be a minimum of one-half mile away" from the facility, overlooking the 10,000 LLNL workers on-site (1ER2(EA):51; 6ER47(Fulk)(SW):¶5. Defendants ignored the rapid urban growth which is engulfing Livermore, and the tens of thousands of commuters who pass nearby on two major freeways that link the area to the rest of the Bay Area. 3ER17(Watt):¶¶3-8; 2ER6(Kelley)(SW):¶5.

Had defendants modeled the direct release and dispersal of bio-agents such as Anthrax following a catastrophic accident, sabotage or terrorist attack, utilizing the federal government's Hazard Prediction and Assessment Capability ("HPAC") model, exposure of over one-half million people to life-threatening dosages might have been revealed. 3ER10(McKinzie);¶¶2-12; 5ER33(McKinzie)(SW):¶¶2-18; 6ER48(McKinzie)(SW):¶¶3-12. Consequently, the public was never informed of

this hazard.

Defendants also assumed that any release of bio-agents would be treatable by medical responders. 1ER2(EA):40-41,48,51. But the facility's proposed genetic modification of bio-agents (1ER2(EA):7-9) would generate uncertain medical risks to public health. 3ER18(Wright)(SW):¶¶3-6; 5ER36(Wright)(SW):¶¶4-13.

Defendants failed to consider the use of alternative testing methods utilizing surrogates as a means of avoiding or mitigating potential impacts on public health and safety. 3ER16(Hammond)(SW):¶11; 4ER30(Hammond)(SW):¶¶3-4.

Fifth, the facility poses potentially significant proliferation impacts by encouraging other countries to develop similar bio-defense facilities, creating additional impacts on the human environment both overseas and, ultimately in response, within the United States. 3ER12(Ritter)(SW):¶¶13-14; 5ER35(Ritter)(SW):¶¶6-10; 3ER16(Hammond)(SW):¶¶13-17, 21; 4ER30(Hammond)(SW):¶¶9-13; 3ER13(Wheelis)(SW):¶¶6-15; 5ER38(Wheelis)(SW):¶¶3-8; 3ER18(Wright)(SW):¶¶10-12.

Although this "Biosafety Level 3" ("BSL-3") laboratory poses obvious, potentially significant threats to the human environment, and would be the first BSL-3 facility ever constructed and operated by DOE, establishing a precedent for conducting bio-agent experiments at other DOE sites, defendants failed to prepare

an EIS. Unlike the 250-300 existing BSL-3 facilities in the United States that conduct traditional medical research to *cure* diseases, the Livermore facility would perform experiments with highly toxic and virulent pathogens in an effort to replicate a terrorist attack that would *create* and *spread* deadly diseases.

3ER13(Wheelis)(SW):¶¶6-7; 3ER16(Hammond)(SP):¶17.

To this end, defendants would *aerosolize* these virulent toxins and pathogens in order to increase the speed and efficiency by which they could kill and spread disease, using small animals to gauge their effectiveness. 1ER2:17,C-25-29,61; 3ER(Hammond)(SP)16:¶17.

This greatly increases their hazards to the public, and creates a “weaponization,” or proliferation risk. *Id.*; 1ER2:C-25, 28-29, 48. The facilities would develop genetically-modified versions of these bio-agents, posing a virtually infinite array of methods of administering lethal doses of infectious and poisonous agents. 1ER2(EA):7-9,18-19; 3ER18(Wright)(SW):¶¶3-5. These lethal experiments would take place at a facility where over 10,000 people work each day and where more than seven million people live within a 50-mile radius. 1ER2:33; 3ER10(McKinzie):¶4; 3ER17(Watt)¶¶3-4; 6ER47(Fulk)(SW)¶5.

The district court, per the Honorable Sandra Brown Armstrong, entered summary judgment for defendants on the grounds that the defendants had complied

with NEPA and FOIA. 6ER53. The district court's grant of summary judgment, which this Court reviews *de novo*, excluded admissible evidence submitted by plaintiffs and failed to correctly apply the provisions of NEPA and FOIA. For the reasons discussed below, defendants' approval of the LLNL BSL-3 is contrary to law and the judgment below must be reversed.

II. JURISDICTIONAL STATEMENT

The district court had jurisdiction over plaintiffs' claims under the APA, 5 U.S.C. §§701-706 and 28 U.S.C. §§1331 (action arising under federal laws); §1361 (mandamus), and §§2102-2202 (declaratory judgments). This Court has jurisdiction under 28 U.S.C. §1281 because this appeal is from a final judgment entered September 10, 2004 disposing of plaintiffs' claims. 6ER53:29. Plaintiffs' appeal, filed November 8, 2004, was timely under FRAP 4(a)(1)(A). 6ER54.

III. STATEMENT OF ISSUES

This appeal presents three issues:

- (1) Whether the district court improperly excluded plaintiffs' evidence.
- (2) Whether defendants complied with NEPA.
- (3) Whether defendants complied with FOIA.

IV. STATEMENT OF THE CASE

On August 26, 2003, plaintiffs filed their Complaint challenging defendants'

approval of BSL-3 facilities at LLNL (still in issue) and LANL (subsequently withdrawn by defendants (6ER56:dkn.no.51)) alleging claims under NEPA (Claims for Relief One through Four), FOIA (Fifth Claim) and the APA (Sixth Claim). Plaintiffs' NEPA claims alleged defendants' failure to prepare: an adequate EA (First Claim), an EIS (Second Claim), a programmatic EIS for defendants' nationwide Chemical and Biological National Security Program ("CBNP") (Third Claim) and a programmatic EIS for the LLNL (Fourth Claim). 1ER1:21-24.

Plaintiffs' FOIA claim alleged that defendants had "repeatedly failed to provide plaintiffs with information and documentation essential to plaintiffs' informed review of and comment upon defendants' programs, actions and decisions challenged in this lawsuit," citing plaintiffs' numerous detailed requests over the previous 16 months for nonprivileged documents pertaining to defendants' decisions challenged herein. 1ER1:25-26. Defendants filed their Answer on November 24, 2003. 2ER5.

After defendants supplemented their administrative record in response to plaintiffs' motion therefor (6ER56:dkn.nos.38-48), the parties filed cross-motions for summary judgment and supporting memoranda and declarations in February and March, 2004. 2ER6-4ER26. Despite filing seven declarations of their own, defendants moved to strike plaintiffs' fifteen declarations on the grounds they were

outside defendants' administrative record, speculative or irrelevant. 4ER26. On April 21, 2004, plaintiffs filed their opposition to the motion, supported by nine foundational declarations. 4ER27-5ER38. After receipt of defendants' reply (5ER39) the district court struck eight of plaintiffs' declarations in whole, and four in part. 5ER40.

Though defendants had already filed seven declarations, the district court permitted defendants to file five more "rebuttal" declarations, for a total of twelve extra-record declarations. 5ER40-6ER45. Plaintiffs sought leave to file five declarations in reply to defendants' declarations. 6ER46-50. The district court denied plaintiffs' motion, preventing plaintiffs from filing testimony in opposition to defendants' substantive declarations, even though defendants had been allowed to file testimony in response to plaintiffs' declarations. 6ER53.

The district court's ruling also granted defendants' summary judgment motion, and denied plaintiffs'. *Id.* The district court ruled that defendants' approval of the LLNL BSL-3 facility complied with NEPA, and that defendants' failure to respond to numerous FOIA requests from plaintiffs until after this litigation was commenced and, in most cases, after plaintiffs filed their summary judgment motion, was excused. *Id.* This appeal followed. 6ER54.

V. STATEMENT OF FACTS

The LLNL BSL-3 facility would be the first of its kind at a DOE National weapons laboratory. 1ER2(EA)7. As proposed, it will handle extremely dangerous biological agents, but according to its own Security Officer, with “grossly inadequate” security. 1ER2:C-61; 2ER14(Zipoli)(SW):¶¶5-16; 2ER15(Stockton)(SW):¶¶15-25. The facility would house three BSL-3 laboratories, one of which would aerosolize dangerous pathogens to conduct the animal challenges. 1ER2:12, C-25-29,61; 2ER16(Hammond)(SW):¶17. Each laboratory would have at least one Class II Type B Biological Safety Cabinet (“BSC”) including a HEPA filter through which air would be exhausted. 1ER2:12. The BSL-3 laboratory used for animal testing would contain up to 100 mice, rats and guinea pigs. 1ER2:16.

Defendants’ EA does not disclose any security measures because such measures – a key environmental safeguard – *have not yet been determined*. 1ER2:17, 2ER14(Zipoli)(SW):¶13. Bio-agents would be shipped to the facility just like other packages, via commercial delivery services, the U.S. Postal Service, or other “authorized entities,” including couriers. 1ER2:22. As many as 40 shipments in, and 20 out, are anticipated each month. *Id.* The EA discloses no procedure for handling damaged packages, as this procedure was “to be developed once the project obtains approval.” 1ER2:23. The EA estimates that the facility would

generate about 22 pounds of lab trash per week, or about 1,144 pounds per year.

1ER2:24-25. The facility's "operational design life" is 30 years. 1ER2:26.

Plaintiffs and others submitted about 100 written or oral comments critical of the EA. 1ER2:C-1-73; 2ER6(Kelley)(SW):¶2. The vast majority requested a more thorough environmental review under NEPA. 1ER2:C-1-73. Defendants failed to include some of these comment letters in the final EA as required by law.

(1ER2(pages following C-73). Additionally, the draft EA was released without any address, phone, fax or email to which interested parties could send comments, or even the due date for comments, stymieing public comment. 1ER2:7,C-35; 2ER6(Kelley)(SW):¶20. Defendants refused to reissue the draft EA with the missing information. 2ER6(Kelley)(SW):¶20.

Defendants issued the Final EA and FONSI, and purported to authorize construction of the BSL-3 facility, on December 16, 2002. 1:ER2; 2ER7(Coghlan)(SP):¶4.

The EA's description of the facility's purpose and need provides less than one page of vague generalizations, omitting any of the facility's specific programs. 1ER2:7,C-14,C-17,C-35-336; 3ER13(Wheelis)(SW):¶¶:16-18; 3ER18(Wright)(SW):¶8. The EA fails to explain which proposed activities are not already being conducted at LLNL's BSL-2, and what bio-agents and related toxins

would be used. 1ER2:1-9; 3ER18(Wright)(SW):¶¶:5-8. The EA allows up to 10 liters² of bio-agents in the facility at any one time, up to an allowable concentration of 100,000,000 organisms per milliliter. 1ER2:21. Ten liters would contain one trillion organisms. 3ER9(Fulk):¶18. By way of comparison, 50 tularemia organisms is an infectious dose; one liter of such organisms contains two *billion* infectious doses. 1ER2:51–52. Less than 10 Q fever organisms is an infectious dose; one liter could cause 10 *billion* illnesses. 3ER9(Fulk):¶21.

The EA does not reveal or restrict the expected diversity of bio-agents to be used, allowing defendants to choose any BSL-3 pathogens for future use, without any analysis of each bio-agent's particular risks. 1ER2:6, 8-9,19; 3ER18(Wright)(SW):¶¶:5-8.

The EA fails to address a reasonable range of alternatives by location, function, size or location, omitting alternate locations away from other employees, or from the surrounding urban area. 1ER2:26-28, C-56. It considered only minor modifications such as different ways of constructing the *same* facility, and a no action alternative. *Id.*

The EA fails to address defendants' poor safety, security and compliance

²Defendants subsequently contradicted the EA by disclosing that *ten times* this volume – 100 liters – would be housed in the facility. 6ER47(Fulk)(SW):¶25 and Attachment 2; 6ER48(McKinzie)(SW):¶7 and Exhibit A.

records, vitiating its presumption of full compliance with applicable standards.

1ER2(EA)38-55, C-21,26,37-39,48,62; 2ER6(Kelley)(SW):¶¶11-19;

3ER11(Strauss)(SW):¶¶15-39. In fact, many of defendants' supposed safeguards are ineffective. 1ER2(EA):C-49, 62-65; 3ER9(Fulk):¶¶12-24;

3ER11(Strauss)(SW):¶¶15-18. The EA's reliance on HEPA filters is misplaced because they are *ineffective* against many bio-agents, such as Rickettsia, due to their physical characteristics. 1ER2(EA):C-49, 62; 3ER9(Fulk):¶¶12-24;

3ER11(Strauss)(SW):¶¶15-18. Indeed, 12 percent of HEPA filters at LLNL fail.

3ER9(Fulk):¶13.

Contrary to the EA's compliance assumptions, in 2001 DOE's Office of Inspector General ("OIG") released a report criticizing DOE's biological agent research activities on the grounds they "lacked appropriate Federal oversight, consistent policy, and standardized implementing procedures, resulting in the potential for *greater risk to workers and possibly others from exposure to biological select agents and select agent materials.*" 2ER4:B3 (emphasis added), 2ER7(Coghlan)(SW):¶¶9-14. The EA ignores these issues.

LLNL's history is replete with safety lapses and mishaps including potentially lethal releases of radioactive and other toxic materials, and failures to disclose these incidents for corrective action. 2ER6(Kelley)(SW):¶¶6-7, 11-19. LLNL is on the

National Priorities List as an extremely contaminated “Superfund” site.

3ER11(Strauss)(SW):¶¶22, 31. Recent investigations have uncovered LLNL’s unauthorized releases and dumping of tritium (radioactive hydrogen) and highly toxic PCBs, resulting in soil and groundwater contamination.

2ER6(Kelley)(SW):¶7; 3ER11(Strauss);¶24. Many workers have been contaminated with plutonium, uranium, curium, chlorine gas, and other highly hazardous and lethal contaminants due to safety violations.

2ER6(Kelley)(SW):¶¶14-19. Hazardous and radioactive materials have been flushed down drains and contaminated public sewers. 3ER11(Strauss)(SW):¶28; 2ER6(Kelley)(SW):¶11. Yet the EA summarily dismisses the potential for such accidental releases of the deadly bio-agents this facility would test. 1ER2:C-3.

The EA understates or ignores obvious “abnormal event” risks. 1ER2:1:40-54, C-26, 49-50, 71; 3ER8(Curry)(SP):¶14; 3ER17(Watt):¶¶ 7-8; 3ER10(McKinzie):¶¶ 2-12;3ER9(Fulk):¶¶ 27-29. It dismisses harmful releases during earthquakes because “[t]he probability of catastrophic events (due to earthquake) is already very low.” 1ER2(EA):50. It claims that “[n]one” of “the active faults in the Livermore Region . . . are in proximity to the location of the proposed facility” even though LLNL is near several active faults, which have caused recent structural damage and injuries. 1ER2(EA):36; 3ER8(Curry):¶¶6-9;

1ER2(EA)37. Although nearby faults are capable of accelerations of nearly 1.0 g, the EA assumes g forces of only .6, understating a serious seismic risk.

1ER2(EA)36; 3ER8(Curry)(SP):¶¶11-14.

The EA asserts that “fire is not a credible hazard with regard to the potential release of infectious biological materials or toxins” on the dubious grounds that “[i]f the fire became so large that structural damage occurred, . . . then the heat would destroy any pathogen or toxin, thereby precluding its spread and release from the facility.” 1ER3:A9-57. But in fact, smoke, heat, increased air pressure or sprinkler activation due to fire could cause failure of the facility’s HEPA filters – allowing bio-agents to escape. 3ER9(Fulk):¶¶ 13,23. Although HEPA filters should be replaced every six years, at LLNL they have remained unchanged for 25 years or more. 3ER9(Fulk):¶ 26.

The EA provides no analysis of security threats involving transportation, storage or use of bio-agents from terrorists, disgruntled employees or others. 1ER2(EA)1:49-54, C-12-13; 3ER12(Ritter)(SW):¶ 7. Yet the Anthrax used in the East Coast attacks likely came from a federal biological weapons facility. 1ER2(EA):1:C-49; 3ER12(Ritter)(SW):¶ 7. No analysis of the facility’s vulnerability to direct attacks using trucks as in the Oklahoma City bombing, or planes as in the “9/11” attacks, is provided. 1ER2(EA):49-54, C-49.

The EA's discussion of cumulative impacts merely lists, *sans* discussion, possible future construction and related activities. 1ER2(EA):56. The cumulative effects of other new programs under the CBNP at LLNL and other NNSA facilities are ignored. *Id.* Indeed, the sister LANL BSL-3 facility is referenced only in passing. 1ER2(EA):6, C-56. Neither EA analyzes the CBNP's cumulative effects. 1ER2(EA):56; 3ER18(Wright(SW)):¶ 12. Yet other research programs that pose similar nationwide issues have prompted programmatic EIS assessments. 3ER13(Wheelis)(SW):¶18; 2ER7(Coghlan)(SP):¶¶ 15-18.

The EA sidesteps the risks of transporting bio-agents to and from LLNL, including damage to containers and dispersal or diversion of agents through terrorism, theft or sabotage, and other errors and accidents. 1ER2(EA):49-54, C-71; 3ER14(Zipoli)(SP):¶¶7-16; 3ER15(Stockton)(SW):¶¶8-27; 2ER6(Kelley)(SW):¶¶14-21.

The EA declined to assess the proliferation risks of co-locating a biodefense facility at a nuclear weapons laboratory. 1ER2(EA):C-5-7, C-70; 3ER12(Ritter)(SW):¶¶7-9; 3ER13(Wheelis)(SW):¶¶4-21. But developing a bio-defense facility at LLNL could prompt other nations to develop similar joint facilities, and potentially weaken the international Biological and Toxic Weapons Convention. 1ER2(EA):C-5-6; 3ER12(Ritter)(SW):5¶13;

3ER13(Wheelis)(SW):¶11.

Plaintiffs attempted to fill these informational voids by requesting documents under FOIA. 2ER6(Kelley)(SW):¶ 21. Defendants failed to timely provide them.

Id.

VI. SUMMARY OF ARGUMENT

The district court erred in three respects. First, the court improperly excluded much of plaintiffs' extra-record evidence, even though it fell within one or more of the four exceptions to the APA record limitation rule recognized by this Circuit. Where, as here, "the plaintiff alleges that the agency failed to take into consideration all relevant factors, the court may need to 'look[] outside the record to determine what matters the agency should have considered but did not.'"

Morongo Band of Mission Indians v. F.A.A., 161 F.3d 569, 573 (quotations and citations omitted). Plaintiffs' declarations seek to facilitate this Court's understanding of complex technical issues, including seismic hazards, security lapses, accidental release risks (including HEPA filter failure), and proliferation impacts. Because defendants' EA ignored or understated many of these issues, this Court's consideration of extra-record evidence is essential to an informed determination regarding whether defendants gave adequate consideration to all relevant factors, and fairly presented the environmental issues to the public.

Second, the district court erred in concluding that defendants complied with NEPA even though they failed to prepare an EIS. The record before the district court – including the extra-record declarations submitted by plaintiffs – clearly demonstrate that the biodefense facility challenged here poses potentially significant impacts on the environment. Because NEPA requires “that an EIS be prepared for all [federal] actions that *may* significantly affect the environment,” the defendants should have prepared an EIS. *Foundation for North American Wild Sheep, supra*, 681 F.2d at 1179, emphasis added.

Third, the district court erred in ruling that defendants complied with FOIA. The record shows that defendants failed to respond to numerous FOIA requests submitted by plaintiffs for months beyond the statutory deadlines for response. Indeed, defendants did not respond to plaintiffs’ FOIA requests until after this litigation was instituted, and in most cases, after plaintiffs filed their summary judgment motion. Forcing the public to institute litigation in order to secure documents that FOIA requires defendants to timely provide to plaintiffs strikes at the heart of FOIA and its purposes.

Because the district court orders striking much of plaintiffs’ extra-record evidence, and order granting defendants’ motion for summary judgment, erred in the foregoing fundamental respects, the judgment below should be reversed.

VII. STANDARD OF REVIEW

This Court reviews the grant of summary judgment *de novo*, “view[ing] the case from the same position as the district court’ and apply[ing] the same standards.” *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001). Hence, this Court must determine, based on the same record, “whether any genuine issue of material fact exists precluding summary judgment and whether the district court correctly applied the substantive laws.” *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 964 (9th Cir. 2002).

The APA, 5 U.S.C. §706(a)(2)(A)-(D), governs review of plaintiffs’ NEPA and FOIA claims. *American Disabled for Attendant Programs Today v. U.S. Dept. of Housing and Urban Development*, 170 F.3d 381, 383-84 (3d Cir. 1989). Under the APA, this Court “shall decide all relevant questions of law, interpret . . . statutory provisions, [and] . . . set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . . [or] without observance of procedure required by law.” 5 U.S.C. §706(2)(A),(D).

VIII. ARGUMENT

A. The Court Improperly Struck Portions of Plaintiff’s Extra Record Declarations.

Plaintiffs submitted fifteen declarations of lay and expert witnesses in support of their summary judgment motion. 2ER6-3ERC18. Eight were struck in their entirety. 5ER40:4-8, 10. Four were admitted in part and only three in full. 5ER40:8-13. Much of the stricken evidence should have been admitted under this Circuit's four recognized exceptions to the record limitation rule. Further, plaintiffs' nine foundational and five reply declarations should have been admitted.

1. This Circuit Recognizes Exceptions to the Record Limitation Rule.

This Circuit recognizes four exceptions to the APA rule limiting judicial review to materials within the agency's record. These exceptions are (1) to determine whether the agency considered all relevant factors and explained its decision; (2) when the agency has relied upon materials outside the record; (3) when necessary to explain technical terms or complex matters; and (4) when plaintiffs make a showing of agency bad faith. *Southwest Center for Biological Diversity v. United States Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996). Each is summarized below.

a. Consideration of all relevant factors and explanation of agency action.

“Particularly in NEPA cases, the court may extend its review beyond the administrative record and permit the introduction of new evidence where the

plaintiff alleges that an [Environmental Impact Statement] has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism . . . under the rug.” *Oregon National Resources Council v. Lowe*, 109 F.3d 521, 526-27 (9th Cir. 1997) (alteration in original) (internal quotations and citation omitted). “[T]he court may consider, particularly in highly technical areas, substantive evidence going to the merits of the agency’s action where such evidence is necessary as background to determine the sufficiency of the agency’s consideration.” *Inland Empire Pub. Lands Council v. United States Forest Serv.*, 88 F.3d 754, 760 n. 5 (9th Cir.1996) (internal quotations omitted). Thus, when the plaintiff alleges that the agency failed to take into consideration all relevant factors, the court may need to ‘look[] outside the record to determine what matters the agency should have considered but did not.’” *Id.*, quoted in *Morongo Band of Mission Indians v. F.A.A.*, *supra*, 161 F.3d at 573. “The court cannot adequately discharge its duty . . . if it is required to take the agency’s word that it considered all relevant matters.” *Asarco, Inc. v. U.S. Environmental Protection Agency*, 616 F.2d 1153, 1160-61 (9th Cir. 1980).

b. Reliance upon documents or materials not in the record.

Courts may permit discovery or supplement the administrative record when it appears that the agency has relied on documents not included in the record. *Public Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982). “[T]he whole record is not necessarily those documents that the *agency* has compiled and submitted as ‘the’ administrative record . . . the court must look to all the evidence that was before the decision-making body.” *Id.*, citing *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 32-33 (N.D. Texas 1981).

c. Explanation of technical terms or complex matters.

The court may consider evidence outside the record “when necessary to explain the agency's action . . . technical terms or complex subject matter involved in the agency action.” *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988).

Where, as here, the accuracy and completeness of the experts upon which the agency relies is questioned, plaintiffs’ experts’ analysis is admissible to facilitate the court’s understanding of complex technical issues and to highlight deficiencies in the agency’s environmental review. *San Luis v. Badgley*, 136 F.Supp.2d 1136, 1144 (E.D. Cal. 2000); *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 fn. 22 (9th Cir. 1992). In *San Luis*, plaintiffs submitted an expert declaration to show that the Fish and Wildlife Service had failed to consider evidence questioning threats to the survival of a species the Service had listed as threatened. 136 F.Supp.2d at 1144. Because “the accuracy and credibility of the primary

experts' analysis, on which the agency relied for its listing," was "seriously disputed," the court ruled that plaintiffs' expert's analysis "[was] necessary and [would] facilitate the Court's understanding of the technical issues." *Id.*

So too here, plaintiffs' declarations dispute the accuracy and credibility of the EA's analysis – or lack thereof – and seek to facilitate this Court's understanding of complex technical issues, including seismic hazards, security lapses, accidental release risks (including HEPA filter failure), and proliferation impacts.

An agency's failure to reveal and consider the very issues its environmental review should examine lends weight to concerns that the agency failed to take the requisite "hard look" at environmental consequences, contrary to NEPA. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998). In *Blue Mountains*, the Forest Service failed to disclose an independent report recommending ecologically sound post-fire salvage logging in its EA on the salvage project. *Id.* In reversing, this Court held that "the . . . EA simply fails to persuade that no significant impacts would result" from the logging project, citing the EA's complete lack of data about the impacts of erosion and sediment deposit upon fisheries habitats. *Id.* The EA's failure to discuss the report, while not alone sufficient to discredit the Service's decision not to prepare an EIS, lent probative weight to plaintiff's claim that the Service did not take the requisite "hard look" at the environmental consequences of post-fire logging. *Id.*

The *Blue Mountains* Court also relied on *Sierra Club v. U.S. Forest Service*, 843 F.2d 1190, 1193 (9th Cir. 1988), noting that in *Sierra Club* the plaintiff

“produced evidence from numerous experts showing the EA’s inadequacies,”
“precisely the type of ‘controversial action’ for which an EIS must be prepared.”
So too here, this Court may rely on “evidence from [plaintiffs’] numerous experts
showing the [BSL-3 EA’s] inadequacies.”

d. Agency bad faith.

Courts may also look beyond the agency record when agency bad faith is
claimed (*Public Power Council v. Johnson, supra*, 674 F.2d at 795) or where, as
here, an agency “swept stubborn problems . . . under the rug.” *National Audubon
Society v. U.S. Forest Service*, 46 F.3d 1437, 1447-48 (9th Cir. 1993); *Animal
Defense Council, supra*, 840 F.2d at 1437.

In *Animal Defense Council*, this Court adopted the Second Circuit’s rule in
County of Suffolk v. Secretary of the Interior, 562 F.2d 1368-1384-85 (2d Cir.
1977) that “the district court may extend its review beyond the administrative record
and permit the introduction of new evidence in NEPA cases where the plaintiff
alleges ‘that an EIS has neglected to mention a serious environmental consequence,
failed adequately to discuss some reasonable alternative, or otherwise swept
stubborn problems or serious criticism under the rug.’” *Id.*, quoting *County of
Suffolk*, 562 F.2d at 1384-85.

**2. The Court Improperly Struck Certain Extra-Record
Declarations Submitted by Plaintiffs in Whole or in Part.**

**a. Susan Wright, Mark Wheelis, and William Scott Ritter,
Jr.**

Plaintiffs submitted the declarations of Professor Susan Wright, Professor

Mark Wheelis, and former United Nations Chief Weapons Inspector William Scott Ritter, Jr. to demonstrate defendants' failure to consider all relevant factors, including the risk of genetically modifying bio-agents (Wright), the proliferation risks of conducting bio-agent experiments within a secret nuclear weapons lab (Ritter) and the far greater occupational, military and proliferation risks associated with aerosolizing – a form of weaponizing – bio-agents in an arms facility (Wheelis). The court ruled these declarations inadmissible because the risks they identified were too “speculative” to merit consideration under NEPA. 5ER40:6-7.

The court cited *No GWEN Alliance v. Aldridge*, 855 F.2d 1380, 1386 (9th Cir. 1988) for the proposition that NEPA does not require agencies to speculate about how U.S. defense policy will impact the foreign policy of other nations. *No GWEN* is inapposite. There, plaintiffs asserted that GWEN, a network of radio towers constructed to convey messages to U.S. strategic forces during and after a nuclear war, would have the effect of making nuclear war more probable, and the likely effects of such a war more severe. 855 F.2d at 1381. But the plaintiffs themselves *admitted* that GWEN's impact on the risk of nuclear war was speculative (*Id.* at 1386), prompting the court's conclusion that an EIS was not needed to discuss nuclear war. *Id.* at 1385-86. Here, by contrast, plaintiffs seek to have defendants examine whether construction of BSL-3 facilities at LLNL and

LANL might induce proliferation of biological weapon development, and if so, how to mitigate that impact through disclosures, monitoring or other safeguards.

Striking the very evidence this Court must consider to decide whether defendants failed to consider all relevant factors ends the inquiry before it is begun.

The district court also reasoned that “the increased *risk* of an occurrence is not an *impact* on the environment under NEPA,” citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983). 5ER40:6. The district court misread this case. In *Metropolitan Edison*, the Nuclear Regulatory Commission *did* consider the “risk of a nuclear accident.” 460 U.S. at 775. Here, by contrast, defendants did *not* consider the risk of proliferation. What the Supreme Court refused to require was an assessment of the “psychological health damage” that plaintiffs in that case claimed “will flow directly from the risk of [a nuclear] accident.” *Id.* Here, in contrast, plaintiffs do not seek an assessment of “psychological health damage” associated with the risk of proliferation. Rather, plaintiffs ask only that defendants do what the NRC did in *Metropolitan Edison*: consider the proliferation risks and if they are significant, consider alternatives that might reduce them.

The district court also struck these declarations because they were “premised on numerous political statements,” and thus impermissible under *Metropolitan*

Edison. 5ER40:6-7, citing 460 U.S. at 777. Again the district court erred. These experts were careful to premise their professional opinions on experience and scholarship, not on “political statements.” 5ER35(Ritter):¶¶3-9; 5ER36(Wright):¶¶4-13; 5ER38(Wheelis):¶¶3-8.

b. Marylia Kelley

Plaintiffs submitted the Declaration of plaintiff Marylia Kelley to demonstrate standing, to establish plaintiffs’ FOIA claim, and to document laboratory safety issues that defendants failed to consider and address in the EA.

2ER6(Kelley)(SW):¶¶11-12. Although Ms. Kelley’s testimony is indisputably relevant and appropriate for each of these purposes, the district court struck her testimony in its entirety on the grounds that “Ms. Kelley’s declaration is repetitive of the administrative record.” 5ERC40:7, citing *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1451 (9th Cir. 1996). The district court is mistaken. Ms. Kelley’s declaration presents many facts that do not appear in the administrative record including LLNL’s history of mishaps with radioactive and toxic materials, and recent disclosure, in response to Ms. Kelley’s FOIA request, of a release of airborne Anthrax in March 1999. 4ER31(Kelley):¶¶5-8.

Because Ms. Kelley’s declaration was not duplicative of the administrative record, *Southwest Center* has no application here. Nor does *Southwest Center* bar

extra-record evidence merely where an issue has been touched upon – however inadequately – in an administrative record. Where, as here, the whole point of a declaration is to show how the agency’s treatment of an issue was inadequate, “the court may need to ‘look[] outside the record to determine what matters the agency should have considered but did not.’” *Morongo Band*, supra, 161 F.3d at 573. The mere fact that Ms. Kelley requested an assessment of laboratory “incidents” in the EA does not thereby render defendants’ tight-lipped treatment of these issues adequate, nor moot this Court’s “need to ‘look[] outside the record to determine what matters the agency should have considered but did not.’” *Id.* Therefore the district court should have admitted Ms. Kelley’s declaration under the “relevant factors” exception.

c. Peter Strauss

Plaintiffs submitted the Declaration of Peter Strauss, an environmental engineer, to document the EA’s omission of critical laboratory safety issues and LLNL’s history of accidental releases. 3ER11(Strauss):¶¶13-41. The district court struck Mr. Strauss’ Declaration on the grounds his “concerns were also raised during the public comment period.” 5ER40:8. The district court erred. Simply because an issue was *raised* during the public comment period does not mean that defendants *adequately considered* all relevant factors regarding that issue. Mr.

Strauss' testimony was submitted for the proper purpose of demonstrating that LLNL's history of accidental releases of hazardous substances belies the EA's facile assertions of future safety. Where, as here, the agency's "accuracy and credibility" are "seriously disputed," plaintiffs' experts' analysis "facilitate[s] the Court's understanding of the technical issues." *San Luis*, supra, 136 F.Supp.2d at 1144. Hence Mr. Strauss' Declaration should not have been stricken.

d. Mathew Zipoli

The district court allowed the Declaration of Matthew Zipoli, an LLNL Security Officer, excepting only certain legal conclusions and references to newspaper articles. 5ER40:8-10. It appears that the district court also admitted Mr. Zipoli's second declaration, which was clearly permissible foundation presented in opposition to defendants' motion to strike. 4ER29. The district court denied plaintiffs' motion to file Mr. Zipoli's reply declaration (6ER49) on the grounds that plaintiffs' reply declarations (6ER47-50) presented "a perpetual battle of the experts." 6ER53:5. The district court erred. Plaintiffs' four reply declarations – their only substantive response to defendants' five substantive declarations – were no more impermissible than defendants' five declarations submitted in opposition to plaintiffs' declarations. 5ER41(Kamath), 42(Dahlstrom), 43(Miller), 44(Durling); 6ER45(Hull). It was fundamentally unfair for the district court to allow defendants

to submit five declarations in opposition to plaintiffs' declarations, but to deny plaintiffs' motion to file declarations in response to defendants' declarations.

6ER47(Fulk), 48(McKinzie), 49(Zipoli), 50(Curry).

e. Peter Stockton

Plaintiffs submitted the Declaration of Peter Stockton to demonstrate the long history of systemic security failures at DOE facilities, particularly nuclear laboratories such as LLNL and LANL. 3ER15(Stockton)¶¶4-46. The district court struck Mr. Stockton's testimony because it was not presented to the agency during the public comment period, apparently relying on defendants' citation of *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991). *Robertson* relies on *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553-54 (1978), which limits NEPA challenges to issues raised in the public comments. But clearly the *issues* Mr. Stockton raises were flagged in public comments. 1ER2:C-3-5,8-13,21-22,25-26,29,30,37-39,49,61,62. Again, the public is not obligated to perform defendants' NEPA duties. Moreover, this Circuit has declined to read *Vermont Yankee* as "establish[ing] a broad rule which would require participation in agency proceedings as a condition precedent to seeking judicial review of an agency decision." *Northwest Environmental Defense Center v. Bonneville Power Admin.*, 117 F.3d 1520, 1534 (quoting *Kunaknana v. Clark*, 742 F.2d 1145, 1148 (9th Cir.

1984)).

f. Terrell Watt and Marion Fulk

The district court allowed the testimony of Terrell Watt, an urban planner, and Marion Fulk, a chemical physicist. 5ER40:10-11. Although the district court apparently considered and allowed Mr. Fulk's second, foundational declaration in opposition to defendants' motion to strike (5ER34), the court denied plaintiffs' motion to submit Mr. Fulk's reply declaration (6ER47) in response to defendants' substantive declarations. 6ER53:5. As previously noted, plaintiffs' four reply declarations were plaintiffs' only declarations in response to defendants' substantive declarations, rather than "a perpetual battle of the experts." Since defendants were permitted to submit declarations in opposition to plaintiffs' declarations (5ER40:13), plaintiffs should have been afforded the same opportunity.

g. Robert Curry

Plaintiffs submitted the Declaration of Professor Robert Curry to show that the LLNL EA understated seismic risks. 3ER8(Curry):¶¶4-15. The district court allowed Dr. Curry's testimony regarding the proximity of fault lines (¶¶7-9)³, but struck his testimony regarding the maximum ground surface acceleration that can

³Although the district court referred to paragraphs "6-7" in its ruling, it appears it meant to refer to paragraphs "7-8" or "7-9." 5ER40:12.

reasonably be expected at LLNL during an earthquake (§§10-15), on the grounds “[t]hese statements are simply contrary opinions and do not fall under any exception.” 5ER40:12. The district court erred.

Professor Curry’s testimony falls within the first and third exceptions to the record limitation rule. The purpose of the stricken testimony was to alert the court that defendants’ analyses were *outdated* – all were completed prior to 1992 – and that newer information does not support the EA’s claims. 3ER8(Curry):§§10-12. As defendants’ own record admits, “seismic hazard estimates have been changing rapidly” and need frequent updating. LLNL AR 3:48:1-2. Dr. Curry simply provided the updating that defendants’ EA should have, but failed, to provide.

Furthermore, Dr. Curry noted, “the active, intense strain on this fault as evidenced by the 2004 earthquake swarm means that earthquakes of all magnitudes are likely to occur more frequently at this location than [the EA] predicted.”

3ER8(Curry):¶ 11. Professor Curry observed that according to “widely available, published data and analysis of the active fault systems in proximity to the Livermore Site, the maximum ground surface acceleration that may reasonably be expected within the life of the proposed BSL-3 laboratory is approximately 1.0 g.” *Id.* Yet the EA assumed a far lower magnitude – just 0.6 g. 1ER2(EA):36. Dr. Curry’s updated information was permissible to assist the district court in making an

informed determination whether defendants properly considered all relevant factors, and ultimately, whether the public was adequately informed of the facility's potential environmental risks. "[O]ne of the functions of an impact statement is to point up uncertainties where they exist." *Scientists' Institute for Public Information, Inc. v. A.E.C.*, 481 F.2d 1079, 1098 and n.78 (D.C. Cir. 1973).

DOE further asserts that Professor Curry's testimony should be stricken because it was not presented to the agency during the public comment period. DMS at 20. Again, DOE may not shift onto the public the burden of full environmental disclosure that NEPA places squarely on DOE.

Because Professor Curry's testimony falls within the first and third exceptions to the record limitation rule, his declaration should not have been stricken.

h. Edward Hammond

Plaintiffs submitted the Declaration of Edward Hammond to show the EA's failure to address whether this facility was needed in light of other existing and planned research facilities. 3ER16(Hammond):¶¶11-16. The district court struck all but paragraphs 3-10 and 20-21 of Mr. Hammond's declaration on the grounds it repeated information already in the administrative record. Because much of the information contained in these paragraphs does appear in comments to the EA

(1ER2:C-28-C-31), this brief references primarily those paragraphs admitted by the district court.

i. Matthew McKinzie

The district court admitted the Declaration of Matthew McKinzie. 5ER40:12. However, the court denied plaintiffs' motion to file Dr. McKinzie's reply declaration (6ER48) even though it addressed the same, permissible matters. 6ER53:5. Since the court allowed defendants to file rebuttal declarations in response to plaintiffs' substantive declarations, the court should have accorded plaintiffs the same opportunity, as previously explained.

j. Conclusion

For the foregoing reasons, the district court's order striking the declarations of Susan Wright, Ph.D., Mark Wheelis, Ph.D., William Scott Ritter, Jr., Marylia Kelley, Peter Strauss and Peter Stockton in whole, and the declaration of Robert Curry, Ph.D., in part are contrary to the law of this Circuit. These declarations properly document the EA's omissions. If defendants' compliance with NEPA were to be determined solely based on defendants' deficient EA, the public would be deprived of the proper NEPA review to which it is entitled.

Furthermore, the district court erred in denying plaintiffs' motion to file the reply declarations of Professor Curry, Dr. McKinzie, Mr. Fulk and Mr. Zipoli.

Defendants introduced significant new information through their five opposition declarations. 5ER41-44; 6ER45. Plaintiffs were entitled to respond to this new evidence just as defendants were entitled – and were in fact permitted by the district court – to respond to plaintiffs’ opening declarations.

B. Defendants’ Failure to Prepare an EIS Violated NEPA.

NEPA requires the preparation of an EIS if the proposed federal action has the *potential* to significantly affect the quality of the human environment. 42 U.S.C. §4332; *Foundation for North American Wild Sheep, supra*, 681 F.2d at 1178. Even if a project’s risks of environmental harm are uncertain, if they are potentially significant, an EIS is required. *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975).

However, a proper finding by an agency that the proposed action will produce *no* significant impact on the environment relieves the agency of its duty to prepare an EIS. 40C.F.R. §1501.4(e). An agency cannot, however, simply issue a conclusory statement claiming the absence of significant impacts. Instead, the agency must support each finding of “no significant impact” with a “concise public document,” known as an environmental assessment. 40 C.F.R. §1501.4(a)-(b), 1508.9. The EA must “[b]riefly provide sufficient evidence and analysis for determining *whether* to prepare an environmental impact statement or a finding of

no significant impact.” 40 CFR § 1508.9(a)(1), emphasis added.

Although an EA need not be as thorough as an EIS, the agency must still conduct a “comprehensive assessment of the expected effects of a proposed action” to determine if that action is significant. *Foundation on Economic Trends v. Weinberger*, 610 F.Supp. 829, 837 (D.C.D.C. 1985), quoting *Lower Alloways Creek Tp. v. Public Service Elec.*, 687 F.2d 732, 740 (3rd Cir. 1982). The significance of the action’s environmental impact is based on various factors, such as “the degree to which the proposed action affects public health or safety,” the “[u]nique characteristics of the geographic area,” the “degree to which the effects on the quality of the human environment are likely to be highly controversial,” the “degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks,” the “degree to which the action may establish a precedent for future actions with significant effects,” and whether “the action is related to other actions with individually insignificant but cumulatively significant impacts.” 40 C.F.R. §1508.27.

The LLNL BSL-3 facility is clearly a major federal action that may significantly affect the quality of the human environment in each of these respects, as the following discussion demonstrates:

- 1. Potentially Significant Effects on Public Health and Safety.**

An EIS is required if a project poses potentially significant effects on public health and safety. 40 C.F.R. §1508.27(b)(2); *Scientists' Institute for Public Information v. A.E.C. supra*, 481 F.2d at 1092. Operation of the proposed facility, including the risks of accident, theft, earthquake, fire, sabotage, or terrorism, has the potential for very significant effects on public health and safety and environmental quality. 3ER8(Curry)(SP):¶¶ 4-15; 3ER10(McKinzie):¶¶ 8-12; 3ER17(Watt):¶¶ 6-8; 3ER9(Fulk):¶¶ 13-33; 3ER11(Strauss)(SW):¶¶ 36-41.

a. Earthquake

This facility could have a catastrophic impact on the environment should it release bio-agents during an earthquake. According to Dr. McKinzie, if just 5 grams of Anthrax (about 2 teaspoons of dry spores) were released while a gentle breeze blew toward San Francisco, over one-half million people would be exposed to a potentially lethal dosage, corresponding to more than 10,000 fatal Anthrax infections without antibiotic treatment. 3ER10(McKinzie):7.

According to Professor Curry, there are two active earthquake faults in the vicinity of the facility which could cause significant structural damage. The Mt. Diablo Thrust Fault located north of Livermore is capable of producing a quake with a Richter magnitude of at least 6.75, only slightly less than the 6.9 to 7.0 magnitude Loma Prieta quake of 1989. 3ER8(Curry)(SP):¶10. The latter quake

generated ground accelerations of 0.68 g at a distance of 7 kilometers from the epicenter. *Id.* Yet the BSL-3 facility is only designed for 0.6 g. 1ER2(EA):36.

The Greenville Fault, which is located immediately adjacent to LLNL, generated a magnitude 5.9 earthquake in the Livermore area on January 24, 1980. *Id.*¶7. This earthquake injured 44 people and caused an estimated \$11.5 million in property damage, including \$10 million in losses at LLNL. *Id.* Damage at LLNL “included fallen ceiling tiles, fallen bricks from chimneys, broken gas and water lines, broken windows, and displacement of mobile structures from supporting foundations.” At the intersection of Interstate 580 and Greenville Road (about 4 kilometers north of LLNL), pavement on the overpass dropped approximately one foot. *Id.*

The 1980 quake “was followed by at least 59 aftershocks within the next six days, indicating a very active and unstable fault system.” *Id.*¶9. During one of these aftershocks, six persons were injured in Livermore by flying glass and falling ceiling tiles and supports. *Id.*¶9. “In the Tassajaro Valley (northeast of Livermore), about fifty houses sustained damage, including a toppled chimney, broken windows, and walls separated from ceilings.” *Id.* In Danville (northwest of Livermore), “one brick chimney was broken off at the roof line, a stone wall was demolished, and walls, ceilings, sidewalks and patios were cracked.” *Id.*

Accordingly, in Professor Curry's professional judgment, "the Greenville Fault poses an extreme earthquake hazard for the Livermore site, and is easily capable of producing severe earthquakes capable of serious structural damage to the proposed BSL-3 facility within its projected [30-year] life." *Id.* Indeed, this fault experienced an "earthquake swarm" in 2004 centered in Livermore, "indicating continuing deformation due to ongoing strain along this fault at depth." *Id.*

Yet defendants' EA breathes not a word about any of these recent, severe earthquakes, and the extensive structural damage they caused in Livermore and surrounding areas. 1ER2(EA):36. Instead of disclosing the proximity of these active faults capable of causing severe structural damage, the EA claims that "[n]one" of the "[a]ctive faults" in the area "are in proximity to the location of the proposed facility." *Id.* This statement is demonstrably false. The EA misleads more. Instead of disclosing the one foot drop in the Interstate 580 intersection 4 kilometers north of LLNL resulting from the 1980 quake, the EA asserts falsely that "[t]he effect of seismic activity is likely to be confined to ground shaking *with no surface displacement.*" 1ER2(EA):36. But in fact, the 1980 earthquake on the nearby Greenville Fault resulted in extensive "surface rupture" that "traveled as far north as Interstate Highway 580" – the freeway one mile north of LLNL (1ER2(EA):37(Figure 3-3)), and was observed for a distance of *six kilometers* along

the Greenville Fault. 3ER8(Curry)(SP):¶8.

In addition, the Las Positas fault, located *adjacent* to LLNL, “is capable of causing surface displacement including subsidence which could crack foundations and trigger structural failure as occurred during the 1980 quake on the Greenville Fault.” 3ER8(Curry)(SP):¶14. For these compelling reasons and others, Professor Curry concluded that “the EA masks a significant risk to public health and safety posed by operation of this facility” in proximity to these active earthquake faults. *Id.*¶15. This significant impact triggers the need for an EIS.

b. Fire

Severe earthquakes may cause fires, as in downtown Berkeley and the Marina District of San Francisco following the 1989 Loma Prieta quake, and throughout San Francisco after its 1906 quake. The 1980 quake on the Greenville Fault resulted in “broken gas and water lines.” 3ER8(Curry)(SP):¶7. Broken gas lines can erupt in flame, as occurred recently when a heavy equipment operator broke an underground gas line in Walnut Creek. Conversely, broken water lines can impede the delivery of water needed to extinguish the resulting fires, a factor in San Francisco’s catastrophic 1906 fire. Yet the EA never discloses that earthquakes in the Livermore area could result in fire damage to the facility. 1ER2(EA):36.

Instead, the EA attempts to allay concern about fire damage. “[C]atastrophic

events such as earthquake, fire, explosions and airplane crashes . . . were viewed as having the potential to actually *reduce* the consequences of microbiological material releases.” 1ER2(EA):49, emphasis added. “Fire and explosion hazards” are merely among “a number of common hazards” that “would be reduced or eliminated by compliance with [OSHA] regulations and [fire] codes.” ER2(EA):39. The EA’s discussion of five potential pathways for bio-agents to escape containment indeed, omits any mention of fire. *Id.*41-44. Buried deep within a document referenced in the EA (*id.* 51), the Final Programmatic EIS for the Biological Defense Research Program (“PDRP”), appears a one-paragraph discussion of the issue. 1ER3:A9-56-57. This discussion claims that “fire is not a credible hazard with regard to the potential release of infectious biological materials or toxins” because “[i]f the fire became so large that structural damage occurred, with concomitant damage to the biosafety cabinetry and laboratory chambers, then the heat would destroy any pathogen or toxin, thereby precluding its spread and release from the facility.” *Id.* Neither the EA nor its referenced documents provides any analysis to support this claim.

In fact, smoke and heat from fires can easily destroy the HEPA filter system which the EA touts as the facility’s primary bulwark against release of bio-agents. 1ER2(EA):17. In 1969, for example, “a fire at [DOE’s] Rocky Flats plant in

Colorado blew out multiple HEPA filters.” 3ER9(Fulk):¶28. In 1977, an accident at LLNL blew the HEPA filter media through an exhaust stack. *Id.* HEPA filters also fail when they become moist, “whether through wetting by a fire suppression system or by other means.” *Id.*¶27. This BSL-3 facility would have a sprinkler system. 1ER2(EA):17.

In sum, fire could release bio-agents, a potentially significant impact requiring an EIS.

c. Terrorism/Sabotage

Although the primary impetus for this bio-agent research facility is “to reduce and counter threats from weapons of mass destruction including . . . bioweapons” and the “infectious agents including those historically used for bioweapons,” the EA never considers the possibility that terrorists might target the facility for the purpose of acquiring or spreading bio-agents. 1ER2(EA):ii. The EA’s analysis of “abnormal events and accident scenarios” omits acts of terrorism or sabotage. 1ER2(EA):49-54. The EA’s failure to consider sabotage or acts of terrorism in this post-9/11 world is inexcusable. In view of the potentially catastrophic harm that misuse of the facility’s bio-agents could cause, an EIS was required to address this impact.

This serious omission has real-world consequences. As attested by a highly-

trained and experienced Security Officer at LLNL, its current security procedures, equipment and personnel are woefully inadequate to respond to a terrorist attack. 3ER14(Zipoli)(SP):¶¶5-16; 4ER29(Zipoli)(SP):¶¶5-7; 6ER49(Zipoli)(SP):¶¶3-14. NEPA requires that the public be made aware of this issue, so that they can make an informed decision about approving this facility. Because of the extreme consequences of a security failure at the facility, these security risks should have been addressed in an EIS.

d. HEPA Filters

The EA places heavy reliance on HEPA filters to prevent harmful releases of bio-agents to the environment. 1ER2(EA):17. But the EA fails to explain that HEPA filters are weak structures that easily fail when wet, plugged, aged, hot, and over-pressured from fires, explosions, blowers and even severe storms.

3ER9(Fulk):¶13; 5ER34(Fulk):¶¶5-12; 6ER47(Fulk)(SW):¶¶5-33. The EA also fails to explain that even under optimal conditions, HEPA filters are unable to effectively contain all bio-agents measuring between 0.03 and 0.3 micrometers.

3ER9(Fulk):¶14. Particles of this size will stay suspended in air for long periods of time and may travel with the winds long distances. *Id.*¶15. Over all, the paper-glue HEPA filters installed in DOE facilities have a failure rate of approximately 12 percent. *Id.*¶13. Consequently, bio-agents could routinely escape the facility, a

significant environmental risk requiring discussion in an EIS.

e. Modeling of unfiltered release

The EA does not model the consequences of an unfiltered release of bio-agents. Instead, it assumes, in its “Maximum Credible Event” analysis, that any accidental release of a bio-agent would pass “through two sets of HEPA filters.” 1ER2(EA):52. This omission masks a potentially catastrophic environmental impact of the facility. According to Dr. McKinzie, a physicist with eight years experiencing researching Weapons of Mass Destruction, the unfiltered release of a small quantity of Anthrax from the facility could expose tens of thousands of Bay Area residents to potentially lethal dosages, depending upon the quantity released and wind speed and direction. 3ER10(McKinzie):¶¶2-12. The computer model Dr. McKinzie employed “currently has widespread use in the U.S. military and emergency first-responder communities,” and was readily available to defendants when they prepared the EA. *Id.*¶2. Defendants’ failure to address this potentially significant impact violates NEPA, and warrants preparation of an EIS addressing this issue.

2. Uncertain Effects Posing Substantial Risks.

An EIS is required if a project poses uncertain, but potentially significant, risks of environment harm. *City of Davis v. Coleman, supra*, 521 F.2d at 676. An

EIS is required here because the possible effects of this facility on public health and safety are highly uncertain and involve inadequately disclosed risks of structural (or HEPA filter) failure leading to the release of pathogens. 3ER8(Curry)(SP):¶¶6-15; 3ER10(McKinzie):¶3; 3ER9(Fulk):¶ 28; 3ER17(Watt):¶¶7-8.

LLNL's history is rife with examples of accidental contamination, unsafe laboratory practices, potentially lethal releases of radioactive and other toxic materials to the atmosphere, and failures to promptly and fully disclose these incidents for public review and corrective action. 2ER6(Kelley)(SW):¶¶ 6-7,11-19; 3ER11(Strauss)(SW):¶¶15-41. Because of its widespread toxic pollution of the area, in 1987 LLNL's Main Site was placed on the National Priorities List as an extremely contaminated "Superfund" site. 3ER11(Strauss)(SW):¶ 22. LLNL's nearby Site 300 was added to the "Superfund" list in 1990. 3ER11(Strauss)(SW):¶ 31. Recent excavation of LLNL's National Ignition Facility construction site has uncovered DOE's unauthorized waste dumping of over 100 huge capacitors leaking highly toxic PCBs and large quantities of contaminated soil.

3ER11(Strauss)(SW):¶ 24. In 1990, the LLNL accidentally released tritium (radioactive hydrogen) at a tank at the lab's Building 292, resulting in soil and groundwater contamination. 2ER6(Kelley)(SW):¶7. Many LLNL workers have been contaminated with plutonium, uranium, curium, chlorine gas, and many other

highly hazardous and potentially lethal contaminants due to the laboratory's violations of applicable safety procedures. 2ER6(Kelley)(SW):¶¶ 14-19; 3ER11(Strauss)(SW):Exhibit 2. On numerous occasions, hazardous and radioactive materials have accidentally been flushed down drains at LLNL and have entered the City of Livermore's Sewage Treatment Plant. 3ER11(Strauss)(SW): ¶28.

The EA failed entirely to analyze the risks associated with transportation of bio-agents to and from the labs. 1ER2(EA):49-54, C71; 3ER14(Zipoli)(SP):¶¶7-16; 3ER15(Stockton)(SW):¶¶8-27; 2ER6(Kelley)(SW):¶¶14-21. Defendants should have analyzed potential impacts from damage to containers and dispersal or diversion of bio-agents through terrorism, theft or sabotage, and other errors and accidents associated with shipping infectious agents. *Id.* Plaintiffs properly raised concerns about transportation impacts during the public comment period. 1ER2:C-37.

Defendants' well-documented history of toxic dumping and unlawful emissions, security lapses, and violations of state and federal water quality and other environmental laws establishes a pattern of uncertain compliance with environmental safeguards which defendants' EA fails to acknowledge, much less rebut with specific plans for assuring safe operation of the facility. 1ER2(EA)C-37-39, C-48-50, C-66; 3ER11(Strauss)(SW):¶¶13-18, 22-37; 3ER9(Fulk):¶¶ 11-33;

3ER14(Zipoli)(SP):¶¶5-15. Defendants' EA fails to address the adequacy of even the most basic safety and handling procedures, including transportation of biological agents to and from the lab, procedures to be followed in the event of structural failure due to earthquake, fire or terrorist attack, and inherent deficiencies in the BSL-3 facilities' HEPA filtration system. *Id.*

3. Potentially Significant Precedential Effects.

An EIS is required if a project may have potentially significant precedential effects. 40 C.F.R. §1508.27(b)(6). In *Anderson v. Evans*, 314 F.3d 1006, 1021-22 (9th Cir. 2002), the court held that the National Marine Fisheries Service's approval of a whale hunting quota for an Indian tribe "could be used as precedent for other countries to declare the subsistence need of their own aboriginal groups," an impact requiring an EIS. In *Friends of the Earth, Inc. v. U.S. Army Corps of Engineers*, 109 F.Supp.2d 30, 43 (D.D.C. 2000), the Corps' approval of casinos on the Mississippi coast had a precedential effect sufficient to require an EIS. In *State of North Carolina v. Hudson*, 655 F.Supp. 428, 444 (E.D.M.C. 1987), the Corps properly considered a water transfer's precedential effect on future inter-basin transfers. In *Scientists' Institute for Public Information v. A.E.C.*, *supra*, 481 F.2d at 1098, the court required an EIS for the Liquid Metal Fast Breeder Reactor Program, in part because it "present[ed] unique and unprecedented environmental

hazards.”

Likewise here, DOE should have addressed the LLNL’s BSL-3’s “unprecedented” effect not only on the Bay Area’s health and safety, but also on other DOE facilities and on world-wide proliferation of biological weapons research, and on the public health and safety dangers posed thereby.

3ER16(Hammond)(SP):¶¶5, 14,21; 2ER7(Coghlan)(SP):¶3;

3ER18(Wright)(SW):¶¶4-12. This facility is very unique in that it will focus on “select agents” – bio-agents historically associated with biowarfare.

1ER2(EA):18fn.13. The facility will aerosolize (spray) these agents onto rodents, an activity associated with weaponization and increased health risks not found in most labs. 1ER2(EA):17)C-25,28-9,48. It will also genetically modify these agents, potentially creating superstrains of agents that could have intensified virulence or immunity to vaccines and treatments, posing additional hazards. 1ER2(EA):7,44; 3ER18(Wright)(SW):¶¶4-12.

This laboratory will also work with large quantities of agents, up to 100 liters at a time – ten times the quantity disclosed in the EA. 6ER47(Fulk)(SW):¶25 and Attach.2:4; 6ER48(McKinzie)(SW):¶7 and Exh.A:22-23. Further, LLNL operates six fermenters whose function is to grow microorganisms. 1ER2:C-6; 3ER13(Wheelis)(SW):¶10. Although defendants disclaim any potential connection

between the two, a proliferation analysis might disclose that LLNL's 1500 liter fermenter could produce enough Anthrax for a theatre-scale war, perhaps warranting discussion of safeguards to guard against such use by terrorists or others. 1ER2:C-25; 3ER13(Wheelis)(SW):¶10.

DOE has proposed to build a second BSL-3 laboratory to test bio-agents within its Los Alamos National Laboratory ("LANL"). This proposal was likewise based only on an EA, challenged in this suit but subsequently withdrawn. The outcome of this appeal might provide a template by which LANL may proceed with its further environmental review. Congress has appropriated hundreds of millions of dollars for new biodefense facilities that are currently being sited throughout the country. 3ER16(Hammond)(SP):¶¶4-10. The environmental review required for the LLNL facility will provide one model by which federal agencies may determine the level of environmental study under NEPA necessary before approving and siting an advanced biodefense research facility.

Construction of the LLNL and LANL BSL-3 facilities, since they are the first DOE BSL-3 facilities, will establish a precedent for future BSL-3s and related biological and chemical agent research facilities and actions at DOE facilities, raising unstudied risks that other nations may seek to conduct such research activities at facilities engaged in the development of nuclear or other weapons of mass

destruction. 3ER16(Hammond)(SP):¶¶4-10; 1ER2:C-66-72 and letters ff.C-73; 3ER11(Strauss)(SW):¶ 39.

Each of the foregoing precedential effects warrants discussion in an EIS.

4. Potentially Significant Cumulative Effects.

An EIS is required if a project poses potentially significant cumulative effects. 40 C.F.R. §1508.27(b)(7). The LLNL BSL-3 facility is part of the CBNP and must be evaluated in context with the other CBNP facilities.

2ER7(Coghlan)(SP):¶ 2. As BSL-3 labs experimenting with aerosolized, highly contagious and potentially deadly pathogens and toxins proliferate, the risk of accidental releases of these poisons into the human environment grows.

3ER13(Wheelis)(SW):¶¶6-21; 3ER12(Ritter)(SW):¶¶6-16. The threat of terrorist releases likewise grows. 3ER12(Ritter)(SW) ¶15; 3ER15(Stockton)(SW):¶¶ 10-17; 3ER14(Zipoli)(SP)¶¶7-16. The threat of proliferation of such facilities worldwide, potentially prompting a biological and chemical arms race, also grows.

3ER13(Wright)(SW):¶¶10-12; 3ER12(Ritter)(SW):¶¶6-14; 3ER13(Wheelis)(SW):¶¶ 10-21. These potentially significant cumulative effects warrant preparation of an EIS.

5. Public Controversy.

An EIS is required if a project generates extensive public controversy over its

potential environmental effects. *Foundation for North American Wild Sheep*, *supra*, 681 F.2d at 1182; 40 C.F.R. §1508.27(b)(4). The environmental effects of the LLNL and LANL BSL-3 facilities are highly controversial, triggering extensive critical public comments. 1ER2(EA):C-1-73; LANL AR 1:1:C-1-137. An EIS is therefore required.

6. Conclusion.

Because defendants failed to prepare an EIS despite this biodefense facility's numerous potentially significant impacts on the environment as documented above, their approval of the facility violated NEPA.

C. Defendants Withheld Crucial Documents in Violation of FOIA.

The Freedom of Information Act, 5 U.S.C. section 552 ("FOIA"), directs that "each [federal] agency upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. §552(a)(3)(A); *Lissner v. U.S. Customs Service*, 241 F.3d 1220 (9th Cir. 2001). FOIA thus assures that members of the public have access to the factual information and documentation on which federal agencies such as defendants rely in making management decisions. This

information is vitally necessary to informed public participation in environmental decision making by federal agencies regarding management of the public's resources.

Contrary to this requirement of FOIA, defendants repeatedly failed to provide plaintiffs with information and documentation essential to plaintiffs' informed review of and comment upon defendants' programs, actions and decisions challenged in this lawsuit. For example, on September 23, 2002 and March 10, 2003, plaintiff Nuclear Watch of New Mexico submitted detailed requests under FOIA to defendant DOE requesting nonprivileged documents pertaining to DOE's decisions challenged herein, including but not limited to (1) agreements between DOE and the federal Department of Health and Human Services ("DHS") for the use by DOE or its contractors of the BSL-2, BSL-3 and BSL-4 facilities operated by DHS' Centers for Disease Control and Prevention; (2) DOE planning documents regarding the siting of the proposed BSL-3 facilities at LLNL; (3) the names of the federal agencies such as the Centers for Disease Control and Prevention and other public and private entities that have conducted research under contract for LLNL regarding development and implementation of the CBNP; and (4) documents regarding its preliminary scoping study and white paper regarding the "concept for homeland security research facility" document

specifically referenced in DOE's Oak Ridge National Laboratory Institutional Plan, FY 2003-FY 2007 at page 4-9. 3ER1(Pelzner-Goodwin):¶5; 3ER22(Rothrock):¶2 and Exh.A. Contrary to FOIA, DOE did not complete its response to these requests until one year later, on March 1, 2004. 3ER22(Rothrock):¶3.

Plaintiff Tri-Valley CAREs likewise submitted a detailed request under FOIA to DOE on May 19, 2003, requesting nonprivileged documents including (1) agreements between DOE and DHS concerning use by DOE of the BSL-3 facility in Fort Collins, Colorado; (2) agreements between DOE and DHS for use of any other BSL-3 or BSL-4 facilities in the United States; and (3) any other documents that discuss BSL-2, BSL-3 or BSL-4 activities at DHS-owned or operated facilities. 2ER6(Kelley)(SW):¶21. Contrary to FOIA, as of February 2004, when plaintiffs filed their summary judgment motion in the district court, DOE had failed to provide these requested documents. *Id.*

DOE's failure and refusal to provide these and other nonprivileged documents requested by plaintiffs violates FOIA and the APA, as the following discussion demonstrates.

- 1. Defendants Violated the Time Limits Set by FOIA and DOE Regulations.**

As noted above, FOIA requires federal agencies to promptly make their

records available following a request made in accordance with their regulations.

DOE's FOIA regulations, in turn direct:

- (1) Action pursuant to paragraph (b) of this section will be taken *within 10 working days of receipt* of a request for DOE records ("receipt" is defined in Section 1004.4(a)), except that, if unusual circumstances require an extension of time before a decision on a request can be reached and the person requesting records is promptly informed in writing by the Authorizing Official of the reasons for such extension and the date on which a determination is expected to be dispatched, then the Denying Official may take an *extension not to exceed 10 working days*.
- (2) For purposes of this section and Section 1004.8(d), the term "unusual circumstances" may include but is not limited to the following:
 - (i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the offices processing the request;
 - (ii) The need to search for, collect and appropriately examine a voluminous amount of separate and distinct records which are responsive to a single request; or
 - (iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components of the Department having substantial subject matter interest therein.
- (3) The requester must be promptly notified in writing of the extension, the reasons for the extension, and the date on which a determination is expected to be made.
- (4) *If no determination has been made at the end of the 10-day period, or the last extension thereof, the requester may deem his administrative remedies to have been exhausted, giving rise to a right of review in a district court of the United States as specified in 5 U.S.C. §552(a)(4). When no determination can be made within the*

applicable time limit, the responsible Authorizing Official will nevertheless continue to process the request. If the DOE is unable to provide a response within the statutory period, the Authorizing Official will inform the requester of the reason for the delay; the date on which a determination may be expected to be made; that the requester can seek remedy through the courts, but ask the requester to forego such action until a determination is made.

- (5) Nothing in this part shall preclude the Authorizing Official and a requester from agreeing to an extension of time for the initial determination on a request. Any such agreement will be confirmed in writing and will clearly specify the total time agreed upon.

10 C.F.R. §1004.5(d)(1-5), emphasis added.

These regulations give members of the public, like plaintiffs here, access to the documentation on which federal agencies, such as defendants, rely in making decisions. This information is vitally important to informed public participation in agency decisions regarding management of the public's resources. FOIA's legislative history confirms the importance of timely agency response to requests. Congress added the ten-day limit for agency responses "in order to contribute to the fuller and faster release of information, which is the basic objective of the Act." H. Rep. No. 876, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 6267.

When plaintiffs filed their Complaint, defendants' delay in responding to plaintiffs' FOIA requests had already exceeded the 20-day response deadline by

many months (and in one case, a year). Defendants had failed to secure plaintiffs' agreement to extend FOIA's deadlines. By the time that plaintiffs' summary judgment motion was filed on February 18, 2004, none of plaintiffs' requests had been entirely responded to, nor had the requested documents been produced in full.

DOE's final determination of Nuclear Watch's September 23, 2002, FOIA Request No. 02-079-C was not released until February 18, 2004, the day plaintiffs' summary judgment motion was filed. 3ER19(Becknell):¶¶5-9 and Exh.G:1-3. This was 17 months after the request had been received and *16 months in excess of the 20-day deadline. Id.*

DOE's final determination that no responsive documents existed for CAREs' May 22, 2003 FOIA Request No. 2003-OK-20 (also known as F2003-00355 by DOE HQ and DSHQ04-61 by the DHS) was not communicated to CAREs until March 4, 2004, *nine months in excess of the 20-day deadline.* 3ER21(Pelzer-Goodwin):¶¶10 and Exh.C:1; 3ER20(Lopez):¶¶8-9.

DOE's final response to Nuclear Watch's March 18, 2003 FOIA Request No. 03-166 – that the specific documents requested could not be located but identifying two documents that “may have bearing on the general subject” – was not sent to the requestor until March 1, 2004, *eleven months in excess of the 20-day deadline.* 3ER22(Rothrock):¶2 and Exh.C:1.

DOE's final determination of Nuclear Watch's September 23, 2002 FOIA Request No. 2002-OK- 49 was not received by the requestor until February 9, 2004, supplemented by additional documents sent on March 12, 2004 – 18 months after the request was submitted and *17 months in excess of the 20-day deadline*. 3ER21(Pelzer-Goodwin):¶5 and Exh.A:1.

Defendants' grossly tardy responses plainly violate FOIA and defendants' regulations. The fact that defendants ultimately did respond does not render plaintiffs' FOIA claim moot. In *Friends of the Earth v. LAIDLAW*, 528 U.S. 167 (2000) a similar situation arose where a defendant voluntarily complied with its permit only after the plaintiff brought suit, and then argued that the claim was moot. The court disagreed, explaining:

FOE's civil penalties claim did not automatically become moot once the company came into substantial compliance with its permit. A defendant's voluntary cessation of a challenged practice ordinarily does not deprive a federal court of its power to determine the legality of the practice. . . . If it did, courts would be compelled to leave the defendant free to return to its old ways. . . . Thus, the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. The *heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness*.

528 U.S. at 698, emphasis added.

Likewise here, plaintiffs' FOIA claims were not mooted simply because DOE belatedly completed its FOIA responses. Its "voluntary cessation" of its prior failure to timely provide the requested documents does not deprive the federal courts of their power to declare unlawful DOE's violation of FOIA's deadlines.

It is settled that, "a case or controversy remains if the [defendant's] allegedly wrongful delay is capable of repetition, yet evading review." *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002) (defendants repeatedly failed to comply with listing deadlines under the Endangered Species Act until the commencement of litigation, then unsuccessfully claimed "mootness"). This principle applies where "the underlying action is almost certain to run its course before either this court or the Supreme Court can give the case full consideration." *Id.* at 1173. Thus in *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329-30 (9th Cir.1992) this Court held that a "regulation in effect for less than a year satisfied the durational component because a year is not enough time for judicial review." Similarly, in *Alaska Center for the Env't v. U.S. Forest Service*, 189 F.3d 851, 855 (9th Cir. 1999), this Court held that two years was still not enough time to allow for full litigation. 189 F.3d at 855.

In sum, an issue that "evades review" is one which, in its regular course, resolves itself without allowing sufficient time for appellate review. Where, as here,

the challenged conduct is the defendant's *failure to act*, the duration of the controversy is solely within the control of the defendant. *Id.* Thus, unless a stringent test of mootness is employed, the defendant will evade judicial review simply by taking the overdue action literally on the courthouse steps.

Here, the fact that all four FOIA requests were not given final determinations until *after litigation was commenced* shows that defendants are trying to avoid judicial review without having to comply with FOIA's deadlines.

In recognition of the foregoing jurisprudential considerations, the courts of this Circuit recognize that courts retain jurisdiction over challenges to tardy FOIA responses even where the underlying FOIA request was belatedly answered. In *Gilmore v. U.S. Department of Energy*, 33 F.Supp.2d 1184, 1188 (N.D. Cal.1998), for example, the court held that even though the plaintiff's FOIA request was properly denied, he had an independent cause of action against DOE for failing to respond to his FOIA request within the statutory time limits: "The DOE's failure to process Gilmore's FOIA request in a timely manner was itself an injury – an invasion of a legally protected interest." 33 F.Supp.2d at 1189. Likewise in *Mayock v. I.N.S.*, 714 F.Supp.1558, 1559-60 (N.D. Cal.1989), the district court rejected the defendant agency's mootness challenge to the plaintiff's claim that the agency had engaged in a recurring pattern and practice of delayed FOIA responses.

So too in this case, DOE's unlawful delays in responding to plaintiffs' FOIA requests give rise to an independent claim that cannot be mooted by the defendants' belated FOIA responses.

2. The Defendants' Searches Were Inadequate and Unreasonable.

The Supreme Court has recognized that "even when an agency does not deny a FOIA request outright, the requesting party may still be able to claim 'improper' withholding by alleging that the agency has responded in an inadequate manner." *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151(1989). Under FOIA, agencies are held to a high standard of competence in searching for documents that are responsive to specific requests. Where an agency's search for records is challenged, the agency must show that it made a good faith effort to conduct a reasonable search for the requested records, using methods which can be reasonably expected to produce the information requested. An agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested. As the court explained in *Campbell v. U.S. Department of Justice*, 165 F.3d 20, 28 (D.C.Cir.1998), "the court evaluates the reasonableness of an agency's search based on what the agency knew at its conclusion [of the search] rather than what the agency speculated at its inception." Where the documents uncovered by the agency in the course of a search indicate that records

may be in record systems that the agency did not plan to search when the search began, the agency must expand the scope of its search. *Id.*

DOE's FOIA regulations contain guidelines for Authorizing Officials to follow when they receive a request to which the responsive documents might exist in a different location. 10 CFR §1004.5(c). These regulations direct:

where a request involves records which are in the custody of or are the concern of more than one Authorizing Official, the . . . Officer will identify all concerned . . . Officers, send copies of the request to them and forward the request for action to the . . . Official that can reasonably be expected to have custody of most of the requested records [*Id.*]

Contrary to this direction, DOE improperly withheld documents sought in plaintiffs' FOIA Request No. 2003-OK-20. Defendants failed to produce a document known to exist that was clearly included in the language of the request, and failed to forward the request to the official who could reasonably be expected to have custody of the requested records. This request, made by CAREs on May 19, 2003, sought:

2. [a]ll memoranda of agreement (MOA's) and memoranda of understanding (MOU's) that have been concluded between the DOE and the CDC or its parent agency for access, use or activities at any other BSL-3 or BSL-4 facilities in the US.
3. Any other document in the possession of DOE, LLNL or LANL that discuss or establish practices or procedures for BSL-2, BSL-3, or BSL-4 activities at a CDC owned or operated facility.

3ER21(Pelzer-Goodwin):Exh.E:2.

While this request repeatedly and clearly sought MOUs between the DOE and the CDC, *none* were produced in response. 3ER21(Pelzer-Goodwin):Exh.F:1. CAREs took this to mean that no MOU existed between the groups and proceeded on that basis. Yet, on January 29, 2004, an MOU between LLNL and the CDC was released to Nuclear Watch of New Mexico pursuant to its FOIA Request No. 2002-OK-49. That request sought:

All facility and program planning documents pertaining to the DOE Chemical and Biological National Security Program activities at LLNL.

3ER21(Pelzer-Goodwin):Exh.A:1.

The MOU between the DOE and the CDC that Nuclear Watch received pursuant to FOIA Request No. 2002-OK-49 should have been released to CAREs pursuant to its FOIA Request No. 2003-OK-20. The MOU clearly fell within CAREs' FOIA Request No. 2003-OK-20, as it was an MOU between a DOE National Laboratory and the CDC. The fact that it was not sent in response to CAREs' requests shows that the DOE office handling the request did not make its required good-faith effort to conduct a search for the requested records, using methods which could reasonably be expected to produce the information requested. *Campbell, supra*, 164 F.3d at 28.

Because the document was released to another group, DOE cannot claim that the document was exempted from release. DOE's failure to provide the document clearly requested by plaintiff under FOIA either reveals the inadequacy of the DOE's search or illustrates the bad faith of DOE in intentionally withholding release of this document. Either way, defendants' conduct was not in accordance with FOIA.

IX. CONCLUSION

The LLNL BSL-3 facility poses potentially significant effects on the environment. Therefore, an EIS is required. Defendants' approval of the FONSI and failure to prepare an EIS for the LLNL BSL-3 facility is therefore contrary to NEPA.

Defendants' failure to timely furnish plaintiffs with the documents sought in plaintiffs' FOIA requests violates that statute.

Accordingly, this Court should reverse the judgment for defendants, and direct entry of judgment for plaintiffs.

Dated: May 9, 2005

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

brief, pursuant to Rule 32(a)(7)(B) of the Federal Rules of Civil Procedure, is in 14-point
proportional typesetting and contains

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CERTIFICATE OF SERVICE

I hereby certify that I am over the 18 years of age and not a party to this action, and on May 9, 2005, copies of the foregoing Appellants' Opening Brief were sent by Priority First Class U.S. Mail to the following parties:

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