

Tri-Valley CAREs

Communities Against a Radioactive Environment

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December 6, 2007

Jay Cohen
Undersecretary for Science and Technology
U.S. Department of Homeland Security
Washington, D.C. 20528

Re: Lawrence Livermore National Laboratory Proposed BSL-3 Laboratory

Dear Undersecretary Cohen:

Tri-Valley CAREs is a non-profit organization founded in 1983 by Livermore area residents to research and conduct public education and advocacy regarding the potential environmental, health and proliferation impacts of the Department of Energy's (DOE) Lawrence Livermore National Laboratory (LLNL). We have been advocating against the operation of a BSL-3 facility at Livermore Lab since 2003 due to the proximity of the lab to homes and schools in Livermore and the highly populated San Francisco Bay Area. We are directing this letter to you because we understand that the work slated for this BSL-3 will be primarily sponsored by, and in the service of, the Department of Homeland Security (DHS). We believe that DHS should take a public role in this process.

On behalf of our 5,600 members, Tri-Valley CAREs urges DHS to support our request for DOE to prepare a full Environmental Impact Statement (EIS) for the proposed BSL-3 facility at LLNL. In the alternative, we ask that the Draft Revised Environmental Assessment (EA) for the proposed Biosafety Level 3 (BSL-3) be further revised to include a clearer purpose and need statement, an expanded alternatives analysis, an evaluation of whether this lab is a "connected action" to the National Biodefense Analysis and Countermeasures Center for the purposes of the National Environmental Policy Act (NEPA), and carefully analyze the LLNL anthrax release and underlying security, safety and transportation violations that occurred during a serious safety breach in 2005. The Draft Revised EA should then be re-circulated for public comment and a public hearing should be held. We believe that these are the minimal actions that should be taken in order to make the Revised EA lab NEPA-compliant. This letter presents an initial review of the inadequacies of the Revised EA. Our public comments that we submitted in response to the Revised EA include a discussion of additional concerns.

In the interest of DHS' values of public participation, transparency and accountability, and in the interest of avoiding a judicial challenge, the Revised Environmental Assessment should be withdrawn. We have sent a similar advisory letter to DOE and we felt that it was prudent to give you an opportunity to weigh in on this decision. If litigation is ultimately necessary, DHS may be brought in as a defendant and so we are putting you on notice at this time to that effect.

I. Purpose and Need Statement is Inadequate

The Revised EA hardly mentions the fact that this BSL-3 facility will be operating in the service of the Department of Homeland Security and will be funded primarily by the Department of Homeland Security through a “work for others” contract. A clear purpose and need statement is essential for laying the ground work for a legally sufficient alternatives analysis under NEPA. The purpose and need statement should be revised to include a fuller disclosure of DHS’ role in relation to this lab and why DHS needs this lab, in addition to the need expressed by DOE.

II. Alternatives Analysis Does Not Comply with NEPA

The Revised EA does not evaluate whether there are alternative locations within facilities overseen by Department of Homeland Security, with a special focus on the Science and Technology Directorate, where this work could be performed. The alternatives analysis currently only evaluates facilities owned by the Department of Energy / NNSA in its search for viable alternatives. Further the alternatives analysis fails to disclose the fact that the NBACC program is a “related action” under NEPA.

NEPA requires agencies to rigorously explore and objectively evaluate all reasonable alternatives to a proposed plan of action that has significant environmental effects. 40 C.F.R. § 1502.14(a). This is "the heart" of an environmental impact statement (EIS). The existence of a viable but unexamined alternative renders an environmental impact statement inadequate. *NRDC v. United States Forest Serv.*, 421 F.3d 797 (2005).

Where the information in the initial environmental impact statement (EIS) is so incomplete or misleading that the decision maker and the public could not make an informed comparison of the alternatives, revision of an EIS may be necessary to provide a reasonable, good faith, and objective presentation of the subjects required by the National Environmental Policy Act, 42 U.S.C.S. § 4332(2)(C).

We urge you to conduct additional analysis under NEPA that evaluates whether there are any viable alternatives for a BSL-3 facility within the existing or under construction DHS complex. Without this analysis, the Revised EA is out of compliance with the spirit and letter of NEPA.

III. LLNL BSL-3 and NBACC Program are “Connected Actions” under NEPA

If the NBACC program were cancelled, the BSL-3 facility proposed for Livermore Lab would have almost no funding or clear mandate. The BSL-3 proposed for LLNL is connected to the NBACC program at DHS.

NEPA requires that all major federal actions that are sufficiently “connected” and “inextricably intertwined” must be evaluated in a single EIS. Actions are connected if they are closely related and if they:

- (i) Automatically trigger other actions, which may require environmental impact statements.
- (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
- (iii) Are interdependent parts of a larger action and depend upon the larger action for their justification. 40 C.F.R. § 1508.25(a)(1).

The NBACC program has been studied under NEPA and this BSL-3 should be studied as an action connected to that program.

IV. A Programmatic Statement is Warranted

Without evaluating the programs at DHS that the BSL-3 is connected to, it is not possible for the public to meaningfully comment about the purpose and need, the alternatives and how other programs or regulations will be impacted by this proposal.

When a broad federal action is being proposed that will affect agency programs or regulations, agencies shall prepare programmatic statements so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decision-making. 40 C.F.R. § 1502.4.

A programmatic study of DHS labs should be undertaken in the S&T directorate to avoid unnecessary duplication, waste of resources and failure of oversight and coordination. NEPA requires programmatic statements be completed to project public resources and avoid these pitfalls. In this case, we urge DHS to conduct a programmatic study of DHS S&T labs throughout the US.

V. EA Warrants Revision or Withdrawal with Proper Analysis of Anthrax Breach Event

1. The Livermore Lab anthrax release in September 2005

In September 2005, LLNL transferred vials of anthrax to two laboratories located in Florida and Virginia. According to the Department of Health and Human Services (DHHS) Office of Inspector General (OIG), “[d]uring the transfers, anthrax was released from the shipped vials.” The OIG alleged that Livermore Lab violated the transfer requirements of the Select Agent Program by failing to comply with applicable shipping and packaging regulations. In addition, the OIG alleged that LLNL failed to comply with security and access requirements by allowing an unauthorized individual to have access to select agents in order to package the shipments of anthrax. Finally, the OIG alleged that Livermore Lab’s Responsible Official failed to ensure compliance with the shipping and packaging requirements of the select agent regulations. LLNL agreed to pay the OIG a historic \$450,000 to resolve the above allegations.

2. The description of the anthrax release in the Draft Revised EA for the proposed BSL-3 facility is inadequate and incomplete

As a result of litigation initiated by Tri-Valley CAREs et al. the United States Court of Appeals for the Ninth Circuit ordered DOE to consider whether the threat of potential terrorist activity necessitates the preparation of an EIS for the proposed BSL-3 facility at LLNL. In response to this ruling and guidance from DOE, the National Nuclear Security Administration (NNSA) revised the 2002 EA for the proposed BSL-3 facility to consider the potential impacts of terrorist activity. In addition, NNSA also made other updates to the 2002 EA, including the addition of a section describing a violation of Department of Transportation (DOT) shipping requirements by Livermore Lab in September 2005.

This additional section, which is in fact describing the LLNL anthrax release in September 2005, is wholly inadequate and any agency decision making based upon it will likely be deemed arbitrary and capricious by a reviewing court. First and foremost, this section severely downplays the significance of the anthrax release. For instance, there is no mention that anthrax was involved, that the anthrax was packaged by an unauthorized individual, or that LLNL’s Responsible Official failed to ensure compliance with the shipping and packaging requirements of the Select Agent Program. Instead, NNSA claimed that, “[u]pon receipt, it was determined that the inner packaging of the shipments violated DOT packaging requirements and that the labels were missing important information.” Such a cursory and misleading analysis surely cannot form the basis for the conclusion that follows: “Accidents due to transportation of microorganisms are not expected to increase due to the Proposed Action.”

NNSA also argued that “[t]he addition of millimeter-quantity samples shipped to and from the BSL-3 facility would not be expected to change the overall incidence of risk of transportation accidents.” With regard to the anthrax release in September 2005, the two shipments from Livermore Lab contained a total of approximately 4,025 vials of anthrax, hardly meager quantities. The operation of a BSL-3 facility at LLNL would necessitate both increased and deadlier shipments of select agents to and from Livermore Lab. Accordingly, there is no

support for the above assertion that the overall incidence of risk of transportation accidents would not be expected to change if the proposed BSL-3 facility becomes operational.

Moreover, NNSA claimed that “[t]he consequences of [any] such accidents would be anticipated to be minor, based on historical data.” While LLNL was fortunate that no known fatalities resulted from the anthrax release in September 2005, two workers were treated with the antibiotic Cipro after opening a shipment from Livermore Lab and discovering two uncapped vials of anthrax and one additional vial with a loose cap. If the packaging deficiencies led to the release of anthrax while in transit, an untold number of individuals may have been exposed. This concern is amplified by the fact that biological materials or infectious agents could be shipped to and from the proposed BSL-3 facility by the U.S. Postal Service and commercial package delivery services. These issues underscore the gravity of the anthrax release and its implications with regard to the consequences of such accidents.

As a related matter, recent reports have indicated that BSL-3 and BSL-4 laboratories in the United States “have experienced more than 100 accidents and missing shipments since 2003, and the number is increasing steadily as more labs across the country are approved to do the work.” A report by the Government Accountability Office documented “a major proliferation of high-containment BSL-3 and BSL-4 labs” in recent years, which calls into question the need for the proposed BSL-3 at LLNL. Moreover, at a recent hearing by the House Energy and Commerce investigations subcommittee, federal officials “said that the expansion of the [biodefense] program over the last few years, coupled with a lack of training of lab workers and poor reporting of lab accidents, posed a potential threat to national security and public health.” These issues should also be analyzed in an EIS or a new Draft Revised EA.

Finally, and perhaps of greatest significance, the anthrax release highlights and validates the concerns expressed by Tri-Valley CAREs et al. and the Ninth Circuit with regard to the threat of terrorist attack on the proposed BSL-3 facility. As specified above, the OIG alleged that Livermore Lab failed to comply with security and access requirements by allowing an individual not authorized to have access to select agents to package the shipments of anthrax. This runs directly counter to the assertion by NNSA in the Draft Revised EA that “[o]nly personnel on LLNL’s CDC registration are allowed to handle [select] agents.” After acknowledging that “the theft of pathogenic materials by an insider could have very serious consequences,” NNSA concluded in the Draft Revised EA that “this scenario is not expected to occur at LLNL due to human reliability programs, security procedures, and management controls at the facility and the laboratory.” With regard to the anthrax release in September 2005, both the security procedures and management controls failed. As such, the Draft Revised EA should be further revised to adequately analyze the LLNL anthrax release and associated violations. For example, instead of ignoring known failures regarding personnel practices, the EIS or new Draft Revised EA should acknowledge these failures and analyze in appropriate detail how they will be remedied.

3. Compliance with the National Environmental Policy Act

In order to comply with the National Environmental Policy Act (NEPA), DOE and DHS should meaningfully analyze, in an EIS or a new Draft Revised EA, the Livermore Lab anthrax release and related violations. Subsequently, the EIS or Draft Revised EA should be re-circulated for public comment and a public hearing should be held. An Environmental Impact Statement (EIS) for the proposed BSL-3 facility at the Livermore Lab Main Site should be prepared because the proposed BSL-3 facility is a “major Federal action significantly affecting the quality of the human environment.”

Federal agencies have “a continuing duty to gather and evaluate new information relevant to the environmental impact of [their] actions.” Under the Council on Environmental Quality (CEQ) regulations for implementing NEPA, agencies shall prepare supplements to either draft or final EISs if “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” The standard for supplementing an EA is the same as for an EIS.

The LLNL anthrax release and associated violations provide significant information relevant to environmental concerns bearing on the proposed BSL-3 facility and its impacts. Specifically, this incident highlights the inherent security risks and dangers involved in the transportation of select agents to and from Livermore Lab; dangers that would only increase if the proposed BSL-3 facility becomes operational. As noted, the fact that an unauthorized individual was allowed access to select agent material is directly relevant to the analysis of potential terrorist attacks that was prompted by the Ninth Circuit's ruling.

Among the purposes of NEPA is to "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." Because the Draft Revised EA for the proposed BSL-3 facility at the Livermore Lab Main Site contained a woefully inadequate and incomplete description and analysis of the anthrax release in September 2005, the involvement of the public was effectively circumvented. As such, DOE should further revise the Draft Revised EA so that the public is able to fully assess the magnitude of the anthrax release in a way that will lead to meaningful and substantive public comments. At a minimum, the public comment period should last at least thirty (30) days.

In order to comply with NEPA, the Draft Revised EA for the proposed BSL-3 facility at LLNL should be further revised and re-circulated for public comment. DOE and DHS should then acknowledge that the proposed facility will significantly affect the quality of the human environment, thereby necessitating the preparation of an EIS.

IV. Conclusion

In light of the above, it is clear that the Draft Revised EA for the proposed BSL-3 facility at LLNL is inadequate and should be discarded completely or further revised to include significantly greater NEPA analysis to lay out DHS' role in regard to the BSL-3 lab and analyze the Livermore Lab anthrax release and related violations in September 2005. The Draft Revised EA should then be re-circulated for public comment. Subsequently, an EIS should be prepared for the proposed BSL-3 facility.

Thank you for your time and consideration. If you have any questions or concerns about any of the matters contained in this letter or would like to further discuss these issues, please do not hesitate to contact me.

Sincerely,

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