

August 25, 2008

U.S. Department of Homeland Security  
Science and Technology Directorate  
James V. Johnson  
Mail Stop #2100  
245 Murray Lane, SW  
Building 410  
Washington, DC 20528

**Re: Comments on the Draft Environmental Impact Statement for the National Bio and Agro-Defense Facility**

To Whom It May Concern:

Tri-Valley CAREs (TVC) is a non-profit organization founded in 1983 by Livermore, California area residents to research and conduct public education and advocacy regarding the potential environmental, health and proliferation impacts of the Department of Energy's Lawrence Livermore National Laboratory. On behalf of our 5,600 members, Tri-Valley CAREs submits the following comments on the Draft Environmental Impact Statement (DEIS) for the Department of Homeland Security's (DHS) National Bio and Agro-Defense Facility (NBAF).

I. The proliferation of high-containment biosafety laboratories

The federal government must undertake an overall assessment of the present U.S. capability and need for high-containment biosafety laboratories and related facilities prior to authorizing the construction and operation of any such facilities, including the proposed NBAF. Since the anthrax mailings in late 2001, the U.S. government "has spent or allocated nearly \$50 billion among 11 federal departments and agencies to address the threat of biological weapons."<sup>1</sup> According to the Government Accountability Office (GAO), these expenditures have led to a "major proliferation" of Biosafety Level 3 (BSL-3) and Biosafety Level 4 (BSL-4) facilities "across many sectors—federal, academic, state, and private—and all over the United States."<sup>2</sup> Alarmingly, the GAO has reported:

No single federal agency has the mission and, therefore, is accountable for tracking the number of all BSL-3 and BSL-4 labs within the United States. Moreover, although several agencies have a need to know the number and location of these labs to support their missions, no agency knows how many such labs there are in the United States or their locations . . . . Therefore, no agency is responsible for determining the aggregate risks associated with the expansion of these labs.<sup>3</sup>

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<sup>1</sup> Center for Arms Control and Non-Proliferation, Fiscal Year 2009 Federal Funding for Bioweapons Prevention and Defense, [http://www.armscontrolcenter.org/policy/biochem/articles/fy09\\_biodefense\\_funding/](http://www.armscontrolcenter.org/policy/biochem/articles/fy09_biodefense_funding/) (last visited August 25, 2008).

<sup>2</sup> GOVERNMENT ACCOUNTABILITY OFFICE, PRELIMINARY OBSERVATIONS ON THE OVERSIGHT OF THE PROLIFERATION OF BSL-3 AND BSL-4 LABORATORIES IN THE UNITED STATES, Highlights (2007).

<sup>3</sup> *Id.* at 7.

Because there is a baseline risk—attributable to human error—associated with any high-containment laboratory, the proliferation of these facilities has increased the risk to human health and the environment, particularly with regard to “new labs with less experience[,]” such as the proposed NBAF.<sup>4</sup> For this reason, among others, Congressmen John D. Dingell and Bart Stupak, who are both members of the House Committee on Energy and Commerce, recently sent a letter to President Bush, urging him to “order the suspension of all further design and construction” of all federal government-run or –sponsored BSL-4 and BSL-4 laboratories in the U.S.<sup>5</sup> In their letter, the Congressmen noted that the preliminary findings of their investigation of these facilities “indicate there appears to have been no overall planning to justify the massive increase in the construction of these labs since 2001”; and, as a result, the Congressmen determined “that many of the labs are probably unnecessary or redundant.”<sup>6</sup> Accordingly, the federal government should undertake a comprehensive and government-wide assessment of the present capability and need for high-containment biosafety laboratories and related facilities in the United States. Until this assessment is complete, DHS should not proceed with the construction and operation of the proposed NBAF.

## II. Alternatives

By neglecting to identify its preferred alternative, DHS has inhibited public participation in the NEPA process. According to the Council on Environmental Quality (CEQ), the alternatives section of an EIS “is the heart of the environmental impact statement.” 40 C.F.R. § 1502.14 (1978). Pursuant to CEQ’s regulations implementing NEPA, agencies are required to “[i]dentify the agency’s preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.” *Id.* at § 1502.14(e). Here, DHS has failed to “[e]ncourage and facilitate public involvement” in the NBAF decision-making process because the public must guess as to which of the alternatives will be DHS’ preferred alternative. *Id.* at § 1500.2(d). Of necessity, most members of the public confronted with a voluminous document such as the draft DEIS will direct their comments to the preferred alternative and subsidiary issues, particularly where the difference between the alternatives is principally geographic in nature, as it is here. DHS’ obfuscation in this regard has rendered that commonsense approach impossible. Instead, in violation of CEQ’s regulations, DHS has “amass[ed] needless detail[,]” where it should have “concentrate[d] on the issues that are truly significant to the action in question,” namely the reasonably foreseeable environmental impacts of DHS’ preferred alternative. *Id.* at 1500.1(b).

Moreover, the entire site selection process appears to have been prejudiced. According to a recent report, DHS “swept aside evaluations of government experts and named Mississippi—home to powerful U.S. lawmakers with sway over the agency—as a top location for [the proposed NBAF].”<sup>7</sup> According to the DEIS for the proposed NBAF, sites were evaluated according to criteria that included DHS’ preferences that “[t]he proposed site be within a comprehensive research community that has existing research programs in areas related to NBAF mission requirements” and that “[t]he proposed site be within proximity to skilled research and technical staff with expertise in

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<sup>4</sup> *Id.*

<sup>5</sup> Letter from Congressmen John D. Dingell and Bart Stupak to President George Bush (Aug. 8, 2008) (on file with author).

<sup>6</sup> *Id.*

<sup>7</sup> Larry Margasak, *Biodefense lab looks headed to Mississippi*, S.F. CHRONICLE, August 11, 2008. This document is included as an addendum to this letter.

operations conducted at biological and agricultural research facilities and be within proximity to training programs for such expertise[.]” NBAF DEIS at 2-10. Based on these criteria, “[g]overnment experts originally expressed concern that the proposed site in Flora, Miss., was far from existing biodefense research programs and lacked ready access to workers already familiar with highly contagious animal and human diseases[.]”<sup>8</sup> For these reasons, the site in Flora, Mississippi was assigned “a score that ranked it 14th among 17 candidate sites in the United States.”<sup>9</sup> Yet, the DHS selection authority determined that the Flora, Mississippi site “met the evaluation criteria and DHS preferences and would therefore be advanced as [one of five] reasonable alternatives to be studied in the [DEIS for the proposed NBAF].” NBAF DEIS at 2-11. This was so because a senior DHS official, Undersecretary Jay Cohen, overruled the government experts’ concerns.<sup>10</sup>

Pursuant to CEQ’s regulations, an EIS is to be “prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made . . . .” 40 C.F.R. § 1502.5. Here, it appears that the DEIS for the proposed NBAF is being used to justify the selection of the Flora, Mississippi site based on political considerations that are inappropriate for a decision of this nature and importance. As such, DHS should provide further information about the politicization of the site selection process and eliminate from consideration any sites that have benefited from the improper influence of biased public officials.

Finally, there is substantial evidence that the principal research to be conducted at the proposed NBAF cannot be conducted safely on the U.S. mainland, thereby eliminating five of the six alternative sites under consideration. On May 22, 2008, the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce conducted a hearing entitled “Germs, Viruses, and Secrets: Government Plans to Move Exotic Disease Research to the Mainland United States.”<sup>11</sup> Congressman Bart Stupak, Chairman of the Subcommittee on Oversight and Investigations, included the following statement in his opening remarks: “For more than 50 years Foot and Mouth Disease [FMD] has been researched safely on Plum Island and moving it to the mainland would be a foolish tempting of fate that could cost countless farmers and ranchers their livelihoods and could cost billions of dollars should an FMD release occur.”<sup>12</sup> This statement is bolstered by a recent GAO report, which reached the following conclusion:

GAO found that the Department of Homeland Security (DHS) has neither conducted nor commissioned any study to determine whether work on foot-and-mouth disease (FMD) can be done safely on the U.S. mainland. Instead, in deciding that work with FMD can be done safely on the mainland, DHS relied on a 2002 U.S. Department of Agriculture (USDA) study that addressed a different question. The study did not assess the past history of releases of FMD virus or other dangerous pathogens in the United States or elsewhere. It did not address in detail the issues of

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> A hearing webcast, witness list, and prepared testimony are available at [http://energycommerce.house.gov/cmte\\_mtgs/110-oi-hrg.052208.PlumIsland.shtml](http://energycommerce.house.gov/cmte_mtgs/110-oi-hrg.052208.PlumIsland.shtml) (last visited Aug. 20, 2008).

<sup>12</sup> *Germs, Viruses, and Secrets: Government Plans to Move Exotic Disease Research to the Mainland United States: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce, 110th Cong. 2* (2008) (statement of Rep. Stupak, Chairman, Subcomm. on Oversight and Investigations). This document is included as an addendum to this letter.

containment related to large animal work in BSL-3 Ag facilities. It was inaccurate in comparing other countries' FMD work experience with that of the United States. Therefore, GAO believes DHS does not have evidence to conclude that FMD work can be done safely on the U.S. mainland.<sup>13</sup>

The GAO report goes on to note that “location can help prevent the spread of pathogens and, thus, a resulting disease outbreak if there is a release.”<sup>14</sup> Since there is always some risk of a release from any biocontainment facility, “most experts GAO spoke with said that an island location can provide additional protection.”<sup>15</sup> This is so because “[a]n island location can help prevent the spread of FMD virus along terrestrial routes, such as from vehicles splashed with contaminated mud, and may also reduce airborne transmission.”<sup>16</sup> In light of this, it seems apparent that, among the six alternative sites under consideration, Plum Island may be the only suitable location. Accordingly, DHS needs to undertake further analysis to determine whether it is truly feasible to construct and operate the proposed NBAF on the U.S. mainland and what role political considerations may have played in the site selection process. If the proposed NBAF cannot be safely constructed and operated on the U.S. mainland, DHS needs to identify and study additional alternative sites, apart from the Plum Island location.

Alternatively, if the Plum Island location has drawbacks or deficiencies outside the parameters of the above discussion, those, too, must be fully disclosed and analyzed by DHS during the NEPA process for the proposed NBAF.

### III. Missing information

The NBAF DEIS fails to provide adequate information concerning the quantity of pathogenic material that will be housed in the proposed NBAF. This information is essential to informed evaluation of the potential environmental risks posed by the proposed NBAF. Moreover, such information is of vital importance in assessing the adequacy of the administrative, biocontainment, and security controls at the facility, as well as the need for additional mitigation measures. In the event of a terrorist attack or natural catastrophic event at the proposed NBAF, the pathogenic material contained therein could be released into the human environment. The magnitude of that risk may be amplified as the quantity of material in the facility increases. Accordingly, DHS must provide further information concerning the total quantity of pathogenic material that is likely to be housed in the proposed NBAF, including any limits for the facility.

### IV. Connected actions

The NBAF DEIS is inadequate because it fails to consider connected actions to the construction and operation of the proposed NBAF at one of the six alternative sites. Pursuant to CEQ's regulations, connected actions, which are those that are closely related to the proposed action, must be considered in the same EIS. 40 C.F.R. § 1508.25(a)(1). Actions are connected to

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<sup>13</sup> GOVERNMENT ACCOUNTABILITY OFFICE, DHS LACKS EVIDENCE TO CONCLUDE THAT FOOT-AND-MOUTH DISEASE RESEARCH CAN BE DONE SAFELY ON THE U.S. MAINLAND, Highlights (2008). This document is included as an addendum to this letter.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

the proposed action if they: (i) “[a]utomatically trigger other actions which may require [an EIS]”; (ii) [c]annot or will not proceed unless other actions are taken previously or simultaneously”; or “[a]re interdependent parts of a larger action and depend on the larger action for their justification.” *Id.* Here, the proposed NBAF is intended to update and expand the federal government’s “facilities to study the range of foreign animal diseases that are potential threats to U.S. agriculture.” NBAF DEIS at ES-1. Much of this research is currently conducted at the Plum Island Animal Disease Center (PIADC) in Plum Island, NY. *Id.* According to DHS, PIADC “is nearing the end of its lifecycle.” *Id.* If the proposed NBAF is constructed and becomes operational, then PIADC will no longer be needed. As such, PIADC is likely to be decommissioned, with attendant environmental impacts related to the demolition, decontamination, and remediation of the site. Moreover, these costs have not been included in the official DHS estimate for construction of the proposed NBAF, which has already increased significantly.<sup>17</sup> These actions—and the continued operation of PIADC in the interim—are connected to the proposed action and must be considered in the NBAF DEIS.

Thank you for your consideration.

Sincerely,

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Enclosures

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<sup>17</sup> Stupak, *supra* note 12, at 2 (“The official DHS estimate is that the NBAF will costs approximately \$450 million to build. But, the Committee staff has learned that DHS engineers have already raised that estimate to between \$600 and \$750 million. Moreover, this does not include the cost of demolition, decontamination, and environmental cleanup of the existing facility if Plum Island is abandoned.”).