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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TRI-VALLEY CARES, MARYLIA KELLEY, and JANIS KATE TURNER,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF ENERGY, NATIONAL NUCLEAR SECURITY ADMINISTRATION, and LAWRENCE LIVERMORE NATIONAL LABORATORY,

Defendants.

Case No.: 08-cv-1372-SBA

PLAITNIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGEMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEROF

Judge: Hon. Saundra Brown Armstrong
Date: December 8, 2009
Time: 1:00 p.m.
Place: Courtroom 1, 4th Floor

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that plaintiffs Tri-Valley CAREs, et al. hereby move the Court for an order granting summary judgment on the grounds that there are no genuine issues of material fact in dispute, and plaintiffs are entitled to judgment as a matter of law. This motion is based on: this Notice of Motion; the accompanying Memorandum of Points and Authorities; the Declarations of Marylia Kelley and Janis Kate Turner; the Administrative Record lodged in this matter; the pleadings and records on file in this matter; and on such argument as counsel may present if the Court orders a hearing on this motion.

Plaintiffs seek an order granting summary judgment in their favor on all claims for relief alleged in Plaintiffs' Complaint for the response set forth below. A proposed order is lodged concurrently.

Dated: October 20, 2009

TRI-VALLEY CARES

By: _____
SCOTT J. YUNDT

Attorneys for Plaintiffs
TRI-VALLEY CARES, MARYLIA KELLEY & JANIS KATE TURNER

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I. INTRODUCTION

This case concerns the failure of Defendants U.S. Department of Energy ("DOE"), National Nuclear Security Administration ("NNSA"), and Lawrence Livermore National Laboratory ("LLNL") (collectively "Defendants") to comply with the important procedural and informational requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*., in connection with the operation of a biological weapon agent laboratory at LLNL in Livermore, California.

According to the Ninth Circuit, "the very purpose of NEPA . . . is to 'ensure[] that federal agencies are informed of environmental consequences before making decisions and that the information is available to the public.'" *Citizens for Better Forestry v. United States Dep't of Agric.*, 341 F.3d 961, 970-71 (9th Cir. 2003). In this case, plaintiffs Tri-Valley CAREs, Marylia Kelley, and Janis Kate Turner (collectively "Plaintiffs") will show that, in their haste to begin operating the biological weapon agent laboratory at LLNL—known as a Biosafety Level 3 or "BSL-3" facility—Defendants conducted an inadequate NEPA analysis that was fatally flawed by their failure to identify and disclose critical information to the public. Indeed, a review of the administrative record in this case leads to the conclusion that Defendants deliberately withheld important information that was inconsistent with their NEPA analysis, thereby depriving public officials and citizens of the opportunity to review and comment on Defendants' Draft Revised Environmental Assessment ("DREA"), Final Revised Environmental Assessment ("FREA") and the Finding of No Significant Impact ("FONSI") for the LLNL BSL-3 facility in a meaningful and effective fashion. This wrongful withholding frustrated the essential purpose of NEPA, and is arbitrary and capricious.

Plaintiffs will also show that Defendants' so-called terrorism analysis does not satisfy NEPA's "hard look" requirement because, among other deficiencies, the purported analysis was vague and conclusory, neglected to consider local environmental impacts, and failed to analyze credible terrorist threats and release scenarios. Finally, Plaintiffs will show that documents made available after Defendants decided to proceed with operation of the BSL-3 facility on the basis of the procedurally flawed and substantively inadequate FREA and FONSI further discredit

Defendants' NEPA analysis and demonstrate that it was not based on the objective "hard look" that NEPA requires.

In light of these legal violations, Plaintiffs seek an order that vacates the FREA and FONSI for the LLNL BSL-3 facility and directs Defendants to complete an Environmental Impact Statement ("EIS") or, alternatively, an adequate EA. Plaintiffs also seek injunctive relief against continued operation of the facility until such time as Defendants comply with the mandatory requirements of NEPA, as this Court may deem appropriate.

II. BACKGROUND

A. THE NATIONAL ENVIRONMENTAL POLICY ACT

As the Nation's "basic national charter for protection of the environment," 40 C.F.R. § 1500.1(a), NEPA's purpose is to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id.* §1500.1(c). The Supreme Court explains that NEPA's "twin aims" are to (a) "'place[ ] upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action,'" and (b) to "inform the public that [the agency] has indeed considered environmental concerns in its decision making process." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983). To achieve those aims, NEPA requires that before undertaking any "major Federal actions significantly affecting the quality of the human environment," an agency must prepare an EIS that, among other things, thoroughly considers the "environmental impact of the proposed action" and reasonable alternatives. 42 U.S.C. § 4332(C).

The Council on Environmental Quality ("CEQ") has promulgated NEPA implementing regulations that are "binding on all Federal agencies." 40 C.F.R. § 1500.3. CEQ's regulations set forth a series of factors that govern whether a project may have "significant" impacts, therefore requiring an EIS. *Id.* § 1508.27. Those factors are to be judged by considering both the "context" and "intensity" of the action. *Id.* Regarding context, CEQ's regulations provide that, for a "site-specific action," an agency must determine whether the "effects in the locale" are significant. *Id.* § 1508.27(a); *Anderson v. Evans*, 314 F.3d 1006, 1021 (9th Cir. 2002).

Finally, under NEPA, federal agencies have "a continuing duty to gather and evaluate new information relevant to the environmental impact of [the agencies'] actions." *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980) (citing 42 U.S.C. § 4332(2)(A-B) (1975)). Under CEQ's regulations, 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." 40 C.F.R. § 1509(c)(1)(ii) (1978). The Supreme Court has interpreted NEPA, in light of this regulation, as requiring an agency to take a "hard look" at new circumstances and information to determine whether supplementation may be required. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 72-73, 124 S. Ct. 2373 (2004).

B. STATEMENT OF FACTS

1. Lawrence Livermore National Laboratory

LLNL, a nuclear weapons design laboratory, lies just outside the boundary of Livermore, California, about 3 miles from Livermore's central business district and approximately 40 miles east of San Francisco. Administrative Record ("AR") 122 at 2. The nearest residence is located about one-half mile from the LLNL BSL-3 facility. *Id.* at 47. In 2000, there were about 1.3 million people living in Alameda County, in which LLNL is located, and approximately 6.9 million people living within a 50-mile radius of the laboratory. *Id.* at 33.

Over the years, LLNL has had recurrent problems with security issues and the proper management and control of dangerous materials including in its bioscience research programs. AR 122 at 56-57, C-103-107. These incidents, which include an anthrax release in September 2005, have resulted in the exposure of individuals to pathogenic material and environmental degradation. *Id.* As demonstrated by the anthrax mailings in late 2001 which essentially shut down mail service to the federal government, "dramatic human health impacts and economic disruption can result following the release of pathogenic materials." *Id.* at 64. In addition, there is an acknowledged security risk associated with select agent research at the LLNL BSL-3 facility. *Id.* at 58-64; AR 159 at 61.

2. The BSL-3 Facility

There are four biosafety levels, "which consist of combinations of laboratory practices and techniques, safety equipment, and laboratory facilities." AR 16 at 11. BSL-3 is suitable for "facilities in which work is done with indigenous or exotic agents which may cause serious or potentially lethal disease as a result of exposure by the inhalation route." AR 122 at A-9.

The LLNL BSL-3 facility is a prefabricated, one-story building with about 1,500 square feet of floor space that houses three individual BSL-3 laboratories. *Id.* at iii, 12. The operational design life of the building is estimated to be at least 30 years. *Id.* at iii. The BSL-3 facility has been constructed and all facility-related equipment installed. *Id.* at ii.

At the LLNL BSL-3 facility, biological research projects will be conducted "involving indigenous or exotic agents which may cause serious or potentially lethal or debilitating effects on humans, plants, and animal hosts, . . . potentially impacting human health as well as agriculture, food, and other industries." *Id.* at 9. The facility is equipped to perform operations involving small-animal testing of bioagents and biotoxins, in which up to 100 rodents (mice, rats, and guinea pigs) would be exposed to aerosolized pathogenic material. *Id.* at 7, 16. In addition, the facility will have the ability to produce biological material (enzymes, deoxyribonucleic acid, ribonucleic acid, etc.) using infectious agents and may handle genetically modified microorganisms. *Id.* at 7, 18.

The LLNL BSL-3 facility is expected to culture life-threatening bioagents including, but not limited to, the select agents anthrax, plague, botulism, Valley Fever, Brucellosis, tularemia, and Q Fever. *See id.* at 18. Select agents are those biological agents and toxins designated by the Secretary of the Department of Health and Human Services ("HHS") as having "the potential to pose a severe threat to public health and safety." 42 C.F.R. § 73.3 (2005).

The LLNL BSL-3 facility may contain up to 50 liters of pathogenic material and up to 3 liters of cultured microorganisms may be handled in the three discrete laboratories within the facility at any given time. AR 122 at C-10. This is a significant amount of material that, if released as the result of an intentional act, could have a catastrophic impact on public health. An accident involving a one liter slurry of *Coxiella burnetii* (Q Fever) is estimated to produce

9,900,000,000 airborne human infective doses at a 50 percent rate of contracting the disease in a 3 cubic foot space above and around the accident. *Id.* at 54.

3. The Flawed NEPA Process For The LLNL BSL-3 Facility

The fatally flawed NEPA process for the LLNL BSL-3 facility commenced in 2002. *See* AR 2. NNSA issued the Draft Environmental Assessment for the LLNL BSL-3 facility on July 24, 2002. AR 1 at 7. In December 2002, NNSA issued the Final Environmental Assessment ("FEA") and FONSI for the BSL-3 facility, which authorized construction and operation of the facility. AR 122 at ii.

On September 16, 2003, Plaintiffs filed a lawsuit in federal district court in San Francisco challenging, *inter alia*, the adequacy of the FEA and FONSI for the LLNL BSL-3 facility. *Id.*; *Tri-Valley CAREs v. Dept. of Energy*, No. 03-3926, Dkt. No. 1 (N.D. Cal. 2003). On September 10, 2004, this Court found the FEA and FONSI to be adequate. *Tri-Valley CAREs v. Dept. of Energy*, 2004 U.S. Dist. LEXIS 18777 (N.D. Cal. 2004), *aff'd in part and rev'd in part*, 203 Fed. Appx. 105, 107 (9th Cir. 2006).

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part, remanding for "DOE to consider whether the threat of terrorist activity [at the LLNL BSL-3 facility] necessitates the preparation of an Environmental Impact Statement." *Tri-Valley CAREs*, 203 Fed. at 107. As a result of the Ninth Circuit's decision, DOE issued interim guidance on how to address intentional destructive acts in NEPA documents. AR 122 at ii.

In response to the Ninth Circuit's ruling and DOE's new guidance, NNSA revised the FEA for the LLNL BSL-3 facility. *Id.* The DREA was made available for public comment on May 11, 2007. *Id.* at C-1. Comments were submitted by Plaintiffs in this action regarding the adequacy of the DREA for the facility and the need for the preparation of an EIS. *See*, *e.g.*, *id.* at C-93-115. On January 25, 2008, Defendants simultaneously issued the FREA and the Revised FONSI for the BSL-3 facility, thereby determining that an EIS was not required. AR 123 at 10.

4. The DREA Fails to Disclose Serious Security Violations

Defendants failed to include violations of the Select Agent Regulations and serious security violations that came to light during the NEPA process in any analysis.

a. Anthrax Release

In August-September 2005, while the first lawsuit filed by Plaintiffs was pending in the Ninth Circuit, LLNL was responsible for an anthrax release. AR 150. Information concerning the anthrax release was withheld from the public until over two years later—after the Ninth Circuit had already rendered its decision—when LLNL issued a press release describing the incident on October 5, 2007. AR 131.

The anthrax release occurred during a three-stage shipment of approximately 6,400 anthrax samples from LLNL to laboratories in Florida and Virginia. AR 150 at 3. On September 16, 2005, LLNL was notified that two employees and three contract workers at the Florida laboratory were exposed to an unidentified liquid while unpacking the second shipment to that facility. *Id.* at 7. This liquid was later determined to be anthrax, requiring medical treatment for the laboratory's employees and contract workers. *Id.* at 7-8. Also, on September 16, 2005, LLNL's Responsible Official – the individual responsible for ensuring compliance with the select agent regulations – received a voicemail message from the laboratory in Virgina stating that its shipment had been packaged "at random." *Id.* at 7. On September 22nd, the Virginia laboratory notified both the Center for Disease Control ("CDC") and LLNL of three inventory discrepancies (extra, missing, and mislabeled samples) and packaging deficiencies related to this shipment. *Id.* at 8.

Following the anthrax release, CDC suspended all LLNL transfers of select agents and LLNL issued an order for a "full stand-down" of all select agent work. AR 122 at 56, 124. On November 15, 2005, following an inspection, CDC sent LLNL a letter describing twenty-nine (29) departures from regulatory requirements, including numerous safety and security deficiencies. AR 125. However, LLNL failed to comply with the stand-down order and failed to respond to the CDC letter. Approximately two months after research with select agents was suspended, LLNL employees still had access to these materials. AR 138; AR 139. In addition, neither LLNL security nor the facility manager were told of the work stand-down and no engineering or administrative controls were put into place to prevent access to select agent materials. AR 139.

LLNL's internal investigation of this incident, which was completed in December 2005, identified a number of failures. *See* AR 150. For instance, it was noted that LLNL did not have a "robust, automated inventory system for select agents." AR 150 at 11. Furthermore, in numerous instances, individuals deviated from required procedures for handling special agents and/or failed to understand their responsibilities. *Id.* at 9-11.

In light of the significance of the anthrax release, and the security and management issues raised by the release, the Department of Health and Human Service ("HHS") Office of Inspector General ("OIG") reviewed the incident. On January 9, 2007, the OIG wrote a letter to LLNL alleging violations of the select agent regulations, including failure to comply with security and access requirements by providing "an unauthorized individual access to more than 4,000 vials of anthrax" and allowing that individual to package and ship those vials. AR 128 at 1. The OIG also alleged that LLNL violated the transfer requirements of the select agent regulations by failing to comply with applicable shipping and packaging laws when transferring a select agent. *Id.* at 1-2. LLNL subsequently reached a $450,000 settlement agreement with the OIG to resolve these allegations. AR 131; AR 122 at 57.

b. Restricted Experiments

In another incident which reflects on security and management issues at LLNL, inspectors from CDC discovered on August 30, 2005 that LLNL had been conducting "restricted experiments," in violation of the select agent regulations promulgated by HHS. AR 141 at 1; AR 125 at 4; AR 145 at 4. One category of "restricted experiments" are those "utilizing recombinant DNA that involve the deliberate transfer of a drug resistance trait to select agents that are not known to acquire the trait naturally, if such acquisition could compromise the use of the drug to control disease agents in humans, veterinary medicine, or agriculture." 42 C.F.R. § 73.13(b)(1). At LLNL, a researcher had been producing an antibiotic resistant strain of *Yersinia pestis* (plague). AR 125 at 4.

"Restricted experiments" may not be conducted with a "select agent or toxin unless approved by and conducted in accordance with any conditions prescribed by the HHS Secretary." 42 C.F.R. § 73.13(a). Because LLNL had neither sought nor been granted such

approval, CDC required the laboratory to destroy the samples immediately as a condition for LLNL to keep its certificate of registration, authorizing the possession, use, and transfer of select agents and toxins. AR 145 at 4. The FREA, failed to disclose that LLNL had conducted "restricted experiments" without the required approval. AR 122.

5. HSS Inspection Validates Security Concern

During March and April 2008, after the issuance of the FREA and Revised FONSI, DOE's Office of Health, Safety and Security ("HSS") inspected safeguards and security and cyber security programs at LLNL. AR 158 at 7. The inspection evaluated LLNL in the following protection-related topical areas, among others: personnel security, physical security systems, material control and accountability, protective force, and protection program management. *Id.* at 8. HSS gave LLNL's protective force the lowest possible rating, "Significant Weaknesses," due to its poor performance against identified adversary threats, "particularly during force-on-force scenarios and in other types of performance assurance testing." AR 155 at 7-8; AR 159 at 16. HSS also identified deficiencies in LLNL's physical security systems and protection program management. AR 155 at 7-8.

A subsequent report prepared by the Government Accountability Office ("GAO"), in March 2009 entitled "*Better Oversight Needed to Ensure That Security Improvements at LLNL Are Fully Implemented and Sustained*" noted that LLNL failed to sustain corrective actions implemented in response to HSS finding "Significant Weakness" in its security performance. AR-155 at 25-26. Additionally, the GAO Report gives a scathing analysis of Defendants' on-going security deficiencies and inability to perform adequate self-assessment of their security performance: "LLNL's security self-assessment program was not comprehensive and individual assessments of security elements lacked the breadth and depth to provide management with information necessary to make meaningful decisions." *Id.* at 10.

III. ARGUMENT

It is well established that, in considering a plaintiff's claims under the Administrative Procedure Act ("APA"), a reviewing court must engage in a "thorough, probing, in-depth review," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), to

determine whether the agency decision under review is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). The reviewing court "must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 416; *see also Ariz. Cattle Growers' Ass'n v. United States Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001) (citations omitted). "[I]f an agency 'fails to consider an important aspect of a problem . . . [or] offers an explanation for the decision that is contrary to the evidence,' its action is 'arbitrary and capricious.'" *Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 889 (9th Cir. 2007).

Applying those principles in this case, it is apparent that Defendants' decision violates NEPA and the APA and must be set aside.

A. PLAINTIFFS HAVE STANDING

To demonstrate Article III standing, a plaintiff must demonstrate that he or she "has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007).[1] In this case, Defendants continued operation of the Livermore BSL-3 facility threatens direct harm to Plaintiffs who live, work, and recreate in the vicinity of the BSL-3 facility at LLNL. Plaintiffs are also members of Tri-Valley CAREs which has standing to represent their interests as well as its separate, organizational interests in securing the environmental disclosures required under NEPA. *Idaho Conservation League v. Mumma*, 956 F. 2d 1508, 1514-18 (9th Cir. 1992); *See* Declaration of Marylia Kelley In Support of Plaintiffs' Motion for Summary Judgment ¶¶ 1-23, and, Declaration of Janis Kate Turner In Support of Plaintiffs' Motion for Summary Judgment ¶¶ 1-9.

[1] Here, Plaintiffs' claim concerns a "procedural right." Thus, all that is required for causation and redressability is to demonstrate "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts,* 549 U.S. at 517.

B. DEFENDANTS FAILED TO CONDUCT THEIR ENVIRONMENTAL ANALYSES IN GOOD FAITH

The NEPA process must be conducted in good faith. "[T]he comprehensive 'hard look' mandated by Congress and required by [NEPA] must be timely, and it must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) (emphasis added); *see also Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 575 (9th Cir. 1998) (requiring "good faith objectivity").

Here, Defendants failed to conduct their environmental analyses under NEPA in good faith. First, Defendants failed to disclose important details about the LLNL anthrax release in the DREA.[2] *Compare* AR 125; AR 128; AR 150 *with* AR 121 at 57. Samuel Brinker, the NEPA Document Manager for the LLNL BSL-3 facility, was notified of the incident on September 23, 2005 (and perhaps sooner), LLNL's internal investigation was complete in December 2005, and the HHS OIG notified LLNL of its potential violations of the select agent regulations in January 2007. AR 128, 132, 150, 154 at 1. Nonetheless, the March 2007 DREA entirely failed to disclose that anthrax was involved in the incident and that the material had been packaged by an unauthorized individual, among other omissions. *Compare* AR 128 at 1 *with* AR 121 at 57. Plaintiffs briefly raised the issue of the release in their comments to the DREA based on the very limited amount of information available at that time; however their ability to comment on the significance of the issue was necessarily hamstrung by Defendants withholding of critical and relevant information pertaining to the incident.

Presumably in response to Plaintiffs' comments, Defendants provided more information on the release in the January 2008 FREA. However, even the FREA failed to disclose important details regarding the incident. *Compare* AR 125; AR 128; AR 150 *with* AR 122 at 56-57. For

[2] In addition, the administrative record initially filed with the Court by Defendants, which was certified as being a "true, correct and complete copy of the administrative record[,]" did not include any documents regarding the anthrax release. *See* Docket No. 18, Exs. "2" and "3." Thus, Defendants withheld critical and relevant information not only from the public, but also from this Court.

instance, it failed to describe LLNL's numerous regulatory violations associated with the incident, including those involving the laboratory's security plan, biosafety plan, incident response plan, safety and biosecurity training, and recordkeeping, among others. *Compare* AR 125 at 4-8 *with* AR 122 at 56-57. Even though the FREA included some information regarding the LLNL anthrax release not available in the DREA, that document and the information contained therein was not made available to public officials and citizens before the BSL-3 facility became operational, in violation of NEPA. *See* 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."); *Bering Strait Citizens for Responsible Res. Dev. v. United States Army Corps of Eng'rs*, 524 F.3d 938, 953 (9th Cir. 2008) ("An agency, when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process").

Second, Defendants entirely failed to disclose – in both the DREA and the FREA -- that LLNL had been conducting "restricted experiments," in violation of the select agent regulations. *Compare* AR 141 at 1; AR 125 at 4; AR 145 at 4 *with* AR 122. In August 2005, inspectors from CDC discovered that an LLNL researcher had been producing an antibiotic resistant strain of *Yersinia pestis* (plague). AR 125 at 1, 4. As noted above, because LLNL had neither sought nor been granted approval to conduct this experiment, CDC required the laboratory to destroy the samples immediately, in order for LLNL to keep its certificate of registration, authorizing the possession, use, and transfer of select agents and toxins. AR 145 at 4.

Since the FREA was not prepared in good faith, its factual conclusions are arbitrary. *Surfrider Found. v. Dalton*, 989 F. Supp. 1309, 1320 (S.D. Cal. 1998) (If the agency "did not conduct its environmental analyses in good faith, then it should be evident that the factual conclusions of those studies were arbitrary"); *see Olmsted Citizens for a Better Community v. United States*, 606 F. Supp. 964, 975 (D. Minn. 1985) (citation omitted) ("[t]he EIS cannot

provide the necessary basis for a reasoned decision if it is knowingly incorrect or incomplete or it has been compiled without an effort in objective good faith to obtain accurate information"). Only if a NEPA document is "forthcoming can the public be appropriately informed and have any confidence that the decisionmakers have in fact considered the relevant factors and not merely swept difficult problems under the rug." *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011, 1034 (2d Cir. 1983).

Because the FREA is both incomplete and misleading, and was not circulated for comment, Defendants must further revise the document and make it available to public officials and citizens for comment. *See Animal Defense Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir. 1988) (citations and quotation omitted) ("Where the information in the initial EIS was so incomplete or misleading that the decisionmaker 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 NEPA."); *NRDC v. United States Forest Serv.*, 421 F.3d 797, 811-12 (9th Cir. 2005) (holding that misleading economic information "was sufficiently significant that it subverted NEPA's purpose of providing decision makers and the public with an accurate assessment of the information relevant to evaluate" the agency's plan).

C. FAILURE TO SUPPLEMENT THE FREA VIOLATED NEPA

Federal agencies have "a continuing duty to gather and evaluate new information relevant to the environmental impact of [the agencies'] actions." *Warm Springs Dam Task Force*, 621 F.2d at 1024 (citing 42 U.S.C. § 4332(2)(A-B) (1975)). Pursuant to CEQ's regulations, 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." 40 C.F.R. § 1509(c)(1)(ii) (1978). The Supreme Court has interpreted NEPA, in light of this regulation, as requiring an agency to take a "hard look" at new circumstances and information to determine whether supplementation may be required. *Norton*, 552 U.S. at 72-73, (2004) (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378-85, (1989)). Although the instant action concerns supplementation of an EA, the standard

for supplementing an EA is the same as for an EIS. *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 566 n.2 (9th Cir. 2000). Under NEPA, supplementation is required only if there remains major Federal action to occur. *Norton*, 542 U.S. at 73. Here, the FREA encompasses both the construction and operation of the LLNL BLS-3 facility, so there remains major Federal action to occur; namely, the continued operation of the facility. AR 122.

Defendants failed to include, disclose and analyze numerous relevant pieces of new information that came to light during the NEPA process for the LLNL BSL-3. Each instance of this violated NEPA. First, by failing to prepare a supplement to the FREA analyzing the LLNL anthrax release and violations of the select agent regulations, Defendants violated NEPA. *See supra* at Section II. Defendants also failed to prepare a supplement to the FREA analyzing the results of the HSS inspection in March and April 2008 in violation of NEPA. HSS gave LLNL's protective force, which is responsible for responding to intrusion or access control alarms at the BSL-3 facility, the lowest possible rating, "Significant Weaknesses." AR 159 at 60, AR 155 at 7-8; AR 159 at 16. HSS also identified deficiencies in LLNL's physical security systems and protection program management, both of which bear upon the environmental impacts that may result from operation of the facility. AR 155 at 7-8. A GAO report noting that LLNL failed to sustain corrective actions implemented in response to the findings of earlier HSS inspections lends further support to the need for supplementation here. AR 155 at 25. Defendants' practice of ignoring any new relevant information in their NEPA review, thereby deprives the public the environmental analysis intended by the law.

D. THE NEPA REVIEW CONDUCTED THUS FAR IS INADEQUATE.

As a result of prior 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 terrorist activity [at the LLNL BSL-3 facility] necessitates the preparation of an Environmental Impact Statement." *Tri-Valley CAREs*, 203 Fed. Appx. at 107. However, Defendants failed to take a "hard look" at the environmental impacts that may result from terrorist activity at the LLNL BSL-3 facility, thereby violating the Ninth Circuit's order and NEPA.

Any discussion of the various inadequacies of the NEPA documentation that DOE prepared in connection with the facility must include a discussion of the historical and institutional failure of the agency to provide accurate and objective self-assessment of its security capability. The recent GAO Report pointed out this failure loud and clear, even citing one DOE official who complained that LLNL's security self-assessment program was "'broken' and missed even the 'low-hanging fruit' of compliance-oriented deficiencies that LLNL must now take actions to correct." *Id.* at 12. The GAO Report loudly echoes the Plaintiffs' recognition of Defendants' inability to self-assess their own security in relation to a possible terrorist threat.

1. Defendants' Analysis Of Direct Terrorist Attacks Resulting In Loss Of Containment Is Inadequate

Defendants failed to comply with the Ninth Circuit's order because their analysis of the environmental impacts that may result from a malicious act designed to breach containment at the LLNL BSL-3 facility is facially inadequate. According to the FREA, "the consequences of a malicious act designed to breach containment are bounded by the accidents and natural catastrophic events evaluated in the [FREA] because they would result in a similar loss of containment." AR 122 at 59. Essentially then, the "terrorism analysis" that Defendants prepared in response to the Ninth Circuit's order is nothing more than a restatement of the FREA's analysis of the consequences that could be expected from an accidental and non-intentional act. In violation of NEPA, this conclusory statement is not supported by data in the FREA or the administrative record. *See Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 973 (9th Cir. 2006) (holding that "vague and conclusory statements, without any supporting data, do not constitute a 'hard look' at the environmental consequences of the action as required by NEPA").

According to guidance from DOE, it is not appropriate to apply an analysis of accidents to an analysis of the potential consequences of acts of sabotage or terrorism where the potential sabotage or terrorist scenarios and the accident scenarios do not "involve similar physical initiating events or forces (e.g., fires, explosions, drops, punctures, aircraft crashes)." AR 91 at 2; *see also* AR 88 at 20. Here, the accident scenario applied by Defendants is a centrifuge accident involving a one liter slurry of *Coxiella burnetii*. AR 122 at 54. Thus, the physical initiating

event in this accident scenario is a laboratory worker's failure to insert O-rings or tighten centrifuge caps on six vials of *Coxiella burnetii* in a free-standing centrifuge. *Id.* In contrast, the physical initiating events or forces in potential sabotage or terrorist scenarios may include a suicidal plane crash, explosion, fire, damage to one or more of the facility's containment features, or damage to the facility's autoclaves, which are used to kill or sterilize microorganisms. *Id.* at 16, 59; AR 27 at A9-50-52 (analyzing sabotage actions that may result in a loss of containment). Since the physical initiating events or forces in these scenarios are not similar to the physical initiating event and forces associated with the accident scenario analyzed in the FREA, it was improper for Defendants to apply the accident analysis to an analysis of the environmental impacts that may result from a malicious act designed to breach containment at the LLNL BSL-3 facility.

Moreover, according to DOE's guidance, "[e]ach EIS and EA should explicitly consider whether the accident scenarios are truly bounding of intentional destructive acts[,]" which Defendants have not done. AR 91 at 2. As specified above, Defendants claim that "the consequences of a malicious act designed to breach containment are bounded by the accidents and natural catastrophic events evaluated in the [FREA] <u>because they would result in a similar loss of containment</u>." AR 122 at 59 (emphasis added). However, there is no evidence whatsoever in the administrative record that supports this assumption that is at the heart of the so-called terrorism analysis. Because Defendants ignored their own guidance, the FREA fails to give adequate consideration as to whether the accident scenario analyzed in the FREA is truly bounding of a malicious act designed to breach containment at the LLNL BSL-3 facility.

Finally, Defendants' claim that the consequences of a terrorist attack resulting in damage or destruction to the LLNL BSL-3 facility and a loss of containment are bounded by the accident scenario discussed above is not credible. According to guidance from DOE regarding intentional and malevolent events,

> In contrast to the randomness of initiators associated with accidents, natural phenomena and other external events, a malevolent, ***intelligent*** initiator can determine where to place explosives or start fires and/or how to use site systems and equipment to deliberately initiate or exacerbate emergency events or conditions. Such premeditated, even suicidal, malevolent events can maximize

> the impact of a release of hazardous material ranging from use-denial by contamination to serious harm to workers or the public.

Ex. 1 at E-1 (emphasis in original). Yet, Defendants failed to analyze the potential environmental impacts of a terrorist attack that results in a greater loss of containment than a centrifuge accident involving six vials of *Coxiella burnetii*, in which the pathogenic material passes through two sets of fully functioning High Efficiency Particulate Air-Purifying ("HEPA") filters before being released into the environment. *See* AR 122 at 54, 57-66. An intelligent LLNL worker conducting an act of sabotage or an intelligent terrorist would have the ability to maximize the impact of a release of pathogenic material, beyond that analyzed in the accident scenario discussed above. *See* Ex. 1 at E-1.

As a result of these deficiencies, the FREA failed to take a "hard look" at the environmental impacts that may result from a malicious act designed to breach containment at the LLNL BSL-3 facility as specifically required by the Ninth Circuit's order in this case. It is clear from the administrative record in this matter that Defendants can, and do, distinguish between the consequences of accidental and intentional acts. *See* AR 27 at A9-16-25 (analyzing aerosol release), A9-50-52 (analyzing employee sabotage); AR 28 at G-36-38 (same). And, it is equally clear that Defendants failed to draw that distinction in the FREA, despite the Ninth Circuit's clear and express order to the contrary.

2. Defendants' Analysis Of The Theft And Subsequent Release Of Pathogenic Material By A Terrorist From Outside LLNL Is Inadequate

Defendants' analysis of the theft and subsequent release of pathogenic material by a terrorist from outside LLNL is also inadequate. For site-specific actions like the proposed action here, the significance of any potential environmental impacts "usually depend[s] upon the effects in the locale rather than in the world as a whole." 40 C.F.R. § 1508.27(a). Accordingly, Defendants must analyze the significance of the proposed action in the context of the Livermore locale. *See id.* (the significance of an action must be analyzed in the context of the locality). However, according to the FREA,

> Because a malicious individual could already obtain pathogenic material by other methods under the No-Action ("status quo") Alternative, the presence of pathogenic agents in the proposed, highly secured BSL-3 facility would not pose any new or greater risk to human health or the environment from an outside terrorist or terrorists than already accrues without operation of the BSL-3 facility at LLNL.

AR 122 at 63. This purported analysis plainly neglects to analyze the significance of the proposed action in the context of the Livermore locale, and instead relies on the presence of pathogenic material in nature and at other BSL-3 facilities throughout the country to justify its conclusion. *Id.* at 62-63.

Here, the LLNL BSL-3 facility will contain a large collection of potential bioweapons, possibly including genetically modified microorganisms and unidentified organisms used in bioterrorist attacks, in close proximity to nearby residences and the City of Livermore. *Id.* at 2, 7, 18, 47, C-9-10. As such, it is clear that the facility poses a new and greater risk to human health and the environment in the Livermore locale, regardless of the availability of pathogenic material in other locations. Because the FREA failed to adequately analyze this threat, defendants are in violation of NEPA. *See Anderson*, 314 F.3d at 1021 (holding that an EIS was required because the EA did not adequately address local impacts).

3. Defendants' Analysis Of The Covert Theft And Subsequent Release Of Pathogenic Material By A LLNL Insider Is Inadequate

Defendants failed to take a "hard look" at the environmental impacts that may result from the covert theft and subsequent release of pathogenic material by an insider with access to the LLNL BSL-3 facility. According to the FREA, "dramatic human health impacts and economic disruption can result following the release of pathogenic materials[,]" yet Defendants failed to analyze <u>any</u> scenarios involving the covert theft and subsequent release of pathogenic material by a LLNL insider. AR 122 at 63-64. However, two such scenarios were analyzed in the Final Programmatic Environmental Impact Statement for the U.S. Army's Biological Defense Research Program ("BDRP FPEIS"), which is the NEPA analysis "considered most relevant to the Proposed Action[,]" according to the FREA. AR 27 at A9-53-56, AR 122 at 52. Such analyses serve the purpose of NEPA, which is "to require disclosure of relevant environmental

considerations that were given a 'hard look' by the agency, and thereby to permit informed public comment on proposed action and any choices or alternatives that might be pursued with less environmental harm." *Lands Council v. Powell*, 379 F.3d 738, 745 (9th Cir. 2004).

Moreover, Defendants' vague and conclusory statements regarding the environmental impacts that may result from such a release violate NEPA. Under NEPA, an agency "must put forth a 'convincing statement of reasons' that explain why the project will impact the environment no more than insignificantly." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005). Here, Defendants' analysis consists of nothing more than vague and conclusory statements about the possible environmental impacts of the covert theft and subsequent release of pathogenic material by an LLNL insider. AR 122 at 64. Accordingly, Defendants are in violation of NEPA. *See Great Basin Mine Watch*, 456 F.3d at 973; *Ocean Advocates*, 402 F.3d at 864 (an agency "cannot avoid preparing an EIS by making conclusory assertions that an activity will have only an insignificant impact on the environment").

4. Defendants Failed To Analyze Other Credible Terrorist Threats

Defendants also failed to take a "hard look" at the potential environmental impacts of other credible terrorist threats. Defendants failed to analyze any of several types of potential sabotage actions, which may include damage to one or more of the LLNL BSL-3 facility's containment features, damage to the facility's containment suite autoclaves, deliberate release of an infected animal, and deliberate self-infection with the intent to spread the pathogenic material within the environment. *See* AR 122 at 57-66. Each of these potential sabotage actions was analyzed in the BDRP FPEIS. AR 27 at A9-51-53; *see also* AR 28 at G-36-38.

5. Defendants Failed To Analyze Other Credible Release Scenarios

Finally, the FREA failed to analyze the environmental impacts that may result from a release of biotoxins, viruses, or genetically modified organisms from the LLNL BSL-3 facility following a terrorist attack, even though each may be present at the facility. AR 122 at 18, A-22-23. In the BDRP FPEIS, the U.S. Army separately analyzed releases of bioagents, biotoxins, and viruses, and explained that its analyses "for containment laboratories must be considered in terms of physical containment for both toxins and biological organisms." AR 27 at A9-4-16; *see also*

AR 11 at 5-6-12. Although the FREA briefly discusses an accident scenario from another NEPA document involving the release of botulinum, a biotoxin, that analysis cannot form the basis for Defendants' decision here, since it is based on the specific features and location of another facility and the quantities and varieties of biotoxins contained there. *See* AR 122 at 52 B-8, AR 11 at 5-1-12; *see also* AR 27 at A9-13-14. The FREA contains no analysis of a release of viruses or genetically modified organisms from the LLNL BSL-3 facility.[3] *See* AR 122.

E. DEFENDANTS MUST PREPARE A COMPREHENSIVE EIS

As noted, CEQ has set forth a series of factors agencies must consider in determining whether an action may "significantly" impact the environment, thereby requiring an EIS. *See* 40 C.F.R. § 1508.27. These include (a) "[t]he degree to which the proposed action affects public health or safety[;]" (b) "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial[;]" and (c) "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." *Id.* § 1508.27(b). If substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor, an EIS must be prepared. *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). Under this "low standard," a plaintiff need not show that significant effects will in fact occur; merely raising substantial questions whether a project may have a significant effect is sufficient to require the preparation of an EIS. *Id.* at 562. Here, each of the CEQ "significance" factors listed above requires the preparation of an EIS.

IV. APPROPRIATE RELIEF

In fashioning relief for a violation of NEPA, a reviewing court is required to balance Plaintiffs' claims of injury against any competing claims by Defendants, and "arrive at a 'nice adjustment and reconciliation' between the competing claims." *Weinberger v. Romero-Barcelo*,

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[3] Although Defendants claim that the rickettsial microorganism *Coxiella burnetii* is "considered representative" of all types of BSL-3 microorganisms, including viruses, for the purpose of analyzing the consequences of an accidental release, AR 122 at 53, this statement is unsupported and there is contrary evidence in the record. *See, e.g.,* AR 27 at A9-14-16 (separately analyzing releases of *Coxiella burnetii* and the Rift Valley Fever virus).

456 U.S. 305, 312 (1982). "[I]f the court determines that the agency's proffered reasons for its FONSI are arbitrary and capricious and the evidence in a complete administrative record demonstrates that the project or regulation may have a significant impact, then it is appropriate to remand with instructions to prepare an EIS." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1225 (9th Cir. 2008) (*citations omitted*).

The relief sought by Plaintiffs in this case is similar to the relief granted by this Court in *Ctr. for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105 (N.D. Cal. 2007). In *Brennan*, this Court found that the defendants had failed to meet their obligations to the public under NEPA by failing to produce an updated National Global Research Plan and by not publishing a required Scientific Assessment. *Id.* at 1131. This Court fashioned an appropriate remedy by compelling the defendants in that case to comply with the requirements of NEPA by producing the documents needed to adequately analyze the environmental impacts of the project. Similarly, here the Defendants have violated NEPA by withholding important information from the public.

In light of Defendants' various NEPA violations in this case, Plaintiffs respectfully submit that the Court must grant summary judgment in their favor and direct Defendants to complete an EIS, or, at a bare minimum, prepare an adequate EA and reconsider whether an EIS is necessary. As further relief, Plaintiffs respectfully request that the Court enjoin continued operation of the LLNL BSL-3 facility until such time as Defendants comply with NEPA.

Dated this 21st day of October, 2009

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