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16 IN THE UNITED STATES DISTRICT COURT  
17 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

20 Plaintiffs,

21 vs.

22 UNITED STATES DEPARTMENT OF  
23 ENERGY, NATIONAL NUCLEAR  
24 SECURITY ADMINISTRATION, and  
25 LAWRENCE LIVERMORE NATIONAL  
26 LABORATORY,

27 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. Sandra Brown Armstrong

) Date: December 8, 2009

) Time: 1:00 p.m.

) Place: Courtroom 1, 4th Floor

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NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

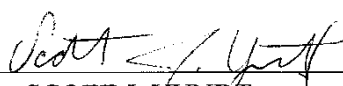
TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

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

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

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

## 8 **II. BACKGROUND**

### 9 **A. THE NATIONAL ENVIRONMENTAL POLICY ACT**

10 As the Nation's "basic national charter for protection of the environment," 40 C.F.R. §  
11 1500.1(a), NEPA's purpose is to "help public officials make decisions that are based on  
12 understanding of environmental consequences, and take actions that protect, restore, and enhance  
13 the environment." *Id.* §1500.1(c). The Supreme Court explains that NEPA's "twin aims" are to  
14 (a) "'place[ ] upon an agency the obligation to consider every significant aspect of the  
15 environmental impact of a proposed action,'" and (b) to "inform the public that [the agency] has  
16 indeed considered environmental concerns in its decision making process." *Baltimore Gas &*  
17 *Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983). To achieve those aims, NEPA  
18 requires that before undertaking any "major Federal actions significantly affecting the quality of  
19 the human environment," an agency must prepare an EIS that, among other things, thoroughly  
20 considers the "environmental impact of the proposed action" and reasonable alternatives. 42  
21 U.S.C. § 4332(C).

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

1 Finally, under NEPA, federal agencies have “a continuing duty to gather and evaluate  
2 new information relevant to the environmental impact of [the agencies’] actions.” *Warm Springs*  
3 *Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980) (citing 42 U.S.C. § 4332(2)(A-  
4 B) (1975)). Under CEQ’s regulations, agencies shall prepare supplements to either draft or final  
5 EISs if “[t]here are significant new circumstances or information relevant to environmental  
6 concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1509(c)(1)(ii) (1978).  
7 The Supreme Court has interpreted NEPA, in light of this regulation, as requiring an agency to  
8 take a “hard look” at new circumstances and information to determine whether supplementation  
9 may be required. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 72-73, 124 S. Ct. 2373  
10 (2004).

## 11 **B. STATEMENT OF FACTS**

### 12 **1. Lawrence Livermore National Laboratory**

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

19 Over the years, LLNL has had recurrent problems with security issues and the proper  
20 management and control of dangerous materials including in its bioscience research programs.  
21 AR 122 at 56-57, C-103-107. These incidents, which include an anthrax release in September  
22 2005, have resulted in the exposure of individuals to pathogenic material and environmental  
23 degradation. *Id.* As demonstrated by the anthrax mailings in late 2001 which essentially shut  
24 down mail service to the federal government, “dramatic human health impacts and economic  
25 disruption can result following the release of pathogenic materials.” *Id.* at 64. In addition, there  
26 is an acknowledged security risk associated with select agent research at the LLNL BSL-3  
27 facility. *Id.* at 58-64; AR 159 at 61.

1                                   **2. The BSL-3 Facility**

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

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

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

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

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

1 9,900,000,000 airborne human infective doses at a 50 percent rate of contracting the disease in a  
2 3 cubic foot space above and around the accident. *Id.* at 54.

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

4 The fatally flawed NEPA process for the LLNL BSL-3 facility commenced in 2002. *See*  
5 AR 2. NNSA issued the Draft Environmental Assessment for the LLNL BSL-3 facility on July  
6 24, 2002. AR 1 at 7. In December 2002, NNSA issued the Final Environmental Assessment  
7 (“FEA”) and FONSI for the BSL-3 facility, which authorized construction and operation of the  
8 facility. AR 122 at ii.

9 On September 16, 2003, Plaintiffs filed a lawsuit in federal district court in San Francisco  
10 challenging, *inter alia*, the adequacy of the FEA and FONSI for the LLNL BSL-3 facility. *Id.*;  
11 *Tri-Valley CAREs v. Dept. of Energy*, No. 03-3926, Dkt. No. 1 (N.D. Cal. 2003). On September  
12 10, 2004, this Court found the FEA and FONSI to be adequate. *Tri-Valley CAREs v. Dept. of*  
13 *Energy*, 2004 U.S. Dist. LEXIS 18777 (N.D. Cal. 2004), *aff’d in part and rev’d in part*, 203 Fed.  
14 Appx. 105, 107 (9th Cir. 2006).

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

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

### 26 **4. The DREA Fails to Disclose Serious Security Violations**

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



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

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

#### 16 **b. Restricted Experiments**

17 In another incident which reflects on security and management issues at LLNL,  
18 inspectors from CDC discovered on August 30, 2005 that LLNL had been conducting "restricted  
19 experiments," in violation of the select agent regulations promulgated by HHS. AR 141 at 1; AR  
20 125 at 4; AR 145 at 4. One category of "restricted experiments" are those "utilizing recombinant  
21 DNA that involve the deliberate transfer of a drug resistance trait to select agents that are not  
22 known to acquire the trait naturally, if such acquisition could compromise the use of the drug to  
23 control disease agents in humans, veterinary medicine, or agriculture." 42 C.F.R. § 73.13(b)(1).  
24 At LLNL, a researcher had been producing an antibiotic resistant strain of *Yersinia pestis*  
25 (plague). AR 125 at 4.

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

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

### 5 **5. HSS Inspection Validates Security Concern**

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

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

### 25 **III. ARGUMENT**

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

1 determine whether the agency decision under review is “arbitrary, capricious, an abuse of  
2 discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2). The reviewing court  
3 “must consider whether the decision was based on a consideration of relevant factors and  
4 whether there has been a clear error of judgment.” *Citizens to Preserve Overton Park, Inc.*, 401  
5 U.S. at 416; *see also Ariz. Cattle Growers’ Ass’n v. United States Fish & Wildlife Serv.*, 273 F.3d  
6 1229, 1236 (9th Cir. 2001) (citations omitted). “[I]f an agency ‘fails to consider an important  
7 aspect of a problem . . . [or] offers an explanation for the decision that is contrary to the  
8 evidence,’ its action is ‘arbitrary and capricious.’” *Or. Natural Res. Council Fund v. Goodman*,  
9 505 F.3d 884, 889 (9th Cir. 2007).

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

#### 12 **A. PLAINTIFFS HAVE STANDING**

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

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27 <sup>1</sup> Here, Plaintiffs’ claim concerns a “procedural right.” Thus, all that is required for causation and  
28 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.

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

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

9                   Here, Defendants failed to conduct their environmental analyses under NEPA in good  
10                  faith. First, Defendants failed to disclose important details about the LLNL anthrax release in  
11                  the DREA.<sup>2</sup> *Compare* AR 125; AR 128; AR 150 *with* AR 121 at 57. Samuel Brinker, the NEPA  
12                  Document Manager for the LLNL BSL-3 facility, was notified of the incident on September 23,  
13                  2005 (and perhaps sooner), LLNL’s internal investigation was complete in December 2005, and  
14                  the HHS OIG notified LLNL of its potential violations of the select agent regulations in January  
15                  2007. AR 128, 132, 150, 154 at 1. Nonetheless, the March 2007 DREA entirely failed to  
16                  disclose that anthrax was involved in the incident and that the material had been packaged by an  
17                  unauthorized individual, among other omissions. *Compare* AR 128 at 1 *with* AR 121 at 57.  
18                  Plaintiffs briefly raised the issue of the release in their comments to the DREA based on the very  
19                  limited amount of information available at that time; however their ability to comment on the  
20                  significance of the issue was necessarily hamstrung by Defendants withholding of critical and  
21                  relevant information pertaining to the incident.

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

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25  
26                  <sup>2</sup> In addition, the administrative record initially filed with the Court by Defendants, which  
27                  was certified as being a “true, correct and complete copy of the administrative record[.]” did not  
28                  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.

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

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

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

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

7 Because the FREA is both incomplete and misleading, and was not circulated for  
8 comment, Defendants must further revise the document and make it available to public officials  
9 and citizens for comment. *See Animal Defense Council v. Hodel*, 840 F.2d 1432, 1439 (9th Cir.  
10 1988) (citations and quotation omitted) (“Where the information in the initial EIS was so  
11 incomplete or misleading that the decisionmaker and the public could not make an informed  
12 comparison of the alternatives, revision of an EIS may be necessary to provide a reasonable,  
13 good faith, and objective presentation of the subjects required by NEPA.”); *NRDC v. United*  
14 *States Forest Serv.*, 421 F.3d 797, 811-12 (9th Cir. 2005) (holding that misleading economic  
15 information “was sufficiently significant that it subverted NEPA’s purpose of providing decision  
16 makers and the public with an accurate assessment of the information relevant to evaluate” the  
17 agency’s plan).

### 18 **C. FAILURE TO SUPPLEMENT THE FREA VIOLATED NEPA**

19 Federal agencies have “a continuing duty to gather and evaluate new information relevant  
20 to the environmental impact of [the agencies’] actions.” *Warm Springs Dam Task Force*, 621  
21 F.2d at 1024 (citing 42 U.S.C. § 4332(2)(A-B) (1975)). Pursuant to CEQ’s regulations, agencies  
22 shall prepare supplements to either draft or final EISs if “[t]here are significant new  
23 circumstances or information relevant to environmental concerns and bearing on the proposed  
24 action or its impacts.” 40 C.F.R. § 1509(c)(1)(ii) (1978). The Supreme Court has interpreted  
25 NEPA, in light of this regulation, as requiring an agency to take a “hard look” at new  
26 circumstances and information to determine whether supplementation may be required. *Norton*,  
27 552 U.S. at 72-73, (2004) (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360,  
28 378-85, (1989)). Although the instant action concerns supplementation of an EA, the standard

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

6 Defendants failed to include, disclose and analyze numerous relevant pieces of new  
7 information that came to light during the NEPA process for the LLNL BSL-3. Each instance of  
8 this violated NEPA. First, by failing to prepare a supplement to the FREA analyzing  
9 the LLNL anthrax release and violations of the select agent regulations, Defendants violated  
10 NEPA. *See supra* at Section II. Defendants also failed to prepare a supplement to the FREA  
11 analyzing the results of the HSS inspection in March and April 2008 in violation of NEPA. HSS  
12 gave LLNL's protective force, which is responsible for responding to intrusion or access control  
13 alarms at the BSL-3 facility, the lowest possible rating, "Significant Weaknesses." AR 159 at  
14 60, AR 155 at 7-8; AR 159 at 16. HSS also identified deficiencies in LLNL's physical security  
15 systems and protection program management, both of which bear upon the environmental  
16 impacts that may result from operation of the facility. AR 155 at 7-8. A GAO report noting that  
17 LLNL failed to sustain corrective actions implemented in response to the findings of earlier HSS  
18 inspections lends further support to the need for supplementation here. AR 155 at 25.  
19 Defendants' practice of ignoring any new relevant information in their NEPA review, thereby  
20 deprives the public the environmental analysis intended by the law.

21 **D. THE NEPA REVIEW CONDUCTED THUS FAR IS INADEQUATE.**

22 As a result of prior litigation initiated by Tri-Valley CAREs, et al., the United States  
23 Court of Appeals for the Ninth Circuit ordered "DOE to consider whether the threat of terrorist  
24 activity [at the LLNL BSL-3 facility] necessitates the preparation of an Environmental Impact  
25 Statement." *Tri-Valley CAREs*, 203 Fed. Appx. at 107. However, Defendants failed to take a  
26 "hard look" at the environmental impacts that may result from terrorist activity at the LLNL  
27 BSL-3 facility, thereby violating the Ninth Circuit's order and NEPA.

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

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

11 Defendants failed to comply with the Ninth Circuit's order because their analysis of the  
12 environmental impacts that may result from a malicious act designed to breach containment at  
13 the LLNL BSL-3 facility is facially inadequate. According to the FREA, "the consequences of a  
14 malicious act designed to breach containment are bounded by the accidents and natural  
15 catastrophic events evaluated in the [FREA] because they would result in a similar loss of  
16 containment." AR 122 at 59. Essentially then, the "terrorism analysis" that Defendants prepared  
17 in response to the Ninth Circuit's order is nothing more than a restatement of the FREA's  
18 analysis of the consequences that could be expected from an accidental and non-intentional act.  
19 In violation of NEPA, this conclusory statement is not supported by data in the FREA or the  
20 administrative record. *See Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 973 (9th Cir.  
21 2006) (holding that "vague and conclusory statements, without any supporting data, do not  
22 constitute a 'hard look' at the environmental consequences of the action as required by NEPA").

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

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

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

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

26 In contrast to the randomness of initiators associated with accidents, natural  
27 phenomena and other external events, a malevolent, *intelligent* initiator can  
28 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

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

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

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

## 19 **2. Defendants’ Analysis Of The Theft And Subsequent Release Of Pathogenic** 20 **Material By A Terrorist From Outside LLNL Is Inadequate**

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

1 Because a malicious individual could already obtain pathogenic material by other  
2 methods under the No-Action (“status quo”) Alternative, the presence of  
3 pathogenic agents in the proposed, highly secured BSL-3 facility would not pose  
4 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.

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

9 Here, the LLNL BSL-3 facility will contain a large collection of potential bioweapons,  
10 possibly including genetically modified microorganisms and unidentified organisms used in  
11 bioterrorist attacks, in close proximity to nearby residences and the City of Livermore. *Id.* at 2,  
12 7, 18, 47, C-9-10. As such, it is clear that the facility poses a new and greater risk to human  
13 health and the environment in the Livermore locale, regardless of the availability of pathogenic  
14 material in other locations. Because the FREA failed to adequately analyze this threat,  
15 defendants are in violation of NEPA. *See Anderson*, 314 F.3d at 1021 (holding that an EIS was  
16 required because the EA did not adequately address local impacts).

### 17 **3. Defendants’ Analysis Of The Covert Theft And Subsequent Release Of** 18 **Pathogenic Material By A LLNL Insider Is Inadequate**

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

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

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

#### 14 **4. Defendants Failed To Analyze Other Credible Terrorist Threats**

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

#### 22 **5. Defendants Failed To Analyze Other Credible Release Scenarios**

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

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

#### 7 **E. DEFENDANTS MUST PREPARE A COMPREHENSIVE EIS**

8 As noted, CEQ has set forth a series of factors agencies must consider in determining  
9 whether an action may "significantly" impact the environment, thereby requiring an EIS. *See* 40  
10 C.F.R. § 1508.27. These include (a) "[t]he degree to which the proposed action affects public  
11 health or safety[;]" (b) "[t]he degree to which the effects on the quality of the human  
12 environment are likely to be highly controversial[;]" and (c) "[t]he degree to which the possible  
13 effects on the human environment are highly uncertain or involve unique or unknown risks." *Id.*  
14 § 1508.27(b). If substantial questions are raised as to whether a project may cause significant  
15 degradation of some human environmental factor, an EIS must be prepared. *Klamath Siskiyou*  
16 *Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). Under this "low standard," a  
17 plaintiff need not show that significant effects will in fact occur; merely raising substantial  
18 questions whether a project may have a significant effect is sufficient to require the preparation  
19 of an EIS. *Id.* at 562. Here, each of the CEQ "significance" factors listed above requires the  
20 preparation of an EIS.

#### 21 **IV. APPROPRIATE RELIEF**

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

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25  
26 <sup>3</sup> Although Defendants claim that the rickettsial microorganism *Coxiella burnetii* is "considered  
27 representative" of all types of BSL-3 microorganisms, including viruses, for the purpose of  
28 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).

1 456 U.S. 305, 312 (1982). “[I]f the court determines that the agency’s proffered reasons for its  
2 FONSI are arbitrary and capricious and the evidence in a complete administrative record  
3 demonstrates that the project or regulation may have a significant impact, then it is appropriate to  
4 remand with instructions to prepare an EIS.” *Ctr. for Biological Diversity v. Nat’l Highway*  
5 *Traffic Safety Admin.*, 538 F.3d 1172, 1225 (9th Cir. 2008) (*citations omitted*).

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

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

19 Dated this 21<sup>st</sup> day of October, 2009

20 /s/ Scott Yundt

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