

No. **10-17636**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**TRI-VALLEY CARES, MARYLIA KELLEY and JANIS KATE
TURNER,
Plaintiffs-Appellants**

v.

**UNITED STATES DEPARTMENT OF ENERGY, NATIONAL
NUCLEAR SECURITY ADMINISTRATION and LAWRENCE
LIVERMORE NATIONAL LABORATORY,
Defendants-Appellees**

**Appealing United States District Court for the Northern District
of California Order Denying Summary Judgment**

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GLOSSARY OF ACRONYMS

AAB	Answering Brief for Federal Appellees
AOB	Appellant's Opening Brief
APA	Administrative Procedure Act
BSL	Biosafety Level
CDC	Centers for Disease Control and Prevention
CEQ	Council on Environmental Quality
DHHS	Department of Health and Human Services
DOE	Department of Energy
DOT	Department of Transportation
DREA	Draft Revised Environmental Assessment
EA	Environmental Assessment
EIS	Environmental Impact Statement
FOIA	Freedom of Information Act
FONSI	Finding of No Significant Impact
FREA	Final Revised Environmental Assessment
HEPA	High Efficiency Particulate Air-Purifying
HSS	DOE's Office of Health, Safety and Security
LLNL	Lawrence Livermore National Laboratory
NAS	National Academy of Sciences

NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
OIG	Office of Inspector General
RFONSI	Revised Finding of No Significant Impact
SER	Supplemental Excerpts of Record
TVC	Tri-Valley CAREs

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In 2008, this Court overturned the United States Department of Energy's ("DOE") decision that it need not consider the potential environmental impacts of a terrorist attack at Lawrence Livermore National Laboratory's ("LLNL") Bio-Safety Level-3 Laboratory ("BSL-3"). The BSL-3 facility in Livermore, California would house potentially lethal pathogens, aerosolize deadly diseases and genetically modify select agents to further the DOE's mission to counter bio-terrorism. Notably, the DOE proposed to conduct this biological weaponry research in a nuclear weapons lab surrounded by a populous metropolitan region.

This Court remanded the case with the specific order that the DOE augment its required analysis under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§4321 *et seq.*, for the subject BSL-3 with an analysis of the threat of terrorism and its effects in accordance with the Court's prior decision in *San Luis Obispo Mothers for Peace v. The United States Nuclear Regulatory Commission* ("NRC"), indicating that a full Environmental Impact Statement ("EIS") could be required. *Tri-Valley CAREs v. U.S. Dept. of Energy*, 203 Fed Appx. 105 (9th Cir. 2006); *Mothers for Peace*, 449 F.3d 1016 (9th Cir. 2006).

On remand, DOE made minimal "revisions" to its original Environmental Assessment ("EA") in its Final Revised Environmental Assessment ("FREA"), and summarily concluded that "the threat of a successful terrorist act the LLNL BSL-3

Facility [was] very low.” Excerpt of Record, Volume 2, Tab 1, Page 61

(*hereinafter*: 2ER1:61). The FREA’s and the simultaneous Revised Finding of No Significant Impact (“RFONSI”) are based on the patently absurd notion that the potential environmental effects of a terrorist attack on the facility by an intelligent and motivated actor or actors would be no more significant than the potential environmental effects in a previously modeled centrifuge accident. In reaching its conclusions, the agency also illogically and illegally left out details regarding two serious incidents that had recently occurred at its facilities (the anthrax shipping incident and the restricted Plague experiment violation), thereby depriving Tri-Valley CAREs (“TVC”) and the public of the opportunity to comment on their relevance to the BSL-3’s security, the possibility of select agent transportation accidents, the potential impacts of novel, genetically modified bio-agents and the potential impacts of a terrorist attack, including by an insider. This fails to satisfy this Court’s prior Order in this case and the directive of *Mothers for Peace*. 449 F.3d 1016; *Tri-Valley CAREs*, 203 Fed Appx. at 105.

Furthermore, in its haste to issue the RFONSI and begin operating the facility, DOE failed to take the required “hard look” at the threat of a terrorist attack on the facility and the environmental impacts that may result from such an attack, thereby violating NEPA and this Court’s specific prior Order in this case. *Id.*, 42 U.S.C. §4321 *et seq.* 1ER24. DOE also failed to comply with its statutory

duty to supplement and re-circulate its NEPA analysis with missing relevant information, including a highly relevant Security Assessment, for public comment.

Finally, TVC alleges that the district court erred by refusing to allow TVC to augment the Administrative Record for this case with a National Academy of Sciences (“NAS”) report entitled, *Evaluation of the Health and Safety Risks of the New USAMRIID High Containment Facilities at Fort Detrick, Maryland*. 1ER6-7. This report illustrates the folly of DOE’s strategy of using a centrifuge accident scenario as a surrogate for an intentional terrorist attack, and points out that the analysis fails to address numerous relevant scenarios and factors. *Id.* Because the report demonstrates the DOE’s failure to consider relevant factors, it is an appropriate supplement to the Administrative Record now before this Court.

TVC seeks an order vacating the FREA and RFONSI for the BSL-3 facility, and directing DOE to complete an EIS, or, at a bare minimum, reconsider whether an EIS is necessary. Alternatively, the Court should order DOE to prepare a supplement to the FREA, providing Tri-Valley CAREs, decision makers and the public with the opportunity to provide the meaningful public comments that they were previously denied.

II. ARGUMENT

A. The FREA Failed to Comply with this Court's Prior Order and NEPA

Terrorist acts are generally low-probability, high consequence events. On this basis, this Court held that federal agencies must take a hard look at terrorist attacks in a NEPA document whenever *the risk of terrorism* “is not insignificant.” *Mothers for Peace*, 449 F.3d at 1032. In fact, this Court plainly held that NEPA requires an analysis that addresses “events with potentially catastrophic consequences, even if their probability of occurrence is low.” *Id.* at 1033.

Perplexingly, in response to this directive, the DOE argues in this case that because the *probability* of terrorist attack is low, no EIS is required.¹

Ultimately, DOE chose not to conduct an analysis of a terrorist scenario and the potential impacts of that scenario in compliance with this Court's prior order, but rather determined that its reliance on the existing *accident* scenario analysis, which involved an employee failing to properly affix tops to vials of Q fever when placing them in a centrifuge, sufficed. By failing to include a reasonable analysis of the impacts of an intentional terrorist attack in the FREA, DOE violated this Court's prior order and failed to take the “hard look” required by NEPA.

¹ “On the basis of the extremely low probability of an insider with a motive to release a pathogen and the extremely low likelihood that such a theft would result in significant impacts, DOE reasonably concluded that the threat of an insider theft and release did not require preparation of an EIS.” Answering Brief For Federal Appellees at 25.

1. The FREA Failed to Take the Required Hard Look at Whether the Threat of a Terrorist Attack Required Preparation of an EIS

NEPA requires more than just “vague and conclusory statements, without any supporting data” to establish that the federal agency has taken a “hard look” at the environmental consequences of the action. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 973 (9th Cir. 2006). “If an agency...opts not to prepare an EIS, it 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), *internal quotations omitted*. “[I]f an agency ‘fails to consider an important aspect of the 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). The purpose of an EIS is to obviate the need for speculation by ensuring that available data are gathered and analyzed prior to the implementation of the proposed action." *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 732 (9th Cir. 2001), *internal quotations omitted*.

The FREA’s cursory discussion of potential terrorist attacks primarily consists of a number of unsubstantiated generalizations dismissing the potential dangers of a terrorist attack without supporting data or analysis, e.g., “*It is*

probable that the organic material would be destroyed by any resulting fire”; catastrophic events “*have the potential*” to reduce the consequences of a breach; bioagents would “*typically be handled*” in liquid or solid medium containers; exposure to environmental factors “*could kill*” many airborne microbes; breach of containment “*is likely to rupture containers of disinfectant.*” 2ER1:62-68 (FREA terrorism discussion), *emphasis added*.

While all of these assumptions may be within the realm of possibility, there is no evidence that these assumptions are realistic. This is precisely why a study is needed. DOE’s discussion of potential terrorist attacks entirely fails to consider the outcome of events where the catastrophic events do not reduce the consequences of the breach, when the bioagents are not handled in liquid or solid form, and when bioagents are used that can withstand environmental factors. The cursory terrorism discussion in the FREA leaves the public with more questions than answers providing ample evidence of the need for a hard look analysis of the environmental and health consequences of a terrorist attack under NEPA.

a. Although NEPA Does Not Require a Specific Methodology, NEPA Does Require More Than Vague and Conclusory Statements

DOE claims that TVC’s brief “faults DOE for not developing an “empirical” model” of a pathogen release by an LLNL insider and that DOE is not required to use the “modeling methodology preferred by TVC”. Answering Brief for Federal

Appellees at 23 (*hereinafter*: AAB 23). Quite the contrary, NEPA leaves the methodology to the agency. However, NEPA does mandate an analysis that provides more than the FREA’s vague and conclusory statements without supporting facts, data and analysis. DOE’s 9-page “revised” discussion of terrorism in the FREA purports that a study was not warranted because an accident scenario had already been studied and it “bounded” the terrorism analysis – that is, the impacts associated with a terrorist act would be no worse than the impacts of the centrifuge accident, originally done by another agency, as applied here. See *Great Basin Mine Watch*, 456 F.3d at 973 (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”).

b. The Centrifuge Failure is Insufficient as a Bounding Scenario for a Terrorist Attack

Moreover, the accident scenario cannot serve as a bounding analysis for the impacts of a terrorist attack because the consequences of an intelligent intentional attack specifically designed to breach containment and the consequences of an accident require different analyses.

DOE’s accident analysis evaluated a mechanical equipment “centrifuge” failure due to human error that resulted in “an instantaneous release of a fixed amount of infectious material.” 2ER1:57. The worker failed to insert the O-rings or tighten the centrifuge caps and only 1 percent of the slurry is aerosolized. *Id.* The

initiating event was the worker turning on the equipment. There was no breach of laboratory containment and all released bio-agents were filtered through two sets of High Efficiency Particulate Air-Purifying (“HEPA”) filters before being released to the outside air. *Id.*

DOE now asserts that this accident “bounds” any likely terrorist scenario, including scenarios that would breach the walls of the facility. This is based almost entirely on unsupported assumptions and defies credibility.

DOE also attempts to claim that its use of the centrifuge accident scenario to bound the impacts of an intentional terrorist act was supported by the Guidance Memorandum issued by DOE’s own Office of NEPA Policy and Compliance, entitled *Need to Consider Intentional Destructive Acts in NEPA Documents*. 2ER19. Defendants argue that this Guidance Memorandum, issued in response to the “October 16, 2006, decision, *Tri-Valley CAREs v. Department of Energy*,” should not persuade the Court. AR 91. However, it is directly relevant in that it directed “Each DOE EIS and [Environmental Assessment (“EA”)] should explicitly consider intentional destructive acts. This applies to all DOE proposed actions...” *Id.* It also suggests:

...ways to apply an analysis of accidents to an analysis of the potential consequences of acts of sabotage or terrorism. This approach may be appropriate...where the potential sabotage or terrorist scenarios and the accident scenarios involve similar physical initiating events or forces (e.g., fires, explosions, drops, punctures, aircraft crashes.) This approach may not be adequate for all situations, however, because

accident scenarios may not fully encompass potential threats posed by intentional destructive acts...Each EIS and EA should explicitly consider whether the accident scenarios are truly bounding of intentional destructive acts. *Id.*

DOE made a giant leap in logic in order to apply the centrifuge accident scenario to all intentional destructive acts in its claim that it complied with this guidance. DOE claims that because its “use of this [centrifuge] MCE bounding analysis for the impacts of abnormal catastrophic events such as earthquakes and accidental plane crashes was upheld during TVC’s challenge to the original EA...and since its MCE scenario was bounding of a release caused by an accidental airplane crash, it was also bounding of the impacts of a release caused by a purposeful plane crash or other purposeful events with similar destructive forces.” AAB 17. In essence, DOE’s leap in logic purports to say that this Court had already approved of DOE’s use of the centrifuge bounding scenario as an analysis of the impacts of the threat of terrorism when it agreed that the accident scenario applied to earthquakes and accidental plane crashes, therefore rendering this Court’s prior Opinion meaningless.

If an accident based scenario is going to be used as a Maximum Credible Event Scenario that bounds all accidents and all intentional destructive acts for a DOE NEPA review, DOE’s NEPA Guidance requires that accident scenario to directly involve a “similar initiating event.” Unless the DOE wants to make the absurd claim that an intentional actor would place open vials of Q fever in a

centrifuge in order to commit a terrorist act, than its use of this scenario simply is not similar to any intentional destructive act and does not comply with the Guidance.

Finally, since the release of the FREA, it has become apparent that DOE's centrifuge accident scenario, borrowed from an Army analysis, is without merit. A 2010 National Academy of Science study explained that the Army's scenario was incomplete, could not be reproduced and low-balled the doses of infectious agents from "puff releases." 1ER7:4.

c. DOE Is Required to Analyze Impacts Specifically to the Livermore "Locale"

DOE's discussion regarding the theft of dangerous material and subsequent release by an outside terrorist is inadequate because it fails to determine the significance of any potential environmental impacts on the specific Livermore *locale*, per Council on Environmental Quality ("CEQ") regulations. 40 C.F.R. §1508.27(a). DOE asserts that the addition of the BSL-3 facility to LLNL will not significantly alter the likelihood of terrorists obtaining dangerous pathogens because there are other BSL-3 facilities that house similar materials. AAB 21. DOE claims that because there are hundreds of other BSL-3 facilities in the United States, the likelihood of a terrorist attack at LLNL is small, and therefore no environmental analysis of the potential consequences of an intentional pathogen

release is necessary. AAB 20-21. This claim is illogical, unsupported in the record, and does not excuse the need for a locale-specific analysis in the NEPA review.

DOE's own record provides substantial evidence that the BSL-3 facility at LLNL is unlike other facilities around the country. Perhaps most obvious, the BSL-3 is located in a top secret nuclear weapons design lab. Being one of two nuclear weapons design facilities in the country, LLNL has a higher risk of a terrorist attack, even if the direct aim of the attack is not the BSL-3, which is why there is a substantial, albeit demonstrated to be inadequate, security force. 2ER8; 2ER18. The DOE cannot on the one hand determine that the threat of a terrorist act is so improbable that no study is needed under NEPA, but in other regulatory contexts acknowledge the significant threat of a terrorist act on the facility. As this Court recognized in *Mothers for Peace*, it is not credible for an agency to argue, in the context of refusing to prepare an EIS, that there is no reasonable means for evaluating the plausibility of an attack, while in other regulatory contexts it "insists on its preparedness" to meet the threat. 449 F.3d at 1031.

Further, the BSL-3 has "the unique capability within the DOE to perform aerosol studies" with potentially lethal biological agents and operates under the auspices of countering the "threat presented by terrorists and rogue nations to the American people." 2ER1:8, 11. The BSL-3 at LLNL is a part of the Department of Homeland Security. 2ER1:8.

While there may be hundreds of BSL-3 facilities around the country, there is only one BSL-3 currently operated by the DOE that is doing national defense experiments with dangerous, aerosolized select agents. 2ER1:30. The availability of pathogens engineered for aerosolization in bioterrorism experiments put this BSL-3 facility at a higher risk of terrorist attack. This unique charge compounded by the location of the LLNL BSL-3 facility so close to residential neighborhoods and a highly populated metropolitan region present an immediate risk to Livermore and the surrounding communities.

DOE also asserts that “the record makes clear that the BSL-3 facility will conduct biological research that is not substantially different from the research being conducted at hundreds of BSL-3 labs across the country.” As University of California at Davis microbiologist, Dr. Mark Wheelis, emphasized in his comments on the Draft Revised Environmental Assessment (“DREA”), DOE facilities “work on a wide range of possible biological warfare agents to prepare for possible biological attacks, rapid advances in genetics and genetic engineering practices...[and this work] will likely result in the production of novel biological agents to which we have no experience controlling.” 2ER1:136.

Indeed the ‘restricted experiment’ conducted at LLNL highlights the fact that just such research has been ongoing at LLNL. *See infra II.A.3.b.* Thus, in order to comply with this Court’s prior Order and NEPA, the DOE should have

focused its scope of environmental analysis on the Livermore-locale, including the workers at LLNL, as well as the residential community a half mile from the BSL-3 and the 6.9 million people living within the 50 mile-radius that is the affected environment. 2ER1:36, 50.

The DOE further asserts that determining the geographic scope of environmental impacts is at the agency's discretion (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976)). AAB 21-22. However, in *Kleppe* the Court granted agency discretion to determine the extent to which it should increase the geographic scope of analysis beyond the locale to include a broader region, assuming that the scope would always include the locale. *Id.* *Kleppe* did not grant agency's the discretion to disregard the locale of the BSL-3 in its NEPA analysis.

The DOE violated NEPA by overlooking the potential environmental consequences on the locale, this BSL-3 and surrounding community, and should have to supplement its findings with adequate analysis.

d. DOE Misapplies the Status Quo Concept Resulting in the Failure to Study the Impacts of the BSL-3 Lab at LLNL

DOE also argues that the avenues to obtain dangerous bio-agents or the “status quo” has not changed, as a result of the addition of the BSL-3, and therefore it is not necessary to complete a full environmental assessment of the potential theft and subsequent release by an outside terrorist. In order to reach this conclusion the DOE improperly interpreted the term “status quo” in *Burbank Anti-*

Noise Group v. Goldschmidt. 623 F.2d 115, 116 (9th Cir. 1980). The term “status quo” in *Burbank* refers to the “mere continued operation of a facility,” which the addition of the first-ever BSL-3 at LLNL (or any DOE facility) is clearly beyond. *Id.* citing *Westside Property Owners v. Schlesinger*, 597 F.2d 1214, 1217-18 (9th Cir. 1979). (In *Burbank*, there were no constructional additions to the property, only a change in how the facility was funded). Here, there is an entirely new facility that poses a unique terrorist target and potential consequences that differ from other LLNL facilities.

2. The FREA Failed to Consider Significant Factors in Determining the Need for an EIS

DOE weakly argues that TVC waived its claim that DOE was compelled by the CEQ’s significance factors to prepare an EIS, because it was not argued “specifically and distinctly”. AAB 46. DOE incongruently cites to *Greenwood v. FAA*, 28 F.3d 971 for support. In *Greenwood*, the opening and reply brief alluded to an indecipherable constitutional challenge unsupported and unclarified by any authority, buried among a plethora of unrelated claims. *Id.* at 977. In contrast, TVC’s argument that DOE failed to consider CEQ significant factors is specific and particularized.

TVC carefully lists the specific CEQ significance factors that the DOE failed to apply to its decision (“the degree to which the proposed action affects public health or safety,” “the degree to which the effects on the quality of the human

environment are likely to be highly controversial” and “the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.”) 40 CFR 1508.27(b), also 2ER1:103, 123-124, 129. Moreover, Appellants’ Opening Brief (“AOB”) is replete with examples of public health and safety concerns associated with DOE’s bio-warfare agent research that are highly controversial and involve unique, unknown and unanalyzed risks (anthrax mailing accidents, restricted experiments creating antibiotic resistant Plague, security assessment failures). AOB 32-59. TVC’s claim was not waived.

Additionally, DOE’s notion that the BSL-3 will not significantly impact public health or safety on “decades of safe operations of hundreds [Centers for Disease Control]-registered BSL-3 labs,” conveniently fails to account for the events of the recent past including “more than 100 accidents and missing shipments since 2003” at BSL-3 and BSL-4 laboratories in the U.S. 2ER3:3. Moreover, DOE ignores the anthrax mailings that were improperly packaged by an unauthorized individual inside LLNL’s own biosafety labs. These facts applied to the CEQ significance factors compel the preparation of an EIS.

3. DOE Failed To Sufficiently Inform the Public and Ensure Public Participation in the NEPA Process on Remand

One of the twin aims of the NEPA process is to ensure that the public is informed and has an adequate opportunity to participate in the agency’s decisionmaking process. *Mothers for Peace*, 449 F.3d at 1115. The DOE has

failed to satisfy this aim of NEPA by failing to disclose unclassified information regarding the 2005 anthrax-shipping incident, the 2005 restricted experiment violations involving antibiotic resistant Plague, and the failed security assessment reported by in 2008 by the DOE Office of Health, Safety and Security (“HSS”). 2ER8. These withholdings necessarily hindered the ability of TVC, officials, and members of the public to meaningfully comment on the relevant details and the information’s impact on the security, safety, transportation and general regulatory compliance purportedly assessed in the DREA, denying the public’s opportunity to participate in the decisionmaking process.

a. DOE’s Failure to Inform the Public of the Details of Its 2005 Anthrax Shipping Incident Violated NEPA

The DOE’s brief before this Court echoes its earlier briefing in the district court by again attempting to characterize the 2005 anthrax shipping incident as insignificant and not deserving of public disclosure during the NEPA process. Specifically, DOE claims that details of the incident “did not alter the agency’s assessment of the potential impacts of the proposed facility, and that additional detail to the discussion of the incident would not have added signification [sic] information regarding potential environmental impacts relating to the operation of the BSL-3 lab.” AAB 39. This continual effort to palliate this incident is improperly dismissive and erroneous.

The very serious dangers posed by this incident, which could have been worse, are clearly documented in the record and in the AOB.² 2ER12 (LLNL's *Incident Analysis Report* which details the incident chronologically and lists numerous security concerns); 2ER16 (Department of Health and Human Services ("DHHS") Centers for Disease Control ("CDC") Office of Inspector General ("OIG") letter notifying LLNL of the six resulting violations of *Department of Transportation ("DOT") Hazardous Material Regulations*); AOB 22-25 and 48-55.

Yet, DOE's incomplete description of this incident both to the district court and in its answering brief to this Court claims that the incident is so minor that its details were not relevant to public participation in a NEPA document specifically tasked with examining the threats and risks of a terrorist attack on the same activities responsible for the incident. AAB 34-36. Despite the fact that the incident resulted in serious violations of basic security, select agent handling, select agent shipping, personnel and oversight regulations of LLNL, DOE, DOT, and the CDC, the DOE suggests that this Court should agree that the details were not relevant to the public because, in follow up inspections (the details of which

² Five receiving laboratory workers were exposed to live, virulent anthrax strains which spilled inside an improperly packaged, unlabelled, non-certified container mailed across the country via Federal Express that conceivably could have exposed additional individuals along the way or upon opening. 2ER12.

were also left out of the DREA and FREA), LLNL has purportedly shown improved compliance with regulations. AAB 36-37.

This is a non-starter. The details of this incident expose significant weaknesses in LLNL's protocols at the time of the incident that go to the heart of the terrorism risks associated with the operation of the BSL-3 facility, which again, were the crux of the inquiry that this Court asked Appellees to complete, with the opportunity for public comment, on remand.

Appellees support their claim that the incident was minor, and the details were irrelevant, by focusing solely on the outcomes of the incident, i.e. that nobody took ill or died, rather than on the public's right and need to know in order to make informed decisions and to have meaningful input into government affairs, as ensured by NEPA.

NEPA procedures require that environmental information is available to public officials and citizens before decisions are made and before actions are taken.³ 40 C.F.R. §1500.1(b). The information that is made available must be of

³ DOE mischaracterized TVC's claim that because the FREA was not made available to public officials and the public before the BSL-3 facility became operational, NEPA was violated. AAB 39. TVC entitled this argument in section VIII.C. "***DOE Failed To Sufficiently Inform the Public and Ensure Public Participation***" as a fact to explain why including additional details of the Anthrax incident in the FREA was relevant to public disclosure. There was no opportunity for the public to comment on the FREA, which violates NEPA. This is not a self-contained "passing reference" to a NEPA violation; it is an additional fact supporting a fully developed, multi-page allegation that NEPA was violated by

high quality. *Id.* Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. *Id.*

TVC's ability to comment on the significance of the issues was necessarily hamstrung by DOE's withholding of critical and relevant information pertaining to the incident. While TVC *did* raise the issue of the violation of select agent transfer regulations in its comments to the DREA, the comments were not able to be fully informed. 2ER3.

Presumably in response to TVC's comments, DOE provided more information on the release in the FREA after the opportunity for public review and comment had closed. 2ER1:59-60, 104. But, even the FREA withheld important details regarding the incident that were later made public. *Compare* 2ER6; 2ER16; 2ER12 *with* 2ER1:59-60. For instance, DOE failed to describe LLNL's numerous regulatory violations, including those involving the laboratory's security plan, Biosafety plan, incident response plan, safety and biosecurity training, and recordkeeping, among others. *Compare* 2ER6:1-4 *with* 2ER1:59-60; *See also* 40 C.F.R. §1500.1(b).

failure to disclose relevant facts in time for public participation. The fact also served to inform the Court that the correct inquiry was not whether the FREA contained "enough facts" about the incident, but rather whether the DREA contained sufficient information regarding the incident, as it was the document relied upon by the public and decision makers to make comments. AOB 59.

Further, because DOE chose to simultaneously issue the FREA, RFONSI and commence full BSL-3 operations on the same day, there was no opportunity for public comment on the contents of the FREA prior to the final agency decision.

The DOE's omission of details concerning the obviously relevant and alarming incident hobbled TVC's, decision makers' and the general public's ability to comment on the incident's relevance to safety, terrorism, transportation and security, subjects that were the focus of the remand. *Id.*

b. DOE's Failure to Inform the Public and Analyze the 2005 "Restricted Experiment" Incident Violated NEPA

DOE's failure to analyze the 2005 "restricted experiment" in the 2008 FREA was arbitrary and capricious and failed to inform the public of the potential consequences of the proposed action, as required by NEPA. DOE alleges that this claim has not been properly raised on appeal and should not be considered by this Court. AAB 40. This allegation holds no merit.

TVC has met the standards for appeal on this claim under *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). Liberal pleading standards in this jurisdiction solely require, "[a] short plain statement of the claim showing that the pleader is entitled to relief" and "that the claim give the defendant fair notice of the plaintiff's claim and upon which grounds it rests." *Kimes v. Stone*, 84 F.3d 1121, 1129 (9th Cir. 1996). TVC's complaint meets the liberal pleading standards unequivocally in *Count 4: Failure to Supplement*:

In violation of applicable federal regulations implementing NEPA, defendants failed to prepare a supplement to the FREA in response to significant new circumstances and information relevant to the environmental impacts of the BSL-3 facility. 1ER19:20.

It was only after a Freedom of Information Act (“FOIA”) request by TVC, filed in May 2007 and responded to in 2009, that the restricted experiment came to light. 1ER15:6. Following this discovery, TVC immediately put the DOE on notice of its intention to augment the Administrative Record with the relevant documents.⁴ Shortly thereafter, TVC included allegations relating to the restricted experiment in its Motion for Summary Judgment. Both provided the DOE with full notice of the incident and opportunity to respond. 1ER14:7.

The Court should consider TVC’s restricted experiment claim and in doing so, determine that DOE’s failure to provide any information about the incident in its DREA or FREA was arbitrary or capricious.

DOE claims that the “restricted experiment” incident provided no information that would materially alter the finding of no significant impact if it had been considered and that its determination to exclude the incident did not deprive the public of information or participation, because the violation “reflects nothing

⁴ TVC negotiated with DOE to augment the Administrative Record with the documents received from the FOIA request regarding the restricted experiment. 2ER5; 2ER6; 2ER7. DOE complied and filed a *Notice of Lodging of Supplement to the Administrative Record* in the district court on July 24, 2009. By approaching DOE to augment the record and their further compliance, TVC had adequately put the DOE on notice of its allegations. 1ER2:10 (*California Northern District Court, Civil Docket for Case #4:08-cv-01372-SBA, Docket #68, Exhibit 1, Parts 1, 4*).

more than a reasoned scientific disagreement between the CDC and LLNL's Institutional Biosafety Committee" ("IBC"). AAB 40-42. However a thorough examination of the facts and the case law implementing NEPA demonstrate otherwise.

The DHHS's CDC had explicit regulations that restricted BSL-3s from experimenting with strains of *Yersinia pestis* (Plague) that are resistant to the antibiotic Chloramphenicol "without first getting approval by and conduct[ing] in accordance with any conditions prescribed by the [D]HHS Secretary." 2ER6:4. Certain experiments are restricted in BSL-3s if they are "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). This restriction exists to protect public health from the risk of drug resistant disease outbreak. The DHHS is the US government's regulating body for ensuring compliance with Select Agent regulations, and LLNL's IBC must review and approve all experiments with select agents and toxins prior to the commencement of work to implement and ensure compliance with the Select Agent regulations. This is an instance in which, for whatever reason, the LLNL IBC failed to do so, not an instance in which there was a "reasoned scientific disagreement."

The details of the restricted experiment violation, which occurred at LLNL's biolabs, were highly relevant to DOE's capacity to implement the security protocols and comply with safety and security regulations upon which DOE's FREA and RFONSI are based. These are the very subjects that were at the core of the inquiry ordered by this Court in its prior order. 2ER6; 2ER16; 2ER2:26. In determining whether an EIS fosters informed decision-making and public participation, a reviewing court must determine if its "form, content and preparation foster[ed] both informed decision-making and informed public participation." *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982). Here, due to this lack of disclosure, the public was arbitrarily and capriciously denied a reasonable opportunity to have meaningful input in the decision-making process prior to issuance of the FREA and RFONSI, thereby violating NEPA.

B. DOE Violated NEPA by Failing to Supplement the FREA with New Information About a Failed Security Assessment

The DOE failed to include, disclose and analyze numerous relevant pieces of new information that came to light during and after the NEPA process. Each failure constituted a violation of NEPA. NEPA imposes a duty to supplement NEPA analyses in response to "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. §1502.9(c)(1)(ii).

Primarily, the requirement for supplementation of the FREA was triggered with the release of the HSS inspection and report evaluating LLNL in the areas of: personnel security, physical security systems, material control and accountability, protective force and protection program management. 2ER17:5. Serious weaknesses and deficiencies in LLNL's protective force, physical security systems and protection program management were detailed in the report. 2ER17:75-6. This report had a significant and direct bearing on the FREA's account of the safety and security of the BSL-3 in the event of a terrorist attack. It constitutes "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. §1502.9(c)(1)(ii).⁵

Had the DOE properly supplemented the FREA at that time, it would have also had an opportunity to comply with NEPA by including the previously omitted of the LLNL anthrax release and the 2005 "restricted experiments."

⁵ The DOE mischaracterizes a four page internally circulated memorandum prepared by a document manager in 2008 as a "supplemental report to determine whether the Security Assessment constituted significant new information requiring supplementation." AAB 44-46. This internal memorandum, which was added to the record in this case in 2009, simply reflects their decision not to supplement the EA with the findings from the HSS Security Assessment with very little actual analysis. Supplemental Excerpts of Record ("SER") 85-88. This internal memorandum even mentions that portions of the FREA (where it claims that LLNL security programs have been found to be effective) are rendered "misleading given the results of the more recent [HSS] review, which identified critical issues with the protective force." SER 87.

C. The Facts of this Case Distinguish It from the Court’s Recent Decision in *Mother’s For Peace*

This Court decided in *Mothers for Peace*, that analysis of the potential environmental consequences of a terrorist attack on a facility is required by NEPA. 449 F.3d at 1034 (*hereinafter* “*Mothers for Peace I*”). More recently, this Court decided in a follow up decision that the NRC had sufficiently complied with the Court’s earlier order by completing a terrorism specific analysis and that it was not obligated to share the results of that classified analysis, in a closed hearing or otherwise, under NEPA. *San Luis Obispo Mothers for Peace v. NRC*, 635 F.3d 1109 (9th Cir. 2011) (*Hereinafter* “*Mothers for Peace II*”). While the *Mothers for Peace I* decision was applied to TVC’s first lawsuit against the DOE by the Court on appeal in 2006, the *Mothers for Peace II* decision should not be applied in this case because of significant factual differences.

Mother’s for Peace II involved a challenge of a denial to a “closed hearing” with the NRC to review classified documents regarding security studies on the interim spent fuel storage installation. This Court upheld the NRC’s decision to not disclose the properly classified information.

The facts before the Court in this case are quite different. Here, DOE withheld significant, unclassified and relevant information from the public that directly related to the environmental impacts of a terrorist attack. When the DOE neglected to inform the public of the anthrax and “restricted experiment” incidents,

which were unclassified, it denied the public the opportunity to influence the agency's decisionmaking process.

Mother's for Peace II was rightly supported by *Weinberger v. Catholic Action of Hawaii*, 45 U.S. 139 (1981), as the classified nature of the documents in question was paramount in determining the public's right to view them in the NEPA process. However, the case at bar involves unclassified documents that were withheld from the public. The supporting case law in the *Mother's for Peace II* decision does not apply here.

Additionally, in *Mother's for Peace II*, NRC certified that it employed a terrorism-specific methodology in classified reports that included analyses of specific terrorist acts on its installation, dispersals of radiation from those scenarios, and impacts analyses on the community from those scenarios, as the NRC believed was required by the ruling in *Mothers for Peace I*. 635 F.3d 1109.

In contrast, DOE did not employ any terrorism-specific methodology in its environmental analysis, maintaining that the previously relied upon "bounding" centrifuge accident scenario could serve as an analytical proxy for a terrorist attack. 2ER19.

Traditionally, the courts have given deference to the agency to determine the methodology appropriate for NEPA analysis. *NRDC v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972). However, in distinguishing this case from *Mother's for Peace II*,

it is clear that the DOE did not adopt **any** terrorism-specific methodology for adequately analyzing the potential environmental impacts of a terrorist attack.

2ER19. As such, DOE has not taken the requisite “hard look” at the environmental consequences of a terrorist attack on the BSL-3.

In *Mother’s for Peace II*, NRC reviewed plausible threats such as ground assaults and aircraft impacts, in addition to including plaintiff’s range of alternate terrorist attack scenarios. 635 F.3d at 1109. NRC concluded that security of the facility was adequate to minimize the environmental impacts of a terrorist attack. This Court found that the NRC properly declines to disclose classified documents describing the specific methodology used to reach this conclusion. Notably, NRC employed a methodology specific to analyzing a terrorist attack, and the Court deferred to the expertise of the agency. *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 993 (9th Cir. 2004).

It is clear that the facts of this case distinguish it from *Mother’s for Peace II*, particularly the unclassified nature of the documents withheld from the public and the nonexistence of terrorism specific analysis. The strong factual distinctions between the two cases should lead the Court to a different conclusion.

D. The District Court Should Have Granted Tri-Valley CAREs' Motion for Leave to Augment the Record, in Exception of the Record Rule and the Violation of Civil Local Rule 7-11(a).

A report entitled, *Evaluation of the Health and Safety Risks of the New USAMRIID High Containment Facilities at Fort Detrick, Maryland*, (Washington: National Academies press, 2010) (*Hereinafter* "NAS Report") has significant bearing on whether the DOE considered all relevant factors and explained its decision pursuant to NEPA. 1ER7.

Generally, judicial review of an agency decision under the APA is limited to the materials contained within the Administrative Record. This Court has recognized exceptions that provide for extra-record evidence to be used in review of the agency's decisions, which include, "to determine whether the agency has considered all the relevant factors and has explained its decision." *Southwest Ctr. for Biological Diversity v. United States Forest Svc.*, 100 F.3d 1443, 1450 (9th Cir. 1996). Also, the Court may extend its review beyond the administrative record in order to explain the agency's decisions. See *Animal Defense Council v. Hodel*, 840 F.3d 1432, 1436 (9th Cir. 1988) and *Public Power Council v. Johnson*, 674 F.2d 791, 793 (9th Cir. 1982).

It is clear after reviewing the NAS Report that the DOE did not consider a number of relevant factors included in the NAS Report in its decision-making process. For instance, the NAS Report found that the catch-all scenario used, the

centrifuge accident, was inadequate as a full NEPA analysis of the possible environmental consequences of an intentional attack or other accidents and mishaps because it fails to provide any reasonably foreseeable scenarios that would be comparable to a terrorist attack, in addition to clear failures in the scientific methodology, as the findings could not be reproduced. There was also a failure to analyze the potential consequences an attack would have on the lab community (workers), as well as the risks associated with the release of arthropods, which will be used in experiments at the BSL-3. 1ER7:4.

The DOE asserts that the NAS Report does not “illuminate any deficiency in the [F]REA,” however it acknowledges the NAS criticism of the Army’s inability to provide adequate transparency for a reproduction of the findings. AAB 52. DOE used this same centrifuge scenario that has been discredited by the NAS and claimed it to be an adequate environmental analysis of a terrorist attack on the BSL-3. 2ER1:61-69. This extra-record evidence provides valuable insight as to whether the DOE considered all the relevant factors in its decision to not prepare a full EIS. As such, the district court should have allowed this study to be considered as extra-record evidence in its review of DOE’s environmental analysis.

While TVC technically violated Civil Local Rule 7-11(a) by not including the declaration of why a stipulation could not be obtained to augment the record with the NAS Report in the district court, in this particular instance the Court of

Appeals should overlook this minor procedural error and take the substance of the document into consideration because of its direct relevance and important content.

E. The Wide Scope of Possible Relief Requested by Tri-Valley CAREs is Appropriate and Within this Court's Jurisdiction

DOE strongly implies that it would be improper for the Court to act in any manner other than to remand the analysis to the DOE, "[w]hether that analysis takes the form of an EIS or a supplemental EA is a choice that should be left to the agency." AAB 54. However, DOE fails to mention that the Court can and should order an EIS if it finds evidence in the record of a significant impact. "[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, 1179 (9th Cir. 2008). Courts have "broad latitude in fashioning equitable relief when necessary to remedy an established wrong." *NRDC v. Southwest Marine, Inc.*, 236 F.3d 985, 999 (9th Cir. 2000).

The record includes sufficient evidence to support the Court's finding of a significant environmental impact. Indeed, LLNL's biosafety labs have already caused a significant environmental impact by improperly shipping anthrax and potentially exposing multiple individuals at the receiving end. LLNL's security

breaches also provide evidence of potentially significant environmental impacts. Finally, the FREA's cursory terrorism discussion acknowledges that a catastrophic release could harm workers and the public, although the FREA dismisses this without further analysis. 2ER1:67.

DOE asserts that injunctive relief is improper in this case because it is "an extraordinary remedy" and that plaintiffs must demonstrate "irreparable harm". The failure to evaluate a significant impact is sufficient to show irreparable harm. "In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). While an injunction does not automatically issue upon a finding that an agency violated NEPA, "the presence of strong NEPA claims gives rise to more liberal standards for granting an injunction." *American Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 965 (9th Cir. 1983). If environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment. *High Sierra Hikers Ass'n v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004). If this Court finds that there is a potentially significant impact that should be studied in an EIS, an injunction requiring the preparation of an EIS is an appropriate remedy.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court granting summary judgment in favor of DOE and denying TVC's motion to augment the Administrative Record should be reversed.

Respectfully submitted,

/s/

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Dated: June 24, 2011

CERTIFICATE OF COMPLIANCE REGARDING WORD COUNT

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), undersigned counsel for Petitioner hereby certifies that the number of words in Appellants' Reply Brief of June 24, 2011, excluding the Table of Contents, Table of Authorities, as counted by the Microsoft Word program, is 6934 words.

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Dated: June 24, 2011

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRI-VALLEY CARES, MARYLIA KELLEY)	
and JANIS KATE TURNER,)	
Petitioners)	
)	
v.)	No. 10-17636
)	
UNITED STATES DEPARTMENT OF)	
ENERGY, NATIONAL NUCLEAR SECURITY)	
ADMINISTRATION and LAWRENCE)	
LIVERMORE NATIONAL LABORATORY,)	
Respondents)	

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2011, electronic copies of the foregoing Appellants' Opening Brief were filed with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by appellate CM/ECF system.

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