

1 PLEASE TAKE NOTICE that Plaintiffs will move this Court for an Order
2 allowing them to augment the Defendants', United States Department of Energy ("DOE"),
3 National Nuclear Security Administration ("NNSA"), and Lawrence Livermore National
4 Laboratory ("Livermore Lab" or "LLNL") (collectively, "Defendants"), administrative record in
5 the above captioned action. This motion will be heard by the Honorable Sandra B. Armstrong.

6 The grounds for this motion stem from a recently released report from the National
7 Academy of Sciences, entitled *Evaluation of the Health and Safety Risks of the New USAMRIID*
8 *High Containment Facilities at Fort Detrick, Maryland*, which shows that Defendants failed to
9 consider all relevant factors or adequately explain their decision. The National Academy of
10 Sciences report is critical to the Court's resolution of Plaintiffs' claims for relief as it has
11 significant bearing on the claim that Defendants violated the National Environmental Policy Act
12 ("NEPA"), 42 U.S.C. § 4321 *et seq.* (1975), and applicable regulations implementing NEPA by
13 analyzing environmental impacts using an inadequate accident scenario in the Final Revised
14 Environmental Assessment ("FREA") for the proposed Biosafety Level 3 ("BSL-3") facility at
15 LLNL. The grounds for this motion are further explicated below.

16 This motion is based on this notice and the accompanying memorandum.

17 A proposed Order is lodged concurrently with this motion.

18 Dated this 11th day of May, 2010.

19 Respectfully submitted,
20 /S/

SCOTT J. YUNDT (CSB #242595)
TRI-VALLEY CARES
2582 Old First Street
Livermore, California 94551
Telephone: (925) 443-7148
Facsimile: (925) 443-0177
Email: scott@trivalleycares.org

25 /S/

26 STEVEN SUGARMAN (*Pro Hac*
27 *Vice*) (approved telephonically)
1210 Luisa Street- Suite 2
Santa Fe, New Mexico 87505
Telephone: (505) 672-5082
28 Email: stevensugarman@hotmail.com

1 all the relevant factors or fully explicated its course of conduct or grounds of decision.” *Id.*
2 *Accord, Public Power Co. v. Johnson*, 674 F.2d 791, 793 (9th Cir. 1982) (“The broadest
3 exception to the general rule that review is to be restricted to the record certified by the agency is
4 one which permits expansion of the record when necessary to explain agency action”;
5 *Kunaknana v. Clark*, 742 F.2d 1145, 1149 (9th Cir. 1984) (same, quoting from *Asarco, supra*);
6 *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) (judicial review may be
7 extended beyond the agency’s record if necessary to explain the agency’s decisions). Other
8 circuits are in agreement. *See, e.g., County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368,
9 1384-85 (“allegations that an EIS has neglected to mention a serious environmental
10 consequence, failed adequately to discuss some reasonable alternative, or otherwise swept
11 stubborn problems ‘under the rug’ ...raise issues sufficiently important to permit the introduction
12 of new evidence in the district court, including expert testimony with regard to technical
13 matters.”)

14 In making a determination whether the Defendants considered all relevant factors, this
15 Court is not limited to considering extra-record information submitted by the defendant agencies.
16 It is settled law that in making this determination, this Court may consider extra-record
17 information submitted by plaintiffs. *National Audubon Society v. U.S. Forest Service*, 46 F.3d
18 1437, 1447-48 (9th Cir. 1993) (holding that the district court’s use of an affidavit submitted by
19 plaintiff’s expert who reviewed the administrative record and conducted his own field review of
20 the timber sales in question, was proper under *Public Power Company v. Johnson, supra* and
21 *County of Suffolk, supra*); *County of Suffolk, supra*, 562 F.2d at 1385-86 (holding that the
22 “district court properly admitted the testimony of [plaintiff’s expert] and the data on which it was
23 based”); *Greenpeace U.S.A. v. Evans*, 688 F.Supp. 579, 584-85 (W.D. Wash. 1987) (same).

24 **III. The National Academy of Science’s Recent Report Entitled ‘Evaluation of the**
25 **Health and Safety Risks of the New USAMRIID High Containment Facilities at**
26 **Fort Detrick, Maryland’ has Significant Bearing on Whether the Defendants in**
27 **this Case Considered All Relevant Factors and Explained their Decision.**

28 The FREA based its analysis of the threat of a terrorist act on a single ‘Laboratory
Release Accident Scenario’ as a catch-all scenario for any type of attack or accident that could

1 occur at the facility. While the Ninth Circuit ordered the Defendants to do a more thorough
2 analysis of the terrorist threat posed by the facility in a revision of the EA, the Defendant chose
3 to stick with this same catch-all scenario as the basis for its additional analysis as it did in its
4 original document.

5 In its justification for using this same catch all “bounding biological accident-release
6 scenario” Defendants assert that, “[t]his scenario is also very similar to the BSL-3 accident
7 analyzed in the recently published Final Environmental impact Statement for the Construction
8 and Operation of the new USAMRID Facilities at Fort Detrick, MD (USAMRMC 2006).”
9 (Administrative Record (“AR”) #80 at 51). This assertion is correct. The “bounding biological
10 accident-release scenarios” in the two NEPA documents are almost exactly the same. Both of
11 these “maximum credible event analyses,” which are required by NEPA, involved simulation of
12 biological aerosol releases of *Coxiella burnetii* (which requires BSL-3 containment) into the
13 surrounding environment from an exhaust stack after vials in a centrifuge leaked and air filters
14 failed to filter the pathogens. Both documents conclude that ground concentrations would be
15 insignificant and would not pose a hazard to the nearby community. The FREA in this case used
16 this finding to support its Finding Of No Significant Impact.

17 The National Academy of Sciences evaluated the USAMRID EIS “maximum credible
18 event analyses” and found the following problems (each and every one of which also apply to the
19 LLNL BSL-3 EIS “maximum credible event analyses”);

20 [T]he committee was unable to verify th[e] prediction [that the ground
21 concentrations would be insignificant and would not pose a health hazard
22 to the community], because the modeling performed in support of the
23 scenarios was not transparent, could not be reproduced, and was
24 incomplete. Specifically, the data and parameterizations used in the
25 computerized simulation scenarios were not provided in the EIS and the
26 model software (Hazard Prediction and Assessment Capability model) is a
27 closed-source system not available for independent review. The
28 committee attempted to verify the calculations using common alternative
models. The committee’s calculations indicated the potential for
significantly higher doses of infectious agents following puff releases than
was described in the EIS.

Other problems with the maximum credible event (MCE) scenarios
were the use of inappropriate scenarios and inadequate enumeration and
characterization of risks. EIS guidance specifies that hazard scenarios

1 should be “reasonably foreseeable,” but the ones used in the USAMRIID
2 EIS required multiple failures, such as human errors (e.g., failure to use
3 O-rings to seal the centrifuge tubes) and safety failures (e.g., inoperable
4 high-efficiency particulate air [HEPA] filter). Results appear to present
5 only peak concentrations, rather than total infectious agent dose, which is
6 the most appropriate measure of per-person risk. The EIS contained no
7 documentation of an individual’s risk of infection under the prescribed
8 conditions or any description of the effect of population density and
9 population size on the number of cases expected for any of the pathogens
10 of interest. Furthermore, the scenarios only considered exposures beyond
11 the Fort Detrick fence line, with no consideration of exposure to
12 USAMRIID workers or other people on the base. Despite the committee’s
13 estimation that an exceptionally large aerosol release might pose a human
14 health risk, there are no reasonably foreseeable scenarios where such a
15 release could occur.

16 The EIS does not provide a systematic characterization of exposure
17 risks and consequences associated with the scenarios. Nor does it
18 document the effects of mitigation measures on scenarios or how risks
19 would vary under alternative actions. For example, a systematic review
20 would have identified arthropod escape as an exposure scenario, in
21 addition to those characterized in the EIS of escape of an infected animal,
22 mishaps during biological material shipments, terrorist acts, external acts
23 (such as natural disaster or mechanical failures), spread by an infected
24 worker, and cumulative impacts. Several biological agents likely to be
25 studied at the new USAMRIID facility are transmitted by arthropod
26 vectors (such as fleas, mosquitoes, and ticks), and the vectors may be used
27 in the course of research. Consideration of such a scenario in the EIS
28 would have shown that there are significant ecological barriers that make
associated relative risks small. Another scenario that was not considered
was the threat of an insider with malicious intent. Although such a
situation is difficult to predict or quantify, it is clearly of concern to the
citizens of Frederick County.

The EIS does not provide scenarios describing potential exposure risks
involving pathogens to USAMRIID laboratory personnel, but does cite a
brief history of cases of laboratory-acquired infections occurring between
1989 and 2002. Review of these cases illustrates both means of
transmission and procedures in place to address identification and
treatment of affected laboratory workers. Common risks to workers are
needle- or sharps-stick accidents, inadvertent aerosol generation that leads
to inhalation or ocular/mucosal exposure, and contact with infected
laboratory animals.

National Research Council of the National Academies, *Evaluation of the Health and Safety Risks
of the New USAMRIID High Containment Facilities at Fort Detrick, Maryland*, Washington:
National Academies Press, 2010. (Attached as Attachment B)

1 Not only does the report find that the catch-all centrifuge accident was not reasonable,
2 they found that the EIS was deficient for not including other reasonable scenarios, including:
3 escape of an infected animal, mishaps during biological material shipments, threat of an insider
4 with malicious intent, external acts (such as natural disaster or mechanical failures), spread by an
5 infected worker, and cumulative impacts. All of these were similarly relevant factors that were
6 not analyzed in the Livermore Lab BSL-3 FREA.

7 This report exposes the fact that Defendants' analyses and conclusions in the FREA in
8 this case relied on an inadequate EIS. The report further demonstrates that the Defendants failed
9 to adequately consider all relevant factors in the FREA and that their decision not to consider
10 additional factors was defective.

11 **IV. Conclusion**

12 For the reasons stated herein, this Court should allow Plaintiffs to augment the
13 administrative record for this case with The National Academy of Science's recent report,
14 *Evaluation of the Health and Safety Risks of the New USAMRIID High Containment Facilities at*
15 *Fort Detrick, Maryland* as AR-166. Additionally this Court should take this new document into
16 consideration when issuing a decision in this case.

17
18 Dated: May 11, 2010

19
20 By: /s/ _____
21 SCOTT J. YUNDT

22
23
24 By: /s/ _____
25 STEVEN SUGARMAN

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

