

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

5 STEVEN SUGARMAN (*Pro Hac Vice*)
6 1210 Luisa Street – Suite 2
Santa Fe, New Mexico 87505
7 Telephone: (505) 672-5082
8 Email: stevensugarman@hotmail.com

9 Attorneys for Plaintiffs
10 TRI-VALLEY CARES, MARYLIA KELLEY,
and JANIS KATE TURNER

11
12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
14 OAKLAND DIVISION

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

17 Plaintiffs,

18 vs.

19 UNITED STATES DEPARTMENT OF
20 ENERGY, NATIONAL NUCLEAR
21 SECURITY ADMINISTRATION, and
LAWRENCE LIVERMORE NATIONAL
22 LABORATORY,

23 Defendants.

) Case No.: 08-cv-1372-SBA

) **REPLY MEMORANDUM IN SUPPORT**
) **OF PLAINTIFFS' MOTION FOR**
) **SUMMARY JUDGMENT AND IN**
) **OPPOSITION TO DEFENDANTS'**
) **MOTION FOR SUMMARY JUDGMENT**

) Judge: Hon. Sandra Brown Armstrong

) Date: December 8, 2009

) Time: 1:00 p.m.

) Place: Courtroom 1, 4th Floor

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION1

II. ARGUMENT.....1

A. DOE’S FINAL REVISED ENVIRONMENTAL ASSESSMENT FAILED TO ADEQUATELY ANALYSE THE TERRORIST THREAT ON REMAND.....1

 1. Defendants’ Analysis Of Direct Terrorist Attacks Resulting In Loss Of Containment Is Inadequate.....2

 2. Defendants’ Analysis Of The Theft And Subsequent Release Of Pathogenic Material By A Terrorist From Outside LLNL Is Inadequate.....3

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

 4. Defendants Failed To Analyze Other Credible Terrorist Threats or Release Scenarios Resulting From a Terrorist Attack.....4

B. DOE VIOLATED NEPA BY WITHHOLDING INFORMATION FROM PUBLIC OFFICIALS AND THE PUBLIC AND BY FAILING TO SUPPLEMENT THE FREA.....5

 1. The Restricted Experiments.....5

 a. Plaintiffs’ Allegations Relate to Counts in the Amended Complaint.....6

 b. The Declaration of Eric Gard Is Inadmissible.....6

 c. LLNL’s Illegal Restricted Experiments Are Relevant to the NEPA Process.....7

 2. The 2005 Anthrax Shipping Incident.....8

C. DOE IA REQUIRED TO SUPPLEMENT THE FREA10

D. AN EIS IS REQUIRED FOR THE BSL-3 FACILITY.....10

E. DOE WAS REQUIRED TO CIRCULATE THE FONSI FOR PUBLIC.....10

F. DECLARATORY AND INJUNCTIVE RELIEF IS APPROPRIATE11

1 **TABLE OF CASES**

2 **FEDERAL CASES**

3 *Arizona Cattle Growers' Ass'n v. United States Fish & Wildlife Serv.*
4 273 F.3d 1229 (9th Cir. 2001).....7

5 *Bering Strait Citizens for Responsible Res. Dev. v. United States Army Corps of Eng'rs*
6 524 F.3d 938 (9th Cir. 2008).....11

7 *Bowen v. Georgetown Univ. Hospital*
8 488 U.S. 204 (1988).....7

9 *California v. Block*
10 690 F.2d 753 (9th Cir. Cal. 1982).....9

11 *Camp v. Pitts*
12 411 U.S. 138 (1973).....7

13 *Cantrell v. City of Long Beach*
14 241 F.3d 674 (9th Cir. 2001).....12

15 *Ciprofloxacin Hydrochloride Antitrust Litig. v. Bayer Ag*
16 2008 U.S. App. LEXIS 27711 (Fed. Cir. Dec. 23, 2008).....10

17
18 *Citizens for Better Forestry v. United States Dep't of Agric.*
19 341 F.3d 961 (9th Cir. 2003).....11, 12

20 *Citizens to Preserve Overton Park, Inc. v. Volpe*
21 401 U.S. 402 (1971).....10

22 *Erickson v. Pardus*
23 127 S. Ct. 2197 (2007).....6

24 *First Health Group Corp. v. Nat'l Prescription Adm'rs, Inc.*
25 155 F. Supp. 2d 194 (M.D. Pa. 2001).....6

26 *Friends of the Clearwater v. Dombeck*
27 222 F.3d 552 (9th Cir. 2000).....7

28

1	<i>Great Basin Mine Watch v. Hankins</i>	
2	456 F.3d 955 (9th Cir. 2006).....	2
3	<i>Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit</i>	
4	507 U.S. 163 (1993).....	6
5	<i>Ocean Advocates v. U.S. Army Corps of Eng’rs</i>	
6	402 F.3d 846 (9th Cir. 2005).....	4, 12
7	<i>Or. Natural Res. Council v. United States BLM</i>	
8	470 F. 3d 818 (9th Cir. Or. 2006).....	3
9	<i>Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA</i>	
10	499 F.3d 1108 (9th Cir. 2007).....	7
11	<i>San Luis Obispo Mothers for Peace v. NRC</i>	
12	449 F.3d 1016 (9 th Cir. 2006).....	1
13	<i>Sierra Club v. Bosworth</i>	
14	465 F. Supp. 2d 931 (N.D. Cal. 2006).....	10
15	<i>Southwest Ctr. For Biological Diversity v. US Forest Service</i>	
16	100 F.3d 1443 (9th Cir. 1996).....	7
17	<i>Swierkiewicz v. Sorema N.A.</i>	
18	534 US 506 (2002).....	6
19	<i>Tri-Valley CAREs v. Dept. of Energy</i>	
20	No. 03-3926, Dkt. No. 1 (N.D. Cal. 2003).....	1
21	<i>Tri-Valley CAREs v. Dept. of Energy</i>	
22	203 Fed. Appx. 105 (9th Cir. 2006).....	1, 3
23	<u>FEDERAL STATUTES</u>	
24	Fed. Rules of Civ. Pro.	
25	§ 8(a).....	6
26	U.S. Code Title 42	
27	§ 4321 <i>et. seq.</i>	5
28		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

REGULATIONS

Code of Federal Regulations, Title 40

§ 1500.1(b).....5, 9
§ 1502.9(c)(1)(ii).....10
§ 1508.27(a).....3
§ 1509.2.....3, 12

Code of Federal Regulations, Title 42

§ 73.13(a).....8
§ 73.13(b)(1).....6, 8

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION

Concerning the DOE’s conclusion that consideration of the effects of a terrorist attack is not required in its Environmental Assessment, we recently held to the contrary in San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission , 449 F3d 1016 (9th Cir. 2006). In Mothers for Peace, we held that an Environmental Assessment that does not consider the possibility of a terrorist attack is inadequate. Id. at 1035. Similarly here, we remand for the DOE to consider whether the threat of terrorist activity necessitates the preparation of an Environmental Impact Statement.

Tri-Valley CAREs v. Dept. of Energy, 2004 U.S. Dist. LEXIS 18777 (N.D. Cal. 2004), *aff’d in part and rev’d in part*, 203 Fed. Appx. 105, 107 (9th Cir. 2006). This case involves a fundamental breach of the National Environmental Policy Act (“NEPA”) by the United States Department of Energy, National Nuclear Security Administration and Lawrence Livermore National Laboratory (“LLNL”) (collectively “DOE,” or, “Defendants”). The ruling in Plaintiffs’ earlier challenge to the adequacy of the DOE’s first Environmental Assessment (“EA”) for the LLNL BSL-3 facility found that the EA was inadequate and remanded for the DOE to analyze the threat of a terrorist attack. DOE failed to remedy the violations. Thus, Plaintiffs’ motion for summary judgment should be granted.

II. ARGUMENT

A. DOE’S FINAL REVISED ENVIRONMENTAL ASSESSMENT FAILED TO ADEQUATELY ANALYSE THE TERRORIST THREAT ON REMAND

As a result of prior litigation initiated by Plaintiffs, the United States Court of Appeals for the Ninth Circuit issued a two part ruling, holding that 1) the DOE erred when it concluded that consideration of the **effects** of a terrorist attack is not required in its EA, and 2) the DOE must “consider whether the threat of terrorist activity [at the LLNL BSL-3 facility] necessitates the preparation of an Environmental Impact Statement.” *Tri-Valley CAREs*, 203 Fed. Appx. at 107. The Court cited to its recent decision in *Mothers for Peace* because that case is directly analogous to the situation at hand and provided an in depth analysis of the Court’s reasoning and expectations of how an agency can satisfy the required terrorist threat analysis. 449 F.3d 1028-35.

However, Defendants failed to take a “hard look” at the environmental impacts that may result from terrorist activity at the BSL-3, in violation of the Ninth Circuit’s order and NEPA.

1 its “EA contains enough information to allow it to determine that the project would have no
2 significant environmental impacts. This argument in effect says that the EA is sufficient "because we
3 say it is. ... [C]ase law in this circuit holds that such an answer must be supported by proper
4 procedure.” *Or. Natural Res. Council v. United States BLM*, 470 F.3d 818, 822 (9th Cir. Or. 2006).

5 Defendants argue that the DOE’s Office of NEPA Policy and Compliance Guidance
6 Memorandum issued in response to the “October 16, 2006, decision, *Tri-Valley CAREs v.*
7 *Department of Energy*” should not persuade the Court. AR 91. However, it is directly relevant in that
8 it directed all “DOE NEPA practitioners” to “immediately implement the guidance in this notice to
9 explicitly consider the potential impacts of intentional destructive acts in NEPA documents.” AR 91.
10 Specifically, “[e]ach EIS and EA should explicitly consider whether the accident scenarios are truly
11 bounding of intentional destructive acts.” AR 91 at 2. The Plaintiffs do not assert that the guidance
12 imposes an obligation on DOE to assess any one "specific type of terrorist attack," as Defendants
13 claim. Rather, the Plaintiffs submit that the guidance stands for the proposition- unacknowledged by
14 the DOE-- that the consequences of an accident and the consequences of an intelligent intentional
15 attack specifically designed to breach containment require different analyses.

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

18 Defendants’ reliance on the proposition that the BSL-3 does not alter the “status quo” is
19 misplaced. For site-specific actions like the BSL-3, the significance of any potential environmental
20 impacts “usually depend[s] upon the effects in the locale rather than in the world as a whole.” 40
21 C.F.R. §1508.27(a). The DOE neglected to analyze the significance of the proposed action in the
22 context of the Livermore locale, instead relying on the presence of pathogenic material in nature and
23 at other BSL-3 facilities throughout the country to justify its conclusion. AR 122 at 62-63.

24 **3. Defendants’ Analysis Of The Covert Theft And Subsequent Release Of**
25 **Pathogenic Material By An LLNL Insider Is Inadequate**

26 Defendants failed to take a “hard look” at the environmental impacts that may result from the
27 covert theft and subsequent release of pathogenic material by an insider with access to the BSL-3
28 facility. According to the FREA, “dramatic human health impacts and economic disruption can

1 result following the release of pathogenic materials[,]”, yet DOE failed to analyze any scenarios
2 involving the covert theft and subsequent release of pathogenic material by a LLNL insider. *See* AR
3 122 at 63-64. Defendants’ conclusory statements regarding the environmental impacts that may
4 result from such a release violate NEPA. Under NEPA, an agency “must put forth a ‘convincing
5 statement of reasons’ that explain why the project will impact the environment no more than
6 insignificantly.” *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864 (9th Cir. 2005).

7 Here, DOE’s purported analysis consists of one half-page of vague and conclusory
8 statements amounting to an argument that there is a low probability of “a covert theft and subsequent
9 release of pathogenic material by a LLNL insider due to stringent personnel security and screening
10 programs at LLNL.” AR 122 at 63-64. This argument fails for two reasons. First, the only terrorist
11 attack using biological agents in the United States was committed by an “insider,” a biological
12 laboratory employee in 2001 at Fort Detrick. Second, the DOE’s assumption is contravened by the
13 Defendants’ Motion for Summary Judgment’s (“DMSJ”) own description of the 2005 anthrax
14 shipping incident in which an unauthorized “Visitor,” who was not even employed at LLNL, was
15 allowed on site at LLNL to collect, package and improperly mail thousands of vials of anthrax
16 resulting in exposure to five people. DMSJ at 11-15. While not a terrorist act, it feasibly could have
17 been and does not create confidence in Defendants’ purported “stringent personnel security and
18 screening programs.” AR 122 at 63.

19 **4. Defendants Failed To Analyze Other Credible Terrorist Threats or Release** 20 **Scenarios Resulting From a Terrorist Attack**

21 Defendants claim in their Opposition that Plaintiffs’ claims that the DOE failed to analyze
22 other credible terrorist threats “must be rejected at the threshold because Plaintiffs did not raise
23 them during the public comment process on the REA, and have therefore forfeited their right to
24 pursue them in Court,” is not supported by the record.¹ Plaintiffs used the example of the
25 possibility of damage to the autoclaves, release of an infected animal or a worker’s deliberate
26
27

28 ¹ See AR 122 C-98. Tri-Valley CAREs Comment to the DREA, “unanalyzed scenarios that don’t involve a conveniently located fire or disinfectant release are possible and must be considered.”

1 self-infection to provide additional detail as to the distinction between an accident and an intentional
2 act and to show that there are many easily conceived of types of attacks that do not fall within DOE's
3 one-size fits all accident scenario.

4 **B. DOE VIOLATED NEPA BY WITHHOLDING INFORMATION FROM PUBLIC**
5 **OFFICIALS AND THE PUBLIC AND BY FAILING TO SUPPLEMENT THE FREA**

6 "NEPA procedures must insure that environmental information is available to public
7 officials and citizens before decisions are made and before actions are taken."40 C.F.R.
8 1500.1 (b) (Describing the Purpose of the NEPA) (42 U.S.C. §§ 4321 et seq.).

9 This Court correctly analyzed this issue in its February 9, 2009 Order on Plaintiffs' Motion
10 for a Preliminary Injunction ("Court's Order"). Docket ("DKT") No. 58, 36-40. Plaintiffs
11 respectfully urge this Court to maintain its finding and grant Plaintiffs' summary judgment.

12 "As the Supreme Court has stated, 'NEPA has twin aims. First, it places upon an
13 agency the obligation to consider every significant aspect of the environmental
14 impact of a proposed action. Second, it ensures that the agency will inform the public
15 that it has indeed considered environmental concerns in its decisionmaking process.'"

16 *Id.* Here, DOE did neither, and Plaintiffs have reasonably concluded the "DOE may have
17 attempted to avoid public comment on these accidents." *Id.* at 40. There are two especially
18 significant instances of the DOE withholding relevant information from the public, the
19 Center for Disease Control's ("CDC's") finding that LLNL was conducting unauthorized
20 restricted experiments in 2005 and the information related to the 2005 anthrax shipping
21 incident. As discussed below, the Court should maintain its finding that the DOE violated
22 NEPA by failing to timely disclose relevant information, thus avoiding public comment.

23 **1. The Restricted Experiments**

24 Plaintiffs' maintain that the DOE failed to disclose its 2003-2005 violations of Department of
25 Health and Human Service's ("DHHS's") Select Agent Regulation for conducting experiments
26 which produced an antibiotic resistant strain of Plague. 42 C.F.R. § 73.13(b)(1). For the following
27 reasons, DOE's arguments and extra-record declaration fail to change the fact that the public was
28 deprived of its opportunity to comment on this incident and its implications for this NEPA review.

1 **a. Plaintiffs’ Allegations Relate to Counts in the Amended Complaint.**

2 Plaintiffs’ allegations regarding LLNL’s illegal restricted experiments are properly before the
3 Court. *See* Dkt. No. 60 at ¶¶ 87-89, 93-95. Because Plaintiffs’ allegations relate to Counts 2 and 4
4 that were set forth in the Amended Complaint, the Court may properly issue a summary judgment
5 order upon them. *See First Health Group Corp. v. Nat’l Prescription Adm’rs, Inc.*, 155 F. Supp. 2d
6 194, 198, 233 n.10 (M.D. Pa. 2001), Dkt. No. 61, 19-20.

7 Although the complaint does not include facts concerning LLNL’s illegal restricted
8 experiments, Plaintiffs have met “the liberal pleading standards” set forth in the Federal Rules of
9 Civil Procedure (“Rules”). *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007). Pursuant to the Rules,
10 “[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the
11 claim showing that the pleader is entitled to relief[.]” FED. R. CIV. P. 8(a). According to the
12 Supreme Court, the Rules “do not require a claimant to set out in detail the facts upon which he bases
13 his claim.” *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S.
14 163, 168 (1993). Further, as the court stated in *Swierkiewicz v. Sorema N.A.*, 534 US 506 (2002), “a
15 complaint need not contain specific facts establishing a prima facie case.” The Amended Complaint
16 more than meets this standard. Dkt. No. 61.

17 **b. The Declaration of Eric Gard Is Inadmissible.**

18 The Declaration of Eric Gard (“Gard Declaration”) submitted by Defendants is inadmissible
19 extra-record evidence because it does not meet any of four “narrow” exceptions that could allow it.

20 “*At the district court level, extra-record evidence is admissible: (1) if admission is*
21 *necessary to determine whether the agency has considered all relevant factors and has*
22 *explained its decision, (2) if the agency has relied on documents not in the record, (3)*
when supplementing the record is necessary to explain technical terms or complex
subject matter, or (4) when plaintiffs make a showing of agency bad faith.”

23 *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 499 F.3d
24 1108, 1117 (9th Cir. 2007). Since the Gard Declaration does not fall within any of these
25 exceptions—and, indeed, Defendants make no claim that it does—it is inadmissible extra-
26 record evidence.²

27 _____
28 ² Judicial review of final agency actions “focuses on the administrative record in existence at the
time of the decision.” *Southwest Ctr. for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450
(9th Cir. 1996). “When a plaintiff challenges a final agency action, judicial review normally is limited to

1 The Ninth Circuit has excluded post-decision evidence submitted by the agency, stating that
2 such evidence would render the complex decision-making process "meaningless" and would allow
3 the agency to produce "unsupported" decisions "knowing that it could search for evidentiary support
4 if the [decision] was later challenged." *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*
5 *Serv.*, 273 F.3d 1229, 1245 (9th Cir. 2001). Moreover, the Gard Declaration is also inadmissible
6 because Defendants' decision must stand or fall on the record before the agencies at the time of their
7 decision. *See Camp v. Pitts*, 411 U.S. 138, 143 (1973). Defendants cannot use "post hoc
8 rationalizations advanced to remedy inadequacies in the agency's record." *Bowen v. Georgetown*
9 *Univ. Hospital*, 488 U.S. 204, 212 (1988).

10 Defendants can claim no surprise at Plaintiffs' allegations regarding LLNL's illegal restricted
11 experiments. This information was available to the agency decisionmakers during the NEPA
12 process. Moreover, LLNL's illegal restricted experiments were first disclosed in a CDC inspection
13 report that was supplemented to the administrative record over a year ago. AR 125 at 4. In addition,
14 Defendants were given ample time to review the additional documents regarding LLNL's illegal
15 restricted experiments that were supplemented to the administrative record. *See Letters Exh. 1*. If
16 counsel for Defendants failed to review these documents before agreeing to supplement them to the
17 administrative record, counsel's shortcomings cannot be blamed on Plaintiffs.

18 Furthermore, the record before the Court is more than adequate to decide this issue. LLNL's
19 illegal restricted experiments are described in CDC documents and in the minutes of LLNL's
20 Institutional Biosafety Committee. AR 141 at 1; AR 125 at 4; AR 145 at 4. Under these
21 circumstances, Defendants can claim no prejudice.

22 **c. LLNL's Restricted Experiments Are Relevant to the NEPA Process.**

23 LLNL's illegal restricted experiments are clearly relevant to the environmental impacts that
24 may result from operation of the BSL-3 facility. On August 30, 2005, inspectors from CDC
25 discovered that LLNL had been conducting "restricted experiments," in violation of the select agent
26

27 the administrative record in existence at the time of the agency's decision." *Friends of the Clearwater v.*
28 *Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000).

1 regulations promulgated by the DHHS. AR 141 at 1; AR 125 at 4; AR 145 at 4. One category of
2 “restricted experiments” are those “utilizing recombinant DNA that involve the deliberate transfer of
3 a drug resistance trait to select agents that are not known to acquire the trait naturally, if such
4 acquisition could compromise the use of the drug to control disease agents in humans, veterinary
5 medicine, or agriculture.” 42 C.F.R. § 73.13(b)(1). At LLNL, a researcher had been producing an
6 antibiotic resistant strain of *Yersinia pestis* (plague). AR 125 at 4.

7 “Restricted experiments” may not be conducted with a “select agent or toxin unless approved
8 by and conducted in accordance with any conditions prescribed by the HHS Secretary.” 42 C.F.R. §
9 73.13(a). Because LLNL had neither sought nor been granted such approval, CDC required the
10 laboratory to destroy the samples immediately, in order for LLNL to keep its certificate of
11 registration, authorizing the possession, use, and transfer of select agents and toxins. AR 145 at 4.
12 LLNL’s illegal restricted experiments are relevant here because they provide further evidence of
13 LLNL’s repeated failures to follow applicable regulations governing select agent research, and of
14 Defendants’ repeated failures to timely inform the public of such violations contravening NEPA.
15 Moreover, they also demonstrate the catastrophic impacts to public health that may result from the
16 release of pathogenic material from the BSL-3 facility, such as an antibiotic resistant strain of Plague.

17 **2. The 2005 Anthrax Shipping Incident**

18 Plaintiffs based their allegation that the DOE violated NEPA by failing to supplement on the
19 fact that the DOE did not include significant information about the 2005 anthrax shipping incident
20 (such as the facts that the agent was anthrax, the quantity sent, the occurrence of a spill, and the
21 extent to which the receivers were exposed and treated) in the 2007 Draft Revised Environmental
22 Assessment (“DREA”), but instead “felt compelled to withhold this information until after the close
23 of the public comment period and until after the termination of the prior litigation.” *Id.* Because of
24 the suspect timing of the disclosure (in the 2008 FREA), this Court agreed with Plaintiffs that DOE
25 should have supplemented at that point in order to provide public officials and citizens the
26 opportunity to make meaningful comments on this new information.

27 In the DMSJ and the extra-record Brinker Declaration, the Defendants put forth various
28 reasons why they “decided” not to disclose the information in the DREA. While Plaintiffs maintain

1 that the lack of disclosure reeks of bad faith, whether or not the Court determines the subjective
2 intent of the DOE to be in bad faith, or not, does not alter the objective fact that DOE violated NEPA
3 by its failure to disclose relevant information. *See Supra II.C. and fn. 6*

4 The details of this significant incident were relevant to the DOE’s capacity to protect against
5 intentional terrorist attacks and to implement security protocols, specifically in connection with
6 shipping biological agents. AR 125; AR 128; AR 150; AR 121 at 57. As this Court stated in its
7 Order, the DOE’s “contention that the information was not ‘significant’ under the NEPA is belied by
8 the very fact the DOE felt compelled to withhold this information until *after* the close of the public
9 comment period and until *after* the termination of the prior litigation.” Dkt. No. 58 at 40 (emphasis in
10 original). The Court added that “the DOE appears to focus too much on the outcomes of the incident,
11 i.e. that nobody took ill or died, rather than on the public’s right and need to know in order to make
12 informed decisions and to have meaningful input into government affairs. Further, this information is
13 clearly significant, as it speaks to the ‘intensity’ or severity of the BSL-3 facility’s impact.” *Id.* at 40
14 fn. 29. Due to this lack of disclosure, the public was unlawfully denied a reasonable opportunity to
15 have meaningful input in the decision-making process, prior to the DOE issuing the FREA. *See* 40
16 C.F.R. § 1500.1(b).³ In determining whether an EIS fosters informed decision-making and public
17 participation, a reviewing court must determine if its “form, content and preparation foster[ed]
18 both informed decision-making and informed public participation.” *California v. Block*, 690 F.2d
19 753, 761 (9th Cir. Cal. 1982).

20 The DOE attempts to recast its disclosure of the 2005 anthrax shipping incident as one that
21 “included sufficient environmental information” because the incident was a single transportation
22 incident, in which nobody was injured and there was no public release” and it “simply does not alter
23 the potential impacts of the proposed facility.” DOPM at 4. However, the incident was actually two
24 separate shipments of over 4000 vials of anthrax in which 5 people were potentially exposed and had
25 to take a serious wide-spectrum antibiotic, ciprofloxacin (Cipro), known to have serious side effects.

26
27 ³ NEPA procedures must insure that environmental information is available to public officials and citizens
28 before decisions are made and before actions are taken. The information must be of high quality.
Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing
NEPA.

1 Defendants attempt to persuade the Court to support their lack of disclosure with the argument that
2 federal agencies are entitled to a “presumption of regularity.” *Overton Park*, 401 U.S. at 415.
3 However, that presumption is not to shield the agency’s action from a thorough, probing, in-depth
4 review of the agency’s decision by a reviewing court. *Id.*

5 **C. DOE IS REQUIRED TO SUPPLEMENT THE FREA**

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 facility. Each instance
8 of this violated NEPA and required supplementation of the FREA. The law is plain that
9 supplementation is mandatory if “[t]here are significant new circumstances or information relevant to
10 environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. §
11 1502.9(c)(1)(ii). This language is broad enough to require supplementation where new information is
12 disclosed about a prior event or occurrence.⁴ Numerous courts have held that supplementation is
13 required regarding disclosures or events that occurred before the issuance of the NEPA documents in
14 question. *See, e.g., Sierra Club v. Bosworth*, 465 F. Supp. 2d 931, 935 (N.D. Cal. 2006).

15 **D. AN EIS IS REQUIRED FOR THE BSL-3 FACILITY**

16 Plaintiffs have consistently addressed the issue of whether an EIS is required for the BSL-3.
17 Plaintiffs have repeatedly shown that Defendants must analyze the environmental impacts from the
18 operation of the BSL-3 facility especially in light of the threat of terrorist attacks. Dkt. No. 72 at 19,
19 Dkt. No. 80 at 3, 8. However, Defendants failed to take a ‘hard look’ at the environmental impacts
20 that may result from terrorist activities at the BSL-3 facility. Plaintiffs, therefore, request that this
21 Court order Defendants to prepare an EIS for the BSL-3 facility.

22 **E. DOE WAS REQUIRED TO CIRCULATE THE FONSI FOR PUBLIC**

23 The two circumstances in which a Finding of No Significant Impact (“FONSI”) must be
24 issued for public review are applicable to this case. *See* Plaintiffs Opposition, Dkt No. 80 at 19.

25
26 ⁴ Plaintiffs’ allegations regarding the LLNL anthrax release support two causes of action: failure to
27 conduct environmental analyses in good faith and failure to supplement the FREA. *See* this Court’s order
28 denying Plaintiffs’ Motion for Preliminary Injunction, holding that DOE “should have supplemented its
REA with details regarding two 2005 shipping incidents and circulated this information for public
comment.” Dkt. No. 58 at 2.

1 Since operation of the BSL-3 facility has unusual and new elements, DOE is required to make the
2 Revised FONSI available for public review.

3 **F. DECLARATORY AND INJUNCTIVE RELIEF IS APPROPRIATE**

4 In its Amended Complaint in this matter, Plaintiffs requested (1) declaratory relief, (2) an
5 order that DOE to withdraw the FONSI while the DOE prepares an environmental analysis that
6 complies with the mandatory requirements of NEPA and the Ninth Circuit’s order, and (3) an
7 injunction against continued operation of the BSL-3 facility pending compliance with NEPA.⁵
8 Dkt. No. 61 at 21-22. In light of this Court’s previous ruling on Plaintiffs’ Motion for
9 Preliminary Injunction, Plaintiffs understand that the Court is reluctant to grant the third category
10 of relief. The Court wrote in its Order that Plaintiffs had failed “to show the possibility of an
11 irreparable injury . . . from the BSL-3 facility’s operation.” Dkt. No. 58 at 50. However,
12 Plaintiffs respectfully submit that the first two forms of relief requested in the Amended
13 Complaint – declaratory relief and an order requiring DOE to prepare an adequate NEPA
14 analysis – are appropriately granted in this case and would redress, in part, Plaintiffs’ injuries.

15 As a threshold matter, the selection of the appropriate relief in this case is largely a
16 function of the procedural and informational nature of Plaintiffs’ injuries. *Citizens for Better*
17 *Forestry v. U.S. Department of Agriculture*, 341 F.3d 961 (9th Cir. 2003). The Ninth Circuit
18 found that a violation of NEPA’s procedural requirements;
19 is tied to a substantive harm to the environment – the harm consists of added risk
20 to the environment that takes place when governmental decisionmakers make up
21 their minds without having before them an analysis (with public comment) of the
22 likely effects of their decision on the environment.” *Id.* at 971. NEPA’s object is
23 to minimize that risk, the risk of uninformed choice. *Id.*

24 In light of the essentially procedural nature of NEPA, and the procedural and
25 informational rights conferred by NEPA, Plaintiffs’ NEPA injury can be redressed by a
26 procedural remedy such as this Court’s order to prepare an adequate NEPA analysis. While this
27 Court does have the discretion to enjoin the continued operation of the BSL-3 pending NEPA
28 compliance, this Court need not grant such an injunction to afford Plaintiffs meaningful and

⁵ Plaintiffs requested attorneys’ fees, costs, and such other relief as the Court deems appropriate.
Dkt. No. 61 at 22.

1 effective relief. Rather, declaratory relief and an order requiring DOE to complete an adequate
2 NEPA analysis will redress Plaintiffs' injuries. *Id.* at 975-76; *see also Ocean Advocates* 402
3 F.3d at 860-61; *Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001).

4 Importantly, in a case like this one – where the BSL-3 facility has been constructed and is
5 operational – there is still meaningful relief that this Court can provide to vindicate NEPA's core
6 procedural and informational purposes. For example, in *Ocean Advocates* the plaintiffs
7 challenged the NEPA analysis that was prepared by the Army Corps of Engineers in connection
8 with its issuance to permit an addition to an oil refinery dock. By the time the Ninth Circuit
9 heard and resolved the plaintiffs' appeal, the dock extension was already constructed and was
10 operational. 402 F.3d at 860. Nonetheless, the Ninth Circuit found that “[t]he fact that BP has
11 completed construction of the dock extension does not alter our conclusion, as we can fashion an
12 appropriate remedy.” *Id.* at 871. Specifically, the Ninth Circuit found that an adequate NEPA
13 analysis would help to assure that all environmental issues were considered and accounted for in
14 the continued operation of the dock extension:

15 If, for example, the Corps determined on remand that the operation of the dock
16 may result in significant degradation of the environment, the Corps could impose
17 restrictions on the operation of the dock or require other mitigating measures.
Thus, requiring an EIS would remedy OA's harm. *Id.*

18 Just as in *Ocean Advocates*, this Court may still fashion effective and meaningful relief
19 for Plaintiffs' NEPA injuries despite the fact that DOE has constructed and is operating the BSL-
20 3. If this Court were to order DOE to prepare an adequate NEPA analysis, as Plaintiffs
21 respectfully request, then NEPA's core procedural and informational purposes might well lead
22 DOE to make modifications to and/or implement mitigation measures. This Court has ample
23 authority to require the preparation of an adequate NEPA analysis so that the public and other
24 agencies can weigh in on possible ways to minimize the terrorism risks associated with
25 continued operation of the facility. Thus, even if this Court decides not to enjoin continued
26 operation of the BSL-3, Plaintiffs respectfully submit that this Court should issue declaratory
27 relief and issue an order requiring DOE to prepare an adequate NEPA analysis. Additionally,
28 varied levels of injunctive relief are available to this Court in Plaintiffs' Proposed Order.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated this 11th day of November, 2009

/s/ Scott Yundt

Scott Yundt (CSB #242595)

Tri-Valley CAREs

2582 Old First Street

Livermore, CA 94551

Telephone: (925) 443-7148

Email: scott@trivalleycares.org

Steven Sugarman (*Pro Hac Vice*)

1210 Luisa Street – Suite 2

Santa Fe, NM 87505

Telephone: (505) 983-1700

stevensugarman@hotmail.com