

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

16 Plaintiffs,

17 vs.

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

21 Defendants.
22
23
24
25

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

) **PLAINTIFFS' 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

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

TABLE OF CONTENTS

I. INTRODUCTION AND FACTUAL BACKGROUND.....1

II. STANDARD OF REVIEW.....2

III. ARGUMENT.....2

 A. THE DOE FAILED TO PROPERLY PREPARE THE FREA.....3

 1. Defendants’ Analysis Of Direct Terrorist Attacks Resulting In Loss Of Containment Is Inadequate.....3

 2. Defendants’ Analysis Of The Theft And Subsequent Release Of Pathogenic Material By A Terrorist From Outside LLNL Is Inadequate.....9

 3. Defendants’ Analysis Of The Covert Theft And Subsequent Release Of Pathogenic Material By An LLNL Insider Is Inadequate.....11

 4. Defendants Failed To Analyze Other Credible Terrorist Threats.....12

 5. Defendants Failed To Analyze Other Credible Release Scenarios.....13

 B. THE DOE FAILED TO PROPERLY DISCLOSE THE 2005 ANTHRAX SHIPPING INCIDENT14

 1. DOE’s Discussion of the Anthrax Shipping Incident was Inconsistent With NEPA..14

 2. DOE Is Barred From Submitting Extra Record Evidence as a Post-Hoc Rationalization for Its Action.....16

 3. The Brinker Declaration Substantively Fails to Justify the Agency's Action.....17

 C. DOE WAS REQUIRED TO CIRCULATE THE REVISED FONSI FOR PUBLIC REVIEW.....19

IV. CONCLUSION.....20

1 **TABLE OF CASES**

2 **FEDERAL CASES**

3 *Alvarado Community Hospital v. Shalala*
4 155 F.3d 1115 (9th Cir.1998).....17

5 *Am. Textile Mfrs. Inst. v. Donovan*
6 452 U.S. 490 (1981).....17

7 *Anderson v. Evans*
8 314 F.3d 1006 (9th Cir. 2002).....6, 10, 12

9 *Ariz. Cattle Growers’ Ass’n v. United States Fish & Wildlife Serv.*
10 273 F.3d 1229 (9th Cir. 2001).....16

11 *Bering Strait Citizens for Responsible Res. Dev. v. United States Army Corps of Eng’rs*
12 524 F.3d 938 (9th Cir. 2008).....14, 15, 16

13 *Blue Mountains Biodiversity Project v. Blackwood*
14 161 F.3d 1208 (9th Cir. 1998).....11

15 *Bowen v. Georgetown Univ. Hospital*
16 488 U.S. 204 (1988).....16

17 *Burbank Anti-Noise Group v. Goldschmidt*
18 623 F.2d 115 (9th Cir. 1980).....10, 11

19 *Camp v. Pitts*
20 411 U.S. 138 (1973).....17

21 *Ctr. for Biological Diversity v. Brennan*
22 571 F. Supp. 2d 1105 (N.D. Cal. 2007).....20

23 *Chevron U.S.A., Inc. v. Nat. Resources Def. Council*
24 467 U.S. 844 (1984).....4

25 *Citizens to Preserve Overton Park, Inc. v. Volpe*
26 401 U.S. 402 (1971).....2, 15, 16, 17

27 *Defenders of Wildlife v. Norton*
28 258 F.3d 1136 (9th Cir. 2001).....16

1 *Ecology Center Inc. v. Austin,*
2 430 F.3d 1057 (9th Cir. 2005).....4
3 *Friends of the Clearwater v. Dombeck*
4 222 F.3d 552 (9th Cir. 2000).....16
5 *Great Basin Mine Watch v. Hankins*
6 456 F.3d 955 (9th Cir. 2006).....3, 11
7 *Lands Council v. Powell*
8 379 F.3d 738 (9th Cir. 2004).....11
9 *Marsh v. Oregon Natural Resources Council*
10 490 U.S. 360 (1989).....2
11 *Ocean Advocates v. U.S. Army Corps of Eng’rs*
12 402 F.3d 846 (9th Cir. 2005).....11
13 *Or. Natural Res. Council Fund v. Goodman*
14 505 F.3d 884 (9th Cir. 2007).....2
15 *Pit River Tribe v. United States Forest Serv.*
16 469 F.3d 768 (9th Cir. 2006).....16
17 *San Luis Obispo Mothers for Peace v. NRC*
18 449 F.3d 1016 (9th Cir. 2006).....5, 8
19 *Save the Yaak Committee v. Block*
20 840 F.2d 714 (9th Cir. 1988).....16
21 *SEC v. Chenery Corp.,*
22 318 U.S. 80 (1943).....17
23 *Sierra Club v. Babbitt*
24 69 F. Supp.2d 1202 (E.D. Cal. 1999).....2
25 *Southwest Ctr. For Biological Diversity v. US Forest Service*
26 100 F.3d 1443 (9th Cir. 1996).....16
27 *Tri-Valley CAREs v. Dept. of Energy*
28 203 Fed. Appx. 105 (9th Cir. 2006).....1, 3, 4, 19

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

FEDERAL STATUTES

U.S. Code Title 5
 §706(2)(A)(D).....2
U.S. Code Title 42
 §4321 *et. seq.*1

REGULATIONS

Code of Federal Regulations, Title 40
 §1500.1(b).....15, 17
 §1502.22 (b) (4).....8
 §1508.27(a).....6, 9
 §1501.4(e)(2).....20

OTHER SOURCES

CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 FR 18026 (1981).....19

1 **I. INTRODUCTION AND FACTUAL BACKGROUND**

2 Defendants (collectively “DOE”) contend in their motion for summary judgment that DOE
3 properly prepared the Final Revised Environmental Assessment (“FREA”) for the BSL- 3 facility at
4 Lawrence Livermore National Laboratory (“LLNL”), that DOE properly disclosed the 2005 anthrax
5 release and exposures, that an Environmental Impact Statement (“EIS”) was not required for the
6 BSL- 3 facility, that the DOE was not required to supplement the FREA, and that the DOE was not
7 required to circulate the Revised Finding of No Significant Impact (“FONSI”) for public review.

8 DOE is mistaken on all counts. As shown below, the FREA and Revised FONSI for the BSL-
9 3 fail to comply with the mandatory requirements of the National Environmental Policy Act
10 (“NEPA”). 42 U.S.C. §§ 4321 et seq. In Plaintiffs’ earlier challenge to the adequacy of the DOE’s
11 first Environmental Assessment for the BSL-3, the Ninth Circuit Court of Appeals remanded the case
12 to this Court with explicit instructions for the DOE to take into “consideration” the effects of a
13 terrorist attack in its Environmental Assessment and “whether the threat of terrorist activity
14 necessitates the preparation of an Environmental Impact Statement.” *Tri-Valley CAREs v. Dept. of*
15 *Energy*, 2004 U.S. Dist. LEXIS 18777 (N.D. Cal. 2004), *aff’d in part and rev’d in part*, 203 Fed.
16 Appx. 105, 107 (9th Cir. 2006). The DOE did not comply with the Ninth Circuit’s specific
17 instructions.

18 Despite the Ninth Circuit’s order, the Draft Revised Environmental Assessment (“DREA”)
19 fails to contain any new analysis of the environmental effects of an intentional terrorist act. Instead,
20 the DREA continued to rely on the same “full containment accident scenario” that the DOE relied
21 upon in the original EA that was found to be inadequate by the Ninth Circuit. AR 122 at C-1.
22 Comments were submitted by Plaintiffs regarding these inadequacies in the DREA, as well as the
23 DOE’s failure to address the 2005 anthrax release, the DOE’s lack of response to the Ninth Circuit’s
24 ruling and the need for the preparation of an EIS. *See, e.g., id.* at C-93-115. On January 25, 2008,
25 DOE suddenly commenced operation of the BSL-3 facility and simultaneously issued the FREA and
26 the Revised FONSI, thereby determining that an EIS was not required. AR 123 at 10. The FREA
27 differed little from the DREA. Like the DREA before it, the FREA failed to address the effects of an
28

1 intentional terrorist act to the BSL-3, and thereby failed to meet the requirements of NEPA as
2 construed by the Ninth Circuit in *Tri-Valley CAREs v. Dept. of Energy*.

3 **II. STANDARD OF REVIEW**

4 Under the Administrative Procedure Act (“APA”), an agency’s action may be set aside only
5 if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5
6 U.S.C. §706(2)(A)(D). The Court must consider whether the agency acted within the scope of its
7 legal authority, adequately explained its decision, based its decision on facts in the record, and
8 considered the relevant factors. *Marsh v. Oregon Natural Resources Counsel*, 490 U.S. 360, 378
9 (1989), *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16, (1971). Although this
10 Court’s review under the APA “is deferential, the agency must nonetheless ‘articulate a rational
11 connection between the facts found and the conclusions made.’” *Or. Natural Res. Council Fund v.*
12 *Goodman*, 505 F.3d 884, 889 (9th Cir. 2007). Moreover, “if an agency ‘fails to consider an
13 important aspect of a problem . . . [or] offers an explanation for the decision that is contrary to the
14 evidence,’ its action is ‘arbitrary and capricious.’” *Or. Natural Res. Council Fund*, 505 F.3d at 889.
15 In *Sierra Club v. Babbitt*, the district court held that the National Park Service had violated NEPA and
16 applied the APA’s standard of review as follows:

17 We must determine whether the agency’s decision was made after considering
18 the relevant factors and whether the agency made a clear error of judgment.
19 We may reverse the agency’s decision as arbitrary or capricious only if the
20 agency relied on factors Congress did not intend it to consider, entirely failed
21 to consider an important aspect of the problem, offered an explanation that ran
22 counter to the evidence before the agency, or offered one that is so implausible
23 that it could not be ascribed to a difference in view or the product of agency
24 expertise. [Citations omitted]

25 69 F. Supp.2d 1202, 1211 (E.D. Cal. 1999).

26 In this case, the FREA entirely failed to consider certain important aspects of the potential
27 environmental impacts of an intentional terrorist act and offered explanations that run counter to the
28 evidence before the DOE decisionmakers, as the Argument below demonstrates.

III. ARGUMENT

DOE moves for summary judgment based on its claim that it acted reasonably in regard to all
of the causes of action brought by Plaintiffs. However, as shown below, the DOE’s actions were

1 arbitrary and capricious in failing to adequately meet various standards required by NEPA and failing
2 to adequately respond to the Ninth Circuit Court of Appeal’s ruling. Thus, DOE’s motion for
3 summary judgment should be denied

4 **A. THE DOE FAILED TO PROPERLY PREPARE THE FREA**

5 As a result of prior litigation initiated by Tri-Valley CAREs, et al., the United States Court of
6 Appeals for the Ninth Circuit ordered “DOE to consider whether the threat of terrorist activity [at the
7 LLNL BSL-3 facility] necessitates the preparation of an Environmental Impact Statement.” *Tri-*
8 *Valley CAREs*, 203 Fed. Appx. at 107. However, Defendants failed to take a “hard look” at the
9 environmental impacts that may result from terrorist activity at the LLNL BSL-3 facility, in violation
10 of the Ninth Circuit’s order and NEPA.

11 **1. Defendants’ Analysis Of Direct Terrorist Attacks Resulting In Loss Of**
12 **Containment Is Inadequate.**

13 The FREA’s analysis of the environmental impacts that may result from an intentional
14 terrorist act designed to breach containment at the LLNL BSL-3 facility is based on the same
15 unsupported assumptions that flawed the original EA. In that document, the DOE failed to consider
16 the specific environmental impacts that could result from a terrorist attack on the BSL-3 and instead
17 assumed that the consequences of an intentional terrorist attack designed to breach containment
18 would be the same as the consequences of an accidental event in which containment is maintained.
19 The Ninth Circuit Court was not satisfied with this lack of specific analysis of the particular
20 environmental risks that are associated with intelligently planned malicious terrorist acts, finding that
21 “an Environmental Assessment that does not consider the possibility of a terrorist attack is
22 inadequate.” *Id.* Rather than engaging in the required analysis of the effects of terrorist activity and
23 whether the threat of that activity requires an EIS, which the Ninth Circuit’s order requires, the DOE
24 instead rehashed the exact same accident scenario in its FREA. According to the FREA, “the
25 consequences of a malicious act designed to breach containment are bounded by the accidents and
26 natural catastrophic events evaluated in the [FREA] because they would result in a similar loss of
27 containment.” AR 122 at 59. This entirely unsubstantiated assumption – which forms the basis of
28 the DOE’s so-called terrorism analysis – finds no support whatsoever in the administrative record.

1 See *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 973 (9th Cir. 2006) (holding that “vague and
2 conclusory statements, without any supporting data, do not constitute a ‘hard look’ at the
3 environmental consequences of the action as required by NEPA”).

4 The DOE’s Office of NEPA Policy and Compliance issued a Guidance Memorandum in
5 response to the “October 16, 2006, decision, *Tri-Valley CAREs v. Department of Energy*,” which
6 should have guided the DOE’s approach to analyzing the effects of a terrorist act in the DREA. 203
7 Fed. Appx. 105; AR 91 and AR 122 at ii. It directed all “DOE NEPA practitioners” to “immediately
8 implement the guidance in this notice to explicitly consider the potential impacts of intentional
9 destructive acts in NEPA documents.” AR 91.

10 According to this guidance, it is not appropriate for the DOE to apply an analysis of accidents
11 to an analysis of the potential consequences of acts of sabotage or terrorism where the potential
12 sabotage or terrorist scenarios and the accident scenarios do not “involve similar physical initiating
13 events or forces (e.g., fires, explosions, drops, punctures, aircraft crashes).” AR 91 at 2; *see also* AR
14 88 at 20. Specifically, “[e]ach EIS and EA should explicitly consider whether the accident scenarios
15 are truly bounding of intentional destructive acts.” AR 91 at 2. Here, the accident scenario applied
16 by Defendants is a fully contained centrifuge accident involving a one liter slurry of *Coxiella burnetii*
17 and fully operational HEPA filters. AR 122 at 54. In contrast, the physical initiating events or forces
18 in potential sabotage or terrorist scenarios may include a suicidal plane crash, explosion, fire, damage
19 to one or more of the facility’s containment features, or damage to the facility’s autoclaves, which
20 are used to kill or sterilize microorganisms. *Id.* at 16, 59; AR 27 at A9-50-52 (analyzing sabotage
21 actions that may result in a loss of containment). The physical initiating events or forces in these
22 scenarios are not similar to the physical initiating event and forces associated with the accident
23 scenario analyzed in the FREA. Thus, the DOE violated its own guidance concerning the analysis of
24 the environmental consequences of intentional terrorist acts.¹

25
26 ¹ This type of guidance has been persuasive to the Court before. (*See Ecology Center Inc. v. Austin*, 430
27 F.3d 1057 (9th Cir. 2005), finding agency standards developed to comply with a statute (similar to the
28 DOE’s Guidance) to be more than “merely advisory.” *Id.* at 1069-70. It is also well established that
agency regulation interpreting a statute must be upheld as long as it is a reasonable construction of the
statute. (*See Chevron U.S.A., Inc. v. Nat. Resources Def. Council*, 467 U.S. 844, 843-45 (1984) (finding
that agency guidance is persuasive on a court deciding the adequacy of agency action.))

1 Furthermore, DOE's claim that the consequences of a terrorist attack resulting in damage or
2 destruction to the LLNL BSL-3 facility and a loss of containment are bounded by the accident
3 scenario discussed above is refuted by the DOE's guidance regarding malevolent events:

4 In contrast to the randomness of initiators associated with accidents, natural
5 phenomena and other external events, a malevolent, *intelligent* initiator can
6 determine where to place explosives or start fires and/or how to use site systems and
7 equipment to deliberately initiate or exacerbate emergency events or conditions.
8 Such premeditated, even suicidal, malevolent events can maximize the impact of a
9 release of hazardous material ranging from use-denial by contamination to serious
10 harm to workers or the public.

11 Exhibit 1 at E-1 (emphasis in original). This guidance acknowledges that when an event is
12 intentional, and not a random accident, there is the possibility for two or more "accident-type" events
13 to occur concurrently (as the result of intelligent planning) with more significant consequences than
14 contemplated in the accident scenario. Yet, DOE failed to analyze the potential environmental
15 impacts of a terrorist attack that result in a greater loss of containment than the hypothetical
16 centrifuge accident involving six vials of *Coxiella burnetii*, in which containment is maintained.

17 The Defendants' Motion for Summary Judgment ("DMSJ") contends that it was not
18 necessary for the FREA to analyze a breach of containment scenario because "even if the structure
19 and freezers were breached...the negative air pressure in the building means that air would be drawn
20 into the building and through the HEPA filtration system...that the fire resulting from an airplane
21 crash or explosive...would itself kill BSL-3 organisms quickly...[and] microorganism are generally
22 rendered innocuous by exposure to outside conditions." DMSJ at 5. While this convenient finding
23 neatly avoids further analysis, DOE is required by NEPA to analyze a "a range of environmental
24 impacts likely to result in the event of a terrorist attack" on the facility. *San Luis Obispo Mothers for
25 Peace v. NRC*, 449 F.3d 1016, 1034 (9th Cir. 2006). That range includes "reasonably foreseeable"
26 impacts of terrorist attack "events of both higher and lower probability."² *Id.* A terrorist attack could

27 ² The Court in *San Luis Obispo Mothers for Peace v. NRC* likewise dismissed any argument that a
28 terrorism analysis is speculative noting that that accusation "stands out as contrary to the vigilant stance
that Americans are encouraged to take by the Department of Homeland Security. See
www.dhs.gov/dhspublic/display?theme=29 (urging that "[a]ll Americans should continue to be vigilant"
and noting that "[t]he country remains at an elevated risk...for terrorist attack.") 449 F.3d at 1034, fn. 10
[citations in original].

1 reasonably involve a scenario that includes breach of containment of the BSL-3 in which pathogens
2 are directly released to the environment (or where the HEPA filters are damaged or not operational),
3 without a fire and where potentially lethal pathogens are dispersed and survive in the environment.³

4 This type of scenario should have been analyzed in the Livermore locale. Analyzing whether
5 environmental impacts are significant also depends on their “context.” CEQ’s regulations provide
6 that, for a “site-specific action,” an agency must determine whether the “effects in the locale” are
7 significant. 40 C.F.R §1508.27(a); *Anderson v. Evans*, 314 F.3d 1006, 1021 (9th Cir. 2002).

8 Defendants must analyze the significance of the proposed action in the context of the Livermore
9 locale. *See id.* (the significance of an action must be analyzed in the context of the locality). Here,
10 the LLNL BSL-3 facility will contain a large collection of potential bioweapons, possibly including
11 genetically modified microorganisms and unidentified organisms used in bioterrorist attacks, in close
12 proximity to nearby residences and the City of Livermore. AR 122 at 2, 7, 18, 47, C-9-10. As such,
13 it is clear that the facility poses a new and greater risk to human health and the environment in the
14 Livermore locale, regardless of the availability of pathogenic material in other locations.

15 For these same reasons, the DOE’s reliance on the U.S. Army NEPA analysis of its own
16 biological research labs is inadequate. For example, the DMSJ claims that the “DOE found that the
17 chances of exposure at LLNL were even more remote than those modeled by the Army” because
18 “(t)he Army scenario assumes one HEPA filter that is only 95 percent effective” and “(t)he LLNL
19 BSL-3 lab...filters all room air through two HEPA filter banks, each of which is 99.97% effective.”
20 DMSJ at 6. This point both mischaracterizes the strategy of US Army’s NEPA analysis and misses
21 the point of the Ninth Circuit’s ruling. Defendants’ acknowledge in their motion that the Army
22 intentionally modeled its scenario so that only one HEPA filter operating at only 95 percent
23 remained as a strategy to achieve a more “conservative result.” DMSJ at 6. Thus the DOE’s
24 assumption that the BSL-3’s “HEPA filter banks” might be more effective than the Army’s only
25 further insulates the FREA from any actual analysis of the effect of a successful non-containment

27 ³ Many of the most deadly pathogens experimented with in the BSL-3, like Anthrax, Valley Fever,
28 Hantavirus, Plague and Rabbit Fever, are resilient enough to survive in the environment in which they
originate. AR122 at 62 and DMSJ at 9-10.

1 terrorist attack in which the structure is breached and the HEPA filters are damaged. This type of
2 terrorist attack is reasonably foreseeable and was within the contemplation of the Ninth Circuit’s
3 ruling; otherwise it would have been satisfied with the DOE’s reliance on the accident scenario and
4 the Army NEPA analysis in the original EA.⁴

5 DOE also claims that “while DOE conducted its analysis based on the assumption of a
6 successful terrorist attack, the probability of such an occurrence is mitigated by the extensive security
7 measures in place at LLNL.” DMSJ at 8. First, DOE can hardly claim to have conducted its analysis
8 based on a “successful terrorist attack.” If DOE had actually analyzed the impacts of a “successful
9 terrorist act,” as it was required to do by the Ninth Circuit’s order, it would have assessed
10 consequences associated with 1) breach of containment of the building, 2) release of pathogens into
11 the environment, and 3) actual exposure of people to pathogens. Second, the DOE continues to fail to
12 acknowledge the significant and highly publicized security lapses that have occurred at LLNL.

13 The most succinct analysis of the LLNL security problem took place in March and April
14 2008. After the issuance of the FREA, DOE’s Office of Health, Safety and Security (“HSS”)
15 inspected safeguards and security and cyber security programs at LLNL. AR 158 at 7. The
16 inspection evaluated LLNL in the following protection-related topical areas, among others: personnel
17 security, physical security systems, material control and accountability, protective force, and
18 protection program management. *Id.* at 8. HSS gave LLNL’s protective force the lowest possible
19 rating, “Significant Weaknesses,” due to its poor performance against identified adversary threats,
20 “particularly during force-on-force scenarios and in other types of performance assurance testing.”
21 AR 155 at 7-8; AR 159 at 16. HSS also identified deficiencies in LLNL’s physical security systems
22 and protection program management. AR 155 at 7-8. Nonetheless, DOE relied on the existence of
23 these highly criticized security measures to support the lack of need to analyze the effects of a
24 terrorist attack.

25
26
27 ⁴ The DOE also makes the point that “(t)he Army scenario also assumes a lab in close proximity to
28 the public, but the LNL BSL-3 is one-half mile from the nearest public area.” DMSJ at 6. Plaintiffs want
to remind the Court that the BSL-3 is located within the boundary of the 1.3 sq. mi. LLNL that has over
7000 employees, making it extremely densely populated on any given work day.

1 Additionally, it has been recognized that LLNL’s ability to self-assess regarding its security
2 program has significant weaknesses and it frequently mischaracterizes its strengths. AR 155. The
3 March 16, 2009 Government Accountability Office (“GAO”) report entitled ‘*Better Oversight*
4 *Needed to Ensure That Security Improvements at Lawrence Livermore National Laboratory Are*
5 *Fully Implemented and Sustained*’ notes that “LLNL’s self-assessments were “neither broad nor deep
6 enough to provide laboratory management with sufficient information to make meaningful decisions
7 about security performance.” *Id.* at 13. As a result, LLNL’s security self-assessment program failed
8 to identify numerous security deficiencies that DOE’s Office of Independent Oversight found when it
9 conducted its inspection. *Id.* at 12. For example, “LLNL’s self-assessment program did not identify
10 security deficiencies in the laboratory’s classified matter protection and control program or the
11 performance assurance program established to test the operability and effectiveness of elements
12 essential to LLNL’s protective strategy.” *Id.* In addition, “[t]he Office of Independent Oversight
13 also found seven security deficiencies in the area of protection program management—LLNL’s
14 security program planning and assurance activities—and rated this security topic as needing
15 improvement.” *Id.* at 10.

16 Finally, In *San Luis Obispo Mothers for Peace* the court stated that an EIS must address
17 “events with potentially catastrophic consequences ‘even if their probability of occurrence is low,
18 provided that the analysis of impacts is supported by credible scientific evidence, is not based on
19 pure conjecture, and is within rule of reason.’” 449 F.3d at 1033, citing 40 C.F.R. §1502.22 (b)(4).
20 Here, Defendants themselves admit that in the event that a pathogen is removed and released, the
21 impact on the environment could be dramatic. (See DMSJ at 10-11 “...in the unlikely event that a
22 pathogen is removed and released, **the impacts could be dramatic**, as evidenced by the 2001
23 anthrax release.”) Based on the court’s reasoning in *Mothers for Peace*, even if the probability of a
24 pathogen being released is low, the fact that it could result in catastrophic consequences requires
25 preparation of an EIS.

26 As a result of these deficiencies, the FREA failed to take a “hard look” at the environmental
27 impacts that may result from a malicious act designed to breach containment at the LLNL BSL-3
28 facility. Had Defendants chosen to take a “hard look,” the administrative record provides guidance

1 as to the form and content of such analyses. *See* AR 27 at A9-16-25 (analyzing aerosol release); A9-
2 50-52 (analyzing employee sabotage); AR 28 at G-36-38 (same).

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

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

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

17 AR 122 at 63. This same argument is relied on in the DMSJ, “Not only do hundreds of BSL-3
18 facilities in the United States regularly handle and store these substances, but many are available
19 from environmental sources.” DMSJ at 9. While this is a novel basis for avoiding any actual analysis,
20 it does not comport with actual law.

21 First, the DOE neglects to analyze the significance of the proposed action in the context of
22 the Livermore locale, instead relying on the presence of pathogenic material in nature and at other
23 BSL-3 facilities throughout the country to justify its conclusion. AR 122 at 62-63. Here, the
24 proposed action is to operate a BSL-3 facility at LLNL, which may contain up to 50 liters of
25 pathogenic material, including an assortment of infectious agents and biotoxins associated with
26 potential bioweapons threats. AR 122 at 7, 18, C-10.

27 Second, the FREA indicates that the facility may receive genetically altered microorganisms
28 and previously identified or unidentified organisms, and may provide analyses to CDC for the
purposes of identification and confirmation during disease outbreaks or bioterrorist attacks from
suspected select agents. *Id.* at 2, 18, C-9. Thus, the BSL-3 facility will contain a large collection of

1 potential bioweapons, possibly including genetically modified microorganisms and unidentified
2 organisms used in bioterrorist attacks, in close proximity to nearby residences and the City of
3 Livermore. *Id.* at 2, 7, 18, 47, C-9-10. These genetically modified pathogens are not of the type
4 normally found at BSL-3 labs in hospitals and other research institutions.⁵ Also, while pathogens are
5 available in the environment, they are not available in the same quantities and varieties in any one
6 place in the environment as they are in the LLNL BSL-3, nor are they necessarily of weapons usable
7 quality. As such, it is clear that the facility poses a new and greater risk to human health and the
8 environment in the Livermore locale, regardless of the availability of pathogenic material in other
9 locations. Because the FREA failed to adequately analyze this threat, Defendants are in violation of
10 NEPA. *See Anderson*, 314 F.3d at 1021 (holding that an EIS was required because the EA did not
11 adequately address local impacts).

12 Defendants rely on *Burbank Anti-Noise Group v. Goldschmidt* to argue that “the operation of
13 a single facility within the highly secure LLNL complex will have no significant impact over the
14 environmental status quo” and where the proposed action “does not significantly alter the status quo,
15 it does not have a significant impact under NEPA.” 623 F.2d 115, 116 (9th Cir. 1980). However, this
16 argument is flawed. In *Burbank* the court found that an EIS is not required when the proposed
17 federal action does not alter the status quo based on its reasoning that “an EIS need not discuss the
18 environmental effects of mere *continued operation* of a facility.” *Id.* The plaintiffs in *Burbank* sought
19 to require the FAA to prepare an EIS to discuss the environmental effects of the *continued operation*
20 *of the airport*. *Id.* at 115. Here, DOE’s assertion that the BSL-3 at LLNL “will have no significant
21 impact over the environmental status quo,” incorrectly applies the rule from *Burbank*, which only
22 applies to continued operation of a facility. DMSJ at 10. Because DOE prepared a NEPA analysis in
23 connection with the operation of a *new* facility, they must analyze the environmental impact that the
24

25 ⁵ In fact, in August 2005, inspectors from CDC discovered that a LLNL researcher had been
26 producing an antibiotic resistant strain of *Yersinia pestis* (plague), i.e. a genetically modified pathogen.
27 AR 125 at 1, 4. Because LLNL had neither sought nor been granted approval to conduct this experiment,
28 CDC required the laboratory to destroy the samples immediately, in order for LLNL to keep its certificate
of registration, authorizing the possession, use, and transfer of select agents and toxins. AR 145 at 4.

1 LLNL BSL-3 will have on the surrounding community and whether there will be deterioration in the
2 current state of the local environment from its operation. To do otherwise would negate the purpose
3 of NEPA.

4 **3. Defendants’ Analysis Of The Covert Theft And Subsequent Release Of** 5 **Pathogenic Material By An LLNL Insider Is Inadequate**

6 Defendants failed to take a “hard look” at the environmental impacts that may result from the
7 covert theft and subsequent release of pathogenic material by an insider with access to the LLNL
8 BSL-3 facility. According to the FREA, “dramatic human health impacts and economic disruption
9 can result following the release of pathogenic materials[,]”, yet DOE failed to analyze any scenarios
10 involving the covert theft and subsequent release of pathogenic material by a LLNL insider. *See* AR
11 122 at 63-64. However, two such scenarios were analyzed in the Final Programmatic Environmental
12 Impact Statement for the U.S. Army’s Biological Defense Research Program (“BDRP FPEIS”),
13 which is the NEPA analysis “considered most relevant to the Proposed Action[,]” according to the
14 FREA. AR 27 at A9-53-56 and AR 122 at 52. Such analyses serve the purpose of NEPA, which is
15 “to require disclosure of relevant environmental considerations that were given a ‘hard look’ by the
16 agency, and thereby to permit informed public comment on proposed action and any choices or
17 alternatives that might be pursued with less environmental harm.” *Lands Council v. Powell*, 379
18 F.3d 738, 745 (9th Cir. 2004).

19 Moreover, Defendants’ vague and conclusory statements regarding the environmental
20 impacts that may result from such a release violate NEPA. Under NEPA, an agency “must put forth
21 a ‘convincing statement of reasons’ that explain why the project will impact the environment no
22 more than insignificantly.” *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 864 (9th
23 Cir. 2005) (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th
24 Cir. 1998)). Here, DOE’s purported analysis consists of one half-page of vague and conclusory
25 statements about the possible environmental impacts of the covert theft and subsequent release of
26 pathogenic material by a LLNL insider. *See* AR 122 at 64⁶. Accordingly, Defendants are in

27
28 ⁶ “As shown in 2001 dramatic human health impacts and economic disruption can result following
the release of pathogenic materials. If a terrorist was able to obtain material from any source, refine the

1 violation of NEPA. See *Great Basin Mine Watch*, 456 F.3d at 973; *Ocean Advocates*, 402 F.3d at
2 864 (an agency “cannot avoid preparing an EIS by making conclusory assertions that an activity will
3 have only an insignificant impact on the environment”).

4 Additionally, DOE again cites to *Burbank* for its assertion that, “the incremental increase in
5 the risk of such an occurrence from this single facility, in light of the 1,350 facilities nation-wide,
6 does not represent a significant change from the environmental status quo.” DMSJ at 11. This
7 reliance again fails to take into consideration the fact that this is a new facility, (rather than the
8 continued operation of an existing facility), the local threats that this facility poses, and the unique
9 characteristics of a BSL-3 that researches biological weapon agents inside of a DOE nuclear weapons
10 lab. See *Anderson*, 314 F.3d at 1021.

11 Finally, the FREA’s purported analysis is based on its unsubstantiated assumption that theft
12 and release of a pathogenic material by an insider with access to the facility is “not expected to occur
13 due to stringent personnel security and screening programs at LLNL.” AR 122 at 63. First, the only
14 terrorist attack using biological agents in the United States was committed by an “insider,” a
15 biological laboratory employee in 2001 at Fort Detrick. Second, The DOE’s assumption is
16 contravened by the DMSJ’s own description of the 2005 anthrax shipping incident in which an
17 unauthorized “Visitor,” who was not even employed at LLNL, was allowed on site at LLNL to
18 collect, package and improperly mail thousands of vials of anthrax resulting in exposure to five
19 people. DMSJ at 11-15. While not a terrorist act, it feasibly could have been and does not create
20 confidence in Defendants’ purported “stringent personnel security and screening programs.”

21 **4. Defendants Failed To Analyze Other Credible Terrorist Threats**

22 Defendants also failed to take a “hard look” at the potential environmental impacts of other
23 credible terrorist threats. Defendants failed to analyze any of several types of potential sabotage
24 actions, which may include damage to one or more of the LLNL BSL-3 facility’s containment
25 features, damage to the facility’s containment suite autoclaves, deliberate release of an infected

26
27
28 material to a dispersible form, and then disperse it through mechanisms such as the postal service. One
could assume that tens of people could be infected and a few unsuspecting or untreated people might
die...one can even postulate scenarios with catastrophic implications.” AR 122 at 64.

1 animal, and deliberate self-infection with the intent to spread the pathogenic material within the
2 environment. *See* AR 122 at 57-66. Each of these potential sabotage actions was analyzed in the
3 BDRP FPEIS. AR 27 at A9-51-53; *see also* AR 28 at G-36-38 (analyzing employee sabotage
4 scenario).

5 **5. Defendants Failed To Analyze Other Credible Release Scenarios Resulting From**
6 **a Terrorist Attack**

7 Finally, the FREA failed to analyze the environmental impacts that may result from a release
8 of biotoxins, viruses, or genetically modified organisms from the LLNL BSL-3 facility following a
9 terrorist attack, even though each may be present at the facility. AR 122 at 18, A-22-23. In the
10 BDRP FPEIS, the U.S. Army separately analyzed releases of bioagents, biotoxins, and viruses, and
11 explained that its analyses “for containment laboratories must be considered in terms of physical
12 containment for both toxins and biological organisms.” AR 27 at A9-4-16; *see also* AR 11 at 5-6-12.
13 Although the FREA briefly discusses an accident scenario from another NEPA document involving
14 the release of botulinum, a biotoxin, that analysis cannot form the basis for Defendants’ decision
15 here, since it is based on the specific features and location of another facility and the quantities and
16 varieties of biotoxins contained there. *See* AR 122 at 52 B-8; AR 11 at 5-1-12; *see also* AR 27 at
17 A9-13-14. For example, at the U.S. Army’s Life Sciences Test Facility, aerosol chamber exhaust is
18 subject to double HEPA filtration and air incineration, AR 28 at G-13-14, whereas aerosol chamber
19 exhaust at the LLNL BSL-3 facility will not be incinerated. *See* AR 122 at 12-17. The FREA
20 contains no analysis of a release of viruses or genetically modified organisms from the LLNL BSL-3
21 facility.⁷ *See* AR 122.

22
23
24
25
26 ⁷ Although Defendants claim that the rickettsial microorganism *Coxiella burnetii* is “considered
27 representative” of all types of BSL-3 microorganisms, including viruses, for the purpose of analyzing the
28 consequences of an accidental release, AR 122 at 53, this statement is unsupported and there is contrary
evidence in the record. *See, e.g.*, AR 27 at A9-14-16 (separately analyzing releases of *Coxiella burnetii*
and the Rift Valley Fever virus).

1 **B. THE DOE FAILED TO PROPERLY DISCLOSE THE 2005 ANTHRAX SHIPPING**
2 **INCIDENT**

3 The DOE withheld critical, relevant information regarding the 2005 anthrax shipping incident
4 from the DREA. The details of this significant incident were relevant to the DOE’s capacity to
5 protect against intentional terrorist attacks and to implement security protocols, specifically in
6 connection with shipping biological agents. AR 125; AR 128; AR 150; AR 121 at 57. Due to this
7 lack of disclosure, the public was unlawfully denied a reasonable opportunity to have meaningful
8 input in the decision-making process, prior to the DOE issuing the FREA. In its preliminary
9 injunction decision, this Court found Plaintiffs likely to prevail on this claim on summary judgment.
10 Docket (“DKT”) No. 58 at 40. The Court explained that DOE’s omission of relevant information and
11 failure to supplement and circulate the DREA with details of the anthrax shipping incident violated
12 NEPA. Dkt. No. 58 at 34-40. This legal inadequacy is hardly remedied by the subsequent additional
13 information offered in DOE’s motion for summary judgment. DMSJ at 11-15. Thus, Defendants’
14 motion for summary judgment should be denied.

15 **1. DOE’s Discussion of the Anthrax Shipping Incident was Inconsistent With NEPA**

16 As this Court noted in its preliminary injunction order, “[i]t is unclear why the DOE failed to
17 include in the 2007 [D]REA, in a section *specifically* addressing the potential environmental impacts
18 of *transit-related incidents*, information more than a year old, about two 2005 shipping incidents.”
19 Dkt. No. 58 at 40. The DOE attempts to recast its failure to disclose important details about the
20 anthrax shipping incident in the DREA as based on “reasonable” agency judgment. DMSJ 11-15.
21 However, none of its explanation remedies the fact that the DREA, which was issued in March 2007,
22 failed to include the crucially relevant information that anthrax was involved and that it had been
23 packaged by an unauthorized individual (or, as the DMSJ calls this person, “the Visitor”), in
24 violation of security requirements, among other omissions. *Compare* AR 128 at 1 *with* AR 121 at 57,
25 See also Dkt. No. 58 at 36-37, DMSJ at 11-15.

26 Additionally, the description of the anthrax release in the FREA also failed to disclose
27 important details regarding the incident, including many of the details now being shared for the first
28

1 time in the DMSJ and the Declaration of Samuel Brinker (“Brinker Declaration”).⁸ Compare AR
2 125; AR 128; AR 150 with AR 122 at 56-57, See also Dkt No.58 at 36-37, DMSJ at 11-15 and
3 Brinker Declaration. For instance, the FREA failed to describe the numerous regulatory violations
4 incurred by LLNL as a result of the incident, including those involving the laboratory’s security plan,
5 biosafety plan, incident response plan, safety and biosecurity training, and recordkeeping, among
6 others. Compare AR 125 at 4-8 with AR 122 at 56-57.

7 The DOE’s Incident Analysis Committee’s report identified numerous deficiencies at LLNL
8 which contributed to the release of anthrax. The report reached several conclusions from its review
9 of select agent inventorying, handling, packaging, and shipping, including that the overall planning
10 and execution was less than adequate, and that neither the LLNL Responsible Official (“RO”) nor the
11 Alternate RO ensured that packing and shipping regulatory requirements were met. AR 150 at 11.
12 Defendants, however, in violation of NEPA, failed to disclose any of this critical and significant
13 information when preparing their DREA or FREA.

14 Even though the FREA included additional detail regarding the LLNL anthrax release not
15 available in the DREA, that document was not made available to public officials and citizens before
16 the BSL-3 facility became operational, in violation of NEPA. See 40 C.F.R. § 1500.1(b) (“NEPA
17 procedures must insure that environmental information is available to public officials and citizens
18 before decisions are made and before actions are taken. The information must be of high quality.
19 Accurate scientific analysis, expert agency comments, and public scrutiny are essential to
20 implementing NEPA.”⁹

22 ⁸ Whether DOE’s decision to not disclose the details regarding the anthrax incident or the details
23 regarding LLNL conducting restricted experiments was made in good or bad faith is not essential to our
24 NEPA analysis. Although Mr. Brinker in his declaration states that “it was not my intent to withhold
25 information for the purpose of preventing public comment on the incident,” the intention behind
26 Defendants’ decision to withhold the information is not relevant to a NEPA sufficiency claim. The fact is
27 that they withheld such significant information from the public in clear violation of NEPA: “An agency,
28 when preparing an EA, must provide the public with sufficient environmental information, considered in
the totality of circumstances, to permit members of the public to weigh in with their views and thus
inform the agency decision-making process.” *Bering Strait Citizens for Responsible Res. Dev. v. United
States Army Corps of Eng’rs*, 524 F.3d 938, 953 (9th Cir. 2008).

⁹ See *Bering Strait Citizens for Responsible Res. Dev.* 524 F.3d at 953 (“An agency, when
preparing an EA, must provide the public with sufficient environmental information, considered in the
totality of circumstances, to permit members of the public to weigh in with their views and thus inform

1 The DOE attempts to recast the 2005 incident as just “an unusual event.” DMSJ at 13, *citing*
2 AR 122 at 56. They attempt to persuade the Court to support their lack of judgment with the
3 argument that federal agencies are entitled to a “presumption of regularity.” *Overton Park*, 401 U.S.
4 at 415. However, that presumption is not to shield the agency’s action from a thorough, probing, in-
5 depth review of the agency’s decision by a reviewing court. *Id.*

6 **2. DOE is Barred From Submitting Extra Record Evidence as a Post-Hoc**
7 **Rationalization for Its Action**

8 The DMSJ and the Brinker Declaration include never before released details of the 2005
9 anthrax shipping incident. Samuel Brinker takes full responsibility for the decision not to disclose
10 important details of the incident in the DREA. DMSJ at 11-15 and Brinker Declaration. However, a
11 motion for summary judgment is not the time for an agency to disclose relevant information about an
12 incident that clearly pertains to a NEPA analysis. Judicial review of final agency actions "focuses on
13 the administrative record in existence at the time of the decision." *Southwest Ctr. for Biological*
14 *Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996) (striking "post-decision
15 information" because it "may not be advanced as a new rationalization either for sustaining or
16 attacking an agency's decision"). "When a plaintiff challenges a final agency action, judicial review
17 normally is limited to the administrative record in existence at the time of the agency's decision."
18 *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) (citing *Citizens to Preserve*
19 *Overton Park, Inc.*, 401 U.S. at 420.)

20 The Ninth Circuit has excluded post-decision evidence submitted by the agency, stating that
21 such evidence would render the complex decision-making process "meaningless" and would allow
22 the agency to produce "unsupported" decisions "knowing that it could search for evidentiary support
23 if the [decision] was later challenged." *Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife*

24
25 the agency decision-making process.”); *Pit River Tribe v. United States Forest Serv.*, 469 F.3d 768, 786
26 (9th Cir. 2006) (“dilatatory or ex post facto environmental review cannot cure an initial failure to undertake
27 environmental review”); *Save the Yaak Committee v. Block*, 840 F.2d 714, 719 (9th Cir. 1988) (untimely
28 environmental analysis seriously impeded the degree to which the agency’s planning and decisions could
reflect environmental values).

1 Serv., 273 F.3d 1229, 1245 (9th Cir. 2001). Defendants cannot use "post hoc rationalizations
2 advanced to remedy inadequacies in the agency's record." *Bowen v. Georgetown Univ. Hospital*, 488
3 U.S. 204, 212 (1988) (declining to defer to a post hoc rationalization "advanced by an agency
4 seeking to defend past agency action against attack").¹⁰

5 **3. The Brinker Declaration Substantively Fails to Justify the Agency's Action**

6 Mr. Samuel Brinker's extra-record declaration states that he was "responsible for determining
7 the level of detail of the description of the shipping incident involving a select agent which occurred
8 in August-September 2005." Mr. Brinker was the Document Manager for the production of the
9 FREA. AR 123 at 10 ("Public Availability: Copies of this EA (DO/EA-1442R) and FONSI are
10 available from: Samuel Brinker, Document Manager, Livermore Site Office").

11 Mr. Brinker is not an expert on biological agents or transportation, nor does his declaration
12 claim such expertise. Mr. Brinker is not an attorney, nor does he claim any expertise with NEPA. In
13 fact, Karin King was the NEPA Compliance Officer at the Livermore Site Office in charge of the
14 BSL-3 FREA. AR 123. In addition, the DOE maintains a NEPA compliance office in Washington,
15 DC. However, Mr. Brinker's declaration fails to mention any consultation between himself as the
16 Document Manager and any DOE NEPA Compliance Officer or other legal expert as to the
17 appropriate level of analysis of the anthrax incident in either the DREA or FREA. We are to believe
18 on the basis of the Brinker Declaration that he made these decisions acting alone.

19 The DMSJ states that the "discussion in the draft REA was brief, because, in his [Mr.
20 Brinker's] judgment, "the incident and the circumstances leading up to it did not add significant
21 information regarding potential environmental impacts." DMSJ at 18. In other words, the DOE
22

23 ¹⁰ See also *Alvarado Community Hospital v. Shalala*, 155 F.3d 1115, 1124 (9th Cir.1998)
24 ("explanatory materials cannot be used to offer new rationalizations for agency action"); *Defenders of*
25 *Wildlife v. Norton*, 258 F.3d 1136, 1146 (9th Cir. 2001) ("we cannot affirm the decision of an agency on a
26 ground that the agency did not invoke in making its decision"); *Camp v. Pitts*, 411 U.S. 138 (1973)
27 (holding that the agency's decision must stand or fall on the record before the agency at the time of the
28 decision); *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 539-540 (1981): "[T]he post hoc
rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for
agency action. See *Citizens to Preserve Overton Park*, 401 U.S. at 419; *SEC v. Chenery Corp.*, 318 U.S.
80, 87 (1943). "It is axiomatic that in determining the validity of an agency rule or decision, a court may
defer only to rationales offered by the agency during the rulemaking or decision-making process, and that
a court should not defer to the post hoc rationalizations of the agency's lawyers."

1 allowed Mr. Brinker to substitute his non-expert judgment in place of (and above) the rights of
2 elected officials, other agency officials and the public to comment on the anthrax incident and its
3 relevance to the then-proposed BSL-3 at LLNL. If this alleged "standard" is allowed to stand by the
4 Court, any low or mid-level agency official can decide against disclosure in an EA.

5 Further, Defendants' assert in their Motion the primacy of Mr. Brinker's declaration in stating
6 the "conclusion" that transportation of pathogens in and out of the LLNL BSL-3 would have no
7 significant impact "based on two facts: First, there are currently a large number of research facilities
8 generating and shipping a large volume of infectious material with an extremely low occurrence of
9 accidents, and the addition of a single new facility to that number would not significantly increase the
10 number of accidents." Not only are the qualitative assertions in the declaration free of quantitative
11 data (Is this transportation national? International? How many accidents constitute an "extremely low
12 occurrence" in his opinion, etc), but Mr. Brinker possesses no particular knowledge or expertise in
13 this topic area.

14 Mr. Brinker then declares, and the DMSJ relies upon this assertion, that he withheld the basic
15 information and that the EA did not identify the agent involved in the incident as anthrax because
16 government guidance forbade linking a bio-weapon agent with a specified facility. In fact, it was a
17 government agency, the Department of Health and Human Services Office of Inspector General
18 ("DHHS OIG") that publicly released the information that anthrax was involved.¹¹ Second, that
19 information was released by the government before the FREA and Revised FONSI were released, i.e.
20 in time for the LLNL BSL-3 EA revision process to have included it. Third, Plaintiff Tri-Valley
21 CAREs promptly sent a detailed letter to Mr. Brinker as Document Manager for the LLNL BSL-3

23
24
25
26
27
28
¹¹ On the DHHS website, <http://www.oig.hhs.gov/fraud/enforcement/administrative/cmp/cmpitems.html#6>
the following information was made available to the public, "The Regents of the University of California,
Lawrence Livermore National Laboratory (LLNL), California, agreed to resolve its liability for an alleged
violation of the Select Agent Program. The OIG alleged that...anthrax was released from...shipped vials.
An investigation of the packaging for the shipments revealed several violations of regulations governing
the shipment of anthrax. The OIG specifically alleged that LLNL violated the transfer requirements of the
select agent packaging regulations... In addition, OIG also alleged that LLNL failed to comply with
security and access requirements... and that LLNL's Responsible Official failed to ensure compliance
with the shipping and packaging requirements of the select agent regulations. Under the terms of the
settlement, LLNL agreed to pay the OIG \$450,000 to resolve these allegations."

1 EA pointing out that NEPA requires this information to be adequately disclosed in the EA and that
2 the public be given its right to comment before the FREA and Revised FONSI were issued (AR 130
3 at 1, *See also*, AR 130 at 1, fn. 1.)

4 Moreover, the announcement that the agent was anthrax could have been accomplished by
5 DOE (and it was by the DHHS OIG) without discussing the "specified facility" wherein the anthrax
6 was improperly packaged and the security and other violations occurred. Thus, Mr. Brinker's
7 assertion that he was precluded from giving this information to the public to comment upon is
8 mistaken. Finally, Defendants acknowledge in a footnote that the Brinker Declaration constitutes
9 their sole "effective means" for why the anthrax incident was not adequately characterized and the
10 public not permitted to comment on its relevance to the proposed LLNL BSL-3. DMSJ at 14, fn. 12.

11 **C. DOE WAS REQUIRED TO CIRCULATE THE REVISED FONSI FOR PUBLIC**
12 **REVIEW**

13 On January 25th, 2008, the DOE simultaneously released the FREA, issued the Revised
14 FONSI, and commenced operation of the BSL-3 at LLNL. By issuing its Revised FONSI (a final
15 determination under NEPA) without allowing for public comment, the DOE violated NEPA
16 regulations. The CEQ NEPA Regulations state that in certain situations federal agencies must make
17 a FONSI "available for public review for 30 days before the agency makes its final determination
18 whether to prepare an EIS and before the action may begin." 40 C.F.R. §1501.4(e)(2). Two of the
19 four situations that trigger this requirement of a minimum of 30-days of public review are present in
20 the case of the LLNL BSL-3.

21 First, when a proposed action is a borderline case for which it can be reasonably argued that
22 an EIS should be prepared, the 30-day review period is required.¹² Here, the Ninth Circuit Court of
23 Appeals found that the DOE had to specifically "consider whether the threat of terrorist activity
24 necessitates the preparation of an Environmental Impact Statement." *Tri-Valley CAREs v. Dept. of*
25 *Energy*, 203 Fed. Appx. at 107. Even this Ninth Circuit ruling contemplated that an EIS might be
26 necessary for the BSL-3 facility.

27
28 ¹² See CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 FR 18026 (1981).

1 Second, when a proposed action is an unusual case, a new kind of action, or a precedent
2 setting case, the 30-day period is required. 40 C.F.R. §1501.4(e)(2). Here, the proposed action is an
3 unusual case in that BSL-3 facility is a biological weapon agent laboratory that is co-located inside
4 the gates of a DOE nuclear weapons research laboratory. Further, although there are 1,350 other
5 BSL-3 facilities nation-wide, this is the first BSL-3 facility managed by the DOE for weapons and
6 defense research. Finally, significant new information came to light between the release of the DREA
7 and the Revised FONSI. Since operation of the LLNL BSL-3 facility has unusual and new elements,
8 DOE is required to make the Revised FONSI available for public review.

9 IV. CONCLUSION

10 In fashioning an appropriate remedy, we ask that the Court grant relief similar to what this
11 Court granted in *Ctr. for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105 (N.D. Cal. 2007). In
12 that case, the Court found defendants' in violation of the APA and granted plaintiffs' motion for
13 summary judgment. The Court found that the plaintiffs suffered procedural and informational
14 injuries due to the defendants' failure to produce a statutorily required assessment. In remedying
15 their injury, the Court issued an injunction compelling the defendants to produce the assessment in
16 compliance with the statute.

17 In providing an appropriate remedy, we ask that the Court deny Defendants' Motion for
18 Summary Judgment and to look to the relief it granted in *Brennan* and require Defendants to issue an
19 environmental review in compliance with the purpose and requirements of NEPA, whether it be
20 through a supplemental EA, or a full EIS.

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 4th 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