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

14		
15	TRI-VALLEY CARES, MARYLIA	) Case No.:
16	KELLEY, JANIS KATE TURNER, and	) PLAINTIFFS' NOTICE OF MOTION AND
17	JEDIDJAH DE VRIES,	) MOTION FOR PRELIMINARY
18	Plaintiffs,	) INJUNCTION; SUPPORTING
19	vs.	) MEMORANDUM OF POINTS AND
20	UNITED STATES DEPARTMENT OF	) AUTHORITIES
21	ENERGY, NATIONAL NUCLEAR	) and
22	SECURITY ADMINISTRATION, and	) [PROPOSED] ORDER THEREON
23	LAWRENCE LIVERMORE NATIONAL	) Date: No Hearing Set
24	LABORATORY,	) Time: No Hearing Set
25	Defendants	) Judge: No Judge Assigned
26)
27)
28)

1 **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION**

2 TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that plaintiffs Tri-Valley CAREs, Marylia Kelley, Janis Kate
4 Turner, and Jedidjah de Vries (collectively, “Plaintiffs”) hereby move the Court for an order
5 granting interlocutory injunctive relief on the grounds that such relief is warranted because
6 Plaintiffs can show both that (1) they are likely to prevail on the merits, and (2) the balance of
7 hardships tips sharply toward Plaintiffs. This Motion is based on: this Notice of Motion and
8 Motion; the accompanying Memorandum of Points and Authorities; the Declarations of Edward
9 Hammond, Marylia Kelley, and Mark Wheelis, Ph.D.; the pleadings and records on file in this
10 matter; and on such argument as counsel may present if the Court orders a hearing on this
11 Motion.

12 Plaintiffs seek an order barring continued operation of the proposed BSL-3 facility at
13 Lawrence Livermore National Laboratory in Livermore, California, for the reasons set forth
14 below. A proposed order is lodged concurrently.

15 Dated this 10th day of March, 2008

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- 22 October 5, 2007
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendants United States Department of Energy (“DOE” or “Department”), National
4 Nuclear Security Administration (“NNSA”), and Lawrence Livermore National Laboratory
5 (collectively, “Defendants”) have commenced operation of a Biosafety Level 3 (“BSL-3”)
6 facility at Lawrence Livermore National Laboratory (“LLNL” or “Livermore Lab”) in
7 Livermore, California in violation of the National Environmental Policy Act (“NEPA”), 42
8 U.S.C. § 4321 *et seq.* (1975), and applicable laws and regulations.¹

9 As a result of prior litigation initiated by Tri-Valley CAREs, et al., the United States
10 Court of Appeals for the Ninth Circuit ordered “DOE to consider whether the threat of terrorist
11 activity [at the proposed BSL-3 facility at Livermore Lab] necessitates the preparation of an
12 Environmental Impact Statement.” *Tri-Valley CAREs v. Department of Energy*, No. 04-17232,
13 mem. op. at 4 (9th Cir. 2006). Following the Ninth Circuit’s decision, the Department was
14 forced to issue interim guidance on how to address intentional destructive acts in NEPA
15 documents. *See* Exhibit 13 at 1. In response to the Ninth Circuit’s ruling and DOE’s guidance,
16 NNSA revised the prior Environmental Assessment for the proposed facility to consider the
17 potential impacts of terrorist activity. Exhibit 6 at ii. The interim nature of DOE’s guidance,
18 coupled with its reliance on the application of an analysis of accidents to an analysis of the
19 potential consequences of acts of sabotage or terrorism, ensured that the new EA would be
20 inadequate.

21 To protect the public from the proposed BSL-3 facility’s inadequately studied risk of a
22 release of dangerous pathogenic material into the environment as a consequence of terrorist
23 attack, abnormal event, or accident, Plaintiffs move this Court for a preliminary injunction
24

25 _____
26 ¹ By stipulation, the parties to this action have agreed to a voluntary limitation on operations in the LLNL BSL-3
27 facility for a period of sixty (60) days in the hopes that they will have this Court’s resolution of this Motion for
28 Preliminary Injunction prior to the expiration of that period. This voluntary limitation on operations is subject to the
following conditions: (a) no aerosol testing; (b) no rodent infection experiments; (c) no production, generation, or
knowing receipt of genetically modified biological material that would require management of the facility at the
BSL-3 level; and (d) the total amount of agents in the facility for which BSL-3 containment is recommended in the
4th Edition of *Biosafety in Microbiological and Biomedical Laboratories* shall not exceed 100 milliliters (ml).

1 barring continued operation of the facility. A plaintiff is entitled to a preliminary injunction if
2 she demonstrates “either ‘(1) a likelihood of success on the merits and the possibility of
3 irreparable injury; or (2) that serious questions going to the merits were raised and the balance of
4 hardships tips sharply in its favor.’” *Nelson v. NASA*, 2008 U.S. App. LEXIS 498, at *9, 512
5 F.3d 1132 (9th Cir. 2008) (emphasis added) (quoting *Walczak v. EPL Prolong, Inc.*, 198 F.3d
6 725, 731 (9th Cir. 1999)). The two prongs are not separate tests, as such, but “rather ‘extremes
7 of a single continuum,’ so ‘the greater the relative hardship to [the party seeking the preliminary
8 injunction], the less probability of success must be shown.’” *Nelson*, 2008 U.S. App. LEXIS
9 498, at *9 (quoting *Walczak*, 198 F.3d at 731). This motion is made on the grounds that interim
10 injunctive relief is warranted in this case under either of the two applicable standards because
11 Plaintiffs can show both that (1) they are likely to prevail on the merits, and (2) the balance of
12 hardships tips sharply toward Plaintiffs.

13 **II. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS**

14 Plaintiffs are likely to prevail on the merits of their claims against Defendants. Plaintiffs
15 plead four counts against Defendants in their Complaint: (1) failure to prepare an adequate
16 Environmental Assessment (“EA”) and Finding of No Significant Impact (“FONSI”), (2) failure
17 to prepare an Environmental Impact Statement (“EIS”), (3) failure to supplement, and (4) failure
18 to comply with applicable regulations. Because the law and the facts support the above
19 allegations, Plaintiffs are likely to prevail on the merits.

20 **1) Failure to prepare an adequate EA and FONSI**

21 Plaintiffs are likely to prevail on the merits of their claim that the new EA for the
22 proposed BSL-3 facility at Livermore Lab is inadequate and does not support the issuance of a
23 FONSI. Under the Department’s NEPA Implementing Procedures,

24 DOE shall prepare a FONSI only if the related EA supports the finding that the
25 proposed action will not have a significant effect on the human environment. If a
26 required DOE EA does not support a FONSI, DOE shall prepare an EIS and issue
27 a [Record of Decision (“ROD”)] before taking action on the proposal addressed
28 by the EA

10 C.F.R. § 1021.322(a) (1996).

1 The Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A) (1966), governs this
2 Court’s review of Defendants’ actions, conclusions, and findings of fact, which must be set aside
3 “if they are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
4 law.’” *Ocean Advocates v. United States Army Corps of Eng’rs*, 402 F.3d 846, 858 (9th Cir.
5 2005) (quoting 5 U.S.C. § 706(2)(A)). Judicial review under the arbitrary and capricious
6 standard is “searching and careful,” but a reviewing court is “not empowered to substitute its
7 judgment for that of the agency.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S.
8 402, 416, 91 S. Ct. 814 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99,
9 105, 97 S. Ct. 980 (1977). This Court “must consider whether the decision was based on a
10 consideration of relevant factors and whether there has been a clear error of judgment.” *Citizens*
11 *to Preserve Overton Park, Inc.*, 401 U.S. at 416; *see Ariz. Cattle Growers’ Ass’n v. United States*
12 *Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001) (citations omitted) (A reviewing court
13 “must determine whether the agency articulated a rational connection between the facts found
14 and the choice made.”). Reviewing courts “must not ‘rubber-stamp . . . administrative decisions
15 that they deem inconsistent with a statutory mandate or that frustrate the congressional policy
16 underlying a statute.’” *Ariz. Cattle Growers’ Ass’n*, 273 F.3d at 1236 (citing *NLRB v. Brown*,
17 380 U.S. 278, 291-92, 85 S. Ct. 980 (1965)).

18 NEPA requires agencies to “take a ‘hard look’ at the environmental consequences before
19 taking a major action.” *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97, 103 S. Ct. 2246 (1983)
20 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21, 96 S. Ct. 2718 (1976)). Here,
21 Defendants have failed to take a “hard look” at the environmental consequences of operation of
22 the proposed BSL-3 facility at Livermore Lab. Specifically, the new EA and FONSI for the
23 proposed facility are legally inadequate because the terrorism analysis that was used to support
24 the issuance of the FONSI is grossly deficient. Defendants’ failure to prepare a legally adequate
25 EA for the proposed facility is arbitrary and capricious, an abuse of discretion, or contrary to law
26 and constitutes a violation of the APA and NEPA.

27 **i. The terrorism analysis is grossly deficient**

28

1 In violation of NEPA, Defendants failed to take a “hard look” at whether the threat of
2 terrorist activity at the proposed BSL-3 facility necessitates the preparation of an EIS. Instead,
3 Defendants prepared an inadequate and unsupported analysis of the threat of terrorist attack on
4 the proposed facility, which was then used to support the issuance of a FONSI in lieu of the
5 required EIS. The terrorism analysis is inadequate in the following respects, among others: (1)
6 the terrorism analysis is based on an inapplicable and flawed accident scenario, and (2) the
7 terrorism analysis is unreasonable and unsupported.

8 The terrorism analysis contained in the new EA for the proposed facility is inadequate
9 because it is based on inapplicable and flawed accident scenario. *See* Exhibit 3 at ¶¶ 13-17.
10 According to the new EA, “the consequences of a malicious act designed to breach containment
11 are bounded by the accidents and natural catastrophic events evaluated in the EA because they
12 would result in a similar loss of containment.” Exhibit 6 at 59. However, as DOE itself
13 acknowledged in a 2006 memorandum, applying an analysis of accidents to an analysis of the
14 potential consequences of acts of sabotage or terrorism “may not be adequate for all situations,
15 because *accident scenarios may not fully encompass potential threats posed by intentional*
16 *destructive acts.*” Exhibit 13 at 2 (emphasis added).

17 According to the Department’s recommendations for analyzing accidents under NEPA,
18 “[t]he key to informative accident analysis is to develop *realistic* accident scenarios that address
19 a reasonable range of event probabilities and consequences.” Exhibit 16 at 4 (emphasis added).
20 An accident scenario “involves a postulated initiating event followed by a sequence of other
21 events or circumstances that result in adverse consequences.” *Id.* at 6. The Department “should
22 consider accident scenarios that represent the range or ‘spectrum’ of reasonably foreseeable
23 accidents, including low probability/high consequence accidents and higher probability/(usually)
24 lower consequence accidents.” *Id.* at 4-5. Significantly, DOE recommendations state that
25 bounding analyses, which were used in the new EA, “may mask differences among alternatives
26 and be less informative about the potential need for mitigation.” *Id.* at 5. “Bounding” analyses
27 are utilized by NEPA document preparers to compensate for analytical uncertainty by using
28 conservative approaches that overestimate potential impacts. *Id.*

1 Unrealistically, the bounding analysis applied by Defendants—a centrifuge accident
2 leading to a release of *Coxiella burnetii*—assumes that the air in the proposed BSL-3 facility
3 would exhaust “to the outside of the building through a stack on the roof after passing through
4 two sets of HEPA [(“High Efficiency Particulate Air-Purifying”)] filters” Exhibit 6 at 54.
5 In this regard the bounding analysis is inadequate because, in the event of a terrorist attack
6 resulting in a breach or rupture of the proposed facility’s walls, air contained therein would
7 clearly not be subject to HEPA filtration as assumed in the new EA. The scenario applied by
8 Defendants also unreasonably assumes that any released bioagents would be destroyed by heat,
9 fire, sunlight, wind, or *exploding containers of disinfectant*. Exhibit 6 at 51, 59; *see* Exhibit 2 at
10 ¶ 39; Exhibit 3 at ¶ 17. Furthermore, given that approximately 8,000 individuals are employed at
11 the Livermore Lab Main Site, a dense collection of buildings occupying approximately 1.3
12 square miles (821 acres), Defendants’ claim that “[a]dverse health effects to uninvolved workers
13 in adjacent buildings or the public would be extremely unlikely to develop from this scenario” is
14 lacking in credibility. Exhibit 6 at 2, 55; *see* Exhibit 3 at ¶¶ 6-12.

15 Thus, the accident scenario described above is clearly inapplicable to an analysis of the
16 threat of terrorist attack on the proposed BSL-3 facility at LLNL. As a result, Defendants have
17 failed to take a “hard look” at the environmental consequences of terrorist attack on the proposed
18 facility.

19 The terrorism analysis contained in the new EA for the proposed facility is also
20 inadequate because it is unreasonable and unsupported. Fundamentally, the terrorism analysis is
21 deficient because it fails to adequately analyze the consequences of a release of pathogenic
22 material on Livermore Lab’s employees, the over 81,000 residents of the City of Livermore, and
23 the approximately 7 million individuals living within a 50-mile radius of LLNL. *See* Exhibit 6 at
24 33, 57-66; Exhibit 3 at ¶¶ 6-12. This glaring oversight is the result of Defendants use of the
25 unrealistic and inapplicable bounding scenario described above, which unreasonably assumes
26 that any released bioagents would be subject to HEPA filtration or destroyed by environmental
27 factors or *exploding containers of disinfectant*. *See* Exhibit 6 at 51, 54, 59. Also, even assuming
28 *arguendo* that Defendants’ assertion is valid that the heat produced by catastrophic events has the

1 potential to reduce the consequences of a release of pathogenic material, it is improbable that a
2 terrorist would seek to completely destroy the proposed BSL-3 facility. *Id.* at 59. Instead, such a
3 terrorist would likely attempt to lightly damage the facility so as to result in a loss of
4 containment and release of pathogenic material.

5 Moreover, Defendants assume that diagnostic testing and medical treatment will be
6 immediately available to those whose health is endangered by a release of deadly bioagents. *See*
7 Exhibit 6 at 60. Defendants fail to consider the strong likelihood that a breach of containment
8 will release multiple types of pathogens—since many different ones may be stored or in use—in
9 unknown concentrations. *See* Exhibit 3 at ¶¶ 16-17. The analysis in the new EA assumes that
10 exposed individuals will be “inoculated to prevent infection or treated to assist in recovery.”
11 Exhibit 6 at 60. Since, as Defendants later acknowledge, the bioagents to be handled in the
12 proposed facility “can be extremely difficult to detect and some may not cause illness
13 immediately,” this assumption is plainly unreasonable. *Id.* at 62. Defendants also fail to account
14 for the possibility that genetically engineered microorganisms handled in the proposed facility,
15 against which available antibiotics and the environmental factors discussed above may be
16 ineffective, will be released into the environment after a loss of containment, catastrophic or
17 otherwise. *See* Exhibit 3 at ¶ 15.

18 Furthermore, Defendants’ unreasonably attempt to bolster their assertion that the
19 probability of a successful terrorist attack on the proposed facility is very low and is not expected
20 during the life of the facility by claiming that the bioagents to be contained in the facility are
21 readily obtainable from the environment. Exhibit 6 at 58, 62-63. This bald assertion simply
22 does not bear scrutiny. *See* Exhibit 3 at ¶¶ 13-16. According to the new EA, the proposed BSL-
23 3 facility will have the ability to produce biological material (enzymes, DNA, ribonucleic acid,
24 etc.) using infectious agents and genetically modified microorganisms, which could not be
25 obtained from the environment. Exhibit 6 at 7; Exhibit 3 at ¶ 15. The proposed facility would
26 represent a collection of bioagents that could be used as bioweapons, so the comparison to
27 gathering pathogenic material from distributed sources is inappropriate. *See* Exhibit 3 at ¶ 16.
28 Also, the quantity of bioagents at the proposed BSL-3 facility, which could be as high as 50

1 liters, would exceed those quantities easily collected from animal or plant sources in the field.
2 Exhibit 6 at C-10; *see* Exhibit 2 at ¶ 10. In addition, terrorists may find the proposed BSL-3
3 facility to be an attractive source of known strains of bioagents with demonstrated human
4 virulence, such as the Vollum strain of anthrax. Exhibit 3 at ¶ 14.

5 Finally, the Department’s recommendations for analyzing accidents under NEPA specify
6 that, “[i]n evaluating the effects of an accident, characterize the degree to which buildings, land,
7 and environmental media would be contaminated, and describe (at least qualitatively) the
8 potential health and environmental effects from such contamination, including direct and indirect
9 effects associated with potential cleanup activities.” Exhibit 16 at 12. According to the new EA,
10 “[a]s shown in 2001 [following the anthrax mailings], dramatic human health impacts and
11 economic disruption can result following the release of pathogenic materials.” Exhibit 6 at 64.
12 A release of deadly bioagents from the proposed BSL-3 facility could necessitate the cessation of
13 operations at Livermore Lab, the evacuation of nearby residents, and the closure of Interstate
14 580, which could cause unprecedented economic disruption throughout the San Francisco Bay
15 Area and the United States. *See* Exhibit 2 at ¶ 13. None of these potential effects are evaluated
16 in the terrorism analysis contained in the new EA, despite DOE’s own recommendations to the
17 contrary.

18 In light of the above, it is apparent that Defendants have violated NEPA by failing to take
19 a “hard look” at whether the threat of terrorist activity at the proposed BSL-3 facility necessitates
20 the preparation of an EIS. Accordingly, Plaintiffs are likely to prevail on the merits of this claim.

21 **2) Failure to prepare an EIS**

22 Plaintiffs are likely to prevail on their claim that Defendants violated NEPA by failing to
23 prepare an EIS for the proposed BSL-3 facility at Livermore Lab. The proposed facility is a
24 “major Federal action[] significantly affecting the quality of the human environment, [for which]
25 a detailed statement [on] . . . the environmental impact of the proposed action,” an EIS, is
26 required. 42 U.S.C. § 4332(2)(C). If substantial questions are raised as to whether a project *may*
27 cause significant degradation of some human environmental factor, an EIS must be prepared.
28 *Ocean Advocates*, 402 F.3d at 864-65 (emphasis in original) (quoting *Idaho Sporting Cong. v.*

1 *Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998) (citation omitted)). A plaintiff is not required to
2 show that significant effects will in fact occur; it is sufficient to raise substantial questions
3 whether a project *may* have a significant effect. *Ocean Advocates*, 402 F.3d at 865 (quoting
4 *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992)).

5 As used in NEPA, significance “requires considerations of both context and intensity.”
6 40 C.F.R. § 1508.27 (1979). Context “means that the significance of an action must be analyzed
7 in several contexts such as society as a whole (human, national), the affected region, the affected
8 interests, and the locality[.]” while intensity “refers to the severity of impact.” *Id.* at §
9 1508.27(a-b). The following factors, among others, should be considered in evaluating intensity:

- 10 1. Impacts that may be both beneficial and adverse. A significant effect may exist
11 even if the Federal agency believes that on balance the effect will be beneficial.
- 12 2. The degree to which the proposed action affects public health or safety.
- 13 . . .
- 14 4. The degree to which the effects on the quality of the human environment are
likely to be highly controversial.
- 15 5. The degree to which the possible effects on the human environment are highly
uncertain or involve unique or unknown risks.
- 16 . . .
- 17 10. Whether the action threatens a violation of Federal, State, or local law or
requirements imposed for the protection of the environment.

18 *Id.* at § 1508.27(b).

19 Regarding context, operation of the proposed facility may have significant impacts at the
20 local, regional, and national levels. Most obviously, a release of pathogenic material from the
21 proposed BSL-3 facility could result in the exposure of a large number of individuals at LLNL
22 and the surrounding communities. *See* Exhibit 2 at ¶¶ 11-13; Exhibit 3 at ¶¶ 10-11,17. Given
23 Livermore Lab’s close proximity to Interstate 580 and the San Francisco Bay Area, such a
24 release could also have significant regional impacts. *See* Exhibit 3 at ¶ 13. Finally, as evidenced
25 by the significant disruptions occasioned by the anthrax mailings in 2001, an accidental release, a
26 terrorist attack on the proposed facility, or the theft and subsequent release of pathogenic
27 material from the facility could have significant impacts nationally as well.

28 Under similar circumstances, the Department has determined that “preparation of an EIS
is the appropriate level of NEPA analysis for the operation of the BSL-3” laboratory at Los

1 Alamos National Laboratory (LANL) in Los Alamos, New Mexico. Notice of Intent To Prepare
2 an Environmental Impact Statement for the Operation of a Biosafety Level 3 Facility at Los
3 Alamos National Laboratory, Los Alamos, NM, 70 Fed. Reg. 71490 (Nov. 29, 2005). The issues
4 to be analyzed in the LANL EIS include “[a]dditional seismic analysis; safety of laboratory
5 operations; public health and safety; handling, collection, treatment, and disposal of research
6 wastes; other risks; pollution prevention; and potential impacts on air quality, biological
7 resources, cultural resources, water resources, land use, and socioeconomic resources.” *Id.*

8 Given the unique status of both LLNL and LANL as the nation’s classified nuclear
9 weapons design laboratories, there is no rational basis for preparing an EIS for the operation of
10 the BSL-3 facility at Los Alamos and not Lawrence Livermore; the same issues which
11 necessitated the preparation of an EIS for the LANL BSL-3 facility are equally applicable to the
12 LLNL BSL-3 facility, if not more so. *See* Exhibit 2 at ¶ 47. For instance, “NNSA determined
13 that it was necessary to conduct additional seismic analysis” concerning the Los Alamos BSL-3
14 laboratory and not the Lawrence Livermore BSL-3 laboratory, despite the presence of an
15 earthquake fault zone less than 200 feet from the LLNL site boundary. 70 Fed. Reg. 71490;
16 Exhibit 2 at ¶ 36. Moreover, the Livermore Lab Main Site is located in an urban region, in close
17 proximity to residential housing and a busy interstate freeway, so the risks to the human
18 environment are even greater than at Los Alamos. Exhibit 2 at ¶¶ 11-13, 47.

19 The proposed BSL-3 facility at Livermore Lab may significantly affect the quality of the
20 human environment in the following respects, among others: (i) operation of the proposed
21 facility may affect public health and safety; (ii) the possible effects on the quality of the human
22 environment from operation of the proposed facility are highly controversial; (iii) the possible
23 effects on the human environment from operation of the proposed facility are highly uncertain
24 and involve unique or unknown risks; and (iv) the proposed action, operation of a BSL-3 facility
25 at Livermore Lab for biodefense purposes, threatens a violation of the Biological Weapons
26 Convention, to which the United States is a State Party. Accordingly, Defendants’ approval of
27 the new EA and FONSI for the proposed BSL-3 facility is arbitrary and capricious, an abuse of
28

1 discretion, or contrary to law and constitutes a violation of the APA and NEPA because
2 Defendants were required to prepare an EIS for the proposed facility.

3 **i. Operation of the proposed facility may affect public health and safety**

4 Operation of the proposed BSL-3 facility at LLNL, including the inadequately studied
5 risks of terrorist attack, accidents, earthquake, and fire, has the potential to cause significant
6 impacts to public health and safety. *See* Exhibit 2 at ¶ 10; Exhibit 3 at ¶¶ 7-17. To put things in
7 perspective, the proposed facility will be located at the Livermore Lab Main Site, which occupies
8 a total area of approximately 1.3 sq. miles (821 acres) and where approximately 8,000
9 individuals are employed. Exhibit 6 at 2. LLNL is located just outside the boundary of the City
10 of Livermore and about 40 miles east of San Francisco at the southeast end of the Livermore
11 Valley in Alameda County. *Id.* The nearest member of the public is about one-half mile away,
12 and the City of Livermore’s central business district is approximately three miles to the west. *Id.*
13 at 2, 55. In 2000, “there were approximately 1.3 million people living in Alameda County . . .
14 and about 6.9 million people living within a 50-mile radius of LLNL[.]” *Id.* at 33.

15 In the event of a release of deadly bioagents from the proposed facility as a result of
16 terrorist attack, abnormal event, or accident, catastrophic impacts to public health and safety may
17 result. *See* Exhibit 2 at ¶ 10; Exhibit 3 at ¶¶ 7-17. As stated in the new EA, operations or
18 activities to be conducted in the proposed facility could “place up to 1 liter quantities of a slurry
19 of material containing pathogenic organisms at risk at any point in time. One liter of *C. burnetti*
20 generated in tissue culture would contain a maximum of about 1 trillion bacteria.” Exhibit 6 at
21 59. The Centers for Disease Control and Prevention has reported that “exposure to only 10
22 microorganisms can cause an individual with normal immunocompetency to develop symptoms
23 of disease[.]” and others have reported “this to be as low as five microorganisms or possibly
24 even one[.]” *Id.* at 53. Thus, a loss of containment of pathogenic material during normal
25 operations may result in the release of 100,000,000 infective doses. *See* Exhibit 1 at ¶ 12;
26 Exhibit 2 at ¶ 46. Such a release would almost certainly cause irreparable harm to public health
27 and safety.

28

1 Furthermore, the proposed facility is designed to handle operations involving small-
2 animal testing of bioagents and biotoxins, in which up to 100 rodents would be exposed to
3 aerosolized pathogenic material. Exhibit 6 at 7, 20. Because the proposed BSL-3 facility will
4 handle agents that may cause serious or lethal disease as a result of exposure by the inhalation
5 route, aerosolization increases the risks to public health and safety due to accidental occupational
6 exposure and, in the case of a loss of containment, exposure of individuals outside LLNL.
7 Exhibit 3 at ¶ 6.

8 **ii. The possible effects on the human environment are highly**
9 **controversial**

10 The possible effects on the quality of the human environment from operation of the
11 proposed facility are highly controversial. A proposed action “is highly controversial when there
12 is ‘a substantial dispute [about] the size, nature, or effect of the major Federal action rather than
13 the existence of opposition to a use.’” *Anderson v. Evans*, 371 F.3d 475, 489 (9th Cir. 2004)
14 (quoting *Blue Mts. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)
15 (citation omitted)). Here, there are substantial disputes regarding the need for the proposed
16 facility, the consequences of an accidental or deliberate release of pathogenic material from the
17 facility, as well as the proposed action’s compliance with the Biological Weapons Convention.
18 See Exhibit 1 at ¶¶ 4-21; Exhibit 2 at ¶¶ 36-40; Exhibit 3 at ¶¶ 7-24.

19 **iii. The possible effects on the human environment are highly uncertain**
20 **and involve unique or unknown risks**

21 The possible effects on the human environment from operation of the proposed BSL-3
22 facility are highly uncertain and involve unique or unknown risks. An agency “must generally
23 prepare an EIS if the environmental effects of a proposed agency action are highly uncertain.”
24 *National Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 731-32 (9th Cir. 2001) (citing
25 *Blue Mts. Biodiversity Project*, 161 F.3d at 1212). Preparation of an EIS “is mandated where
26 uncertainty may be resolved by further collection of data,” or “where the collection of such data
27 may prevent ‘speculation on potential . . . effects. The purpose of an EIS is to obviate the need
28 for speculation by insuring that available data are gathered and analyzed prior to the

1 implementation of the proposed action.” *National Parks & Conservation Ass’n*, 241 F.3d at 732
2 (citing *Blue Mts. Biodiversity Project*, 161 F.3d at 1213-14; quoting *Sierra Club v. United States*
3 *Forest Service*, 843 F.2d 1190, 1194 (9th Cir. 1988)).

4 In this case, the possible effects on the human environment from operation of the
5 proposed facility are highly uncertain because there is no precedent for a release of pathogenic
6 material from such a facility in the United States. Exhibit 6 at 52. Although Defendants attempt
7 to use this historical evidence to justify their failure to consider the consequences of such a
8 release, the Ninth Circuit has clearly indicated that incidents of this nature are not so remote and
9 highly speculative as to be beyond NEPA’s requirements. *See Tri-Valley CAREs*, No. 04-17232,
10 mem. op. at 4; *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1030 (9th Cir. 2006).
11 Moreover, on April 2, 1979, an accidental anthrax release occurred at a military microbiology
12 facility at Sverdlovsk, in the former Soviet Union. Exhibit 3 at ¶¶ 7-9. Over 100 people died as
13 a result of this incident, which was caused by operator error in removing a HEPA filter and not
14 replacing it. *Id.* at ¶ 8. Furthermore, since the proposed BSL-3 facility will handle bioagents
15 that could have offensive uses as bioweapons, and potentially genetically modified versions
16 thereof, the proposed action involves unique or unknown risks to the human environment.
17 Exhibit 6 at ii, 18; *see* Exhibit 3 at ¶ 15.

18 **iv. The proposed action threatens a violation of the Biological Weapons**
19 **Convention**

20 The proposed action, operation of a BSL-3 facility at LLNL for biodefense purposes,
21 threatens a violation of the Biological Weapons Convention (“BWC”), to which the United
22 States is a State Party. Convention on the Prohibition of the Development, Production and
23 Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction
24 (“BWC”), Mar. 26, 1975, 26 U.S.T. 583, 1015 U.N.T.S. 163. Pursuant to Article I of the BWC,
25 each State Party “undertakes never in any circumstances to develop, produce, stockpile or
26 otherwise acquire or retain . . . microbial or other biological agents, or toxins whatever their
27 origin or method of production, of types and in quantities that have no justification for
28 prophylactic, protective or other peaceful purposes[.]” *Id.* at art. I.

1 Given that the proposed BSL-3 facility may contain up to 50 liters (or 25,000 vials) of
2 pathogenic material and that research to be conducted therein may involve aerosolization and
3 genetic manipulation of bioagents and biotoxins, there are substantial questions as to whether the
4 proposed action may transgress the BWC. Exhibit 6 at 7, C-10; *see* Exhibit 1 at ¶¶ 11-16;
5 Exhibit 2 at ¶ 38; Exhibit 3 at ¶¶ 18-24. Moreover, although Defendants claim that Livermore
6 Lab’s management will ensure compliance with the Convention, there is no indication as to what
7 expertise LLNL’s management brings to bear to this matter or what criteria would guide these
8 determinations. *See* Exhibit 6 at 18. Since compliance with the BWC is a difficult issue even for
9 experts in the field, these words ring hollow, particularly in light of Defendants’ failure to
10 provide any information as to how compliance would be instituted after public comments
11 explicitly raised such concerns during the public comment periods for both EAs. *See* Exhibit 3
12 at ¶ 19; Exhibit 5 at C-7-8; Exhibit 6 at C-10-11.

13 Even though the research to be conducted in the proposed BSL-3 facility at LLNL would
14 be “directed to developing technologies and systems to improve national defense against, and
15 mitigate the consequences of . . . terrorist attacks[.]” Defendants cannot use the presupposed
16 benefits of this research to override the significant effects that may result from operation of the
17 proposed facility and which necessitate the preparation of an EIS. Exhibit 6 at 56-57. As
18 specified above, “[a] significant effect may exist even if the Federal agency believes that on
19 balance the effect will be beneficial.” 40 C.F.R. § 1508.27(b)(1).

20 Accordingly, Plaintiffs are likely to prevail on their claim that Defendants violated NEPA
21 by failing to prepare an EIS for the proposed BSL-3 facility at Livermore Lab.

22 **3) Failure to supplement**

23 Plaintiffs are likely to prevail on their claim that Defendants violated applicable
24 regulations implementing NEPA by failing to prepare a supplement to the new EA in response to
25 significant new circumstances and information relevant to the environmental impacts of the
26 proposed facility that became publicly available only after the new EA was circulated for public
27 review and comment. Moreover, there are indications that Defendants deliberately withheld
28 some of this information until after the public comment period had ended. Defendants’ failure to

1 prepare a supplement to the new EA for the proposed facility is arbitrary and capricious, an
2 abuse of discretion, or contrary to law and constitutes a violation of the APA and NEPA.

3 Federal agencies have “a continuing duty to gather and evaluate new information relevant
4 to the environmental impact of [the agencies’] actions.” *Warm Springs Dam Task Force v.*
5 *Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980) (citing 42 U.S.C. § 4332(2)(A-B) (1975)); *Essex*
6 *County Preservation Ass’n v. Campbell*, 536 F.2d 956, 960-61 (1st Cir. 1976); *Society for*
7 *Animal Rights, Inc. v. Schlesinger*, 512 F.2d 915, 917-18 (D.C.Cir.1975)). Pursuant to the
8 Department’s regulations implementing NEPA, “DOE shall prepare a supplemental EIS if there
9 are . . . significant new circumstances or information relevant to environmental concerns,” as
10 discussed in the NEPA regulations promulgated by CEQ. 10 C.F.R. § 1021.314(a) (1992).
11 Under CEQ’s regulations, agencies shall prepare supplements to either draft or final EISs if
12 “[t]here are significant new circumstances or information relevant to environmental concerns and
13 bearing on the proposed action or its impacts.” 40 C.F.R. § 1509(c)(1)(ii) (1978). The Supreme
14 Court has interpreted NEPA, in light of this regulation, as requiring an agency to take a “hard
15 look” at new circumstances and information to determine whether supplementation may be
16 required. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 72-73, 124 S. Ct. 2373 (2004)
17 (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378-85, 109 S. Ct. 1851
18 (1989)).

19 Although the instant action concerns supplementation of an EA, the standard for
20 supplementing an EA is the same as for an EIS. *Idaho Sporting Congress, Inc. v. Alexander*, 222
21 F.3d 562, 566 n.2 (9th Cir. 2000) (citations omitted); see *Price Rd. Neighborhood Ass’n v.*
22 *United States DOT*, 113 F.3d 1505, 1509-10 (9th Cir. 1997); *Friends of the Bow v. Thompson*,
23 124 F.3d 1210, 1218 n.3 (10th Cir. 1997) (citations omitted); *Clinch Coalition v. Damon*, 316 F.
24 Supp. 2d 364, 376 (D. Va. 2004) (citations omitted).

25 The following significant new circumstances and information relevant to environmental
26 concerns and bearing on the proposed action and its impacts require supplementation of the new
27 EA for the proposed BSL-3 facility at LLNL: (i) the Livermore Lab anthrax release in August-
28 September 2005; (ii) information regarding the safety and security of BSL-3 facilities; (iii) a

1 report on the proliferation of high-containment biosafety laboratories; (iv) a hearing in Congress
2 on the proliferation of high-containment biosafety laboratories; and (v) a report assessing the
3 biological weapons and bioterrorism threat.

4 **i. Livermore Lab anthrax release**

5 In August-September 2005, while the prior lawsuit filed by Tri-Valley CAREs, et al.
6 regarding the LLNL BSL-3 facility was pending in the Court of Appeals for the Ninth Circuit,
7 Livermore Lab was responsible for an anthrax release. *See* Exhibit 6 at 56-57; Exhibit 1 at ¶ 18;
8 Exhibit 2 at ¶¶ 21-26; Exhibit 3 at ¶ 12. Defendants failed to inform either the court or Plaintiffs
9 of this incident, which was relevant to the issues under consideration in the litigation. *See*
10 Exhibit 1 at ¶ 18; Exhibit 2 at ¶ 24. Although the anthrax release was briefly described in the
11 draft of the new EA, that description omitted important details and downplayed the significance
12 of the incident. *See* Exhibit 4 at 57. For instance, there was no mention that anthrax was
13 involved, that the anthrax was packaged by an unauthorized individual, or that LLNL’s
14 Responsible Official—the individual designated by Livermore Lab with the authority to ensure
15 compliance with the select agent² regulations—failed to ensure such compliance. *See id.*
16 Instead, Defendants misleadingly attempted to characterize the anthrax release as a minor
17 violation of Department of Transportation (“DOT”) shipping and packaging requirements. *See*
18 Exhibit 4 at 57; Exhibit 2 at ¶ 25.

19 On September 24, 2007, the Regents of the University of California, as the manager of
20 Livermore Lab, agreed to resolve its liability for the anthrax release. Exhibit 7. The HHS Office
21 of Inspector General (“OIG”) “alleged that LLNL transferred vials of anthrax to two laboratories
22 located in Florida and Virginia.” *Id.* During the transfers, anthrax was released from the
23 approximately 4,000 shipped vials because the scientist who packaged the shipments “left the
24 twist caps off two containers” and a third vial had a loose cap. *Id.*; Exhibit 10. Five workers
25 were exposed to anthrax while unpacking the shipments and required medical treatment. Exhibit
26

27 _____
28 ² Select agents are bioagents “of human disease whose transfer or receipt requires a facility to be registered with the [Centers for Disease Control and Prevention] under 42 CFR Part 72.6; select agents have historically been associated with weaponizing efforts.” Exhibit 6 at 18.

1 6 at 56. As a result of this incident, CDC suspended all LLNL transfers of select agents, and
2 Livermore Lab issued a full stand-down of all select agent work. *Id.* CDC sent LLNL a report
3 listing twenty-nine (29) points that needed to be addressed. Exhibit 12 at 5.

4 Specifically, the OIG alleged that Livermore Lab failed to comply with security and
5 access requirements by allowing an individual not authorized to have access to select agents to
6 package the shipments of anthrax. Exhibit 7. The OIG also alleged that Livermore Lab violated
7 the transfer requirements of the select agent regulations by failing to comply with applicable
8 shipping and packaging laws when transferring a select agent. *Id.* Finally, the OIG alleged that
9 LLNL's Responsible Official failed to ensure compliance with the shipping and packaging
10 requirements of the select agent regulations. *Id.* Under the terms of the settlement, Livermore
11 Lab agreed to pay the OIG \$450,000 to resolve these allegations. *Id.*

12 The LLNL anthrax release is significant because it highlights and validates concerns
13 expressed by Plaintiffs and the Ninth Circuit with regard to the threat of terrorist attack on the
14 proposed BSL-3 facility. *See* Exhibit 2 at ¶ 23. As specified above, the OIG alleged that
15 Livermore Lab failed to comply with security and access requirements by allowing an
16 unauthorized individual to have access to select agents. Exhibit 6 at 57. This runs directly
17 counter to the assertion in the new EA that “[o]nly personnel on LLNL's CDC registration are
18 allowed to handle [select] agents.” *Id.* at 65. After acknowledging that “the theft of pathogenic
19 materials by an insider . . . could have very serious consequences,” Defendants concluded that
20 “this scenario is not expected to occur at LLNL due to human reliability programs, security
21 procedures, and management controls at the facility and the laboratory.” *Id.* at 66. With regard
22 to the anthrax release, both the security procedures and management controls failed. *See id.* at
23 56-57.

24 Although Livermore Lab rightfully instituted multiple corrective actions in response to
25 the anthrax release, Defendants' lack of candor regarding the incident in both the earlier
26 litigation and the draft version of the new EA effectively circumvented judicial review and
27 public comment under NEPA. *See* Exhibit 6 at 56; Exhibit 1 at ¶ 18; Exhibit 2 at ¶¶ 24-26.
28 Under CEQ's regulations, agencies are required to “prepare, circulate, and file a supplement . . .

1 in the same fashion (exclusive of scoping) as a draft and final [EIS,]” which Defendants have not
2 done. 40 C.F.R. § 1502.9(c)(4) (1978). Thus, because the final version of the new EA
3 containing significant new information regarding the anthrax release was not circulated for
4 public comment, Defendants have failed to comply with NEPA.

5 **ii. Information regarding the safety and security of BSL-3 facilities**

6 After the completion of the public review and comment period on the draft of the new
7 EA, a report by the Associated Press indicated that BSL-3 and BSL-4 laboratories in the United
8 States “have experienced more than 100 accidents and missing shipments since 2003, and the
9 number is increasing steadily as more labs across the country are approved to do the work.”
10 Exhibit 15; *see* Exhibit 1 at ¶¶ 18-20. While these mishaps are too numerous to list here in any
11 detail, they include skin cuts, needle sticks, workers bitten or scratched by infected animals,
12 broken vials, leaks of contaminated waste, missing infected animals, dropped containers,
13 defective seals on airtight containers, missing or lost shipments, and more. Exhibit 15. Thirty-
14 six (36) accidents and lost shipments were reported between January and August 2007, which is
15 nearly double the number reported during all of 2004. *Id.* In addition, as of October 2007,
16 “[m]ore than two-dozen incidents were still under investigation.” *Id.*

17 These mishaps substantially undercut the assertion in the new EA that “it is improbable
18 laboratory staff would acquire accidental laboratory-acquired infection during the operation of
19 the proposed BSL-3.” Exhibit 6 at 51; *see* Exhibit 1 at ¶¶ 18-20. Similarly, the significant
20 number of transportation-related incidents calls into question Defendants’ claim that “[a]ccidents
21 due to transportation of microorganisms are not expected to increase” due to operation of the
22 proposed BSL-3 facility, particularly in light of the Livermore Lab anthrax release. Exhibit 6 at
23 57; *see* Exhibit 1 at ¶¶ 18-20; Exhibit 3 at ¶ 12. Biological shipments to the BSL-3 facility may
24 currently be as high as 40 shipments in and 20 shipments out per month, or ten times the levels
25 before the facility became operational, indicating a greater likelihood of another shipping mishap
26 occurring. Exhibit 6 at 21. Although the final Revised EA contains a perfunctory discussion of
27 recent laboratory-acquired infections, Defendants failed to take a “hard look” at the significant
28

1 new information regarding the safety and security of BSL-3 facilities, which requires
2 supplementation of the Revised EA. *See* Exhibit 6 at 50-51.

3 **iii. A report on the proliferation of high-containment biosafety**
4 **laboratories**

5 On October 4, 2007, the Government Accountability Office (“GAO”) released a report
6 documenting “a major proliferation of high-containment BSL-3 and BSL-4 labs” in the United
7 States, which calls into question the need for the proposed BSL-3 facility at LLNL. Exhibit 17 at
8 Highlights. The GAO report also stated that “[n]o single federal agency has the mission to track
9 and determine the risk associated with the expansion of BSL-3 and BSL-4 labs in the United
10 States, and no single federal agency knows how many such labs there are in the United States.”
11 *Id.* at 13. According to Keith Rhodes, Chief Technologist for the GAO, this lack of oversight
12 “has caused particular concern among officials at the Federal Bureau of Investigation . . .
13 because the laboratories themselves could become the source of agents that might be used in
14 terrorist attacks.” Exhibit 8.

15 In both the earlier EA and new EA, issued over five years apart, Defendants bolster their
16 assertion that the proposed BSL-3 facility at LLNL is needed because “[c]ommercial or
17 governmental BSL-3 facilities currently available are often heavily committed to other projects
18 or tailored to work with specific types of microorganisms.” Exhibit 5 at ii; Exhibit 6 at iii.
19 While these statements, in themselves, are inadequately supported in either document, they are
20 particularly dubious in light of the major expansion of BSL-3 laboratories over the past several
21 years. *See* Exhibit 6 at 7-8; Exhibit 1 at ¶¶ 4-9. Although the GAO report is cited in the new EA
22 for the proposition that “[t]here are currently over 1350 BSL-3 laboratory facilities in the United
23 States at various non-DOE sites,” there is no analysis of how the recent expansion in the number
24 of these facilities may obviate the need for the proposed BSL-3 facility at Livermore Lab or how
25 this proliferation may affect the terrorism analysis ordered by the Ninth Circuit. *See* Exhibit 6 at
26 61.

1 The major expansion of BSL-3 facilities in the United States over the past several years
2 documented in the GAO report rises to the level of significant new circumstances warranting
3 supplementation of the new EA.

4 **iv. A hearing in Congress on the proliferation of high-containment**
5 **biosafety laboratories**

6 On October 4, 2007, the House Committee on Energy and Commerce’s Subcommittee on
7 Oversight and Investigations held a hearing entitled “Germs, Viruses, and Secrets: The Silent
8 Proliferation of Bio-Laboratories in the United States.” In his opening statement, Chairman
9 Stupak noted that “[t]he accidental or deliberate release of some of the biological agents handled
10 at these labs could have catastrophic consequences.” Exhibit 9. Chairman Stupak went on to
11 question whether the unprecedented proliferation of these facilities is necessary. *Id.* At the
12 hearing, federal officials “said that the expansion of the [biodefense] program over the last few
13 years, coupled with a lack of training of lab workers and poor reporting of lab accidents, posed a
14 potential threat to national security and public health.” Exhibit 11.

15 This hearing, like the GAO report discussed above, raises substantial questions about the
16 need for the proposed BSL-3 facility at Livermore Lab and the safety and security of these
17 facilities. *See* Exhibit 1 at ¶¶ 4-21. These significant new circumstances and information require
18 supplementation of the Revised EA.

19 **v. A report assessing the biological weapons and bioterrorism threat**

20 In December 2005, Milton Leitenberg, Senior Research Scholar at the Center for
21 International and Security Studies at the University of Maryland, released a report entitled
22 *Assessing the Biological Weapons and Bioterrorism Threat*. The report was prepared for the
23 Strategic Studies Institute, a division of the U.S. Army War College. Exhibit 14. In his report,
24 Leitenberg asserts that “the U.S. biodefense research program appears to be drifting into
25 violation of Article 1 of the [Biological Weapons Convention (“BWC”).” *Id.* at 89-90.

26 This report is significant because, since Leitenberg established that there is no national-
27 level oversight system to ensure compliance with the BWC, there is reason to question whether
28 LLNL’s management is capable of approving and authorizing the research to be conducted in the

1 proposed BSL-3 facility in strict compliance with the Convention, as stated in the new EA. *Id.* at
2 89; Exhibit 6 at 18; *see* Exhibit 1 at 11-16; Exhibit 3 at ¶¶ 20-24. This is particularly so because
3 determining compliance with the BWC is notoriously difficult, as described above. *See* Exhibit
4 3 at ¶ 19. This significant new information necessitates supplementation of the new EA under
5 applicable regulations.

6 While some of the new circumstances and events discussed above were mentioned in
7 passing in the final version of the new EA, that document was not circulated for public comment.
8 Accordingly, the public and other government agencies were denied the opportunity “to react to
9 the effects of [the] proposed action at a meaningful time.” *Marsh*, 490 U.S. at 371 (citing
10 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-350, 109 S. Ct. 1835 (1989)).
11 Under CEQ’s regulations, “NEPA procedures must insure that environmental information is
12 available to public officials and citizens before decisions are made and before actions are taken.”
13 40 C.F.R. § 1500.1(b) (1978). Therefore, Defendants have violated NEPA by failing to prepare
14 and circulate a supplement to the new EA in response to significant new circumstances and
15 information relevant to the environmental impacts of the proposed BSL-3 facility at Livermore
16 Lab.

17 **4) Failure to comply with applicable regulations**

18 Plaintiffs are likely to prevail on their claim that Defendants violated applicable
19 regulations implementing NEPA by issuing a FONSI for the proposed BSL-3 facility at
20 Livermore Lab without public review and comment. Defendants’ failure to comply with
21 applicable federal regulations is arbitrary and capricious, an abuse of discretion, or contrary to
22 law and constitutes a violation of the APA and NEPA.

23 Under the applicable regulations, Defendants were required to issue a proposed FONSI
24 for the BSL-3 facility for public review and comment before making a final determination on the
25 FONSI. Pursuant to the Department’s Implementing Procedures under NEPA, “DOE shall issue
26 a proposed FONSI for public review and comment before making a final determination on the
27 FONSI if required [under the NEPA regulations promulgated by CEQ.]” 10 C.F.R. §
28 1021.322(d) (1996). Under CEQ’s NEPA regulations, an agency shall make a FONSI available

1 for public review for 30 days before the agency makes its final determination whether to prepare
2 an EIS and before the action may begin where “[t]he nature of the proposed action is one without
3 precedent.” 40 C.F.R. § 1501.4(e)(2) (1978).

4 Whether the nature of the proposed action “is ‘without precedent’ is largely a function of
5 the definition one assigns to the term ‘nature’.” *Sabine River Authority v. U.S. Dep’t of Interior*,
6 745 F. Supp. 388, 401 (D. Tex. 1990) (quoting 40 C.F.R. § 1501.4(e)(2)(ii)). In *Sabine River*
7 *Authority*, the court reasoned that the common understanding of the word nature is “the essential
8 character of something[.]” 745 F. Supp. at 401. Here, the essential character of the proposed
9 action is the operation of a BSL-3 facility by DOE. Prior to commencing operation of the
10 proposed BSL-3 facility at Livermore Lab, the Department had not previously operated any
11 microbiological facilities above Biosafety Level 2 (BSL-2”). Exhibit 6 at iii.

12 Although DOE has previously operated BSL-2 facilities, there are important differences
13 between BSL-2 and BSL-3. BSL-2 “is suitable for work involving agents of *moderate potential*
14 *hazard to personnel and the environment.*” *Id.* at A-4 (emphasis added). BSL-3 is applicable to
15 “facilities in which work is done with infectious agents which may cause *serious or potentially*
16 *lethal disease as a result of exposure by the inhalation route.*” *Id.* at A-9 (emphasis added). As
17 such, the bioagents to be contained in the proposed facility represent a much greater hazard to
18 the public and the environment; namely, that of serious or lethal disease. Moreover, the
19 indigenous or exotic agents that would be handled in the proposed facility have the potential for
20 aerosol transmission. *Id.* This is particularly significant insofar as a loss of containment in the
21 facility, which will aerosolize pathogenic material for small-animal testing, may have dire
22 consequences on public health and safety and the environment that would not be applicable to a
23 BSL-2 facility. Exhibit 3 at ¶ 6.

24 The *Sabine River Authority* court went on to note that, “even if the Court were to find that
25 the 30-day comment period applied to the FONSI [at issue], the plaintiffs failed to identify any
26 additional relevant information that they or any other party would have provided to the
27 [agency].” 745 F. Supp. at 401. In the instant case, Plaintiffs and others would have provided
28 significant information relevant to environmental concerns and bearing on the proposed action

1 and its impacts. *See* Exhibit 2 at ¶ 28. For instance, Plaintiffs would have provided further
2 information about the Livermore Lab anthrax release and its implications regarding the terrorism
3 analysis ordered by the Ninth Circuit. *See id.* Plaintiffs would also have provided information
4 concerning the proliferation of BSL-3 facilities and the large number of accidents, security
5 lapses, and shipping mishaps at such facilities since 2003. *Id.* Also, Plaintiffs would have
6 provided information concerning the Leitenberg report. *Id.* Finally, depending on the timing of
7 the public review and comment period, Plaintiffs would have provided information concerning
8 the deliberate exposure of construction workers at Livermore Lab to the toxic metal beryllium,
9 which implicates the safety and management protocols at LLNL. *Id.*

10 Accordingly, the proposed BSL-3 facility at LLNL is clearly without precedent, and
11 Defendants violated applicable regulations by issuing the Revised FONSI without public review
12 and comment.

13 **III. THE BALANCE OF HARDSHIPS TIPS SHARPLY TOWARD PLAINTIFFS**

14 The balance of hardships tips sharply in Plaintiffs' favor because the significant threat to
15 the human environment posed by operation of the proposed BSL-3 facility under these
16 circumstances far outweighs the resulting negligible delay in operations that a preliminary
17 injunction would occasion. According to the Supreme Court, if environmental injury "is
18 sufficiently likely, . . . the balance of harms will usually favor the issuance of an injunction to
19 protect the environment." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545, 107 S. Ct.
20 1396 (1987).

21 Defendants propose to experiment with a number of deadly bioagents, including, but not
22 limited to, the select agents *Bacillus anthracis* (anthrax), *Yersinia pestis* (plague), *Clostridium*
23 *botulinum* (botulism), *Coccidioides immitis* (Valley Fever), *Brucella spp.* (Brucellosis),
24 *Francisella tularensis* (tularemia), and *Coxiella burnetii* (Q Fever). Exhibit 6 at 18, 51. The
25 proposed BSL-3 facility at Livermore Lab may also be used to handle small amounts of
26 biotoxins and may receive genetically modified organisms. *Id.* at 18. In addition, the proposed
27 facility may contain up to 50 liters of bioagents, a number of which could have offensive uses as
28 bioweapons. *Id.* at iii, C-10. If released to the environment due to terrorist attack, earthquake,

1 fire, worker transmission, improper shipment, equipment malfunction, operator error, sabotage,
2 or the like, these deadly pathogens would pose a grave danger of irreparable health impacts to an
3 untold number of individuals. *See* Exhibit 2 at ¶ 10; Exhibit 3 at ¶¶ 7-17.

4 Moreover, Plaintiffs have suffered procedural injury as the result of Defendants' actions.
5 *See* Exhibit 2 at ¶ 28. Defendants' obfuscation with regard to the August-September 2005
6 anthrax release effectively circumvented the public's ability to comment on an incident having
7 important ramifications concerning the environmental impacts of the proposed facility. *See id.* at
8 ¶¶ 25-26. Similarly, Plaintiffs also suffered procedural injury because Defendants failed to
9 prepare and circulate a supplement to the EA in response to significant new circumstances and
10 information. Under these circumstances, "the harm at stake is a harm to the environment, but the
11 harm consists of the added risk to the environment that takes place when governmental
12 decisionmakers make up their minds without having before them an analysis (with prior public
13 comment) of the likely effects of their decision upon the environment." *Sierra Club v. Marsh*,
14 872 F.2d 497, 500-01 (1st Cir. 1989). In addition, Plaintiffs' suffered procedural injury because
15 Defendants failed to prepare an EIS, which creates a risk that significant environmental impacts
16 will be overlooked. Exhibit 2 at ¶ 47; *Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975).

17 Any delay resulting from this requested preliminary injunction would be slight in
18 comparison to the potentially catastrophic results of a release of deadly bioagents from the
19 proposed BSL-3 facility. Defendants can advance no credible claim of prejudice from the
20 negligible delay in operation of the proposed facility requested in this preliminary injunction. As
21 noted above, it has been widely reported that there has been a major proliferation of BSL-3
22 facilities in recent years. Exhibit 1 at ¶ 4; Exhibit 17 at Highlights. Given that offsite BSL-3
23 facilities have been used in the past to support bioscience research at Livermore Lab, it is likely
24 that such facilities could be engaged in the interim, particularly in light of the recent expansion in
25 the number of these facilities. Exhibit 6 at 7-8; *see* Exhibit 1 at ¶ 10. Defendants' expected
26 claim that there is a "national security" or other urgent need for the proposed facility is belied by
27 Livermore Lab's trumpeted claims of "pioneering work on biological agent (bioagent) detection
28

1 and counter-terrorism technologies, and basic research understanding of emerging and re-
2 emerging natural diseases” prior to operation of the proposed facility. Exhibit 6 at iii.

3 In light of the above, it is clear that the balance of hardships tips sharply in Plaintiffs’
4 favor because the significant threat to the human environment posed by operation of the
5 proposed facility in violation of NEPA far outweighs the resulting negligible delay in operations
6 that may result from issuance of a preliminary injunction.

7 Therefore, Plaintiffs are entitled to interim injunctive relief. In addition to the factors
8 discussed above, Plaintiffs have demonstrated the possibility of irreparable harm to the human
9 environment from operation of the proposed BSL-3 facility at LLNL. See Exhibit 3 at ¶¶ 6-17.
10 As the Supreme Court has explained, “[e]nvironmental injury, by its nature, can seldom be
11 adequately remedied by money damages and is often permanent or at least of long duration, i.e.,
12 *irreparable.*” *Amoco Prod. Co.*, 480 U.S. at 545 (emphasis added). Here, operation of the
13 proposed BSL-3 facility at Livermore Lab threatens grave environmental injury. Moreover, as
14 specified in detail above, Plaintiffs have raised serious questions about the legality of
15 Defendants’ actions in commencing operation of the proposed BSL-3 facility at Livermore Lab.
16 These serious questions go to the merits of Plaintiffs’ claims and also favor the issuance of a
17 preliminary injunction in this instance.

18 **IV. THE BOND AMOUNT SHOULD BE NOMINAL**

19 Any bond required of Plaintiffs should be set—if at all—at a nominal amount in light of
20 the fact that Plaintiffs are non-profit public benefit organizations and private citizens that have
21 brought suit in order to ensure that Defendants comply with federal laws and regulations. The
22 Court has “discretion to dispense with the security requirement, or to request mere nominal
23 security, where requiring security would effectively deny access to judicial review.” *California*
24 *ex rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985)
25 (citations omitted). Moreover, “special precautions to ensure access to the courts must be taken
26 where Congress has provided for private enforcement of a statute,” as it has done with NEPA.
27 *Id.* at 1325-26 (citations omitted). As noted, Plaintiffs are non-profit organizations and
28 concerned citizens with extremely modest economic resources. Exhibit 2 at ¶¶ 49-52.

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V. CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Plaintiffs have satisfied this Court’s test for issuance of a preliminary injunction. Accordingly, this Court should grant Plaintiffs’ Motion for Preliminary Injunction. The amount of bond, if any, should be nominal.

WHEREFORE, Plaintiffs respectfully request that this Court grant Plaintiffs the following relief:

- a. Order Defendants to suspend operation of the BSL-3 facility at Livermore Lab pending a determination on the merits of this action.
- b. Waive bond, or set a nominal bond.
- c. Award Plaintiffs reasonable attorney and expert witness fees and expenses incurred in the litigation of this action.

Dated this 10th day of March, 2008

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GOOD CAUSE APPEARING from the Plaintiffs' Motion for Preliminary Injunction and Supporting Memorandum of Points and Authorities, the Declarations of Edward Hammond, Marylia Kelley, and Mark Wheelis, Ph.D., and the Court having considered the opposition submitted thereto by Defendants,

IT IS HEREBY ORDERED that Defendants, their agents, officers, representatives, servants and employees, and all persons acting under, in concert with, or for them, are enjoined from operating the proposed Biosafety Level 3 ("BSL-3") facility at Lawrence Livermore National Laboratory that is the subject of this action, pursuant to administrative approvals that are challenged in this proceeding, pending the Court's review and disposition of this matter.

BOND on this preliminary injunction is hereby fixed at _____.

Dated: _____, 2008

[Name]
United States District Judge

1 **CERTIFICATE OF SERVICE**

2
3 I am a citizen of the United States of America. I am over the age of eighteen (18) years
4 and not a party to this action. My business address is 2582 Old First Street, Livermore,
5 California 94551.

6 On March 10, 2008, I served a true copy of the foregoing document entitled
7
8 **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION;
SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES**
9
10 in the above-captioned matter on each of the persons listed below by placing a true copy thereof
11 in a sealed envelope with postage thereon fully prepaid in the United States mail at Livermore,
12 California addressed as follows:

13 Steven Sugarman
14 Belin & Sugarman
15 618 Paseo de Peralta
16 Santa Fe, NM 87501
17 Telephone: (505) 983-1700
18 Facsimile: (505) 983-0036

19 Barclay T. Samford
20 United States Department of Justice
21 Environment & Natural Resources Division
22 1961 Stout St. 8th Floor
23 Denver, CO 80294
24 Telephone: (303) 844-1475
25 Facsimile: (303) 844-1350

26 I certify under penalty of perjury that the foregoing is true and correct. Executed on
27 March 10, 2008, at Livermore, California.
28

Robert Schwartz