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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TRI-VALLEY CARES, NUCLEAR WATCH OF NEW MEXICO, MARYLIA KELLEY, JANIS KATE TURNER, TARA DORABJI, HENRY C. FINNEY and CATHERINE SULLIVAN, Plaintiffs, v. UNITED STATES DEPARTMENT OF ENERGY, NATIONAL NUCLEAR SECURITY ADMINISTRATION, LAWRENCE LIVERMORE NATIONAL LABORATORY, and LOS ALAMOS NATIONAL LABORATORY, Defendants.	Civ. No. C-0-3-3926 SBA **<u>CORRECTED</u> PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY, FOR PARTIAL SUMMARY JUDGMENT; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES** Date: No Hearing Set Time: No Hearing Set Judge: Hon. Saundra B. Armstrong

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that plaintiffs Tri-Valley Cares, et al. hereby move the Court for an order granting summary judgment on the grounds that there are no genuine issues of material fact in dispute, and plaintiffs are entitled to judgment as a matter of law. This motion is based on: this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; the Declarations of James Coghlan, Robert R. Curry, PhD., Marion Fulk, Linda Gallego, Edward Hammond, Marylia Kelley, Colin King, Matthew G. McKinzie, Ph.D., Scott Ritter, Peter Stockton, Peter Strauss, Terrell Watt, Mark Wheelis, Ph.D., Susan Wright, PhD., and Mathew Zipoli; the Administrative Record lodged in this matter; the pleadings and records on file in this matter; and on such argument as counsel may present if the Court orders a hearing on this motion.

Plaintiffs seek an order granting summary judgment in their favor on all claims for relief alleged in plaintiffs' Complaint, for the reasons set forth below. A proposed order and findings in support thereof is lodged concurrently.

Dated: February 19, 2004

LAW OFFICES OF STEPHAN C. VOLKER

By:_____
STEPHAN C. VOLKER

BELIN & SUGARMAN

Dated: February 19, 2004

By:_____
ALLETTA BELIN, Esq.

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I. INTRODUCTION AND STATEMENT OF ISSUES

This case seeks judicial review of a decision to introduce extremely potent biological poisons – the kind that the former Iraqi regime was accused of developing for "weapons of mass destruction" – into the populous and seismically unstable Bay Area for highly risky aerosol testing and experimentation on live animals. This decision by the National Nuclear Security Administration ("NNSA"), an agency within the United States Department of Energy ("DOE"), to construct and operate bioagent testing facilities at Lawrence Livermore National Laboratory ("Livermore Lab") – and initially at Los Alamos National Laboratory ("Los Alamos Lab") as well – would expose lab workers and potentially the public to some of the most dangerous organisms and related toxins known to man, including bacteria such as anthrax, tularaemia, plague, Q fever, botulism, brucellosis, rickettsia, tuberculosis, staphylococcus and salmonella, and viruses such as HIV, herpes, hantavirus, influenza, and hepatitis. Livermore Lab Admin. Rec. ("AR") 1:1:A-24-38.

The proposed facilities, each styled a "Biosafety Level 3" ("BSL-3") laboratory, would be the first BSL-3 facilities ever constructed and operated at a DOE facility, and would establish a precedent for creating BSL-3 facilities at other DOE sites. Strauss Dec. ("Strauss") ¶ 39. Unlike the 250-300 existing BSL-3 facilities in the United States, the Livermore facility would perform experiments with *weaponized* pathogens in an effort to replicate a terrorist attack, a critical distinction not disclosed in DOE's Environmental Assessment for the facility. Wheelis ¶ 6; Hammond ¶¶ 4, 6, 12, 17. Moreover, defendants would deliberately *aerosolize* these virulent toxins and pathogens, and apply them to small animals to gauge their effectiveness and potentially develop counter-measures. AR 1:1:C-28-29,-61; Hammond ¶ 17.

These facilities may perform experiments with hundreds of infectious bacterial and viral agents, fungi, and parasites, many of them extremely virulent, and potentially fatal, as well as agents not currently categorized in any BSL-3 "risk group" (and perhaps not even conceived of at this time). AR 1:1:8-9, 18-19. The facilities could also use and develop genetically-modified versions of any of these agents, posing a virtually infinite array of such agents, and could

employ all of these agents in infectious or poisonous forms. *Id.*; Wright ¶¶ 3-6.

Plaintiffs challenge defendants' decision, styled a Finding of No Significant Impact ("FONSI"), to construct and operate the Livermore Lab on the basis of a grossly deficient Environmental Assessment ("EA"), rather than a full Environmental Impact Statement ("EIS") as required by the National Environmental Policy Act, 42 U.S.C. section 4321, *et seq*. ("NEPA"). AR 1:1:ii-65. Coghlan ¶ 4. Plaintiffs further challenge defendants' failure to prepare a programmatic EIS on the environmental effects of DOE's entire nationwide Chemical and Biological National Security Program ("CBNP"), pursuant to which these challenged BSL-3 facilities are being proposed, and a sitewide EIS on the numerous biomedical research facilities at the Livermore Lab. Plaintiffs also challenge defendants' failure and refusal to produce documents related to these facilities requested by plaintiffs under the Freedom of Information Act, 5 U.S.C. section 552 ("FOIA"), in violation of that act.

Because defendants threaten construction and operation of the Livermore Lab BSL-3 facility in the near future, plaintiffs seek an injunction pending defendants' full compliance with NEPA and FOIA.

II. STATEMENT OF FACTS

The Livermore Lab BSL-3 facility would handle extremely dangerous biological agents with "grossly inadequate" security. AR1:1:C-61; Zipoli ¶¶ 5-16; Stockton ¶¶ 15-25. The facility would house three BSL-3 laboratories, one of which would have rodent handling and maintenance capabilities. AR 1:1:12. Dangerous pathogens would be aerosolized in this BSL-3 lab. AR1:1:C-28-29, 61; Hammond ¶ 17. Each of the three BSL-3 laboratories would have at least one Class II Type B Biological Safety Cabinet ("BSC") including a HEPA ("High Efficiency Particulate Arrestor") filtration system. AR1:1:12. All BSC air would be exhausted to the outside air through the building's heating, ventilation and air conditioning system. *Id.* The BSL-3 laboratory used for rodent testing would contain a maximum of 100 rodents, including mice, rats and guinea pigs. AR1:1:16. The EA for the Livermore Lab facility does not disclose measures proposed to assure the physical security of the facility building because security measures – a key environmental safeguard – have not yet been determined. AR1:1:17;

Zipoli ¶ 13. Biological materials or infectious agents would be shipped to the Livermore Lab BSL-3 facility via commercial package delivery services, the U.S. Postal Service, or other "authorized entities," including couriers. AR1:1:22. As many as 40 shipments in and 20 shipments out of the facility are anticipated each month. *Id*. The procedure for handling damaged packages is not described in the EA, as this procedure was "to be developed once the project obtains approval." AR1:1:23. The EA estimates that laboratory research experiments would generate about 22 lbs. of lab trash per week, or about 1,144 lbs. per year. AR1:1:24-25. The "operational design life" of the proposed facility would be at least 30 years. AR1:1:26.

Plaintiffs and others submitted about 100 written or oral comments critical of the EA. AR1:1:C-1-73; Kelley ¶ 2. The vast majority requested a more thorough environmental review under NEPA. *Id*. DOE failed to include some of these comment letters in the final EA as required by law. Supp. AR1, 2. Additionally, the draft EA was released without any address, phone, fax or email to which interested parties could send comments, or even the due date for comments. AR 1:2:7; Kelley ¶ 20. Plaintiffs had to make multiple phone calls to Livermore Lab and DOE just to find out where comments could be sent (and by what date). AR1:1:C-35; Kelley ¶ 20. Plaintiff CAREs requested that DOE reissue the draft EA with the missing information. Kelley ¶ 20. DOE refused. *Id*.

Defendants issued the Final EA and FONSI, and purported to authorize construction of the BSL-3 facility, on December 16, 2002. Coghlan Dec ¶ 4.

The EA fails to provide an adequate description of the purpose and need for the proposed facility. AR1:1:C-14, C-35-36. It provides less than one page of vague generalizations which fail entirely to reveal any of the facility's specific experiments or programs. AR1:1:7; AR1:1:C-14; King ¶16; Wheelis ¶¶ 16-18; Wright ¶ 8. The EA also fails to describe precisely what activities would be undertaken that are not presently being conducted at the lab's BSL-2, and what biological agents and related toxins would be used. AR1:1:1-9; King ¶16; Wright ¶¶ 5-8. The EA allows up to 10 liters of cultured microorganisms in the BSL-3 facility at any one time. AR1:1:21. The EA lists the allowable concentration as 100,000,000 organisms per milliliter. *Id*. One milliliter would contain 100 million cells, one liter would

hold 100 billion cells and 10 liters would contain one trillion. Fulk ¶18. By way of comparison, 50 tularemia organisms is an infectious dose; one liter of such organisms contains two *billion* infectious doses. AR1:1:51-52. Less than 10 Q fever organisms is an infectious dose; one liter could cause 10 *billion* illnesses. Fulk ¶21; Hammond ¶15. The EA fails to reveal the expected diversity or range of agents that would be in use at the facilities at any one time, or over the facility lifetime, providing a virtual *carte blanche* for the lab to choose any BSL-3 pathogens for future use, devoid of any analysis of each microorganism's particular risk. AR1:1:6, 8-9, 19; Wright ¶¶ 5-8.

The EA fails to address a reasonable range of alternatives to the facilities by location, function, or size. AR1:1:26-28; C-56. It considered only minor variations in the proposed facility such as different ways of constructing the *same* facility, and a no action alternative. *Id*. The EA did not even consider alternate locations away from other employees, or from the surrounding urban area. *Id*.

The EA presumes the BSL-3 lab will cause no adverse environmental effects based on the unsupportable assumption that it will comply with all of the CDC requirements and guidelines concerning such facilities. AR1:1:38-55. But as numerous comments pointed out, the lab and DOE have poor safety, security and compliance records, rendering a presumption of full compliance unreasonable. AR1:1:C-21, 26, 37-39, 48, 62; Kelley Dec ¶¶ 11-19; Strauss ¶¶ 15-39. Moreover, as the Los Alamos EA points out, "CDC does not, per se, have jurisdiction by law over the NNSA with regard to the required approval of procedures used in NNSA biological research activities and does not have a local presence with regard to [this lab]." Los Alamos National Laboratory ("LANL") AR1:1:15. Furthermore, many of the labs' supposed safeguards are ineffective. AR1:1:C-49, 62-65; Fulk ¶¶ 12-24; Strauss ¶¶ 15-18. The proposed reliance on HEPA filters, for example, is fraught with peril because many of the test organisms, such as rickettsia, cannot be effectively captured in such filters due to their physical characteristics. AR1:1:C-49, 62; Fulk ¶¶ 12-24; Strauss ¶¶ 15-18. Moreover, 12 percent of all installed paper-glue HEPA filters, such as the kind in use at Livermore, fail. Fulk ¶ 13.

The EA's errors and omissions confirm a pattern of laxity and neglect. In February

2001, the DOE Office of Inspector General released a report entitled, "Inspection of Department of Energy Activities Involving Biological Select Agents" – agents used for biowarfare. LANL AR1:1:B1-40; Coghlan ¶ 9. The report concluded that DOE's biological agent research activities "lacked appropriate Federal oversight, consistent policy, and standardized implementing procedures, resulting in the potential for greater risk to workers and possibly others from exposure to biological select agents and select agent materials." LANL AR1:1:B3; King ¶ 5; Coghlan ¶¶ 9-14. The report found that some DOE laboratories "were not adhering to [CDC] requirements," that procedures for conducting research activities involving these agents varied significantly among the laboratories, and that DOE had not developed policies to ensure that the laboratories follow "best practices" in the conduct of their biological activities. LANL AR1:1:B4; King ¶ 5; Coghlan ¶ 11. The EA fails to address, much less resolve, the deficiencies this report reveals. King ¶¶ 6-8.

The Livermore Lab's history is replete with examples of lax administration, unsafe laboratory practices, potentially lethal releases of radioactive and other toxic materials to the atmosphere, and failures to promptly and fully disclose these incidents for public review and corrective action. Kelley ¶¶ 6-7, 11-19. In 1987, the Livermore Lab's Main Site was placed on the National Priorities List as an extremely contaminated "Superfund" site. Strauss ¶ 22. Livermore Lab's Site 300 was added to the "Superfund" list in 1990. Strauss ¶ 31. Recent excavation of Livermore Lab's National Ignition Facility construction site has uncovered DOE's unauthorized waste dumping of over 100 huge capacitors leaking highly toxic PCBs and large quantities of contaminated soil. Strauss ¶ 24. In 1990, the Livermore Lab accidentally released tritium (radioactive hydrogen) at a tank at the lab's Building 292, resulting in soil and groundwater contamination. Kelley ¶ 7. Numerous workers at Livermore Lab have been contaminated with plutonium, uranium, curium, chlorine gas, and many other highly hazardous and potentially lethal contaminants due to the laboratory's violations of applicable safety procedures. Kelley ¶¶ 14-19; Strauss Exhibit 2; Gallego ¶ 8. On numerous occasions, hazardous and radioactive materials have accidentally been flushed down drains at Livermore Lab and have entered the City of Livermore's Sewage Treatment Plant. Strauss ¶ 28.

Plutonium and Americium are among the contaminants that have been released in this manner. Strauss ¶ 28. Over a 15-month period in the late 1990s, Livermore Lab's releases to the City Sewage Treatment Plant ("CSTP") violated its permit limit on 14 occasions, illegally discharging heavy metals and chemical pollutants. Kelley ¶ 11. Yet the EA summarily dismisses potential harm from its BSL-3 releases to the CSTP. AR1:1:C-3.

The EA's accident and "abnormal event" analysis understates and or ignores obvious risks and potential impacts. AR1:1:40-54, C-26, 49-50, 71; Curry ¶¶ 6-14; Watt ¶¶ 7-8; McKinzie ¶¶ 2-12; Fulk ¶¶ 27-29. It dismisses potential pathogen releases during earthquakes on the grounds "[t]he probability of catastrophic events (due to earthquake) is already very low." AR 1:1:50. The EA falsely claims that "[n]one" of "the active faults in the Livermore Region . . . are in proximity to the location of the proposed facility." AR 1:1:36. In fact, the Livermore Lab is near several active earthquake faults, which have caused structural damage and injuries within the recent past, and which pose a substantial and unacceptable risk of a catastrophic event. AR 1:1:37 (Fig. 3-3); Curry ¶¶ 6-10.

Although the nearby Greenville and Mount Diablo Faults are capable of generating accelerations of almost 1.0 g, the EA assumes, and the proposed BSL-3 facilities are designed to withstand, g forces of only .6, thus creating a serious risk of seismic failure within the design life of the facilities. AR 1:1:36; Curry ¶¶ 11-14.

Similarly, the EA ignores the risk of fire on the grounds that "fire is not a credible hazard with regard to the potential release of infectious biological materials or toxins." AR 2:27:A9-57. But this conclusion is premised on the baseless assumption that "[i]f the fire became so large that structural damage occurred, . . . then the heat would destroy any pathogen or toxin, thereby precluding its spread and release from the facility." *Id*. Yet increases in air pressure or activation of sprinklers due to fire, smoke or heat would cause failure of the Lab's HEPA filters – its primary bulwark against the escape of pathogens. Fulk ¶¶ 13,23. Although due to their fragility, HEPA filters should be replaced every six years, at Livermore HEPA filters have remained unchanged for more than a quarter century. Fulk ¶ 26.

The EA does not provide *any* analysis of internal or external threats to security, from

terrorists, disgruntled employees, or otherwise, involving transportation, storage and use of the biological agents. AR1:1:49-54, C-12-13; Ritter ¶ 7. Yet the strain of anthrax used in the recent attacks on the East Coast emanated from a United States facility, according to the U.S. government, and may have involved a former employee of a federal biological weapons facility. AR1:1:C-49; Ritter ¶ 7. No analysis of the facility's vulnerability to direct terrorist attacks using trucks as in the Oklahoma City bombing, or planes as in the "9/11" attacks, is provided. AR1:1:49-54; C-49.

The EA provides only a severely truncated discussion of cumulative impacts, limited entirely to a simple listing of possible future construction and related activities. AR1:1:56. The EA does not discuss the cumulative effects of other new construction and operations under the CBNP at Livermore and at the other NNSA facilities. *Id.* Indeed, the Livermore EA largely ignores the Los Alamos BSL-3 facility, making reference to it only in passing. AR1:1:6, C-56. Neither EA analyzes the cumulative environmental effects of the CBNP. AR1:1:56; Wright ¶ 12. Yet by contrast, DOE and the Department of Army have prepared programmatic EISs addressing the cumulative effects of other nationwide research programs that pose similar cumulative effects issues. Wheelis ¶ 8; Coghlan ¶¶ 15-18.

The EA fails entirely to analyze the risks associated with transportation of biological select agents to and from the labs. AR1:1:49-54. The potential risks include damage to containers and dispersal or diversion of agents through terrorism, theft or sabotage, and other errors and accidents associated with shipping infectious agents. AR1:1:C-71; Zipoli ¶¶ 7-16; Strauss ¶¶ 36-41; Stockton ¶¶ 8-27; King ¶¶ 5-8; Kelley ¶¶ 14-21.

The EA fails to disclose and address the fact that the BSL-3 facilities would be built over existing contamination from past lab operations. Kelley ¶¶ 3-4. The BSL-3 facility would be located over soils and groundwater that are so severely contaminated they are now designated a Superfund site. *Id.* At minimum, the EAs must address the environmental effects of construction at the contaminated locations.

The EAs also fail to adequately analyze the proliferation risks associated with co-locating a biodefense facility at a nuclear weapons design and development laboratory.

AR1:1:C-5-7, C-70; Ritter ¶ 7-9; Wheelis ¶¶ 4-21. For example, the Livermore Lab operates six fermenters whose function is to grow microorganisms. AR1:1:C-6; Ritter ¶ 10. The lab's 1500 liter fermenter has the capacity to produce enough anthrax for a theater-scale war. Ritter ¶ 10; AR1:1:C-25. Developing bio-defense facilities at these labs creates a precedent that may prompt other nations to develop similar joint facilities, threatening proliferation of weapons facilities that conduct research on biological warfare. Ritter ¶ 13. Such joint weapons and biological warfare research facilities pose potential violations to and may weaken the international Biological and Toxic Weapons Convention. AR1:1:C-5-6; Wheelis ¶ 11; Ritter ¶ 13. The EA fails to address these proliferation risks.

Each of the foregoing undisclosed and understated environmental risks may significantly affect the environment, a fact mandating preparation of an EIS.

Plaintiffs attempted to fill these informational voids in the EA by submitting requests to DOE under FOIA. Kelley ¶ 21; King ¶ 29. DOE refused to provide the requested information, violating FOIA. *Id*.

III. ARGUMENT

A. Standard for Summary Judgment

Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment on a particular claim or defense as a matter of law. Fed.R.Civ.P. 56(c): *see also*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Upon a showing that there is no genuine issue as to a claim, the court may grant summary judgment in the party's favor "upon all or any part thereof." Fed.R.Civ.P. 56(b). Plaintiffs satisfy this standard here.

B. Standard of Review

Under the Administrative Procedure Act ("APA"), an agency's action may be set aside only if it is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A)(D). In exercising its narrowly defined duty under the APA, the Court must consider whether the agency acted within the scope of its legal authority, adequately explained its decision, based its decision on facts in the record, and considered the relevant

factors. *National Park and Conservation Assn. v. Stanton*, 54 F.Supp.2d 7, 11 (D.D.C. 1999), *citing Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989); *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415-16, (1971).

In *Sierra Club v. Babbitt*, 69 F.Supp.2d 1202 (E.D. Cal. 1999), the district court held that the National Park Service had violated both NEPA and the Wild and Scenic Rivers Act, applying the APA's standard of review as follows:

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

69 F.Supp.2d at 1211, quoting from *Western Radio Services Co., Inc. v. Espy,* 79 F.3d 896, 900 (9th Cir. 1996), *cert. den.*, 519 U.S. 822 (1996).

In the case at bar, DOE conducted an inadequate environmental review that failed to consider important aspects of the project and offered explanations that run counter to the evidence before the DOE decisionmakers, as the Argument below demonstrates.

C. Scope of Review

This Court's review of DOE's FONSI and EA for the Livermore Lab is governed by the APA. 5 U.S.C. § 702. Under the APA, the "reviewing court shall . . . (2) hold unlawful and set aside agency action, . . . not in accordance with law . . . [or] . . . without observance of procedure required by law . . . ." 5 U.S.C. § 706(2). "In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party . . . ." 5 U.S.C. § 706.

The Ninth Circuit recognizes four exceptions to the APA rule that judicial review is limited to materials within the agency's administrative record. These exceptions are (1) to determine whether the agency has considered all relevant factors and has explained its decision; (2) when the agency has relied upon documents or materials not included in the record; (3) when necessary to explain technical terms or complex matters; and (4) when plaintiffs make a showing of agency bad faith. *Southwest Center for Biological Diversity v. United States Forest*

Service, 100 F.3d 1443, 1450 (9th Cir. 1996).

As the Ninth Circuit explained in *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980), "[i]t is both unrealistic and unwise to 'straight-jacket' the reviewing court with the administrative record. It will often be impossible, especially when highly technical matters are involved, for the Court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not. The Court cannot adequately discharge its duty to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered all relevant matters." *Id.* at 1160.

Consequently, this Court may consider extra-record evidence in order to "ascertain whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision." *Id.; accord, Public Power Co. v. Johnson*, 674 F.2d 791, 793 (9th Cir. 1982) ("The broadest exception to the general rule that review is to be restricted to the record certified by the agency is one which permits expansion of the record when necessary to explain agency action."); *Kunaknana v. Clark*, 742 F.2d 1145, 1149 (9th Cir. 1984) (same, quoting from *Asarco, supra*); *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) (judicial review may be extended beyond the agency's record if necessary to explain the agency's decisions). Other circuits are in agreement. *See, e.g., County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1384-85 (2d Cir. 1977) ("allegations that an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems 'under the rug' . . . raise issues sufficiently important to permit the introduction of new evidence in the district court, including expert testimony with regard to technical matters.")

In making a determination whether the defendants considered all relevant factors, this Court is not limited to considering extra-record information submitted by the defendant agencies, but may consider extra-record information submitted by plaintiffs. *National Audubon Society v. U. S. Forest Service,* 46 F.3d 1437, 1447-48 (9th Cir.1993) (holding that the district court's use of an affidavit submitted by plaintiffs' expert who reviewed the administrative

record and conducted his own field review of the timber sales in question, was proper under *Public Power Company v. Johnson, supra and County of Suffolk, supra)*; *County of Suffolk, supra,* 562 F.2d at 1385-86 (holding that the "district court properly admitted the testimony of [plaintiff's expert] and the data on which it was based"); *Greenpeace U.S.A. v. Evans,* 688 F.Supp. 579, 584-85 (W.D. Wash. 1987) (same).

Each of the fifteen declarations submitted by plaintiffs in support of this summary judgment motion may be considered by this Court under the foregoing exceptions to the APA's record review restriction. Each of these declarations is offered to document the defendants' failure to consider all relevant factors, both in preparing the challenged Livermore EA, and in adopting defendants' FONSI purporting to find that the Livermore BSL-3 will not pose any potential to significantly affect the quality of the human environment. Additionally, the declarations of Ms. Kelley and Mr. Coghlan document plaintiffs' standing to bring this action. Kelley ¶ 2; Coghlan ¶ 3. Further, the declarations of Ms. Kelley and Mr. King document defendants' failure to provide plaintiffs with documents requested under FOIA. Kelly ¶ 21; King ¶ 29.

All of the declarations also assist this Court in understanding the complex, highly technical subject matter. The declarations also bridge gaps left by defendants' misleading and inadequate EA, and deficient administrative record. The facts documenting application of these exceptions to these declarations are set forth in the declarations.

D. Plaintiffs Have Standing

The doctrine of standing comprises both constitutional requirements and prudential considerations. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *LaKuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir. 1985). To come within the "case or controversy" requirement of Article III of the United States Constitution, a plaintiff must show that he has or will suffer an "injury in fact," a causal connection between defendant's behavior and that injury, and a likelihood that the injury will be redressed by the relief sought by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). In addition to the Article III requirements, federal courts apply "prudential considerations" that must be met. In particular,

the plaintiff's claim must fall within the "zone of interest" sought to be protected or regulated by the statute in question. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475-76 (1982).

In this case, plaintiffs have standing under both the Article III requirements, as well as judicially-mandated prudential considerations. Defendants' approval of the Livermore BSL-3 facility threatens direct harm to plaintiffs Tri-Valley CAREs, Marylia Kelley, Janis Kate Turner, and Tara Dorabji. Kelley ¶¶ 2, 12. Each of these individual plaintiffs lives or works within the vicinity of this proposed facility, and would be exposed to its potential release of harmful pathogens. *Id*. These individual plaintiffs are also members of Tri-Valley CAREs, which has standing to represent their interests as well as its separate, organizational interests in securing the environmental disclosures required under NEPA. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1514-18 (9th Cir. 1992); Kelley ¶ 2. Each of these plaintiffs also has prudential standing to enforce NEPA and FOIA, because "the interest that the plaintiff seeks to protect [is] arguably within the zone of interests to be protected or regulated by" these statutes. *National Credit Union Admin. v. First National Bank & Trust Co.*, 522 U.S. 479, 488 (1998).

Plaintiffs Nuclear Watch of New Mexico, Henry C. Finney and Catherine Sullivan likewise have standing because defendants' approval of the Livermore BSL-3 facility is part of a nationwide program to develop such facilities throughout the country, including the Los Alamos National Laboratory. Coghlan ¶ 2. Both Ms. Sullivan and Mr. Finney reside or work in the vicinity of the Los Alamos Lab wherein defendants propose to operate a second BSL-3 facility, and plaintiff Nuclear Watch of New Mexico's members, including Catherine Sullivan, reside, work or recreate in the vicinity of this site. Coghlan ¶ 3. Additionally, Nuclear Watch of New Mexico has organizational standing to seek the disclosures and analysis of potential environmental impacts required under NEPA for defendants' CBNP program.

All of these plaintiffs also have standing under FOIA to seek this Court's redress for defendants' failure to furnish documents that plaintiffs have requested under FOIA but defendants have refused to provide in violation of this statute.

E. Plaintiffs Are Entitled to Summary Judgment Because DOE Failed to Prepare a EIS for the BSL-3 Livermore Lab

NEPA requires the preparation of an EIS if the proposed federal action has the *potential* to significantly affect the quality of the human environment. 42 U.S.C. § 4332; *Foundation for North American Wild Sheep v. United States*, 681 F.2d 1172, 1178 (9th Cir. 1982). Because NEPA requires an EIS for actions that may significantly affect the quality of the human environment, a proper finding by an agency that the proposed action will produce no significant impact on the environment relieves the agency of its duty to prepare an extensive EIS. An agency cannot, however, simply issue a conclusory statement claiming the absence of significant impacts. Instead, the agency must support each finding of "no significant impact" with a "concise public document," known as an environmental assessment. 40 C.F.R. 1501.4(a)-(b), 1508.9. The EA must "[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 CFR § 1508.9.

Although an EA need not be as thorough as an EIS, the agency must still conduct a "comprehensive assessment of the expected effects of a proposed action" to determine if that action is significant. *Foundation on Economic Trends v. Weinberger*, 610 F.Supp. 829, 837 (D.C.D.C. 1985), *quoting Lower Alloways Creek Tp. v. Public Service Elec.*, 687 F.2d 732, 740 (3rd Cir. 1982). The significance of the actions' environmental impact is based on various factors, such as "the degree to which the proposed action affects public health or safety," the "[u]nique characteristics of the geographic area," the "degree to which the effects on the quality of the human environment are likely to be highly controversial," the "degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks," the "degree to which the action may establish a precedent for future actions with significant effects," and whether "the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 CFR § 1508.27.

The Livermore BSL-3 facility is clearly a major federal action that may significantly affect the quality of the human environment in each of these respects, as the following

discussion demonstrates:

1. Uncertain effects posing substantial risks.

An EIS is required if a project poses uncertain, but potentially significant, risks of environment harm. *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975). An EIS is required here because the possible effects of this facility on public health and safety are highly uncertain and involve significant risks due to a substantial and inadequately disclosed risk of seismically-induced structural failure leading to the release of pathogens. Curry ¶¶ 6-15; McKinzie ¶ 3; Fulk ¶ 28; Watt ¶¶ 7-8. Defendants' well-documented history of toxic dumping and unlawful emissions, security lapses, and violations of state and federal water quality and other environmental laws establishes a pattern of environmental laxity and neglect which defendants' EA fails to acknowledge, much less rebut with specific plans for assuring safe operation of the facility. Kelley ¶¶ 6-19; Strauss ¶¶ 13-18, 22-37; Fulk ¶¶ 11-33; Zipoli ¶¶ 5-15. Defendants' EA fails to address the adequacy of even the most basic safety and handling procedures, including transportation of biological agents to and from the lab, procedures to be followed in the event of structural failure due to earthquake, fire or terrorist attack, and inherent deficiencies in the BSL-3 facilities' HEPA filtration system. *Id*.

2. Potentially significant precedential effects.

An EIS is required if a project may have potentially significant precedential effects. 40 C.F.R. § 1508.27(b)(6). In *Anderson v. Evans*, 314 F.3d 1006, 1021-22 (9th Cir. 2002), the court held that the National Marine Fisheries' Services' approval of a whale hunting quota for an Indian tribe "could be used as precedent for other countries to declare the subsidence need of their own aboriginal groups," an impact requiring an EIS. Similarly, in *Friends of the Earth, Inc. v. U.S. Army Corps of Engineers*, 109 F.Supp.2d 30, 43 (D.D.C. 2000), the Corps' approval of casinos on the Mississippi coast had a precedential effect sufficient to require an EIS. In *State of North Carolina v. Hudson*, 655 F.Supp. 428, 444 (E.D.M.C. 1987), the Corps properly considered a water transfer's precedential effect on future inter-basin transfers. Likewise here, DOE should have addressed the Livermore Lab's precedential effect not only on other DOE facilities, but its potential impact on world-wide proliferation of biological weapons research

and the public health and safety dangers posed thereby. Hammond ¶¶ 5, 14, 21; Coghlan ¶ 3; Wright ¶¶ 4-12. The Livermore BSL-3 will have such effects. Construction of the Livermore and Los Alamos BSL-3 facilities, since they are the first DOE BSL-3 facilities, will establish a precedent for future BSL-3's and related biological and chemical agent research facilities and actions at DOE facilities, raising unstudied risks that other nations may seek to conduct such research activities at facilities engaged in the development of nuclear or other weapons of mass destruction. *Id*; Strauss ¶ 39.

3. Potentially significant cumulative effects.

An EIS is required if a project poses potentially significant cumulative effects. 40 C.F.R. § 1508.27(b)(7). The Livermore BSL-3 facility threatens such effects. Each facility, as part of the CBNP, is related to other CBNP actions and facilities with cumulatively significant impacts. Coghlan ¶ 2. As BSL-3 labs experimenting with weaponized, highly contagious and potentially deadly pathogens and toxins proliferate, the threat of releases of these poisons into the human environment grows. Wheelis ¶¶ 6-21; Ritter ¶¶ 6-16. The threat of terrorist attacks grows. Ritter ¶ 15; Stockton ¶¶ 10-17; Zipoli ¶¶ 7-16. The threat of proliferation of such facilities world wide, potentially prompting a biological and chemical arms race, grows. Wright ¶¶ 10-12; Ritter ¶¶ 6-14; Wheelis ¶¶ 10-21.

4. Public controversy.

An EIS is required if a project generates extensive public controversy over its potential environmental effects. *Foundation for North American Wild Sheep v. U.S. Dept. of Agriculture*, supra, 681 F.2d at 1182; 40 C.F.R. § 1508.27(b)(4). Both the Livermore and the Los Alamos facilities are highly controversial. Each proposed facility prompted extensive critical comments from the public. AR 1:1:C-1-73; LANL AR 1:1:C-1-137.

5. Potentially significant effects on public health and safety.

An EIS is required if a project poses potentially significant effects on public health and safety. 40 C.F.R. 1508.27(b)(2); *Scientists' Institute for Public Information v. A.E.C.* 481 F.2d 1079, 1092 (D.C. Cir. 1973). Operation of each proposed facility, including the risks of accident, theft, earthquake, fire, sabotage, or terrorism, has the potential for very significant

effects on public health and safety and environmental quality. Curry ¶¶ 4-15; McKinzie ¶¶ 8-12; Watt ¶¶ 6-8; Fulk ¶¶ 13-33; Strauss ¶¶ 36-41.

DOE's approval of the EA and FONSI for the proposed Livermore facility is arbitrary and capricious, and not in accordance with NEPA and the APA, as defendants were required to prepare an EIS because operation of the facility may significantly affect the quality of the human environment.

F. Plaintiffs Are Entitled to Summary Judgment Because DOE Failed to Prepare a Programmatic EIS for the CBNP

NEPA and its regulations require environmental review of "major federal actions." "Actions" include programs financed, assisted, conducted, regulated, or approved by the federal government. The CBNP is a "major federal action" which requires environmental review pursuant to NEPA.

Under the Council on Environmental Quality's ("CEQ's") NEPA regulations, a programmatic EIS should be prepared if actions are "connected," "cumulative," or sufficiently "similar" that a programmatic EIS is "the best way" to identify the environmental effects. 40 C.F.R § 1508.25. Similarly, the regulations require that "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." 40 C.F.R. § 1502.4(a). In 40 Questions and Answers (46 Fed.Reg. 16343 (Mar. 23, 1981), the CEQ also directs agencies to include related actions in one study:

> An EIS must be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive. Section 1508.18. . . . In all cases, the policy, plan, or program must have the potential for significantly affecting the quality of the human environment in order to require an EIS.

40 Questions and Answers (46 Fed.Reg. 16343), ¶ 24a.

Agencies must take into account two important considerations when deciding whether or not to prepare a programmatic EIS: (1) whether the programmatic EIS could be sufficiently forward-looking to contribute to the decisionmakers' basic planning of the overall program; and

(2) whether a decision not to prepare a programmatic EIS would "segment" the overall program and thereby unreasonably constrict the scope of environmental evaluation. *NWF v. Appalachiam Regional Comm'n*, 677 F.2d 883, 889 (D.C. Cir. 1981).

DOE has failed to analyze the environmental effects of the CBNP, including its facilities (particularly the newly proposed facilities such as the Los Alamos and Livermore BSL-3 facilities) and actions, in a "programmatic" document, as required by NEPA. Coghlan ¶ 2; Wheelis ¶¶ 11-21; Wright ¶¶ 10-12; Ritter ¶¶ 6-16. The proliferation of biological agent research labs throughout the nation poses important and far reaching questions that demand environmental review. Coghlan ¶¶ 3, 6-11, 15-21; Wheelis ¶¶ 6-8; Wright ¶¶ 10-12; Ritter ¶¶ 5-14. Because the CBNP may have significant effects on the human environment, a programmatic EIS must be prepared to analyze its environmental effects. *Id.* DOE's failure to prepare a programmatic analysis of the environmental effects of the CBNP, and particularly its failure to prepare a programmatic EIS for the CBNP, are arbitrary and capricious, and violate NEPA and the APA.

G. Plaintiffs Are Entitled to Summary Judgment Because DOE Failed to Address Site-wide, Cumulative Impacts in a Comprehensive EIS

NEPA and its regulations require preparation of a programmatic EIS where a series of closely related "major federal actions" poses a greater effect cumulatively than each action does individually, particularly where they constitute successive phases of an overall program. 40 C.F.R § 1508.7; 40 C.F.R. § 1508.18 (b)(3). The CEQ Guidelines explain that "[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement." 40 C.F.R. 1502.4(a).

Despite this requirement, defendants failed to prepare a programmatic EIS on DOE's Livermore Lab Biology and Biotechnology Research Program (BBRP), thereby failing to address the cumulative and interconnected impacts of the existing LLNL bio-programs with the new BSL-3 facility. This violates NEPA for several reasons.

First, DOE must complete a programmatic environmental impact statement on all of the BBRP components, including the BSL-3 proposal because it is interconnected with the existing

BBRP facilities which include BSL-1 and BSL-2 labs. AR 1:1:8-9. The BSL-3 facility will not be able to function independently but instead will rely upon other areas of the LLNL bio-programs for office space, personnel, and storage space.

NEPA requires that all major federal actions that are sufficiently "connected" and "inextricably intertwined" must be evaluated in a single EIS. The regulation that governs the scope of EISs specifically provides for the consideration of:

> (I) Connected actions, which means they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
>
> (I) Automatically trigger other actions, which may require environmental impact statements.
>
> (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
>
> (iii) Are interdependent parts of a larger action and depend upon the larger action for their justification.

40 C.F.R. § 1508.25(a).

In *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985), plaintiffs sued the United States Forest Service for failure to prepare an EIS that analyzed the combined environmental effects of proposed road construction and ongoing timber sales rather than the Environmental Assessments that had been prepared analyzing the impacts of each road and each timber sale individually. The court held that the Forest Service was required to prepare an EIS analyzing the combined environmental impacts of the road and timber sales because failure to do so would permit the Forest Service to divide a project into multiple actions, each of which individually had an insignificant environmental impact, but which collectively had a substantial impact. *Id*. at 758.

Similarly, here, DOE erroneously prepared only an EA on the proposed BSL-3 laboratory without completing any programmatic review of LLNL's BBRP. The BSL-3 will rely upon the unstudied infrastructure of the BBRP to conduct its daily operations. AR 1:1:8. The BSL-3 will not be a self-sufficient unit but will share storage and chemical management space with other BBRP facilities. AR 1:1:8-9. The program infrastructure between the BSL-3 and the BBRP is so intertwined that the personnel at the BSL-2 labs will be integrated into the BSL-3 facilities.

AR 1:1:9. For example, the BSL-3's staff will be relocated from the adjacent Building 360 BBRP labs with no requirement for permanent relocation. AR 1:1:8.

Without the shared office space, personnel and infrastructure from the BBRP program, DOE indicates that the BSL-3 facility may not have been sited at LLNL at all. AR 1:1:21-28. LLNL has qualified and experienced personnel and a sophisticated existing biological infrastructure in the BBRP. AR 1:1:27. Placing the BSL-3 laboratory at another NNSA laboratory would require significant duplication of this capability. AR 1:1:27-28.

Courts have looked to a project's independence from other programs as a factor in deciding whether or not a programmatic EIS is required. *Thomas* at 758. The proposed BSL-3 is inextricably linked to the overarching Biology and Biotechnology Research Program at LLNL. The BSL-3 serves the core program objectives for the BBRP, which include understanding genetic and biochemical causes of disease, countering biological terrorism, and bioengineering research. AR 1:1:4. Programmatic NEPA review must incorporate the BBRP and the BSL-3 in order to ensure that there are no unstudied hazards to the community.

Second, DOE must study the impacts arising from all the activities conducted by the BBRP, rather than simply the incremental increases in environmental impacts posed by the addition of the BSL-3 facility to the existing BBRP infrastructure, because the impacts are cumulative. An agency is required to consider cumulative impacts in an EIS, meaning actions that "when viewed with other proposed actions have cumulatively significant impacts." 40 C.F.R. § 1508.25(a)(2). A cumulative impact on the environment "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions...." 40 C.F.R. § 1508.7. Cumulative impacts may result from "individually minor but collectively significant actions taking place over a period of time." In determining whether a project will have a "significant" impact on the environment, an agency must consider whether the action is related to other actions with individually insignificant but cumulatively significant impacts. 40 C.F.R. § 1508.27(b)(7). If several actions have a cumulative environmental effect, "this consequence must be considered in an EIS." *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (quotation omitted).

In *Blue Mountains*, environmental groups sought to enjoin timber salvage sales in a national forest, alleging that the United States Forest Service failed to comply with procedural requirements of NEPA in awarding contracts for sales. The court held that the Forest Service was required to prepare a single EIS that addressed cumulative effects of five salvage logging projects proposed for the same watershed. *Id.*

Performing an EA solely on the BSL-3 facility at LLNL, while failing to study the environmental impacts of the entire BBRP, is similar to conducting discrete EAs on each timber sale in *Blue Mountain*. The end result of a failure to conduct an EIS on the BBRP is that the BSL-3 EA will understate the cumulative impacts of the overall project. Contrary to NEPA, DOE has never completed a NEPA document that focuses on the program-wide impacts of the BBRP at LLNL.

Moreover, there are significant cumulative impacts associated with the increased bio-activities at LLNL in the areas of shipping hazards, hazardous waste disposal, accidents, unforeseen results from genetic modifications, risk of release to the public, lack of management oversight and coordination to accompany expanded projects. Kelley ¶¶ 6-19; Strauss ¶ 41; Wright ¶¶ 4-9, 12. Additionally, the BSL-3 facility would vastly increase the laboratory trash stream for BBRP. The BSL-3 is expected to generate 1,144 lbs of solid waste annually, roughly 50 percent as much medical/laboratory waste as the entire LLNL main site combined. AR 1:1:24. With these increases in medical waste taken cumulatively, a programmatic review is needed to ensure that best practices are achieved. When several commenters to the BSL-3 EA asked DOE to prepare a Programmatic Environmental Impact Statement to study the increased impacts posed by the BSL-3 facility on the as yet unstudied BBRP program, DOE responded that the bioscience research has been ongoing for over four decades. AR 1:1:C-1. But DOE failed to mention that there has been no programmatic review of this expanded bio-work over the decades. *Id.*

The urgent need to coordinate management practices, transportation controls and handling procedures for select agents, program-wide, for the BBRP could not be clearer. The DOE's Inspector General office audited the DOE's select agent program in 2001 and concluded

that there was insufficient organization, coordination, and direction in the Department's biological select agent activities; "specifically, the Department's activities lacked sufficient Federal oversight, consistent policy, and standardized implementing procedures." Coghlan ¶ 11.

DOE claims that "LLNL has operated BSL-1 and BSL-2 equivalent laboratories for the last 20 years without any infections associated with their operations and no unintentional releases to the environment or public." AR 1:1:C-3. This assertion does not comport with the recent admission from LLNL that equipment and utensils contaminated with a virulent strain of Bacillus anthracis, the causative agent for anthrax, were mistakenly disposed of in the "general trash." Kelley ¶ 19. Plaintiffs obtained this admission in response to a FOIA request. *Id*. This fact should have been disclosed in the EA.

The impacts of the proposed BSL-3, when added to the present impacts of the BBRP, clearly constitute potentially significant cumulative impacts on the environment that have not been studied. Reviewing the BSL-3 as an isolated project ignores the combined cumulative effects of the BBRP and the BSL-3 and masks the fact that the BSL-3 is one aspect of the larger BBRP program.

H. Plaintiffs are entitled to Summary Judgment because DOE withheld crucial documents in violation of FOIA

The Freedom of Information Act, 5 U.S.C. section 552 ("FOIA"), directs that "each [federal] agency upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. §552(a)(3)(A); *Lissner v. U.S. Customs Service*, 241 F.3d 1220 (9th Cir. 2001). FOIA thus assures that members of the public have access to the factual information and documentation on which federal agencies such as defendants rely in making management decisions. This information is vitally necessary to informed public participation in environmental decision making by federal agencies regarding management of the public's resources.

Contrary to this requirement of FOIA, defendants repeatedly failed to provide plaintiffs with information and documentation essential to plaintiffs' informed review of and

comment upon defendants' programs, actions and decisions challenged in this lawsuit. For example, on September 23, 2002 and March 10, 2003, plaintiff Nuclear Watch submitted detailed requests under FOIA to defendant DOE requesting nonprivileged documents pertaining to DOE's decisions challenged herein, including but not limited to (1) agreements between DOE and the federal Department of Health and Human Services ("DHS") for the use by DOE or its contractors of the BSL-2, BSL-3 and BSL-4 facilities operated by DHS' Centers for Disease Control and Prevention; (2) DOE planning documents regarding the siting of the proposed BSL-3 facilities at Livermore Lab; (3) the names of the federal agencies such as the Centers for Disease Control and Prevention and other public and private entities that have conducted research under contract for Livermore Lab regarding development and implementation of the CBNP; and (4) documents regarding its preliminary scoping study and white paper regarding the "concept for homeland security research facility" document specifically referenced in DOE's Oak Ridge National Laboratory Institutional Plan, FY 2003-FY 2007 at page 4-9. King ¶ 29. Contrary to FOIA, DOE has failed to provide the requested documents. *Id.*

Plaintiff CAREs likewise on May 19, 2003, submitted a detailed request under FOIA to DOE requesting nonprivileged documents including (1) agreements between DOE and DHS concerning use by DOE of the BSL-3 facility in Fort Collins, Colorado; (2) agreements between DOE and DHS for use of any other BSL-3 or BSL-4 facilities in the United States; and (3) any other documents that discuss BSL-2, BSL-3 or BSL-4 activities at DHS-owned or operated facilities. Contrary to FOIA, DOE has failed to provide these requested documents. Kelly ¶ 19.

DOE's continuing failure and refusal to provide these and other nonprivileged documents requested by plaintiffs under FOIA is arbitrary and capricious and not in accordance with applicable law, in violation of FOIA and the APA.

IV. CONCLUSION

For the foregoing reasons, defendants' approval of the FONSI and preparation of the EA for the Livermore Lab BSL-3 facility is contrary to NEPA. Because this project poses numerous potentially significant effects on the environment, an EIS is required. Additionally, because defendants' plans for developing and implementing the CBNP, including development of BSL-3

facilities at Livermore and Los Alamos, represent an interconnected and interdependent program whose cumulative effects are far greater than the impacts of any of these BSL-3 facilities taken alone, defendants' failure to prepare a programmatic EIS on the CBNP violates NEPA. Likewise, defendants' failure to prepare a site-wide EIS for the myriad related biological agent testing facilities at the Livermore Lab violates NEPA's command that interconnected and interdependent activities posing potentially significant cumulative effects must be addressed in a single NEPA document. Furthermore, defendants' failure to furnish plaintiffs with the documents sought in plaintiffs' FOIA requests violates that statute.

Accordingly, this Court should grant summary judgment for plaintiffs as prayed in the Complaint herein.

Dated: February 19, 2004

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