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9 TRI-VALLEY CARES, NUCLEAR
WATCH OF NEW MEXICO, MARYLIA KELLEY,
10 JANIS KATE TURNER, TARA DORABJI,
HENRY C. FINNEY and CATHERINE SULLIVAN
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12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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15	TRI-VALLEY CARES, NUCLEAR)	Civ. No.
	WATCH OF NEW MEXICO, MARYLIA)	
16	KELLEY, JANIS KATE TURNER,)	COMPLAINT FOR DECLARATORY,
	TARA DORABJI, HENRY C. FINNEY)	MANDAMUS AND INJUNCTIVE
17	and CATHERINE SULLIVAN,)	RELIEF
18)	
)	
19	Plaintiffs,)	
20)	
	v.)	
21)	
	UNITED STATES DEPARTMENT OF)	
22	ENERGY, NATIONAL NUCLEAR)	
	SECURITY ADMINISTRATION,)	
23	LAWRENCE LIVERMORE NATIONAL)	
	LABORATORY, and LOS ALAMOS)	
24	NATIONAL LABORATORY,)	
25)	
)	
26	Defendants.)	
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I. INTRODUCTION

1. 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 seismically unstable Bay Area and the wildfire-plagued mountains of northern New Mexico for highly risky aerosol testing and experimentation on live animals. This decision by the National Nuclear Security Administration (“NNSA”), a semi-autonomous agency within the United States Department of Energy (“DOE”), to construct and operate facilities at Lawrence Livermore National Laboratory (“Livermore Lab”) and at Los Alamos National Laboratory (“Los Alamos Lab”) 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. 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. These facilities may perform experiments with any bacterial and viral infectious agents, fungi, and parasites listed now or at any time in the future as allowed at a BSL-3 facility, as well as agents not currently categorized in any BSL-3 “risk group” (and perhaps not even conceived of at this time). There are hundreds of such agents already known to science, many of them extremely virulent, infectious, and potentially fatal. 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

1 Livermore Lab. CAREs has won numerous local and national commendations and awards,
2 including from the U.S. EPA, the Alameda County Public Health Department and Physicians for
3 Social Responsibility. CAREs prepared informative materials for the community and submitted
4 extensive public comments on the draft EA for the Livermore Lab BSL-3. The proposed BSL-3
5 facilities challenged in this action would, if constructed and operated as proposed by defendants,
6 harm CAREs by exposing its members who work and reside in Livermore and the surrounding
7 urban region to virulent and infectious biological agents and their byproducts, and by harming
8 public health and safety and environmental quality in Livermore, the San Francisco Bay Area, and
9 Northern California.
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12 8. Plaintiff NUCLEAR WATCH OF NEW MEXICO (“NUCLEAR WATCH”) is a
13 nonprofit public benefit corporation organized under the laws of New Mexico. Its mission is to
14 provide timely and accurate information to the public on nuclear issues in New Mexico and the
15 Southwest. Through the resulting empowerment of effective citizen action, Nuclear Watch seeks
16 to promote both greater safety and environmental protection at regional nuclear facilities, and
17 federal policy changes that genuinely encourage international efforts to curb the proliferation of
18 nuclear weapons. Nuclear Watch maintains an informative web site (www.nukewatch.org), which
19 receives over one-half million hits a year, that provides access to thousands of documents relating
20 to nuclear weapons. Nuclear Watch posts information on the proposed Los Alamos Lab BSL-3
21 facility on its web site. Nuclear Watch also mails out quarterly newsletters (as well as occasional
22 special reports) to about 2,000 people and organizations, the majority of whom are located in
23 northern New Mexico. That newsletter has frequently addressed issues related to the proposed
24 Los Alamos Lab BSL-3 facility. Nuclear Watch also airs a weekly half-hour television show that
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1 provides a forum for issues related to Los Alamos Lab and the nuclear weapons complex,
2 including the proposed BSL-3 facility.

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4 9. Plaintiff MARYLIA KELLEY was a co-founding member of CAREs in 1983 and
5 currently serves as the group's executive director. CAREs' offices are located at 2582 Old First St.
6 in Livermore, California, approximately 5 miles from Livermore Lab. Ms. Kelley has lived in
7 Livermore for 28 years. Since 1978, she has resided at 5720 #116 East Ave., located
8 approximately one-quarter mile from the Livermore Lab Main Site where the BSL-3 is planned.
9 Soil analyses conducted by the U.S. EPA and other agencies have found elevated levels of
10 plutonium in a city park located one block from Ms. Kelley's home, and the Livermore Lab Main
11 Site is the responsible party. Rain samples taken by Livermore Lab in Ms. Kelley's neighborhood
12 have been found to contain elevated levels of tritium (radioactive hydrogen), which wafted over
13 from the Lab's Main Site. Groundwater beneath her home is part of an off-site plume containing
14 chemical contaminants emanating from Livermore Lab's Main Site. The plume is currently being
15 remediated by the Lab. On a daily basis, Ms. Kelley lives, works and recreates in close proximity
16 to Livermore Lab. Her duties as CAREs' executive director bring her on to the Livermore Lab
17 Main Site for meetings with DOE and Lab personnel on a regular basis. Ms. Kelley has been a
18 member of the Livermore Lab Main Site's Community Work Group to advise DOE, the Lab and
19 state and federal regulators on cleanup of contaminated soil and groundwater at Livermore Lab
20 since 1989. Defendants' proposed operation of BSL-3 facilities without a comprehensive
21 environmental review could add new, unresolved health and environmental threats to air, soil and
22 water resources already stressed with toxic and radioactive releases from Livermore Lab
23 operations.
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1 10. Plaintiff JANIS KATE TURNER has lived in Livermore for more than 37 years
2 and owns a home at 749 Hazel St., approximately one-half mile from Livermore Lab's Main Site,
3 which is slated to house the BSL-3. Ms. Turner maintains a vegetable garden, an herb garden and
4 numerous fruit trees at her home, and these provide a portion of her daily diet. Ms. Turner has
5 taught in area elementary and middle schools for more than three decades. For the past twenty
6 years, she has taught literature and science at East Avenue Middle School, located about 2 miles
7 from Livermore Lab's Main Site. Ms. Turner recently retired from full-time teaching, and
8 occasionally substitute teaches at East Ave. Middle School. Ms. Turner lives, works and recreates
9 in close proximity to Livermore Lab. From 1958 - 1974 plutonium accidently released from the
10 Livermore Lab Main Site to the City of Livermore sewage treatment plant was given away in the
11 sludge to residents for use as a soil amendment. Ms. Turner obtained sludge during that time
12 period and she has volunteered to serve on a task force established by the Alameda County Public
13 Health Department to determine appropriate monitoring and remediation. Ms. Turner's daughter-
14 in-law, a local Livermore girl, died at the age of 27 from malignant melanoma. A three decade
15 study, conducted by the California State Department of Health Services, found that Livermore-
16 born children and youth had more than 6 times the expected rate of malignant melanoma. Ms.
17 Turner believes that Livermore Lab operations may be implicated. She is concerned that
18 operation of a BLS-3 facility and the resultant importation of live anthrax, plague, botulism and
19 other potentially deadly bioagents may result in further negative health impacts on her family,
20 neighbors and friends. Ms. Turner has been an member of CAREs for more than ten years and
21 currently serves on the group's Board of Directors as its Treasurer.

26 11. Plaintiff TARA DORABJI, a recent graduate in environmental science from the
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1 University of California at Santa Cruz, moved to Livermore in 2001. She is CAREs' outreach
2 coordinator and community organizer. Ms. Dorabji lives at 749 Hazel St., approximately one-half
3 mile from Livermore Lab's Main Site, and works at the CAREs office, about 5 miles from the
4 Lab. Ms. Dorabji often rides her bicycle to work. Ms. Dorabji conducts outreach on CAREs'
5 behalf at the Livermore Farmers' Market, the Rodeo Parade and many other community events
6 within 5 miles of the Livermore Lab Main Site, the location of the proposed BSL-3. Ms. Dorabji
7 lives, works and recreates in close proximity to Livermore Lab. Her duties as CAREs' outreach
8 coordinator/community organizer are such that she represents the organization at public meetings
9 held by DOE and Livermore Lab at the Livermore Lab Main Site. Ms. Dorabji believes that
10 defendants' proposal to "green light" BSL-3 facilities without programmatic and site specific
11 Environmental Impact Statements could lead to the release of bioagents that would endanger her
12 health and impact her ability and decision to raise a family in the future.

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15 12. Plaintiff HENRY C. FINNEY is a retired Doctor of Sociology who has resided at
16 35 Barranca Road, Los Alamos, since 1995. His residence is located approximately 2.5 miles
17 downwind from the proposed BSL-3 locations. On a near daily basis, Dr. Finney conducts
18 personal business or recreates in downtown Los Alamos, approximately 1.5 miles from the
19 proposed BSL-3 locations, and commonly travels on roads yet closer. Defendants' proposed
20 operation of BSL-3 facilities at the Los Alamos Lab would harm Dr. Finney by exposing his
21 family, friends and neighbors to the risk of exposure to virulent biological agents. This harm is
22 exacerbated by defendants' failure to prepare an Environmental Impact Statement and otherwise
23 to conduct an adequate environmental review of the facility's potential threats to human health
24 and safety and environmental quality. The defendants' Environmental Assessment for example,
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1 fails to identify, much less restrict, the types of dangerous biological agents that the Los Alamos
2 Lab may choose to use in future experiments. Accordingly, Mr. Finney is fearful for the future
3 well-being of himself and his family, friends and neighbors.
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5 13. Plaintiff CATHERINE SULLIVAN has lived for 37 years in Tesuque, New
6 Mexico, approximately 25 miles downwind from the Los Alamos Lab. For 29 years Ms. Sullivan
7 owned and operated a printing business in Santa Fe. Ms. Sullivan travels regularly – at least once
8 per week – to the Los Alamos townsite where she spends several hours at the Bradbury Science
9 Museum which is located approximately 1.5 miles from the proposed BSL-3 sites. She also hikes
10 and camps in the Jemez Mountains, mostly at the Bandelier National Monument, which is
11 contiguous with the Los Alamos Lab. Since defendants propose to use at the Los Alamos BSL-3
12 facility many airborne pathogens that can infect humans through inhalation, Ms. Sullivan is
13 harmed by the threat that an infectious agent might be accidentally released, exposing her and
14 other people in the area to illness or death. Ms. Sullivan is also harmed by the fact that the
15 Environmental Assessment does not limit what organisms the Los Alamos Lab might use in its
16 future experiments.
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19 14. Plaintiffs are concerned not only for their personal safety, but also for the health of
20 the environment. They are also concerned that the subject BSL-3 facilities are vulnerable to
21 attack by terrorists, a fact ignored in defendants’ environmental reviews. Plaintiffs seek
22 defendants’ full compliance with NEPA so that federal decision makers reach sound decisions
23 with appropriate mitigation measures for the CBNP generally and the Livermore Lab and Los
24 Alamos Lab BSL-3 facilities specifically.
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26 15. Defendant UNITED STATES DEPARTMENT OF ENERGY (“DOE”) is a federal
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1 agency. It is responsible for administering and overseeing the contracts between the United States
2 and the University of California concerning operation of DOE's Livermore Lab and Los Alamos
3 Lab facilities. DOE, through its National Nuclear Security Administration (“NNSA”), proposes to
4 construct and operate the BSL-3 facilities which are the subject of this complaint. DOE also
5 prepared the Final Environmental Assessment (“EA”) and Finding of No Significant Impact
6 (“FONSI”) for these proposed BSL-3 facilities. DOE has also authorized funding for design and
7 construction of these facilities.
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10 16. DOE is also responsible for management of the contract between the United States
11 and the Lockheed Martin Corporation for management of the Sandia National Laboratories
12 (SNL), whose principal site is located in Albuquerque, New Mexico (approximate population:
13 450,000). DOE, through NNSA, also carries out the nationwide Chemical and Biological
14 National Security Program (“CBNP”). NNSA’s plans to construct BSL-3 facilities at both Los
15 Alamos and Livermore Labs are carried out as part of the CBNP.
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17 17. In their capacities as two of NNSA’s national laboratories, the Livermore and Los
18 Alamos Laboratories are charged with carrying out NNSA’s mission, which includes
19 administering this country’s nuclear weapons program and reducing and countering threats from
20 weapons of mass destruction, including nuclear, chemical, and biological weapons. While the
21 great majority of the current work of these labs focuses on nuclear weapons and related issues,
22 they also conduct studies relating to biological weapons, through BSL-1 and BSL-2 laboratories
23 used to conduct molecular and cellular research.

24 18. Microbiological and biomedical laboratories are classified from BSL-1 to BSL-4,
25 according to the level of danger posed by the activities and agents permitted in the laboratory.
26 Those classifications and criteria are specified by the federal Centers For Disease Control and
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1 Prevention (“CDC”); in order to qualify in each category, a laboratory must meet the CDC criteria
2 for that level of facility. Generally speaking, BSL-1 is appropriate for working with
3 microorganisms that are not known to cause disease in healthy humans. BSL-2's are designed to
4 maximize safe conditions for people working with agents of moderate risk to personnel and the
5 environment. The agents manipulated in BSL-2's are often ones to which the workers have had
6 exposure in the community, and to which they have already experienced an immune response. A
7 BSL-3 is required for work with infectious agents which may cause serious or potentially lethal
8 diseases as a result of exposure. BSL-4 facilities are designed to handle the most deadly agents
9 (for which there is no treatment) and have exceptional engineering controls. There are BSL-4's at
10 approximately six locations in the United States and less than thirty locations worldwide.

- 11 19. Some of the designs and practices required in BSL-3 facilities are as follows:
- 12 a. procedures involving infectious materials must be conducted within biological
13 safety cabinets or other physical containment devices;
 - 14 b. access to the laboratory is limited when experiments are in progress, and access
15 is limited to people who have been immunized or at least advised of biohazards;
 - 16 c. personnel are trained in biosafety techniques and protective clothing is worn;
 - 17 d. the laboratory has a double-door access zone and sealed penetrations;
 - 18 e. there is a ducted air ventilation system that draws air into the laboratory and
19 does not recirculate exhaust air into other areas, and HEPA (High Efficiency Particulate Arrestor)
20 filters are used for exhaust air; and
 - 21 f. there is a system for decontaminating laboratory wastes before disposal.

22 20. NNSA operates three national laboratories, the Los Alamos Lab, Sandia National
23 Laboratories, and the Livermore Lab, as well as a variety of other facilities, including nuclear
24 weapons production facilities. Currently, NNSA has no BSL-3 facilities at any of its sites. All
25 three of these national laboratories have BSL-2's on-site. In February 2002, DOE approved
26 construction of a BSL-3 facility at the Los Alamos Lab, which will reportedly commence
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1 operation in May 2004. On December 16, 2002, DOE issued a Final Environmental Assessment
2 and Finding of No Significant Impact (“FONSI”) for a BSL-3 facility at the Livermore Lab.
3 Additionally, a BSL-3 facility for Sandia National Laboratories may be considered in the future.
4 Evidence suggest that DOE may also be considering a future BSL-3 facility at its Oak Ridge,
5 Tennessee site and other DOE sites, all without proper NEPA compliance.
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7 21. NNSA administers DOE’s CBNP for the newly formed Department of Homeland
8 Security (DHS) at the DOE’s Livermore, Los Alamos, and Sandia labs. Neither DOE, NNSA nor
9 DHS has ever prepared a programmatic Environmental Impact Statement, or even an
10 Environmental Assessment, under NEPA to address the totality of actions being planned and
11 undertaken pursuant to the CBNP. The CBNP was established in 1997 pursuant to the Defense
12 Against Weapons of Mass Destruction Act passed by Congress in 1996. 50 U.S.C. §2301, *et seq.*
13 The purpose of the CBNP is “to engage the DOE and its laboratories more fully in the
14 development and demonstration of new technologies and systems to improve U.S. domestic
15 preparedness and response capabilities to chemical and biological attacks.” CBNP’s mission is to
16 “develop, demonstrate, and deliver technologies and systems to improve domestic defense
17 capabilities and, ultimately, to save lives in the event of a chemical or biological attack.” The
18 CBNP includes analytical studies, research and development of technology, and “Domestic
19 Demonstration and Application Programs” for prototype operational systems. The CBNP seeks to
20 develop better technology to improve detection of chemical and biological agents, prediction of
21 dispersal of chemical and biological agents, development of rapid and effective decontamination
22 and restoration technologies, improved identification of biological and chemical agents,
23 recognition of bio-engineered features, geographic source, event reconstruction and attribution,
24 and development of vaccines and treatments. The CBNP has grown rapidly since 1997; its FY
25 2002 budget was approximately \$85.2 million.

26 22. The BSL-3 facilities, although small in physical dimensions, would handle extremely
27 dangerous biological agents with minimal security. As described in the EA, the proposed Los

1 Alamos BSL-3 facility would be 3,000 square feet in size and include two BSL-3 laboratories,
2 two BSL-3 mechanical rooms, and one BSL-2 laboratory. Up to ten people would work in the
3 facility. Shipments of biological agents to the new facility are estimated to range between 10 and
4 60 every month as stocks are built up, which is up to ten times the current shipment levels of
5 biological agents to Los Alamos Lab. Materials would be shipped to the lab by commercial
6 delivery services, U.S. Postal Service, or “other authorized entity.” The facility would also
7 generate an estimated 2,600 lbs. per year – more than 10 lbs. daily – in “special” infectious
8 wastes.

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10 23. The Livermore Lab BSL-3 facility would be a one-story building occupying
11 approximately 1500 square feet of floor space. It would house three BSL-3 laboratories, one of
12 which would have rodent handling and maintenance capabilities. Dangerous pathogens would be
13 aerosolized in this BSL-3 lab. Each of the three BSL-3 laboratories would have at least one Class
14 II Type B Biological Safety Cabinet (“BSC”) including a HEPA filtration system. All BSC air
15 would be exhausted to the outside air through the building’s heating, ventilation and air
16 conditioning system. The BSL-3 laboratory used for rodent testing would contain a maximum of
17 100 rodents, including mice, rats and guinea pigs. The EA for the Livermore Lab facility does not
18 disclose measures proposed to assure the physical security of the facility building because security
19 measures had not yet been determined. Biological materials or infectious agents would be
20 shipped to the Livermore Lab BSL-3 facility via commercial package delivery services, the U.S.
21 Postal Service, or other “authorized entities,” including couriers. As many as 40 shipments in and
22 20 shipments out of the facility are anticipated each month. The procedure for handling damaged
23 packages is not described in the EA, as this procedure was “to be developed once the project
24 obtains approval.” The EA estimates that laboratory research experiments would generate about
25 22 lbs. of lab trash per week, or about 1,144 lbs. per year. The “operational design life” of the
26 proposed facility would be at least 30 years.

27 24. Both the Los Alamos and Livermore Labs received extensive public comments on

1 their respective Environmental Assessments for the BSL-3 facilities. The Los Alamos lab
2 received over 200 public comments on the EA in writing (including two from the plaintiffs) or by
3 telephone. In addition, over 800 petition signatures requesting an EIS were submitted to the Los
4 Alamos Lab. The Livermore Lab received about 100 public comments on its EA in writing
5 (including ten from CAREs' Board and staff) or by telephone. The vast majority of the comment
6 letters specifically requested a more thorough environmental review process under NEPA and that
7 public hearings be held. Some of the comment letters sent to DOE for the Livermore Lab BSL-3
8 EA were not included by DOE in the final EA as required by law. Additionally, the draft EA for
9 the Livermore Lab BSL-3 was released without including any address, phone, fax or email to
10 which interested parties could send comments. Moreover, the due date for comments was not
11 included in the document. Plaintiffs had to make multiple phone calls to Livermore Lab and DOE
12 just to find out where comments could be sent (and by what date). Plaintiff CAREs requested that
13 DOE reissue the draft EA with the missing information. DOE declined to do so.

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15 25. Defendants issued Final Environmental Assessments for the Los Alamos BSL-3
16 facility and the Livermore Lab BSL-3 facility on February 26, 2002, and December 16, 2002,
17 respectively. On the same dates, defendants issued Findings of No Significant Impact ("FONSIs")
18 for each of these facilities. On the same dates, defendants authorized funding for design and
19 construction of these BSL-3 facilities.

20 26. Neither EA provides an adequate description of the purpose and need for the proposed
21 facility. Each EA provides less than one page of vague generalizations which fail entirely to
22 reveal any of the specific capabilities, experiments or programs that would take place at the BSL-3
23 facilities. The EAs also fail to describe precisely what functions and activities the proposed
24 facilities will carry out, and specifically what activities involving the various biological agents and
25 related toxins, would be undertaken that are not presently being conducted at these labs' BSL-2
26 facilities now. The Los Alamos EA fails to reveal the maximum volume and inventory of
27 infectious agents that would be handled. The Livermore EA allows up to 10 liters of cultured

1 microorganisms in the BSL-3 facility at any one time. The EA lists the allowable concentration as
2 100,000,000 organisms per milliliter. Many microorganisms to be used in the BSL-3 are single
3 cell. One milliliter would contain 100 million cells, one liter would hold 100 billion cells and 10
4 liters would contain one trillion. By way of comparison, 50 tularemia organisms is an infectious
5 dose; one liter of such organisms contains two billion infectious doses. One to ten Q fever
6 organisms is sufficient to cause illness. One liter of *Coxiella burnetti* (Q fever) at the
7 concentration allowed in the Livermore BSL-3 could cause 10 to 100 billion illnesses. Neither EA
8 reveals the expected diversity or range of agents that would be in use at the facilities at any one
9 time, or over the facilities' lifetime.

10 27. The EAs provide virtual *carte blanche* for the biological agents that the labs could
11 choose to utilize in the future, all without analysis of each microorganism's particular risk.
12 According to the EA for the Los Alamos Lab, for example, in addition to agents listed by CDC in
13 the BSL-3 category, "the [BSL-3 facility] could handle other bacterial or viral infectious
14 organisms not specifically or currently regulated by CDC or other Federal agencies. . . ." Thus,
15 this lab could introduce naturally occurring or genetically modified agents for which the virulency
16 and health effects are unknown, for which the CDC does not offer guidance, and for which there
17 are no known cures. The EA for the Livermore Lab is likewise vague in its description of
18 potential biological agents.

19 28. Neither EA addresses a reasonable range of alternatives to the facilities by location,
20 function, or size. Both considered only minor variations in the proposed facility such as different
21 ways of constructing the same facility (construction alternative, prefabrication alternative, partial
22 prefabrication/build alternative), and a no action alternative. Neither considered locations away
23 from other employees or away from the surrounding urban area.

24 29. Both EAs presume no adverse environmental effects will occur from the BSL-3
25 facilities on the assumption that the labs will comply with all of the CDC requirements and
26 guidelines concerning such facilities. However, as numerous comments to both draft EAs pointed
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1 out, both labs and DOE have poor safety, security and compliance records, rendering a
2 presumption of full compliance unreasonable. Moreover, as the Los Alamos EA points out,
3 “CDC does not, per se, have jurisdiction by law over the NNSA with regard to the required
4 approval of procedures used in NNSA biological research activities and does not have a local
5 presence with regard to [this lab].” Furthermore, many of the labs’ supposed safeguards are
6 ineffective. The proposed use of HEPA filters, for example, is fraught with peril because many of
7 the test organisms, such as rickettsia, are too small or otherwise elusive to be effectively captured
8 in such filters.

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10 30. The above deficiencies in defendants’ EAs for these facilities confirm a pattern of
11 neglect and laxity. In February 2001, the DOE Office of Inspector General released a report
12 entitled, “Inspection of Department of Energy Activities Involving Biological Select Agents.”
13 (Biological Select Agents are those whose characteristics lend themselves to use in biological
14 weapons.) The report concluded that DOE’s biological agent research activities “lacked
15 appropriate Federal oversight, consistent policy, and standardized implementing procedures,
16 resulting in the potential for greater risk to workers and possibly others from exposure to
17 biological select agents and select agent materials.” The report found that some DOE laboratories
18 “were not adhering to [CDC] requirements,” that procedures for conducting research activities
19 involving these agents varied significantly among the laboratories, and that DOE had not
20 developed policies to ensure that the laboratories follow “best practices” in the conduct of their
21 biological activities. The DOE Inspector General report made several recommendations for
22 improvement. The defendants’ EAs on the Livermore and Los Alamos Labs fail to address, much
23 less resolve, the deficiencies these reports reveal.

24 31. With respect to biological select agent research at the Los Alamos Lab, the Inspector
25 General found that the lab had not conducted the assessments and evaluations of its biosafety
26 program that were required by its own regulations. For example, Los Alamos Lab had received
27 and mistakenly conducted research with contaminated select agent DNA, revealing that its

1 screening procedures were inadequate. The report also faulted Los Alamos Lab for not
2 developing specific procedures for handling damaged packages, even though the lab had received
3 at least one severely damaged package containing a select biological agent. The report also
4 pointed out that although CBNP officials stated that Los Alamos Lab had a hazard control plan for
5 handling regulated materials and for controlling exposures to hazardous materials from damaged
6 packages, lab officials stated that they had no such hazard control plan.

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8 32. The history of the Livermore Lab is likewise replete with examples of lax
9 administration, unsafe laboratory practices, potentially lethal releases of radioactive and other
10 toxic materials to the atmosphere, and failures to promptly and fully disclose these incidents for
11 public review and corrective action. In 1987, the Livermore Lab's Main Site was placed on the
12 National Priorities List as an extremely contaminated "Superfund" site. Livermore Lab's Site 300
13 was added to the "Superfund" list in 1990. Recent excavation of Livermore Lab's National
14 Ignition Facility construction site has uncovered unauthorized toxic waste dumping of over 100
15 capacitors leaking highly toxic PCBs, 75 crushed waste drums marked "radioactive," and more
16 than 37 truckloads of contaminated soil that has since been trucked to a Utah disposal site. In
17 1990, Livermore Lab experienced the accidental release of tritium (radioactive hydrogen) at a tank
18 at the lab's Building 292, resulting in soil and groundwater contamination. Numerous workers at
19 Livermore Lab have been contaminated with plutonium, uranium, curium, chlorine gas, and many
20 other highly hazardous and potentially lethal contaminants due to the laboratory's violations of
21 applicable safety procedures. On numerous occasions, hazardous and radioactive materials have
22 accidentally been flushed down drains at Livermore Lab and have entered the City of Livermore's
23 Sewage Treatment Plant. Plutonium and Americium are among the contaminants that have been
24 released in this manner. Over a 15-month period in the late 1990s, Livermore Lab's releases to
25 the City Sewage Treatment Plant violated its permit limit on 14 occasions. These releases
26 included heavy metals and corrosive chemicals. The Livermore Lab EA summarily rejects careful
27 consideration of harm from its BSL-3 releases to the City Sewage Treatment Plant.

1 33. The EAs’ accident and “abnormal event” analyses are deficient in numerous respects.
2 At Los Alamos, the analysis is based on a literature search of only the U.S. Army facilities, and
3 did not include any other BSL-3 facilities. Both EAs fail to provide any substantial analysis
4 because defendants simply elected not to analyze the risk and accident scenarios in any depth.
5 The Los Alamos EA relies on a Hazard Control Plan for addressing emergency response
6 procedures and safeguards that has not even been written for the proposed BSL-3 facility, so there
7 is no basis for presuming such a plan will mitigate effects of any abnormal events. The Livermore
8 EA’s discussion of abnormal events and accidents falsely claims that “[t]he probability of
9 catastrophic events (due to earthquake) is already very low.” The Livermore EA bases this claim
10 on the conclusion from the U.S. Army’s 1989 Biological Defense Research Program
11 Programmatic Environmental Impact Statement (“PEIS”). Yet, the Army there made clear that its
12 findings are a “generalized case” for the entire nationwide program and that specific facility-by-
13 facility analyses may be required to determine the full risk at a site. The Army’s seismic studies
14 are heavily weighted to low probability due to the fact that the majority of its facilities are located
15 in regions of the U.S. in which seismic occurrences are low. The one exception to this is the
16 Army’s Dugway Proving Grounds, located in Utah’s Great Basin. The Army PEIS states that a
17 discussion of seismic risks is found in the 1988 Dugway Draft Environmental Impact Statement.
18 In its final 1992 Dugway EIS, the Army determined that there was a probability of a severe
19 seismic event within the next 100 years. This finding led the Army to conclude that the Dugway
20 “Life Sciences Test Facility” should be constructed to meet maximum seismic codes to reflect
21 “the worst event regardless of the probability of occurrence.” Defendants disingenuously omitted
22 from the EAs the only U.S. Army site that is prone to seismic activity. The Livermore site is both
23 more seismically active and has a higher risk of a destructive event, in terms of Richter scale, than
24 does the Dugway site. A 2000 study by the U.S. Geological Survey found that the San Francisco
25 Bay Area has a “70 percent chance of an earthquake of [Richter] 6.7 or greater” and a 37 percent
26 chance of a similar event in near proximity to Livermore Lab between 2000 and 2030 (the life-
27

1 span of the proposed Livermore BSL-3). The event probability range for Livermore begins at 6.7
2 Richter while the Dugway range ends at 6.9. In fact, the Livermore Lab is located in proximity to
3 several active earthquake faults, which pose a substantial and unacceptable risk of a catastrophic
4 event, yet the defendants merely relied on a cursory bibliographic search to come to an
5 inapplicable, completely unsupportable conclusion.

6 34. The EAs fail to adequately analyze the risks to the structural integrity of the proposed
7 BSL-3 facilities due to potential seismic activity and fires. At the Livermore Lab, the Las Positas
8 Fault Zone is adjacent to, and may be situated partially underneath, the lab facilities. Although
9 the Las Positas Fault Zone is capable of generating accelerations in excess of 1.0 g, the EA
10 assumes, and the proposed BSL-3 facilities are designed to withstand, g forces of only .6, thus
11 creating a serious risk of seismic failure within the design life of the facilities. At the Los Alamos
12 Lab, the Rendija Canyon fault, which has a potential to unleash an earthquake up to 6.5 on the
13 Richter scale, runs through Technical Area 3, which contains two of the proposed optional
14 locations for the BSL-3, while the third optional location is contiguous to TA-3. The Los Alamos
15 EA fails to analyze the risks associated with an earthquake on the Rendija Canyon fault of less
16 than 6.0 on the Richter scale. Also, the Los Alamos EA improperly dismisses analysis of the
17 environmental risks posed by potential fires by asserting that a fire would be expected to kill all
18 microorganisms rather than acknowledging that a fire might only partially destroy the facility, thus
19 dispersing onto a vulnerable public, rather than destroying, the facility's biological agents.
20 Because of New Mexico's worsening drought the risk of fire is an ever-increasing concern,
21 especially after the catastrophic Cerro Grande Fire of 2000.

22 35. Neither EA provides any analysis of internal or external threats to security, particularly
23 the potential threats from terrorists or disgruntled employees involving operation of the proposed
24 BSL-3 facilities (including transportation of the biological agents to and from the labs) and the
25 potential environmental effects emanating therefrom. This is true even though the anthrax used
26 in the recent attacks on the East Coast emanated from a United States facility and one of the
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1 strongest hypotheses concerning the perpetrator is that a former employee of a federal biological
2 weapons facility carried out the attacks. No analysis of the facilities' vulnerability to direct
3 terrorist attacks using trucks as in the Oklahoma City bombing, or planes as in the "9/11" attacks,
4 is provided.

5 36. Both EAs provide only a very abbreviated and inadequate discussion of cumulative
6 impacts which is limited entirely to a listing of construction and related activities planned roughly
7 over the next decade. Neither EA discusses the cumulative effects of other new actions and
8 construction planned to occur pursuant to the CBNP at these labs and the other NNSA facilities.
9 For example, the Los Alamos EA fails to mention NNSA's current plans to construct a BSL-3
10 facility at Lawrence Livermore Laboratory, even though those plans were underway at the time
11 the EA for the Los Alamos Lab BSL-3 was being prepared. The Livermore EA likewise largely
12 ignores the Los Alamos BSL-3 facility, making reference to it only in passing. Nor does either
13 EA attempt to analyze the cumulative environmental effects of the CBNP.

14 37. The EAs fail entirely to analyze the risks associated with transportation of biological
15 select agents to and from the labs. The potential risks include damage to containers and dispersal
16 or diversion of agents through terrorism, theft or sabotage, and other errors and accidents
17 associated with shipping infectious agents. One example of these risks occurred at Los Alamos
18 Lab in October 2001, when a container of virulent anthrax was shipped to the lab even though it
19 had no facilities to handle virulent anthrax. Had that package been opened, due either to
20 inadequate marking or to inadvertence, virulent anthrax would have entered the facility with
21 potentially deadly consequences to workers.

22 38. The EAs fail to disclose and address the fact that the BSL-3 facilities would be built
23 over existing contamination from past lab operations. At Los Alamos, the New Mexico
24 Environment Department expressed serious concern over that possibility and requested that the
25 potential contamination sites near the Option A location be investigated and remediated before the
26 beginning of construction. At Livermore, the BSL-3 facility would be located over soils and

1 groundwater that are so severely contaminated they are now designated a Superfund site. At
2 minimum, the EAs must address the environmental effects of construction at the contaminated
3 locations.

4 39. The EAs also fail to adequately analyze the proliferation risks associated with co-
5 locating a biodefense facility at a nuclear weapons design and development laboratory. Currently
6 Livermore and Los Alamos Labs are competing with each other on the design of a new weapons
7 capacity for the B83 and B61, respectively. The new nuclear weapon designs will have earth
8 penetrating capability and are referred to as the Robust Nuclear Earth Penetrators. The B83
9 possesses the highest yield of any nuclear bomb in the U.S. arsenal; the B61 has high and variable
10 yield options. In addition, Livermore Lab operates six fermenters ranging in size from 2 liters to
11 1500 liters. The function of these fermenters is to grow microorganisms. Although these
12 fermenters are not known to be affiliated with the BSL-3 facility, if one liter of live anthrax were
13 grown in the 1500 liter fermenter, it would give the Lab the capacity to produce enough anthrax
14 for a theater-scale war. Developing bio-defense facilities at these labs creates a precedent that
15 may prompt other nations to develop similar joint facilities, threatening proliferation of weapons
16 facilities that conduct research on biological warfare. Such joint weapons and biological warfare
17 research facilities pose potential violations to and may weaken the international Biological and
18 Toxic Weapons Convention. The EAs fail to address these proliferation risks.

19
20 **(Violation of NEPA: Inadequate EA)**

21 40. Plaintiffs incorporate by reference all preceding paragraphs.

22 41. The EAs and FONSI for the proposed Los Alamos and Livermore facilities are
23 inadequate in the following respects; among others:

24 a. They fail to provide sufficient evidence and analysis for determining whether to
25 prepare an EIS;

26 b. They contain an inadequate analysis of alternatives, cumulative effects, and specific
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1 environmental effects, such as the effects and risks of accidents, terrorism, theft, earthquakes, fire
2 and sabotage; and

3 c. They do not adequately describe the project itself, and the purpose and need for the
4 project, which in turn renders the analysis of environmental effects inadequate.

5 42. Defendants' failure to prepare a legally adequate EA and FONSI for each of these
6 facilities is arbitrary and capricious, and constitutes a violation of the Administrative Procedure
7 Act, 5 U.S.C. §706 ("APA"), and NEPA.

8
9 **SECOND CLAIM FOR RELIEF**
10 **(Violation of NEPA: EIS Must Be Prepared)**

11 43. Plaintiffs incorporate by reference all preceding paragraphs.

12 44. The proposed Los Alamos and Livermore BSL-3 facilities are each a major federal
13 action that may significantly affect the quality of the human environment in a number of different
14 respects, including the following:

15 a. The possible effects from each facility are highly uncertain and involve unique
16 and unknown risks;

17 b. Construction of these facilities, since they are the first DOE BSL-3 facilities,
18 will establish a precedent for future BSL-3's and related biological and chemical agent research
19 facilities and actions at DOE facilities, raising unstudied risks that other nations may seek to
20 conduct such research activities at facilities engaged in the development of nuclear or other
21 weapons of mass destruction;

22 c. Each facility, as part of the CBNP, is related to other CBNP actions and
23 facilities with cumulatively significant impacts;

24 d. Each proposed facility is highly controversial;

25 e. Operation of each proposed facility, including the risks of accident, theft,
26 earthquake, fire, sabotage, or terrorism, has the potential for very significant effects on public
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1 health and safety and environmental quality.

2 45. DOE's approvals of the EA and FONSI for each of the proposed Los Alamos and
3 Livermore facilities are arbitrary and capricious, and in violation of NEPA and the APA, because
4 defendants were required to prepare an EIS for each of the proposed facilities and operation of the
5 facilities may significantly affect the quality of the human environment.

6 **THIRD CLAIM FOR RELIEF**

7 **(Violation of NEPA: Programmatic EIS Must Be Prepared)**

8 46. Plaintiffs incorporate by reference all preceding paragraphs.

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

13 48. DOE has failed to analyze the environmental effects of the CBNP, including its
14 facilities (particularly the newly proposed facilities such as the Los Alamos and Livermore BSL-3
15 facilities) and actions, in a "programmatic" document, as required by NEPA. Because the CBNP
16 may have significant effects on the human environment, a programmatic EIS must be prepared to
17 analyze its environmental effects. DOE's failure to prepare a programmatic analysis of the
18 environmental effects of the CBNP, and particularly its failure to prepare a programmatic EIS for
19 the CBNP, are arbitrary and capricious, and violate NEPA and the APA.

20 **FOURTH CLAIM FOR RELIEF**

21 **(Violation of NEPA: Programmatic EIS Must Be Prepared for Livermore Lab)**

22 49. Plaintiffs incorporate by reference all preceding paragraphs.

23 50. NEPA and its regulations require preparation of a programmatic EIS where a
24 series of closely related "major federal actions" poses a greater effect cumulatively than each
25 action does individually, particularly where they constitute successive phases of an overall
26 program.

27 COMPLAINT

1 51. In 1992, DOE prepared a Site-Wide Environmental Impact Statement on the
2 operation of the Lawrence Livermore and the Sandia Livermore National Labs. In 1999, DOE
3 prepared a supplemental analysis tiered onto its 1992 SWEIS, and determined at that time that no
4 new SWEIS was needed. Although the 1992 SWEIS briefly mentions that Livermore Lab has a
5 bio-medical program and facilities, neither it nor DOE's 1999 supplemental analysis discloses and
6 addresses the bio-medical program's specific operations, potential environmental impacts, and
7 relationship to programs involving weapons of mass destruction. In 2002, DOE published a
8 Federal Register notice of its intent to prepare a new EIS on its Livermore Lab operations. Again,
9 DOE failed to disclose and discuss its bio-medical facilities in this notice.

10 52. In August 2002, DOE released its draft EA on the proposed Livermore Lab BSL-3 in
11 which DOE admitted that construction of the proposed BSL-3 facility was possible because the
12 Livermore Lab's existing bio-medical facilities could be used for storage of materials for the BSL-
13 3. It therefore appears that DOE was aware, at the time it prepared its previous SWEIS and
14 supplemental analyses, that the Livermore Lab's existing bio-medical facilities might be used for
15 storage of materials for subsequent development of the BSL-3 facilities. Yet DOE never
16 disclosed the functional interrelationship and interdependence between the Livermore Lab's BSL-
17 1, BSL-2, and proposed BSL-3 facilities, nor has DOE ever analyzed the cumulative effects of the
18 Livermore Lab's bio-medical program, including these facilities.

19 53. Consequently, defendants' EA and FONSI for the proposed BSL-3 facilities failed to
20 include any cumulative analysis of the effects of the existing facilities combined with the
21 proposed new BSL-3 facilities. DOE's failure to prepare a programmatic EIS on the Livermore
22 Lab's bio-medical facilities, addressing their interdependence and cumulative effects, is arbitrary
23 and capricious, and violates NEPA and the APA.
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FIFTH CLAIM FOR RELIEF

(Violation of Freedom of Information Act)

54. Plaintiffs incorporate by reference all preceding paragraphs.

55. 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). 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.

56. 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 May 19, 2002, 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.

1 Contrary to FOIA, DOE has failed to provide the requested documents.

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

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

11 **SIXTH CLAIM FOR RELIEF**

12 **(Violation of the Administrative Procedure Act)**

13 58. Plaintiffs incorporate by reference all preceding paragraphs.

14 59. Defendants' approvals challenged herein, and failure and refusal to
15 provide the foregoing nonprivileged documents requested by plaintiffs under FOIA, are arbitrary
16 and capricious, an abuse of discretion, not in accordance with the law and without observance of
17 procedure required by law, in violation of the APA, 5 U.S.C. section 706(2), in that such conduct
18 violates NEPA and FOIA, as alleged more specifically hereinabove.

19 **ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF**

20 60. Plaintiffs have exhausted all available administrative remedies by raising each of the
21 defendants' violations of law alleged hereinabove, both in written and oral comments thereon. No
22 administrative appeals are available to plaintiffs.

23 61. Defendants' threatened construction and operation of the subject BSL-3 research
24 facilities at Livermore Lab and Los Alamos Lab would cause irreparable harm to the environment,
25 to plaintiffs, and to the public in the respects alleged hereinabove. Therefore this Court should

1 issue preliminary and permanent injunctive relief staying and setting aside defendants' approvals
2 of the BSL-3 facilities challenged herein.

3
4 **REQUEST FOR RELIEF**

5 As relief for the above violations of law, plaintiffs respectfully request the following:

- 6
7 1. A declaration that defendants acted in an arbitrary and capricious manner by issuing a
8 FONSI for each of the proposed Los Alamos and Livermore BSL-3 facilities because the EA for
9 each facility is legally inadequate and because an EIS must be prepared on each facility.
- 10 2. A declaration that DOE is in violation of NEPA and the APA because it has failed to
11 prepare either a programmatic EIS or any programmatic environmental assessment for the CBNP.
- 12 3. An order requiring defendants to withdraw their FONSI for the Los Alamos and
13 Livermore BSL-3 facilities until such time as defendants have complied with all pertinent
14 environmental law for both BSL-3 facilities and the entire CBNP.
- 15 4. An injunction against ground-disturbing work, construction, and the introduction and
16 use of bacterial agents in connection with the Livermore BSL-3 facility until defendants have
17 complied with NEPA for both the Livermore BSL-3 facility and the entire CBNP.
- 18 5. An injunction against the introduction and use of bacterial agents in connection with
19 the Los Alamos BSL-3 facility until defendants have complied with NEPA for both the Los
20 Alamos BSL-3 facility and the entire CBNP.
- 21 6. A declaration that defendants violated FOIA.
- 22 7. An award of reasonable attorney's fees and expenses incurred in the litigation of this
23 action.

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8. Any other relief that this court deems just and proper.

Dated: August 26, 2003

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