UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KLARE ALLEN, MELVIN KING, JOYCE KING, CARMEN NAZARIO-VEGA, and CONSERVATION LAW FOUNDATION,
Plaintiffs,
v.

NATIONAL INSTITUTES OF HEALTH, and ELIAS A. ZERHOUNI in his official Capacity as Director of National Institutes of Health (NIH),
Defendants.

TRUSTEES OF BOSTON UNIVERSITY and BOSTON MEDICAL CENTER CORPORATION,
Defendant-Intervenors.

C.A. No.: 06 CV 10877 PBS

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, EXPANSION OF THE RECORD AND PERMANENT INJUNCTIVE RELIEF

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The individual Plaintiffs, residents of Boston's South End and Roxbury neighborhoods (the "Individual Plaintiffs"),[1] and the Conservation Law Foundation ("CLF") (collectively, the "Plaintiffs"), submit this Memorandum in support of their Motion for Summary Judgment, expansion of the Administrative Record to include the attached documents, and Permanent Injunctive Relief. The Plaintiffs are entitled to judgment that the defendant National Institutes of Health ("NIH") violated the National Environmental Policy Act ("NEPA") and the Administrative Procedures Act (the "APA") by issuing a Supplemental Record of Decision (the "SROD") allowing funding of the National Emerging Infectious Disease Laboratories, biological defense research laboratories intended for the study of some of the world's most lethal pathogens (the "NEIDL") in Boston's densely populated South End and Roxbury neighborhoods without an adequate analysis of the purpose and need for the NEIDL, alternatives to its location in a dense environmental justice neighborhood, or the consequences of the proposed action. Although NIH prepared a *Supplementary Risk Assessment for the NEIDL* (July 2012) (the "RA") that purports to address those issues, that document lacks the level of analysis and credibility required under NEPA and any decision based on it is therefore arbitrary and capricious, for the reasons set forth below. The defendants should be enjoined from providing or accepting further federal funding for BSL-3 and BSL-4 research at the NEIDL unless and until NIH complies with NEPA.

Background and Statement of the Case

In February 2002, the National Institute of Allergy and Infectious Disease ("NIAD"), an institute of NIH, launched a national program to expand research on dangerous pathogens for biodefense purposes. Amended Complaint, ¶ 19; Federal Defendants' Answer, ¶ 19. As part of

[1] Plaintiff Ruth Barkley died in August 2012. The Plaintiffs filed a Suggestion of Death under Rule 25 on February 19, 2013.

this program, NIAD identified the need to approve and fund the development of multiple high-level biocontainment laboratories. *Id*.

In October 2002, NIH issued a Request for Proposals ("RFP") for the development of national biocontainment laboratories suitable for work on dangerous and exotic pathogens. The Boston University Medical Center ("BUMC") responded, proposing to build a laboratory on Albany Street in Boston, in Boston's Roxbury and South End Neighborhoods (the "Boston Location"). On September 30, 2003, NIAD granted BUMC $128 million to construct the NEIDL at the Boston Location. Amended Complaint, ¶ 30; Federal Defendants' Answer, ¶ 30. On December 2, 2005, NIH issued a Final Environmental Impact Statement ("FEIS") on the NEIDL and, on February 2, 2006, it issued a Record of Decision ("ROD") approving the FEIS, the award to BUMC and the Boston Location. Amended Complaint, ¶ 39; Federal Defendants' Answer, ¶ 39; National Emerging Infectious Diseases Laboratories Record of Decision, 71 Fed. Reg. 5670 (Feb. 2, 2006).

On May 18, 2006, the individual Plaintiffs, residents of the South End and Roxbury, and the Conservation Law Foundation ("CLF"), a non-profit dedicated to solving environmental problems that threaten the residents, communities and natural resources of Massachusetts and other New England states, filed the Complaint in this action. They amended the Complaint on June 29, 2006. The Amended Complaint alleges that the defendants (1) failed to properly assess environmental risks and impacts on public health associated with the NEIDL pursuant to NEPA, 42 U.S.C. § 4321, *et seq.*; (2) failed to consider alternatives to the NEIDL or the Boston Location under NEPA; and (3) failed to conduct an environmental review of NIH's overall program to enhance biodefense infrastructure. The Plaintiffs requested that the Court declare that the defendants violated NEPA, its implementing regulations and the Administrative Procedures Act

("APA"); enjoin them from providing any further funding or authorization for the NEIDL until they have fully complied with those statutes; and retain jurisdiction to assure such compliance. Amended Complaint, p. 31 (Demand for Relief).

On June 29, 2006, the Plaintiffs moved for a preliminary injunction. This Court held a hearing on that motion on September 6, 2006.[2] However, on August 2, 2006, in parallel litigation under the Massachusetts Environmental Policy Act, M.G.L. c. 30A, §§ 61-62H ("MEPA"), the Massachusetts Superior Court had found the Private Defendants' environmental analysis (which was largely similar to their FEIS) inadequate under MEPA and remanded the matter to the Massachusetts Secretary of Environmental Affairs for further analysis, a decision affirmed by the SJC. *Ten Residents of Boston v. Boston Redev. Auth.,* 21 Mass. L. Rptr. 324, 2006 WL 2440043 (Mass. Super. 2006), *aff'd*, *Allen* v. *Boston Redev. Auth.*, 450 Mass. 242 (2007). The Secretary required the NEIDL's private proponents to assess at least one additional scenario involving accidental or malevolent release of a contagious pathogen, evaluate alternative locations for the facility, provide evidence of mitigation, and respond to comments received during the MEPA review process. Accordingly, on October 20, 2006, this Court deferred a decision on the Plaintiffs' motion for a preliminary injunction until NIH conducted a supplemental risk assessment. Between October 20, 2006 and November 11, 2007, the Federal Defendants filed six Status Reports regarding that risk assessment with the Court. On April 30, 2009, with no such assessment having been filed, the Court placed the case on administrative stay.[3]

[2] On August 28, 2006, the Court had granted BU's and BMC's (the "Private Defendants"") unopposed Motion to Intervene.

[3] The stay was subject to the terms of the Plaintiffs' proposed order. That order required the parties to file motions for summary judgment or permanent injunctive relief within 45 days of the release of a supplemental NEPA document and its notice in the Federal Register, and opposition memoranda 30 days thereafter.

On July 6, 2012, NIH finally issued a "Final Supplementary Risk Assessment" for the NEIDL (the "RA"). Environmental Impact Statements, Notice of Availability, 77 Fed. Reg. 40036, 40037 (July 6, 2012). On January 2, 2013, it issued the SROD approving the RA and the award to BUMC. Supplemental Record of Decision; Final Supplementary Risk Assessment for the Boston University National Emerging Infectious Diseases Laboratories, 78 Fed. Reg. 110 (Jan. 2, 2013).

The RA represents an effort to remedy the shortcomings of the FEIS in order to comply with NEPA. The SROD states that NIH's decision is based on the "completion of a Final Supplementary Risk Assessment for [the NEIDL] and a thorough consideration of the public comments on the Draft and Final Supplementary Risk Assessments, that the NEIDL, in [the Boston Location] poses minimal risk to the community surrounding the facility." 78 Fed. Reg. 110, 110 (Jan. 2, 2013). It also asserts that the RA "evaluated scenarios involving the potential human health consequences of an exposure to laboratory workers and members of the general public as a result of unintentional or malevolent events" and the "health impacts of siting the NEIDL at two alternate locations from the current site in Boston." *Id*. Finally, the SROD relies on the RA for its consideration of impacts on "environmental justice communities adjacent to the NEIDL's current location or to any environmental justice communities at either of the two alternative locations analyzed." *Id.*

ARGUMENT

I. STANDARDS OF REVIEW.

Under the familiar standard of Fed. R. Civ. P. 56(c), the Plaintiffs are entitled to summary judgment if there is no genuine issue as to any material fact and they are entitled to a judgment as a matter of law. Whether the Plaintiffs are entitled to judgment depends on whether NIH complied with NEPA, an issue "governed by section 10 of the [APA]." *Fund for Animals* v.

Mainella, 283 F. Supp. 2d 418, 429 (D. Mass. 2003). Accordingly, "agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 414 (1971) (quoting the APA, 5 U.S.C. § 706) (*abrogated on other grounds in Califano* v. *Sanders*, 430 U.S. 99 (1977))

Although agencies are entitled to deference, judicial review under NEPA "is not a rubber stamp." *Airport Impact Relief, Inc.* v. *Wykle*, 192 F.3d 197, 203 (1st Cir. 1999) (citations omitted). NEPA "declares a broad national commitment to protecting and promoting the environmental quality." *Dubois* v. *United States Dep't of Agric.* 102 F.3d 1273, 1285 (1st Cir. 1996). That purpose is carried out through the requirement that "an agency considering any agency action that will have a significant impact on the environment must prepare an Environmental Impact Statement ("EIS")." *Strahan* v. *Linnon,* 967 F. Supp. 581, 602 (D. Mass. 1997). This requirement "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). *See Simmons* v. *U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997) (Under NEPA, "[o]fficials must think through the consequences of – and alternatives to – their contemplated acts; and citizens get a chance to hear and consider the rationales the officials offer."). Given the goals and self-review structure of NEPA "[t]he reviewing court must undertake a 'thorough, probing, in-depth review' and a 'searching and careful' inquiry into the record. Only by carefully reviewing the record and satisfying itself that the agency has made a rational decision can the court ensure that agency

decisions are founded on a reasoned evaluation of the relevant factors." *Airport Impact Relief, Inc.,* 192 F.3d at 203.

In this case, NIH has relied on the RA to provide "detailed information concerning significant environmental impacts" and "guarantee[] that the relevant information will be made available to the large audience that may also play a role in both the decision-making process and the implementation of that decision." Accordingly, the Plaintiffs' NEPA challenge addresses the FEIS as supplemented, and in some cases superseded, by the RA. The arguments below focus primarily on the adequacy of the RA under NEPA.

II. THE RA FAILS TO MEET THE REQUIREMENTS FOR AN EIS.

Council on Environmental Quality ("CEQ") regulations require an environmental impact statement ("EIS") to contain an analysis of four essential components of a proposed project: (1) its "purpose and need"; (2) "alternatives including the proposed action," (3) the "affected environment" and (4) its "environmental consequences." But even after several years of litigation and numerous comments from the public, the Massachusetts Superior Court and SJC, a special committee of the National Research Council (the "NRC") and experts in the field, the RA still fails to adequately address three of these four components of an EIS: (1) the purpose of and need for the NEIDL is outdated; (2) the study of alternatives is merely a *post-hoc* rationalization of the choice to locate the NEIDL in a dense, urban neighborhood; and (3) the analysis of potential consequences relies on dubious assumptions and fails to properly account for missing or incomplete information. NIH's decision to reaffirm its prior decision to fund the NEIDL at the Boston Location is arbitrary and capricious and should be rejected.

A. The RA Relies on an Outdated Statement of Purpose and Need.

CEQ regulations require an agency to "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40

C.F.R. § 1502.13. Although "[c]ourts have 'afforded agencies considerable discretion to define the purpose and need of a project, … this discretion is not unlimited." *Westlands Water Dist.* v. *U.S. Dep't of Interior*, 376 F.3d 853, 866 (9th Cir. 2004). Such statements are reviewed for their "reasonableness." *Id*. Among other things, "[a] purpose and need statement will fail if it unreasonably narrows the agency's consideration of alternatives so that the outcome is preordained." *Alaska Survival* v. *Surface Transp. Bd.*, --F.3d --, 2013 WL 264653 at *8 (9th Cir. Jan. 23, 2013).

NIH continues to rely on the conclusions of a Blue Ribbon Panel ("BRP") on "Bioterrorism and Its Implications for Biomedical Research" in 2002 that an insufficient amount of such research space existed to protect the United States from bioterrorist attack to support the purported need for the NEIDL, and in particular Biosafety Levels 3 and 4 ("BSL-3" and "BSL-4") research space. R.832 at 1-4.[4] As the RA notes, the BRP was formed as part of the federal government's response to the September 11, 2001 terrorist attacks and the subsequent anthrax attacks. *Id*.

The BRP's conclusions, even if accurate more than a decade ago, are outdated now. In their comments on the draft RA, the Plaintiffs pointed to the *Alternative Vision*, a document prepared and submitted to NIH by Plaintiffs in 2010 suggesting that modern research techniques limited the need for live pathogen research. R.832 at page opposite O-100. Other commenters also noted that "bio-safety laboratory space has grown up to twenty-fold since 2011," an increase described by the Government Accounting Office as "unbridled." R.832 at page opposite O-89. *See also* R.832 at page opposite O-236 (public comment noting the "proliferation of high level labs" since 2002.

[4] The administrative record in this case is organized by document number. Citations to the record in this Memorandum are "R.[Document Number] at [Page]."

The RA does not address or even acknowledge the *Alternative Vision*. Neither the RA nor the SROD addressed the above comments directly or the current need for additional BSL-3 or BSL-4 space that takes into account advances in scientific research, the number or quality of research laboratories built since 2002, or the changing nature of terrorism risks.

Instead, NIH responds simply that it "concurs with the 2002 panel recommendations" and "the need for this type of facility continues to be essential." R.832 at O-102. This conclusion, unsupported by any evidence of the continued need for the facility, is unreasonable. It gives the Court no assurance that NIH took a hard look – or any look at all – at the current need for the facility. It gives no assurance that NIH based its summary dismissal of this threshold issue on any reasoned analysis, or anything else besides a reflexive adoption of the BRP's conclusion in the near-hysteria following 9/11. NIH's approach constitutes exactly the type of *post-hoc* justification of a preordained decision that NEPA is intended to avoid.

B. The RA Fails to Meaningfully and Adequately Analyze Alternatives.

Pursuant to NEPA, an agency has a "duty to 'study all alternatives that appear reasonable and appropriate for study…, as well as significant alternatives suggested by other agencies or the public during the comment period.'" *Dubois,* 102 F.3d at 1286 (citations omitted). CEQ regulations require the agency to "[r]igorously explore and objectively evaluate" these alternatives. 40 C.F.R. § 1502.14(a). Further, "where changed circumstances affect the factors relevant to the development and evaluation of alternatives," an agency "must account for such change in the alternatives it considers." *Natural Res. Def. Council* v. *U.S. Forest Serv.*, 421 F.3d 797, 837 (9th Cir. 2005). Such an analysis is at the "heart" of the EIS required by NEPA. 40 C.F.R. § 1502.14. *Accord, Dubois*, 102 F.3d at 1286.

In the FEIS, NIH purported to consider only two alternatives: the Proposed Action (to partially fund the construction of the NEIDL in Boston) and the no-action alternative. R.9 at A-1.

Several years of vigorous criticism of that limited analysis by the public and state environmental agencies and courts followed. *E.g.*, *Allen*, 450 Mass. at 259 (noting that the Environmental Impact Review for the NEIDL under MEPA was insufficient where it "failed to consider alternatives locations for the [NEIDL] … as directed by the Secretary" of Environmental Affairs). The RA purports to add two alternatives – a suburban site in Tyngsborough, MA and a rural site in Peterborough, NH – but still fails to consider them adequately. The SROD states that the RA "showed minimal differences in the risks of infections or fatalities to lab workers at the three different sites because the laboratory and its operations would be the same at all three sites." 78 Fed. Reg. 110, 111 (Jan. 2, 2013). It acknowledges that there are "differences in the three sites with regard to population density and other features of the environment, such as availability of medical care," but concludes that "[t]he possible effects of these differences on risks to the public were evaluated" and "[t]he results show that no statistically significant difference" at those two sites compared to the Boston Location. *Id*.

That conclusion, however, rests on unsupported analysis. First, the RA's comparison of the urban, suburban and rural alternatives rests on faulty and unreasonable assumptions that appear to have been selected to favor NIH's preferred alternative. In particular, NIH assumes away potential differences in the NEIDL's structure and completely ignores the differences in commuting methods and the probability of a malevolent attack. Second, it fails to respond to changed conditions requiring the analysis of different alternatives, including changed conditions created by the Private Defendants themselves. These changes are the divestment by one project partner, BMC, from the project and BU's disposition of the Tyngsborough location.

i. The RA's alternatives analysis rests on unsupported assumptions.

Under NEPA, an agency cannot "assume[] what can only be demonstrated by reasoned analysis." *Conservation Law Found. of New England, Inc.* v. *General Servs. Admin.*, 707 F.2d

626, 633 (1st Cir. 1983). The RA violates this principle by substituting unsupported assumptions that favor the predetermined choice of the urban location for reasoned analysis on some of the most fundamental issues regarding the NEIDL. Not surprisingly, having included such assumptions in the RA, NIH determines that the alternative locations do not present a meaningful difference in risk.

The RA assumes that the NEIDL, as constructed in Boston, would be "the identical structure" that would have been constructed in Tyngsborough and Peterborough, and that "[t]herefore, the facility description and proposed operations are applicable for all three sites." R.832 at 1-18; 2-1. This assumption ignores the potential impacts of available space and site conditions on the building's height, footprint, and other dimensions and, in turn, the effects of those structural differences on secondary transmission risks, the risks of a malevolent attack and the ability to respond to either risk.

For instance, the Tyngsborough site contains 210 acres and the Peterborough site 700 acres, while the Boston site contains only 14 acres. R.832 at B-6, 9; R.9 at 1-2. NIH did not consider whether the availability of larger spaces at the alternatives sites would allow for a lower building with a larger footprint, likely reducing earthquake and airplane crash risks, or if the larger area would allow for different security measures than those proposed for the urban location. *See* R.832 at page opposite O-103.[5]

In response to public comments, NIH conceded that it was required to consider and discuss alternatives "to a comparable level of detail, which usually also necessitates that the alternatives be developed to a comparable level." R.832 at O-102. Yet instead of developing the alternatives comparably, NIH simply "assume[s] that any facility built at an alternative location would be

[5] The Plaintiffs' comment letter on the draft RA does not have page numbers in the record but is presented opposite numbered pages.

designed and constructed with the same high standards of biosafety containment protection, earthquake resistance, and external force protection and that the risk of release would be the same" as at the Boston Location. *Id*. Indeed, NIH adds, the fact that the urban alternative has been fully developed is an "advantage" permitting "more precision in the scenario modeling." *Id*. This response does not address how the design may differ or be *more* protective in alternate locations had they been fairly considered. Instead, it confirms that NIH has substituted the details of the Boston location's design for all of the unstudied details of the alternative sites. Not surprisingly, the alternative locations do not appear so different under those conditions.

Similarly, NIH sweeps away the potential differences in secondary transmission risks by ignoring the potential differences in commuting patterns for the NEIDL at urban, suburban, and rural sites. Although the RA highlights the significantly greater availability of public transportation at the Boston site than at the other sites (R.832 at B-2, 7-8, 11), it fails to link the availability of mass transit to how NEIDL employees, including those potentially exposed to deadly pathogens, would commute to each site. It relies on data on the percentage of workers in each locality who commute, but omits how they commute. R.832 at L-11.[6] This method results in a finding that "the estimated probability for total numbers of infections and fatalities are generally *slightly* smaller at the suburban and rural sites as compared to the urban site." R.832 at L-86 (emphasis added). But that probability might well be *much* smaller if the RA took into account that an infected lab worker would be more likely to commute via public transportation at the urban site than at the rural or suburban site, putting them close to many more people who would then risk becoming infected and transmitting their illness to yet others. *See* R.647 at 14

[6] These data are not beyond NIH's or BU's reach. The NEIDL is already operating as a BSL-1 and BSL-2 facility. BU could gather data on commuting patterns from the lab's current employees. R.832 at page opposite O-108.

(NRC Letter Report questioning a prior NIH "assumption that use of public transportation (trains or buses) is unlikely in the case of the South End of Boston inner city location.").

Another important but unfounded assumption appears in the RA's treatment of the risk of a malevolent attack. The RA asserts that, since the consequences of malevolent acts are presumed to be similar to those from accidental or natural occurrences such as needlestick incidents and earthquakes, no further analysis of the probability of such attacks is necessary. R.832 at 6-16. As the Plaintiffs noted in response to the draft RA, this cursory treatment is flawed for two reasons. First, the consequences of a random natural disaster and those of a malevolent attack intended to harm as many people as possible are fundamentally different. An earthquake cannot purposefully target the most vulnerable points of the NEIDL structure or attempt to cause the release of specific pathogens, but a malevolent attacker certainly could, and presumably would, do precisely that. R.832 at page opposite O-101.

Second, even if the consequences of a malevolent attack and an accidental or natural occurrence at the different sites were equal, their probability is not. The likelihood that the NEIDL, if located in a dense urban environment, would attract malevolent activity is a demonstrated key concern of both the local community and the courts and should be addressed in determining the suitability of its location and the adequacy of its structural and operational protections. The sorts of malevolent attacks contemplated in these concerns include the infection of a laboratory staff member with homicidal or suicidal intent, the unauthorized removal of viruses from the laboratory, hijacking of a viral shipment and acts of terrorism. *Ten Residents of Boston* v. *Boston Redev. Auth.*, 21 Mass. L. Rptr. 324, 2006 WL 2440043 at *10 (Mass. Super. 2006). The SJC specifically commented on the absence of analysis in the FEIR of the "likely damage to the environment caused by the release of a *contagious* pathogen … through … terrorism," calling

it a "critical consideration in a densely populated urban area." *Allen*, 450 Mass. at 256-57 (emphasis in original). A malicious actor's incentive to commit one of those acts will differ greatly depending on how many other individuals he or she has the potential to harm. The differences in vulnerability to attack between the urban site and the others is an important consideration when comparing alternatives.

The RA ignores these points, responding to public comments with only the irrelevant statement that NIH used several variables to define potential threats at each of the three sites, without even identifying these variables. R.832 at O-162; O-102. This response to a central concern, raised repeatedly by the Plaintiffs and other members of the public, is wholly inadequate.

The NIH's faulty assumption about malevolent attacks is compounded by its assumptions regarding Boston safety officials' ability to respond to such an attack. Throughout its alternatives analysis, NIH paints Boston's emergency response capabilities as far exceeding those of the other two sites. *See, e.g.*, R.832 at 2-23-26. NIH, however, does not analyze the City's challenges in responding to emergency situations, including population density, criminal activity, traffic, and the potential need to navigate (and the vulnerability of) various bridges and tunnels that traverse important access roads. As with other issues neglected in the RA, information and statistics on these factors is readily available and should be used to accurately depict the potential sites' differing abilities to respond to an emergency at the NEIDL.

The NEIDL's challenges to Boston's emergency response resources are highlighted by public comments by entities with direct knowledge of those resources. The Massachusetts Nursing Association ("MNA") has consistently commented that Boston Medical Center ("BMC"), the nearest hospital to the NEIDL, has insufficient capacity to handle an outbreak involving the pathogens proposed for study, opposing the laboratory for this reason. R.832 at page opposite

O-103-104; O-137-139 (*Position Statement of MNA re: Proposed BU Biosafety Level 4 Lab* (January 2005)). MNA members also testified at the hearing on the draft RA that BMC had faced significant cuts and funding reductions during the recession. R.832 at page opposite O-203. At that same hearing, a Boston City Councilor testified that Boston Police and Fire Department officials had made it clear to him that the City is not equipped to respond to an emergency at the NEIDL. R.832 at page opposite O-225-226. These concerns underscore the lack of adequate analysis in the RA regarding the risk of a malevolent attack at the Boston Location and the need for further assessment.

ii. The RA does not take into account changed circumstances created by BMC's divestment from the NEIDL and BU's sale of one of the proposed alternatives.

As stated above, "where changed circumstances affect the factors relevant to the development and evaluation of alternatives," an agency "must account for such change in the alternatives it considers." *Natural Res. Def. Council*, 421 F.3d at 837. The RA violates this standard by ignoring the effects of two relevant, and significant, changed circumstances. First, in 2010, Boston Medical Center ("BMC") withdrew its funding from the NEIDL project, leaving BU as the only private operator of the NEIDL, a fact not disclosed to the public until November 2012. Craig Douglas, *Boston Medical Center quietly transfers ownership in infectious-disease lab to Boston University*, Boston Business Journal (Nov. 13, 2012) (attached as Exhibit A). Second, BU sold the Tyngsborough location in 2008, but again failed to disclose this sale in its analysis of alternatives in the RA or SROD. BioSquare Phase II, Supplemental Final Environmental Impact Report, § 3.2.2 (Jan. 9, 2013) (the "SFEIR") (attached as Exhibit B).[7] Both events not only affect the adequacy of NIH's analysis, but call into question the candor of its NEPA process.

The Court may allow extra-record evidence on both issues and should grant the Plaintiffs' Motion to include them. Such evidence is permitted where: (1) the opposing party failed to provide the evidence in bad faith; (2) the new evidence denies original agency predictions; (3) the evidence clarifies an unclear or technical record; or (4) the evidence concerns factors the defendants should have considered but did not. *See, e.g.*, *Strahan v. Linnon*, 966 F. Supp. 111, 114 (D. Mass. 1997), *aff'd*, 187 F.3d 623 (1st Cir. 1998). The evidence of BMC's divestment from the BMC and BU's sale of the Tyngsborough site satisfy the first, second and fourth conditions. In both instances, the Private Defendants, and perhaps NIH, knew this information when the record was certified but failed to include the evidence. This information undermines BU's reliance on BMC's facilities and its presentation of the Tyngsborough property as a feasible alternative site. Finally, for the reasons explained in this section, the evidence on both issues should have been considered in the preparation of an adequate RA.[8]

BMC has been described as one of the institutions that will "operate and manage the NEIDL." Memorandum of Trustees of Boston University and Boston Medical Center Corporation in Support of their Motion to Intervene at 1. Its divestment undercuts NIH's repeated reliance on the BMC for emergency support in the event that a NEIDL employee or visitor is infected with a dangerous pathogen. *See, e.g.*, R.832 at B-4; R.832 at A-18 (describing BMC's role in the NEIDL's compliance with the BPHC's Disease Surveillance and Reporting Regulation). For instance, in response to the MNA's concerns regarding the BMC's ability to respond to an outbreak of pathogens, NIH refers to BMC's resources and cooperation with BU regarding NEIDL operations. R.832 at O-104. Such references falsely implied that BMC was still actively involved in the project. Where BMC divested the NEIDL more than two years ago,

[8] The Plaintiffs informed counsel for the remaining parties that they may seek to expand the record. The Plaintiffs are including their request to do so for the convenience of the Court and the parties and on the assumption that all issues in this Motion will be heard together.

it is impossible to determine whether it still will be willing and able to respond to outbreaks from the NEIDL as described in the RA, or even whether it was asked about its current capacity to do so.[9]

The second changed circumstance, BU's sale of the proposed alternative site four years before the completion of the RA, emphasizes the superficiality of NIH's and BU's alternatives analysis. NIH funding for the NEIDL does not include funding for site acquisition, and the choice of the Tyngsborough site as the suburban campus was premised on BU's ownership of that site. R.9 at 2-37 (minimum siting criteria for NEIDL include that the "site must be controlled (owned or currently leased) by Boston University"). Despite that, NIH does not mention the sale in the RA. *See, e.g.*, R.832 at B-6 (purporting to discuss site characteristics but omitting this information). In this case, where the very site being considered was no longer a viable alternative (and has not been for more than four years), NIH and BU should have disclosed that information. Instead, NIH submitted a misleading document to the public that purported to maintain an open mind about a suburban alternative when, in fact, NIH and the Private Defendants had neither the intention nor the ability to use that site regardless of the results of the RA's analysis. In fact, their sale of the Tyngsborough site appears to be an attempt to force the NEIDL's placement at the Boston location, a strategy inconsistent with NEPA's prohibition on prejudging the alternatives analysis.

C. The RA Fails to Adequately Analyze the Environmental Consequences to the Human Environment.

The requirement to describe and analyze the environmental consequences of a proposed action and its alternatives "forms the scientific and analytic basis for the comparisons" of alternatives. 40 C.F.R. § 1502.16. This part of the analysis must include a discussion of, among

[9] On January 4, 2013, counsel for the Individual Plaintiffs submitted a Freedom of Information Act request to NIH to determine its state of knowledge of the BMC divestment at the time the RA and the SROD was published. NIH has not yet provided information in response to this request.

other things, direct and indirect effects of the proposed project, the environmental effects of alternatives, and the means to mitigate adverse environmental impacts. 40 C.F.R. § 1502.16.

If the agency cannot provide adequate discussion on these subjects because "there is incomplete or unavailable information," it must "always make clear that such information is lacking." 40 C.F.R. § 1502.22. Further, if the missing information is "relevant to reasonably foreseeable significant adverse impacts" and "cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known," the EIS must include: (1) a statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to the evaluation of reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. 40 C.F.R. § 1502.22(b).

The RA, despite its length and purported dedication to discussing potential environmental consequences, fails to meet the basic standard for describing environmental consequences by relying, as it does with respect to its alternatives analysis, on questionable and unsupported assumptions. It also concludes in several important areas that information is unavailable without complying with § 1502.22.

i. The RA's description of potential environmental consequences relies on unjustified and unrealistic assumptions.

Throughout the RA, NIH has made questionable and unsupported assumptions regarding both the probability and the consequences of the risks created by the NEIDL's placement in a

dense urban area. As in the alternatives analysis, these assumptions create results that intentionally skew selection of the Boston Location over the suburban and rural alternatives.

With respect to probability, NIH states that it considered "[m]ore than 300 incidents described as occurring at other comparable biocontainment facilities and postulated events with relevance to NEIDL." R.832 at 11-4. However, after estimating the probability of each of these events, the RA excludes most of them from its evaluation of the NEIDL's risks. Instead, because many of the events were "similar," it consolidated them "into about 30 candidate events for further consideration." *Id*. It then explains that many of these events "are bounded by (i.e., have a frequency … that is less than) other candidate events" and therefore "[a] set of events was selected for analyses that were considered to be the highest risk events": a needlestick, a centrifuge release, a malevolent act and a transportation accident. R.832 at 11-4, 11-5. Each of these four scenarios is then described separately.

Even if NIH cannot separately analyze each of the many potential events that could affect the NEIDL, folding 300 candidate events into the four allegedly representative scenarios understates the actual risk. The risk analysis should include the frequencies of all the candidate events summed together, which would yield a much higher probability of occurrence. Even if the RA appropriately focused on only the four representative events, it analyzes only the probability of each of those events in isolation, enabling it to conclude that no individual risk is significant. That ignores that the total risks of the NEIDL constitute the sum of those probabilities. R.832 at page opposite O-154; page opposites O-212-213.[10]

[10] NIH countered in response to public comments that "inclusion of total risk was discussed with the Blue Ribbon Panel and excluded from the Draft Supplementary Risk Assessment because not all potential scenarios were analyzed. Summation of the frequency for those events that were analyzed would present a misleading perspective that would not serve the public interest." R.832 at O-123. This response is disingenuous. Even if NIH could not aggregate the risks of all the scenarios, it should have aggregated the risks of those that it did analyze. That sum would still understate the risks of the NEIDL, but NIH's approach understates that risk far more. If the former would have been "misleading," the NIH's approach is far more so.

Further, evaluating the four candidate events independently ignores that multiple events could take place simultaneously or in sequence, or that one event could make others more likely. For example, if the NEIDL at the Boston Location is compromised by an earthquake, a malicious actor might well take the opportunity to remove pathogens from the NEIDL and release them in the city. In addition, the RA's focus on the effects of the release of individual pathogens (*see e.g.*, R.832 at 4-26-27; 4-34-40) ignores the impact of multiple pathogens being released at once, an event more likely after a malevolent act or natural disaster than after a needlestick or centrifuge release. As the Plaintiffs noted in public comments, such a release could be catastrophic, especially because first responders and other emergency resources would already be responding to the natural disaster itself. R.832 at page opposite O-114.

NIH's assumptions about the probability of a secondary transmission rely on an equally faulty assumption. That analysis was conducted using a computer modeling incorporating the following assumption:

> A simulation of the synthetic population on a single day (a weekday in the Spring) spending time in various activity locations, such as homes, offices, and schools, was used to estimate the number of contacts of at least 10-minute duration for each individual.

R.832 at L-18. Based on this assumption, NIH then determined the average number of contacts for a person in the zip codes of the Boston Location, the suburban location (Tyngsborough), and the rural location (using Ashby, MA as a substitute for Peterborough, NH). It concluded that a person would have an average of 44.0 contacts of at least 10 minutes in the urban location, 37.6 in the suburban location and 20.83 in the rural location. R.832 at L-18-19. It then used these figures to model the potential for secondary transmission at each of the three sites, concluding that there is little difference in that risk between them. *Id.*

NIH, however, does not explain why the number of 10-minute contacts should be based only on the population of a zip code. Boston has 37 zip codes. Contacts with the populations of multiple zip codes is far more likely there than in a rural or suburban area. Moreover, NIH offers no support whatsoever for the assumption that infections require at least ten minutes of contact. In fact, it acknowledges that "the relative importance of brief, casual contacts compared to more intimate contacts during historical outbreaks has often been unclear." *Id*. at L-17. Those contacts are more likely to last less than ten minutes and to occur on public transportation or a crowded urban sidewalk. NIH's assumptions improperly equates the risks of infection between locations and leads to the nonsensical conclusion that one is just as safe from an outbreak in a sparsely populated hamlet as in a major city.

Finally, the RA's use of unsupported assumptions extends to its blithe reliance on safety procedures. For instance, NIH states that "[t]here are no reports of laboratory-acquired infections with Lassa viruses or any other BSL-4 pathogens after institution of appropriate biosafety practices." R.832 at 3-61. These types of statements have previously been criticized by the NRC, which has suggested that NIH avoid general commentary regarding transmission, and particularly critiqued the assumption that appropriate biosafety practices will always be followed. *See, e.g.*, R.650 at 13 ("[T]he Committee is concerned that failure of protective equipment and failure to follow procedures on the part of personnel are underestimated in the analyses."). Yet this assumption-laden analysis remains in the RA with no justification.

NIH's reliance on safe practices is especially problematic. The RA relies heavily on a planned "culture of safety," the "manner in which safety is managed and is reflected in the attitudes and values of the employees and management," as protection from the accidental release of a pathogen. However, NIH conceded that this culture is "nebulous." R.832 at 2-2. Further,

to the extent the safety management practices proposed for the NEIDL are based on regulation by non-BU entities, the Boston Public Health Commission ("BPHC") will be the primary agency responsible for regulating the NEIDL. R.832 at O-103 ("With regards to the ongoing safety of NEIDL operations, Boston University must comply with the requirements of the Boston Public Health Commission, which has full oversight over the activities of all BSL3- [*sic*] and BSL-4 research."). The BPHC, of course, has never regulated a BSL-4 laboratory, as the NEIDL would be the first of its kind in New England. And even if the BPHC had the expertise to design proper policies and procedures, such policies and procedures cannot eliminate the risk of human error or malevolent activity. *See Allen et al.* v. *National Inst. of Health, et al.*, Civil Action No. 06-10877-PBS at p. 39 (Sep. 6, 2006) (Transcript of Motion Hearing, Saris, J.) ("The Court: … I believe that the NIH will do [everything in human power to make the NEIDL safe] … But people are people. People make mistakes."). The residents are entitled to an adequate analysis of the mitigation measures that will be in place if error or malevolent activity occurs and the agencies' capability to execute those measures.

ii. The RA violates 40 C.F.R. § 1502.22(b) regarding missing information.

As described above, 40 C.F.R. § 1502.22(b) requires federal agencies to "always make clear" when there is incomplete or unavailable information and either obtain that information or, where that is not possible because the costs of doing so are exorbitant, explain the information that *is* available and use that information to describe reasonably foreseeable significant adverse impacts on the human environment. Absent such a discussion, "an environmental impact statement which is incomplete due to the omission of ascertainable facts, or the inclusion of erroneous information, violates the disclosure requirement of 42 U.S.C. § 4332(2)(c)." *Tribal Vill. of Akutan* v. *Hodel*, 869 F.2d 1185, 1992 (9th Cir. 1989).

The RA suffers in several locations from the omission of ascertainable facts, including transportation data and socioeconomic data as described in previous sections of this memorandum *See supra* § II.B.i. It declines to ask if there are differences in how people commute between sites or whether the susceptibility to secondary transmission of environmental justice populations surrounding the Boston Location might differ in meaningful ways from that of populations near the alternative locations.

Similarly, the document lacks information that would allow NIH and the public to assess the likelihood and potential consequences of a malevolent attack. The NRC specifically called on NIH to include this information in the RA. R.649 at 14 (The "committee … believes that available information on a variety of agents to be studied at the NEIDL could be used to provide context and a basis for reality to the qualitative aspect of the risk posed to the local community by an infected laboratory worker."). Nevertheless, the RA eschews any discussion of high-profile cases of pathogen loss from other facilities, including, among other things, the disappearance of thousands of vials of pathogens from a biosafety facility in Fort Detrick, Maryland, and malevolent releases of anthrax. R.832 at page opposite O-109. NIH defends this exclusion by explaining that "[a]dversary-consequence scenarios were reviewed by The Boston University Director of Public Safety and members of the Boston University Policy and Public Safety Department" and that the Executive Director is an experienced law enforcement professional. R.832 at O-114. This explanation, of course, says nothing of BU security officials' expertise with the unique circumstances of a BSL-4 facility or dangerous pathogens, let alone why information on actual thefts was ignored. Further, to the extent NIH did analyze this information, it maintains that it cannot share that information because it contains "sensitive information" and is thus included in a confidential threat assessment. R.832 at O-115; O-101. Even if NIH can

justifiably refuse to release security policies or procedures in a public document to protect the NEIDL's security, that rationale does not excuse a failure to explain whether pathogen loss events in other laboratories were considered and NIH's conclusion as to whether similar events were likely to occur at the NEIDL in the Boston Location.

III. NIH FAILED TO COMPLY WITH EXECUTIVE ORDER 12,898 OR TO PROVIDE FOR MEANINGFUL COMMUNITY INPUT.

Executive Order 12,898 and the CEQ guidelines require a federal agency to "analyze the environmental effects, including human health, economic and social effects of Federal actions, including effects on minority populations, low-income populations … when such analysis is required by NEPA." CEQ, *Environmental Justice: Guidance under the National Environmental Policy Act* 4 (Dec. 10, 1997) ("CEQ EJ Guidance"); Exec. Order No. 12,898, 59 Fed. Reg. 7269 (Feb. 11, 1994). Although Executive Order 12,898 does not itself create a private right to judicial review, when an agency includes an environmental justice analysis in its NEPA evaluation, that analysis is properly subject to arbitrary and capricious review under NEPA and the APA. *Communities against Runway Expansion, Inc.* v. *F.A.A.*, 355 F.3d 678, 689 (D.C. Cir. 2004). NIH, having chosen to analyze environmental justice issues, was required to do so adequately, and its analysis is subject to judicial review under the same standard as an EIS. NIH cannot dress up the RA with references to an environmental justice analysis while actually neglecting to study the impacts of the NEIDL on environmental justice communities

A. The RA Violates the CEQ EJ Guidance by Omitting a Thorough Analysis of Environmental Justice Issues.

An environmental justice analysis should "state clearly ... whether, in light of all of the facts and circumstances, a disproportionately high and adverse human health or environmental impact on minority populations, low-income populations, or Indian tribe is likely to result from the proposed action and any alternatives." CEQ EJ Guidance at 21. "This statement should be

supported by sufficient information for the public to understand the rationale for the conclusion." *Id*.

The SROD concludes that the RA "showed there was no disproportionate impact to the residents living in the environmental justice communities adjacent to the NEIDL's current location or to any environmental justice communities at either of the alternative locations analyzed." 78 Fed. Reg. 110, 111. That statement, however, is not supported by sufficient information or a meaningful discussion of why the risks associated with the NEIDL justify its placement in a densely populated, low-income, and predominantly minority neighborhood rather than an alternative, less dense one. In its Letter Report on the 90% draft of the RA, the NRC commented that the RA included statements which "imply that the major concern in [the EJ] area is differences in population density among sites." R.650 at 9. The NRC commented that, in particular, Chapter 1 of the RA should include a comment describing how the principles of Environmental Justice seek to compare population characteristics, not just density, including, "variations in host population susceptibilities to infectious agents and access to appropriate healthcare." *Id*. Despite the NRC's urging NIH to correct this deficiency, this analysis was completely absent in the final RA.

For instance, rather than obtaining and analyzing data on health disparities among environmental justice communities, the RA states vaguely that "health disparities are noted in Massachusetts" and cites Massachusetts' universal health care law to imply that all Massachusetts residents have access to healthcare. R.832 at 10-7. Although the RA acknowledges that barriers to utilizing healthcare remain, it cites no specific studies, data or other information to assess whether those barriers exist to a greater or lesser extent in each of the three alternatives. In response to criticism on this point, NIH offers only a lengthy explanation that it is aware of such

barriers and again references Massachusetts' unique healthcare system. R.832 at O-120. The RA also opines that there is insufficient data to support the proposition that "any social contacts, regardless of race, ethnicity, or economic status are or are not more likely to become infected from an infected worker leaving the NEIDL." R.832 at 10-20-21. However, the RA is silent as to how these factors correlate with the likelihood that individuals live in more densely populated homes or neighborhoods or use public transportation, factors that would plainly affect secondary transmission rates.

Like other data absent from the RA, information on these factors is obtainable. At the very least, it can be documented through census data and sociological studies. These data would likely confirm that people with a lower socioeconomic status are more likely to live in densely populated dwellings (including public or subsidized housing) and use public transportation more frequently than individuals with a higher socioeconomic status, bringing these individuals into more frequent contact with others, including potentially infected NEIDL employees. Data would also likely confirm that people with a lower socioeconomic status more often have health conditions that would increase their susceptibility to infection if exposed to a released pathogen or infected lab worker. Rather than obtaining these data, NIH appears to have willfully ignored any potential impact the NEIDL may have on the affected environmental justice communities surrounding the Boston Location and excluded data that undermines its preference for that location.

Further, to the extent the RA attempted to determine the effect of the NEIDL on environmental justice communities at each of the alternative sites, it did so by measuring the effects on environmental justice communities within 10 kilometers, relying on a standard used in the siting of nuclear energy facilities. R.832 at M-4. However, the RA points to no relationship

between the effects of a nuclear accident and those of a biological accident. It gives no explanation of how the person-to-person or vector-to-person transmission of a pathogen compares to the exposure from a nuclear accident. This unsupported assumption is important. Reliance on a 10-kilometer radius brings within range of the suburban site in Tyngsborough environmental justice communities in Lowell that have no direct connection to that site, artificially neutralizing the differences in the sites' effects on environmental justice communities. R.832 at 11-28.[11]

B. NIH's process in preparing and publishing the RA and SROD fails to comply with the CEQ EJ Guidance and NEPA.

NIH also failed to comply with the CEQ EJ Guidance in the way it developed the RA. The CEQ EJ Guidance states:

> Early and meaningful public participation in the federal agency decision making process is a paramount goal of NEPA.... Participation of low-income populations, minority populations, or tribal populations may require adaptive or innovative approaches to overcome linguistic, institutional, cultural, economic, historical, or other potential barriers to effective participation in the decision-making processes of Federal agencies under customary NEPA procedures. These barriers range from agency failure to provide translation of documents to the scheduling of meetings at times and in places that are not convenient to working families.

CEQ EJ Guidance at 19. NIH cites "public input" dating back to 2004 to show that it has engaged in an active community process in developing the RA. R.832 at 10-4. However, it does not explain how this input influenced its analysis or its development of the proposed alternative. Further, although NIH cites several meetings to solicit public comments, many of these meetings took place in Bethesda, Maryland or locations in Boston far from the affected communities, and were completely inaccessible to the residents living near the Boston Location. R.832 at 10-11.

[11] Although the Lowell environmental justice communities are identified, "the extent to which there might be a specific risk to residents of Lowell due to observed travel patterns in that area has not been assessed." R.832 at 11-28. Thus, even assuming the 10-kilometer radius is appropriate, NIH has still failed to meet its obligation to assess impacts on environmental justice communities.

On January 10, 2007, the Plaintiffs filed a Community Outreach Plan with the Court at the Court's request. That Plan requested that the Defendants "develop a much more comprehensive network of contacts and a more effective method of communicating with those contacts and the community at large." It suggested that the Defendants identify organizational contacts across Boston and improve their methods for contacting residents by using mail and email lists and widespread media notices of upcoming meetings. Community Outreach Plan at 1, 3. It also recommended that the Defendants hold a series of background meetings on key technical issues involving the NEIDL, with an opportunity for community members to ask questions. *Id.* at 5. Unfortunately, the Defendants have largely ignored the Plan.

To the extent NIH has also attempted to rely on community involvement through the community liaison committee ("CLC"), that committee's interactions with and accessibility to the Plaintiffs and other members of the public have been deficient. As the Plaintiffs noted in public comments, CLC members are not in direct contact with the community and opponents to the NEIDL have been repeatedly denied seats on this committee or had their applications ignored. Finally, CLC meetings are held at 9:30 a.m., when many community members are working. R.832 at page opposite O-104.

NIH's lack of meaningful communication with the NEIDL's affected communities was not improved by the release of the RA. In December 2011, the NRC commented that the 90% draft of the document was "extremely large and technically complex," and suggested that NIH add "an Executive Summary written for the lay audience and a summary of Chapter 11 that synthesizes and interprets the major findings of the RA in plain language be developed to facilitate public understanding." R.650 at 8. By the time the draft RA was released to the public in February 2012, it had grown even more to a dense and prolix document of over 1700 pages, with no

executive summary. Despite public requests for a clearer document, the final RA lacked any useful summary and was not substantively amended to make it more accessible to a lay audience. The density of the document frustrates the public participation purposes of NEPA and fails to comply with CEQ guidance urging federal agencies to prepare "concise," "plain language" NEPA documents that "focus on significant issues" and discuss impacts "in proportion to their significance" rather than producing "an encyclopedia of all applicable information." Nancy H. Sutley, Chair, CEQ, *Memorandum for Heads of Federal Departments and Agencies re: Improving the Process for Preparing Efficient and Timely Environmental Review under the National Environmental Policy Act* (Mar. 6, 2012).

IV. A PERMANENT INJUNCTION IS THE APPROPRIATE REMEDY FOR THE DEFENDANTS' NEPA VIOLATION.

A permanent injunction is an appropriate remedy for a violation of NEPA where the traditional requirements of a permanent injunction are met, namely, that a plaintiff demonstrates that it "(1)… has suffered an irreparable injury; (2) [the] remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) ... considering the balance of hardships between the plaintiff and defendant a remedy in equity is warranted; and (4) … the public interest would not be disserved by a permanent injunction." *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743, 2748 (2010) (citation omitted). The Plaintiffs satisfy all four conditions and are entitled to a permanent injunction enjoining the Defendants providing further funding, or accepting further funding, for the NEIDL unless and until NIH complies with NEPA.

First, NIH's failure to adequately analyze the risks of housing lethal pathogens in a densely populated urban environment deprives the Plaintiffs of their NEPA rights to an adequate review. The Plaintiffs are irreparably harmed by NIH's decision to fund the NEIDL at the Boston Location without disclosing the real risks and consequences of the project or adequately analyzing

reasonable alternatives. *Massachusetts* v. *Watt*, 716 F.2d 946, 952 (1st Cir. 1983) ("when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.").

Second, remedies other than injunction are plainly insufficient. No payment of monetary damages or declaratory decision will elucidate the information that NIH has failed to provide or cause the agency to make a properly informed decision.

Third, the balance of hardships between the plaintiffs and the defendants strongly favors the plaintiffs. As described above, the NEIDL presents a risk of catastrophic and lethal harm. NIH's decision to fund the NEIDL without an adequate analysis of alternative sites, the potential risks or potential mitigation measures deprives them of their rights under NEPA and potentially places them in danger of further harm. By contrast, the defendants' ability to comply with NEPA is fully within their control. Their choice not to do so after many years and rounds of environmental assessment and litigation does not constitute hardship.

Fourth, the public interest will not be disserved, but will benefit, from an injunction. In passing NEPA, Congress intended to minimize the "risk of uninformed choice" by "bureaucratic decision makers." *Sierra Club* v. *Marsh*, 872 F.2d 497, 500 (1st Cir. 1989) (Breyer, J.). An injunction here will further that intent and protect the public from the potentially catastrophic, and still poorly analyzed, risks that accompany the NEIDL. As then-Superior Court (now SJC Associate Justice) Judge Gants recognized in his decision in the state litigation, this is "no ordinary project, and the potential risks it poses to the environment and public health are extraordinary and, potentially, catastrophic.… One prays that these risks are small but, in an imperfect world, these risks inevitably exist and they must be addressed…." *Ten Residents of Boston*, 2006 WL 2440043 at *10.

V. CONCLUSION.

For the reasons described above, the Plaintiffs are entitled to summary judgment that the SROD is arbitrary and capricious because of the defendants' failure to comply with NEPA and the APA. They are also entitled to expand the administrative record to include the two exhibits attached to this Memorandum and an injunction prohibiting the defendants from providing, or accepting, further funding for the NEIDL unless and until they comply with those statutes.

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February 19, 2013

Certificate of Service

I hereby certify that on February 19, 2013, I caused the foregoing document to be electronically filed using the ECF system which I understand will send a notice of electronic filing to counsel of record for all parties to this action.

/s/ Christine M. Griffin
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