

## **The Boston University Biolab: A Case of Environmental Injustice**

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### **I. Introduction**

In February 2002, the National Institute of Allergy and Infectious Diseases (NIAID), an institute within the National Institutes of Health (NIH), launched its Biodefense Research Agenda, the central purpose of which is to protect the United States from bioterrorist attacks. The Biodefense Research Agenda included a plan to select and fund multiple laboratories to expand research on the most high risk disease organisms that could potentially be used as bioterrorism agents and also to assist in the eventuality of a bioterrorism emergency. Highest risk organisms are commonly understood as organisms that are easy to disseminate, cause high rates of mortality, and have no known cure. Laboratories doing research on the most high risk organisms are commonly known as BSL-4 laboratories.

In February 2003, Boston University submitted a proposal to NIAID to construct a facility with a BSL-4 laboratory<sup>1</sup> (hereinafter, “the Biolab”) that would be sited in the midst of the BU Medical Center which is located in a dense, urban neighborhood with a

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<sup>1</sup> BU and NIH now refer to the lab as the National Emerging Infectious Diseases Laboratory (NEIDL) after changing it from its original name in 2003 the “National Center for Emerging Infectious Diseases and Biodefense.” It has also been called officially Biosquare Phase II, National Biocontainment Laboratory (NBL), and unofficially the BU Biolab, the Biodefense lab, and the Bioterror lab.

majority low-income and minority residents nearby. The process of proposal development, site selection and subsequent approval for funding took place in secret, without informing and consulting the local community. Although the site selected for the laboratory was pre-determined prior to undertaking a NEPA-mandated review and without involving the surrounding residential and working community, NIAID approved the proposal for \$128 million. The biodefense research facility is currently under construction and about 75% completed.

The outfall has been a classic struggle between an environmental justice community -- a community that is overburdened with health disparities, waste facilities, bus depots and that is home to the majority of social institutions, such as the county prison, homeless shelters, mental health facilities, and a heroin detox center which other neighborhoods have rejected -- and a powerful academic medical institution in alliance with a federal agency and the majority of city government and federal politicians. While there is a strong and vibrant network of communities and individuals organizing against military contamination and pollution, among them the Military Toxics Project<sup>2</sup>, this struggle is unique in that it is, to our knowledge, the first environmental justice protest and action against a high-risk biodefense/biowarfare facility.<sup>3</sup> This paper will locate the "David and Goliath" struggle within the framework of an analysis of the social and environmental injustice dimensions of the Biolab and the community protest strategies, which include persistent community organizing, public protest, use of media, coalition building between community, local politicians and science experts, and legal action.

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<sup>2</sup> See [www.miltoxproj.org](http://www.miltoxproj.org) for website of Military Toxics Project. MTP provides information, education, networking, and organizing resources for organizations and communities concerned with military pollution issues.

<sup>3</sup> Other biodefense laboratories have been resisted by communities in Livermore, CA, Ft. Detrick, MD, and Bitterroot, MT. but these are not environmental justice communities. [ask Klare about others]

## **II. Issues of Injustice**

The census tract in which the Biolab is being built and the adjoining census tract are comprised of very poor and predominantly minority populations living in public and subsidized housing. Census tract 712, where the Biolab site is located on Albany St at the juncture of the South End and Roxbury neighborhoods of Boston, and census tract 711, which is immediately adjacent, are comprised of a majority of African American and Latino residents whose annual household income ranges from \$11,572 to \$26,894. Cathedral Housing Development, comprised largely of African American and Latino residents of which many are single mothers with children, is located two blocks from the Project site. Adjacent to the housing development is a grammar school whose pupils are minority and low-income children.

The federal environmental impact statement (FEIS) conducted by NIH for the construction of a Biolab failed to take into account the overall poor health of many residents in the surrounding one-mile radius Environmental Justice Study Area. Hospitalization rates are an overall health measure of illness in a community, resulting from complications in people with chronic illnesses such as diabetes, asthma and hypertension; poor medical care; and prevalence of acute illnesses and conditions such as heart attacks and injuries. Black Bostonians are hospitalized at a 50% higher rate than White Bostonians, a definitive indicator of the overall poorer health of Blacks.<sup>4</sup> The majority of people living in the nine Roxbury block groups located in the Environmental Justice Study Area of the Federal Environmental Impact Statement (FEIS) are Black.

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<sup>4</sup> See Boston Public Health Commission Disparities Project, available at <http://www.bphc.org/director/pdfs/datareport/datareport.pdf>

They are, by reason of overall poorer health, more vulnerable to the stress of having a high risk facility within a mile radius of their homes and more vulnerable to the effects of a potential release from the facility. Moreover, many Roxbury residents use Boston Medical Center for health services and their health access would be jeopardized by a Biolab-related transport accident, fire, release or terrorist event.

Latinos in Boston are 2½ times as likely as White residents to report being unhealthy; and their infant mortality rates are higher than those of Whites. Latino children are hospitalized for asthma at three times the rate of White children and Latinos die from asthma at four times the rate of White residents.<sup>5</sup> A large number of low-income Latinos live within 2-5 blocks of the proposed Biolab, residing principally at Cathedral Housing Development and Villa Victoria, a tenant-managed affordable housing development with over 2,000 Latino residents.

One of the known triggers of asthma is stress.<sup>6</sup> Stress due to a Biolab-related emergency, in which fire and police are mobilized, could have a major health impact on a nearby population that has high rates of asthma and a higher-than average risk of asthma hospitalization and mortality. In the event of an emergency caused by a laboratory accident, local residents suffering acute asthma attacks would likely lose access to Boston Medical Center because of its proximity to the Project site.

Within five blocks of the Project site are three of the largest shelters in Boston for the hungry and homeless, namely Rosie's Place, the Pine Street Inn, and the Woods Mullen Shelter. Collectively these institutions serve a majority of the hungry and

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<sup>5</sup> Id.

<sup>6</sup> Wright, Rosalind. (1996). Life events, perceived stress, home characteristics and wheeze in asthmatic/allergic families. *American Journal of Respiratory and Critical Care in Medicine*. 153: A420.

homeless of the city of Boston. Five low-income senior housing developments are located within one mile of the Project site. In case of an emergency at the Project site, it would be extremely difficult to mobilize large numbers of homeless, low-income families with children, and the elderly disproportionately located within census tracts closest to the Project site. A fire, a release of an insect vector, a local accident in the transport of laboratory organisms, or other emergency at the Project site would put the most vulnerable residents of the South End and Lower Roxbury at disproportionate risk.

The mobility needs of the elderly during any evacuation were not considered in the FEIS. Likewise, the special needs of the South End's homeless population, many of whom are battling alcoholism and/or mental illness were not considered. A conventional evacuation plan, where residents are temporarily housed in a school gymnasium, is not appropriate for evacuees requiring the special care currently being provided by the area's homeless shelters.

The city's emergency guide, "Ready Boston," has identified the Curley School as a gathering site for the local South End neighborhood in case of emergency, including fire, earthquake, storm/flooding, no power and terrorist attack. The Curley School is six blocks from the Project site and is too close to the site to serve as a safe gathering place for people in panic, in the event of an emergency at the Project site. The FEIS cites the ample police and fire protection in the Project area, in case of fire at the Biolab facility. However, it fails to note the high risk to community evacuation in the event of a fire at the Project site. Given the normal density of pedestrian and vehicular traffic in the Project site area, due to compact multifamily housing, the concentration of medical centers and the ED Trauma Center at Boston Medical Center, numerous homeless

shelters, and narrow side streets, a fire or other emergency at the Biolab would paralyze traffic in the area and render the city's emergency evacuation plan useless.

The City of Boston has produced only an abbreviated emergency preparedness pamphlet which provides no information about the evacuation strategy for residents relying on Mass Transit or any information about strategies to prevent massive grid-lock by private automobiles in the case of a large-scale evacuation.

Neither the National Institutes of Health as the funding agency, nor the Boston University Medical Center as the grant recipient took a hard look at the salient emergency preparedness considerations. The Project site is located on Albany Street, across from the Boston Medical Center, a hospital where 70% of the patients are members of minority groups. Fifty percent of the patients speak English as a second language. Additionally, Boston Medical Center has the largest Level One Emergency Department Trauma Center in New England. Ambulances serving the hospital and trauma center use local roads near the Project site, including Albany Street where the site is located. In the event of a release of biological agent from the laboratory, an accident in transport of infectious agents on local roads, a laboratory fire, a terrorist attack on the laboratory, or any other lab-related emergency, access to the trauma center would be jeopardized. Moreover, it is inconceivable that any emergency preparedness and response plan could meet the critical needs of patients in panic, particularly in all the languages necessary.

The risk of placing a Biodefense laboratory, where research will be conducted on the most dangerous biological organisms with no known cure, in a highly urbanized and populated environmental justice community is compounded by the national defense nature of the proposed facility. The secrecy of the work will likely make it impossible

for local health care workers to quickly and properly diagnose illness that may result from releases from the facility.

Inexplicably, in the FEIS, the density of the surrounding neighborhood was not factored at all into the potential impacts of a high risk laboratory, especially when this Biolab is located in a much more densely populated area than any other BSL-4 lab in the country.<sup>7</sup> Hamilton County, Montana, the location of the Bitterroot Biolab, has a population of 15 per square mile, whereas Suffolk County, where the Boston University Medical Center Biolab would be sited, has a population density of 11,788 people per square mile. The county population density of the area surrounding the proposed Boston University laboratory is 4 times that of the CDC Atlanta facility, 10 times that of the San Antonio facility; almost 20 times that of the Galveston facility, and about 40 times that of Fort Detrick, Maryland's facility. One can only conclude that NIH and Boston University see the local diverse, predominantly low-income and minority community as a convenient "sacrifice zone" for a high-risk research facility that would otherwise be rejected by more affluent and politically-connected communities.

### **III. Community Activism**

#### **1. Community Organizing**

Safety Net is a movement of people of color who historically have been excluded from the decision-making process on fundamental issues affecting our lives and the condition

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<sup>7</sup> See *infra*, at 28-29. Discussion of Draft Supplemental Assessment. In relevant part, the National Resource Council found that although NIH included population density, "the model results... do not seem to be sensitive to population density." In other words, even though population statistics were included in the report, the models used did not take them into account. See Technical Input on the National Institutes of Health's Draft Supplementary Risk Assessments and Site Suitability Analyses for the National Emerging Infectious Diseases Laboratory, Boston University: A Letter Report. [http://books.nap.edu/openbook.php?record\\_id=12073&page=1](http://books.nap.edu/openbook.php?record_id=12073&page=1)

of our neighborhoods. Safety Net works to confront the dominant power structure in Boston directly, demanding fundamental changes in the rules of the game and a place at the decision-making table, and affirming our right to healthy communities and a healthy environment.

Safety Net was formed in 2000 to bring together residents from the Melnea Cass Blvd. and Tremont St. neighborhoods in Roxbury with a focus on issues of concern to the tenants of ten housing developments in the area. These neighborhoods were facing a crisis of gentrification and residents were looking for ways to respond to a series of proposals for satellite parking garages, developments servicing near-by Longwood Medical area clientele and biotechnology research facilities, all of which threatened to bring more traffic, air pollution and resident displacement. More recently, Safety Net has led the fight against the effort of Boston University (BU) and the National Institutes of Health (NIH) to build a high-risk biodefense laboratory in our community.

Safety Net's mission is to promote the economic and social opportunities necessary to achieve healthy, livable, and sustainable neighborhoods in our community. Over the past six years, we have become a significant grassroots voice, promoting environmental justice and community control over local development. We have developed a proactive strategy and effective solutions for fighting gentrification and displacement while at the same time promoting resident-created sustainable development that addresses existing environmental problems. Safety Net strives to develop new community leaders, to provide educational tools and resources, and to pioneer models of organizing, community education and mobilization that will help residents implement their agendas and visions as they play an ever increasing role in the decision-making process.

### **Safety Net's Community Organizing Activities a Part from the Biolab.**

- In 2002, When Boston attempted to create the Roxbury Master Plan; several dozen residents (primarily low-income African-Americans and Latinos) came together and created their own visions of what businesses and services they wanted in their community. These residents worked with Safety Net to demand that the Boston Redevelopment Authority expand its public process so that residents would have a formal role in decision-making and that key documents be translated into Spanish. In response, the Roxbury Oversight Committee and a Project Review Committee was created so that the voices of the people could be heard. Residents also succeeded in obtaining a ban on satellite parking, a mixed-use commercial development vision, and a process for Roxbury residents' review of disposition of public land included in the Master Plan.
- In 2003 Safety Net members worked with Whittier Street Apartments tenants to sponsor the first City Council tour and hearing to prevent BHA receiving their budget for the year until needed repairs were made in all 199 units of the development. For 8 months BHA worked with Whittier residents, Safety Net members, City Council Chuck Turner to resolve critical issues such as lead paint, asbestos, mold, cracks in ceilings and floors, plumbing and pests.

### **Safety Net Activities Related to the Biolab.**

- Since 2002, Safety Net has been working to build a strong, broad-based coalition of neighborhood residents, city and state community leaders, elected officials, 150 scientists, nurses' associations, unions, youth and faith-based groups throughout

Greater Boston to oppose the Biolab. Safety Net has charged BU with environmental racism in the choice of site and their failure to acknowledge the residents as local people who have questions and concerns that need to be addressed.

- Organizing this campaign has been an eye opening experience at all levels of environmental injustice. Since our presentation at the 2007 National EJ Conference, we have focused a lot of our energy on the decision-makers at the state level, in part because a new Massachusetts Governor was elected. Governor Romney supported the Biolab, and it was his administration that rubber stamped the inadequate environmental review. The new Governor, Deval Patrick, had indicated that he was more open to listen to the community. As a result, Safety Net secured a meeting with members of the Patrick administration, and ultimately with the Governor himself to voice our concerns of the states' preparedness and transportation plan. Safety Net's persistence led to an announcement by Partick's chief environmental officer Ian Bowles (Secretary of Energy and Environmental Affairs) that independent scientific experts would review BU/NIH's 3<sup>rd</sup> attempt to conduct a proper worse-case scenario. This review conducted by National Research Council (NRC) concluded that NIH/BU's latest environmental review of the project was "not sound or credible" and "did not adequately consider the public health and safety impact of the NEIDL on Boston's South End, an environmental justice community, in comparing the risk associated with alternative locations for the laboratory."

- At the local level, the organizing by District Captains has reached a new level of ownership. There are 9 district Captains that coincide with City Council members throughout Boston. District Captains do the same type of work the Safety Net does in their community of Roxbury: hold informational workshops, hold educational workshops, create events in their areas. The greatest thing this year has been to watch how members are networking, sharing resources, relying, and sharing needed information without me taking the lead. The coalition and Safety Net members see themselves as a family working together to defeat this issue. We are really getting more support with the college/university and high school students. Students are creating actions as the graduating grade or their final projects. The youth side is really growing.
- Presently, we are implementing goals set at the end of 2007 including: Sponsoring a national EJ forum in October 08 for residents in 12 states that are at different levels of trying to fight their proposed high-risk biosafety labs. We are also considering an effort to put a ballot question regarding the location of the Biolab for the November 2008 election. The students of all ages are designing strategies for the City Council to help coalition members who have organized around the city council for the past 5 years.

## **2. What made us start the campaign?**

In March 2002, Safety Net received two anonymous phone calls requesting that the Safety Net attend a meeting. When we arrived at the meeting we were the only residents present. There were city agencies, including the city's development agency, the Boston Redevelopment Agency (BRA), community development groups and Boston

University. Dr. Mark Klempner, the principal investigator of the Biolab, spoke about landscape, possible traffic issues, other retail opportunities and jobs. He spoke about financial benefits for the city and in the long run what BU saw as the bigger picture for the city of Boston. Dr. Klempner then spoke about how there were 4000 labs within the city of Boston. He also stated that, “with all the labs in the city of Boston, there hasn’t been one accident and we as residents don’t even know they exist.” Repeatedly, he stated, “there’s nothing to worry about.”

At that time we didn’t know a BSL-4 lab from a BSL-10. We left the meeting, spoke a bit and went home. A month later I received another anonymous call and the caller told us about another BU meeting being held on the BU medical campus that night. With this call we had some time to call more residents.

We walked into a huge lecture hall filled with what appeared to be 100 scientists and researchers. Dr. Klempner was speaking once again about the BSL-4 plan. The more he spoke the less we understood. Over time, we heard the word Plague, Roxbury/South End. We then heard Hemorrhagic Fever, Roxbury/South End, Anthrax, Roxbury/South End; then we heard “unknown,” Roxbury/South End. We then raised our hand and asked, “Are you talking about bringing those diseases in our community?” Dr. Klempner replied, “Yes, we are.” We then asked for a community-wide meeting. People had been thinking that the facility is more of a blood lab not this type of lab.

Dr. Klempner answered our request by saying, “If you can get some competent residents to sit down and talk to us, we will meet with you.” He then turned his back to us and proceeded to talk to someone in front of him and said, “You have a PhD, I’ll talk to you, you’ll understand”.

Out of all the many scientists and professors who were present, one woman stood up. It was BU Professor Patricia Hynes. She asked Dr. Klempner with fire in her voice “Why are you talking to the residents in this manner? It is their community,” she exclaimed. We all were ignored and looked at throughout the meeting. After the meeting, where we had been ignored, stared at and humiliated, we went down stairs held hands and cried. And, at that moment, we all agreed to tell everybody and their momma about the Boston University’s proposed plan to develop a level-4 biolab in our community.

Two years before the BU lab, MIT had tried to build a research lab in the “Lower Roxbury” area. Safety Net organized more than 40 residents, the media and elected officials within 30 minutes of hearing of the development. The next day MIT withdrew from the project. We thought that this would be the same type of fight. WRONG!!

It is important to remember that the only reason we knew about this lab was because of the caller who alerted us. Folks who were going to get something from the development knew. Only certain elected officials knew in both the city council and state government. Local residents had no clue. In 2002, we passed out flyers letting folks know. People wouldn’t believe us. They’d say, “Yea, right, the Plague in Boston.” We would flyer at heavily populated train stations, town meetings, at libraries, speaking engagements etc. No one would listen. People avoided us. Some folks thought that we were crazy.

In addition to our direct outreach, the Safety Net and Roxbury residents called BU to ask for an informational forum to answer some of our questions. Questions such as: What type of viruses will you research? If there was a release, what is the procedure for telling the community? How will you dispose of the viruses? How will the viruses be

transported? What communities will the viruses travel through? Will you meet with us in our community to answer our questions? And more. This is our 6<sup>th</sup> year and BU has still refused to meet with us.

We realized that if we weren't a community of color, community hearings, state informational hearings, city meetings, BU community meetings, town meetings would be happening. Why should we be treated any different? We shouldn't, and this is where our legal strategies came into play in 2004 and continue to date.

#### **IV. Legal Action**

NIH and Boston University's decision to locate this biodefense laboratory in the South End/Roxbury sections of Boston has been challenged by community activists on both state and federal law grounds. While some of the plaintiffs are the same individuals in both the state and federal lawsuits, the course of litigation in both cases has been distinct. And, therefore, in the interest of clarity, this section will describe each legal action separately.

##### **1. State Environmental Review Case**

The state environmental review process was initiated before the federal process, therefore the state lawsuit<sup>8</sup> was filed in January 2005 almost a year and half before the federal lawsuit.<sup>9</sup> The central issues in *Ten Residents of Boston v. Boston Redevelopment Authority (BRA), et al.* revolved around the adequacy of the Environmental Impact

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<sup>8</sup> *Ten Residents v. Boston Redevelopment Authority*, Suffolk Superior Court, Civil Action No. 05-0109-BLS2. In addition to the BRA, various departments of the Commonwealth of Massachusetts, and Boston University were named defendants.

<sup>9</sup> *Allen, et al. v. National Institutes of Health, et al.* U.S. Dist. Court, District of Mass., C.A. No. 06-10877-PBS

Report (EIR) that is required under the Massachusetts Environmental Policy Act (MEPA). The purpose of an EIR is

to describe the nature and extent of the proposed project and its environmental impact; all measures being utilized to minimize environmental damage; any adverse short-term and long-term environmental consequences which cannot be avoided should the project be undertaken; and reasonable alternatives to the proposed project and their environmental consequences.<sup>10</sup>

According to the *Ten Residents*, Boston University's Environmental Impact Report<sup>11</sup> did not comply with this statutory mandate because 1) the worst case scenario (or risk analysis) only included an anthrax spill within the laboratory and not a release of a contagious virus like small pox or the Ebola;<sup>12</sup> 2) the EIR was "fatally flawed because it fail[ed] to consider whether the environmental risks posed by the BSL-4 laboratory in the Biolab would be significantly diminished if the BSL-4 laboratory were located in a suburban or rural location, rather than a densely populated urban area in the South End of Boston."<sup>13</sup> The *Ten Residents* argued that BU's failure to examine alternative locations for the Biolab was particularly "egregious in light of the special impacts and cumulative effects of locating this facility near low and moderate income neighborhoods and communities of color."<sup>14</sup> The *Ten Residents* were using the term "special impacts" to

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<sup>10</sup> M.G.L. c.30, § 62B.

<sup>11</sup> Under the Massachusetts Environmental Policy Act (MEPA), a project proponent who seeks a permit or financial assistance from the State must prepare and submit the Environmental Impact Report. *See* M.G.L. c.30, § 62B. Therefore, in this case, Boston University was legally responsible for the EIR. This requirement is slightly different from NEPA where a federal agency (e.g. NIH) is still legally responsible for the Environmental Impact Statement, but the agency can "outsource" it, and have the project proponent pay for consultants to prepare it. Here, Boston University paid for the EIS required under NEPA, but the legal responsibility for its compliance with federal law remains with NIH. This is the reason NIH was the named defendant in the federal complaint.

<sup>12</sup> *Ten Residents v. Boston Redevelopment Authority*, 21 Mass.L.Rptr. 324, 2006 WL 2440043 (Mass. Super) at \*9.

<sup>13</sup> *Id.*

<sup>14</sup> *Ten Residents v. BRA*, Plaintiffs' Amended Memorandum in Support of Their Motion for Judgment on the Pleadings, (February 2, 2006) at 17. (On file with author).

describe the potentially distinct and/or exacerbated harmful impacts on the surrounding populations because of their poorer health, greater dependence on public transit and multiplicity of languages than the average Massachusetts resident.

Boston University responded to the plaintiffs' environmental justice concerns with complete disdain calling it "meritless."<sup>15</sup> BU argued that no legal basis existed for the EIR to consider "race, ethnicity, national origin or economic status" in its assessment of the environmental impacts of the project.<sup>16</sup> Furthermore, BU argued that MEPA did not even allow them to look at the public health effects of a project at all, and therefore the risk of a communicable disease to the surrounding community does not constitute "damage to the environment." The State Court Judge Gants completely rejected this interpretation of MEPA because it would lead to "absurd" and "unreasonable results."<sup>17</sup> (Even BU's co-defendant, the Commonwealth of Massachusetts, was not willing to agree with the position that the human health of citizens is not an aspect of the environment.) Judge Gants also rejected BU's refusal to consider the demographics of the surrounding community in alternative locations, because "the environmental impact of this Project on a poorer community may be different from that of a wealthier community of similar density..."<sup>18</sup> Interestingly, Judge Gants pointed out that the "issue of fairness" with respect to past siting decisions of environmental hazards (and political inequities) is not

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<sup>15</sup> *Ten Residents v. BRA*, Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Pleadings Filed on Behalf of Defendants University Associates Limited Partnership, Trustees of Boston University and Boston Medical Center Corporation, at 15. (On file with author).

<sup>16</sup> BU dismissed the Massachusetts Environmental Justice Policy that requires an enhanced analysis as well as enhanced participation when a project is located in an EJ community, and is of the requisite type and size, because the EJ policy was passed in 2002 after the Secretary's certificate was issued. This technical argument is questionable on its merits, but more importantly, it completely dismisses the concept that race and economic status affects environmental/public health outcomes.

<sup>17</sup> *Ten Residents v. BRA*, 21 Mass.L.Rptr. 324, 2006 WL 2440043 (Mass. Super) at fn. 8.

<sup>18</sup> *Id.* at fn. 9.

sufficient reason to consider alternative locations, rather a different environmental impact must exist.

Based on Judge Gants' view that public health effects are environmental impacts that must be considered and that the demographics, most importantly the density, of the surrounding communities must be considered, he found that the Secretary's certificate was "arbitrary and capricious" in light of MEPA, and that the certificate must be vacated.<sup>19</sup> The real world effect of Judge Gants' July 31, 2006 Order was the Secretary of the Executive Office of Environmental Affairs was forced to write a new Certificate that required BU to examine a "worst case" scenario that involved a contagious disease, and identify feasible alternative locations for the Biolab in a less densely populated area, and in turn evaluate "whether the potential public health impacts due to the release of a contagious pathogen...would be materially different if... locat[ed] in a less densely populated area."<sup>20</sup> The *Ten Residents* asked for an injunction to stop the construction of the Biolab, but it was not granted directly. Instead, the Judge stated that any agency action that was premised on the illegal environmental review should be stayed.<sup>21</sup> Unfortunately, the City agencies have been given the latitude to interpret this Order as having no effect on building permits and the like. (It is important to note that Mayor Thomas Menino of Boston is strongly in favor of the lab, and that just the Building Permit alone cost BU/NIH a mere \$1,055,344.00) Therefore, Judge Gants' decision posed no impediment to BU's construction schedule, but still BU and the Boston Redevelopment Authority (BRA) appealed the decision. Because of the import of the

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<sup>19</sup> (A Secretary's Certificate defines the scope of environmental impacts that the proponent (e.g. BU) must examine in the EIR.)

<sup>20</sup> FEIR Certificate, EOE A #12021 (September 5, 2006) at 3.

<sup>21</sup> *Ten Residents v. Boston Redevelopment Authority*, 21 Mass.L.Rptr. 324, 2006 WL 2440043 (Mass. Super) at \*18.

case, the Supreme Judicial Court (SJC) of Massachusetts decided to hear the case “sua sponte” or on their own accord, and therefore the case skipped the intermediary step of an appeals court.

In December 2007, the SJC issued its ruling on Boston University’s appeal of the lower court opinion that vacated the certification of the final EIR for the Biolab, and required a supplemental environmental review.<sup>22</sup> Specifically, the SJC affirmed the Superior Court’s July 2006 ruling that EOEA Secretary’s Certificate of November 2004 that the FEIR for the Biolab adequately and properly complied with Massachusetts Environmental Policy Act (MEPA) was arbitrary and capricious. The defendants’ appeal was based on two central arguments: 1) MEPA does not require the “consideration of remote contingencies,” rather MEPA only requires the examination of “actual” or “probable” environmental impacts; 2) It was within the Secretary’s discretion to not require an examination of alternative locations for siting the biolab. The SJC found these two arguments unavailing.

First, the SJC disagreed that MEPA does not require the consideration of remote contingencies. The defendants argued that the “likely” language of the statute focuses on “whether the release of a pathogen from the Biolab is probable in the first instance.” But, the SJC found that the focus is “whether if such a release occurs, even if the changes are remote, it is “likely to cause damage to the environment.” Therefore, “given the nature of a Biosafety Level 4 facility is to conduct research on highly virulent infectious pathogens... and it will be located in a densely populated urban area...the likelihood that

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<sup>22</sup> *Allen v. Boston Redevelopment Authority et al.*, 877 N.E.2d 904 (2007).

the release of such a pathogen will cause damage to the environment is extraordinarily high.”<sup>23</sup>

Furthermore, the SJC pointed out that the Secretary did recognize the nature of the facility and required an examination of a “worst case scenario.” BU analyzed as its worst case scenario a release of anthrax a non-contagious pathogen. Because BU did not look at a release of a contagious pathogen “whether through laboratory accident, escape of an infected research animal, theft, terrorism or transportation mishap, which is a critical consideration in a densely populated urban area,” the SJC found that it was “significantly incomplete.”<sup>24</sup> And, while the Secretary has discretion under MEPA, the purpose of the regulatory scheme is to “provide meaningful opportunities for public review” so that State agencies can consider “the measures that would be necessary to mitigate environmental damage.”<sup>25</sup>

Second, the SJC disagreed that BU was not required to consider alternative geographical locations. The defendants argued that it is under the Secretary’s discretion as to whether she wants the proponent to look at certain alternatives, and therefore she was not arbitrary and capricious to approve the FEIR that did not include an analysis of alternative locations. The SJC emphasizes that the statute requires an EIR to include “*reasonable alternatives to the proposed project and their environmental consequences*”<sup>26</sup> (emphasis in original), but it recognizes that “reasonable alternatives” is not defined, and therefore whether the term includes a different site location altogether is

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<sup>23</sup> *Id.* at 914.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 915 quoting 301 Code Mass Regs. § 11.01(1)(a).

<sup>26</sup> *Id.* at 916 quoting General Laws c. 30 §62B.

not clear. And, it is within the jurisdiction of the Secretary to decide based on the “nature of the project” what “reasonable” means.<sup>27</sup>

Here, the SJC found that the Secretary did exercise her authority to examine alternative locations when she included in the Scope that the FEIR must respond to a detailed letter submitted by Alternatives for the Community and the Environment (ACE) who was working with Safety Net in 2004. The letter “repeatedly and pointedly emphasized that it was imperative ... to address the issue of alternative locations.”<sup>28</sup> The FEIR never addressed reasonable alternative locations, but the Secretary still found that the FEIR was in compliance with her Scope and MEPA. The SJC affirmed the Superior Court’s ruling that the Secretary’s approval of the FEIR in spite of the complete disregard of her own Scope was “arbitrary and capricious.”

## **2. Federal Environmental Review Case**

The activities in the State case have affected the course of the federal case, but they are separate pieces of litigation with different timelines, parties, lawyers and laws involved. Almost two and half years after NIH had selected BU as the awardee for the \$128 million construction grant, on February 2, 2006 NIH issued a Record of Decision stating that after review of the environmental consequences through the NEPA process, they would proceed with their “selected alternative” or BU’s proposed site. Shortly thereafter, some of the plaintiffs, who brought the *Ten Residents*<sup>29</sup> case, and other community activists approached Lawyer’s Committee for Civil Rights Under Law for the

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> The Supreme Judicial Court of Massachusetts inexplicably altered the name of this case from *Ten Residents v. Boston Redevelopment Authority* to *Allen et al. v. Boston Redevelopment Authority*. For the sake of clarity, this paper will continue to refer to the state case as “*Ten Residents*” versus the federal case which is *Allen v. NIH* or “*Allen*.”

Boston Bar Association (LCCR) and the Conservation Law Foundation (CLF) to ask these two organizations to represent them in a federal lawsuit alleging violations of the NEPA.<sup>30</sup>

As a result of the community activists' request, on May 19, 2006, LCCR, CLF and McRoberts, Roberts and Rainer LLP, filed a lawsuit on behalf of the named plaintiffs and CLF members against NIH for violating NEPA as well as Department of Health and Human Services own regulations. Specifically, the causes of action were 1) failure to properly assess the environmental risks and impacts on the public health associated with the Biolab, 2) failure to consider alternative locations for the Biolab, 3) failure to conduct environmental review of the national program to expand biodefense research before awarding individual grants to specific entities. The entire complaint was infused with the view that NIH had failed its obligation to promote environmental justice. Specifically, in the first cause of action, plaintiffs alleged that defendants' failure to examine pre-existing environmental burdens, the potential disproportionate potential impacts given the demographics of the surrounding communities violated NEPA. Likewise, in the second cause of action, plaintiffs argued that defendants' failure to examine whether the potential

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<sup>30</sup> Some of the community activists had an established relationship with LCCR and a pro bono attorney Andrew Rainer, a partner at McRoberts, Roberts and Rainer, LLP. In the spring of 2005, LCCR and Rainer had filed, on behalf of Mel King and other residents, an administrative complaint with the Office for Civil Rights of the U.S. Dept. of Health and Human Services (hereinafter, "OCR") claiming that NIH was in violation of Title VI of the Civil Rights Act. King et al. was forced to file the administrative complaint before heading to federal court because of the Supreme Court opinion, *Alexander v. Sandoval*, 532 U.S. 275 (2001)(J. Scalia) that held no private right of action existed under Title VI of Civil Rights Act to allege discriminatory impact or effects from a federal program. This decision overturned thirty years of jurisprudence as explained in length in Justice Stevens' dissent. *Alexander v. Sandoval*, 532 U.S. at 293. After two years of OCR taking no action on the administrative complaint, a writ of mandamus was filed with Judge Saris. (*King et al. v. Office of Civil Rights et al.*, C.A. No. 07-10861-PBS.) *King et al.* asked the Court to require OCR conduct its investigation of the complaint and make a ruling. The U.S. Government argued that they were waiting for the results of the supplemental environmental analysis before it acted. *King et al.*, therefore, filed a Motion for Entry of Judgment on February 22, 2008. Specifically, the Motion requests that Judge Saris order OCR to begin its investigation of the impacts of the BSL-2 and BSL-3 portions of the Biolab immediately, and complete its investigation no later than 60 days after NIH issues its draft supplemental environmental impact statement. Judge Saris has not yet ruled on this motion.

adverse public health consequences would have been reduced in alternative locations. Similarly in the third cause of action, plaintiffs argued that NIH failed to conduct an environmental review of the entire biodefense infrastructure program that would have examined what locations across the United States would cause the least environmental damage especially on human health. All of these causes of action embody environmental justice principles as articulated in President Clinton's Executive Order 12898, to identify and address "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."<sup>31</sup>

*Allen, et al.* did not bring an independent cause of action under Executive Order 12, 898 because of the plain language of the Order and judicial decisions interpreting it.<sup>32</sup> In 1998, the Ninth Circuit rejected the Morongo Band of Mission Indians claim that the Federal Aviation Authority violated the Order and the FAA's accompanying regulation because they both "specifically state that they do not create any right to judicial review for alleged noncompliance."<sup>33</sup> Instead, *Allen, et al.* alleged that NIH violated the National Environmental Policy Act (NEPA) and Administrative Procedures Act (APA) because

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<sup>31</sup> 59 Fed. Reg. 7629 (1994) Exec. Order No. 12898, 1994 WL 16189208 (Pres.)

<sup>32</sup> *Id.* at § 6-609. Judicial Review. "This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order."

<sup>33</sup> *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 575 (9<sup>th</sup> Cir. 1998); *See also, Sur Contra La Contaminacion v. E.P.A.*, 202 F.3d 443, 449 (1<sup>st</sup> Cir. 2000)(citing to *Morongo*, the 1<sup>st</sup> Cir. (the controlling circuit for *Allen et al. v NIH et al.*) denied judicial review of an EJ claim under the Order); *One Thousand Friends of Iowa v. Mineta*, et al. 250 F. Supp.2d 1075, 1084 (S.D. Iowa 2002)(finding that the Court is not legally bound to review the claim based on the language of the Order, but even if it reviewed the government's action it was not arbitrary and capricious); *Citizens Concerned About Jet Noise v. Dalton*, 48 F. Supp. 2d 582 (E.D. Virginia, 1999).

NIH's environmental justice analysis was "arbitrary and capricious."<sup>34</sup> This approach was affirmed by the D.C. Circuit Court of Appeals, when it found the plaintiffs claim against the FAA was "properly before this court because it arises under NEPA and APA...[t]he FAA exercised its discretion to include the environmental justice analysis in its NEPA evaluation, and that analysis therefore is properly subject to 'arbitrary and capricious' review under the APA."<sup>35</sup> Here, NIH also included an environmental justice analysis but it was completely deficient for many of the reasons described above in the "Issues of Injustice" section.

At the end of June 2006, plaintiffs filed a preliminary injunction requesting the Court to order NIH to halt the funding for construction until the Court could evaluate the merits of the claims. NEPA is a procedural statute that ensures that the federal government carefully considers the environmental impacts of its actions, and that the public have access to the information regarding environmental impacts so that they may play a role in the decision-making process.<sup>36</sup> Therefore, the plaintiffs argued that if the construction continued, it was increasingly unlikely that even if the Court found NIH had violated NEPA that the outcome would change. Plaintiffs requested a hearing which was scheduled in early September of 2006. In the meantime, the federal government was ordered to give the plaintiffs the full record related to the decision to award BU the

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<sup>34</sup> National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq.; Administrative Procedures Act, 5 U.S.C. §§ 701 et seq.

<sup>35</sup> *Communities Against Runway Expansion v. Federal Aviation Administration* (FAA), 355 F.3d 678,689 (DC Cir. 2004)(finding EJ claims reviewable under NEPA and APA but held that FAA's methodology was reasonable and adequate NOT arbitrary and capricious). According to the definitive treatise on NEPA law by Professor Daniel Mandelker, in all cases where the Court has granted judicial review, the EJ analysis was deemed adequate. See *NEPA Law and Litigation*, Environmental Law Series, (2006), at 2-86. See also, Uma Outka, *NEPA and Environmental Justice: Integration, Implementation, and Judicial Review*, 33 Boston College Environmental Affairs Law Review 601-625 (2006)(essay) (describing other cases where courts have reviewed the EJ analysis under the APA, but in all cases the courts have deemed them adequate.)

<sup>36</sup> See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989).

money. These records revealed that BU was given more than \$50 million dollars before the Record of Decision was issued in February of 2006. NEPA clearly prohibits a federal agency from distributing funds before an environmental review is complete.<sup>37</sup> This fact alone made plain to the plaintiffs and community activists that the environmental review was simply a rubber stamp on a decision already-made and not an honest analysis of the potentially catastrophic harm that could befall Bostonians and people beyond.

In October of 2006, Judge Saris of the Massachusetts federal district court ruled that she would defer ruling on the preliminary injunction because the defendants were already in the process of undergoing a new environmental review at the state level, as result of Judge Gants' decision and the subsequent new Secretary's certificate.<sup>38</sup> In addition to the requirements outlined in Secretary's certificate,<sup>39</sup> Judge Saris' Order reiterated NIH and BU's promises in court and in their written filings to also examine "additional measures to identify and assess other risks associated with the level-4 laboratory" (e.g. risks from transporting pathogens to the lab); and, to develop "a community relations plan to improve community input and involvement, and to discussing DNA research protocols and limitations."<sup>40</sup> Judge Saris' believed that in light of these actions by the defendants and that the federal government had already spent \$51 million of the taxpayer's money on the project<sup>41</sup>, and additional monies were to be

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<sup>37</sup> 40 CFR § 1502.2

<sup>38</sup> In the federal lawsuit, plaintiffs originally sued only NIH and not BU because the obligations of NEPA rest on the federal government (this is slightly different than MEPA). *See Supra*, at fn 4. But, BU became concerned that NIH was not necessarily going to fully protect their interests in the federal lawsuit, and therefore intervened as co-defendants at the end of the Summer of 2006.

<sup>39</sup> *See Supra*, at 15.

<sup>40</sup> *Allen et al. v. NIH et al.*, Judge Saris' Order, Doc. # 36, at 3 (October 20, 2006) (On electronic docket of Case 1:06-cv-10877-PBS).

<sup>41</sup> Recall that all of this \$51 million had been released to BU before the NEPA process was complete, and therefore in direct violation of the law. 40 CFR § 1502.2

released momentarily, she thought that “halting construction by enjoining funding [wa]s not in the public interest.”<sup>42</sup>

After the Judge’s Order, NIH conducted three “community meetings” in Roxbury. According to NIH, the sole purpose of the meetings was to seek information for the additional risk assessment on a contagious pathogen. In other words, all NIH wanted to ask “the community” was: which contagious pathogen (e.g. Ebola, Marburg,) should they use in their additional risk analysis? NIH and BU did not have a community relations plan before these meetings, and in fact argued that the Judge “misunderstood” that they had agreed to such a plan. NIH refused to answer any questions about an alternatives analysis, and they refused to submit their findings to public comment. Furthermore, they argued strenuously that this additional review was not part of a formal NEPA process, but simply a volunteer effort on their part.<sup>43</sup>

Plaintiffs quickly perceived NIH and BU’s actions as an attempt to placate the public and the Judge, and not to affect NIH’s decision-making as is required by NEPA. Thus, the plaintiffs felt it necessary to go back to Judge Saris to ask her to clarify her understanding of the defendants’ duties. In open court, Judge Saris made plain to the defendants that they must comply with the letter and spirit of NEPA and to perform a formal supplemental environmental review. As a result of Judge Saris’ oral order,

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<sup>42</sup> *Id.* at 4. Judge Saris explained this approach (i.e. affirming that additional environmental review was appropriate, but not granting the injunction) by stating that even if the plaintiffs eventually do prove that NEPA was violated with respect to the BSL-4 lab, a remedy will still exist for the plaintiffs. In her estimation, at that later point in time, the Court could issue an injunction to stop the level-4 lab. To no avail, plaintiffs argued against this approach because it allows NIH and BU to proceed even though the Judge stated in a status hearing that the review of the BSL-4 lab was not in accordance with NEPA. NEPA is a procedural statute to ensure good decision-making, it does not mandate an outcome. How likely is it that the government will make a different decision based on newly revealed environmental impacts if the building is complete and the money has been spent?

<sup>43</sup> See *Plaintiffs Request for Status Conference to Clarify Process For Supplemental Environmental Review*, Doc. # 37, at 4. (On electronic docket of Case 1:06-cv-10877-PBS).

defendants submitted a “Notice” with the Court that clarified the additional risk and alternatives analysis will be performed in accordance with NEPA including notice and public comment requirements.<sup>44</sup> Furthermore, “BU has provided NIH with site specific data for alternative sites” in more rural locations in New Hampshire and Massachusetts, and NIH planned to use this data in the various risk analyses that include a variety of pathogen strains as well as a number of release scenarios. And, “the simulation model for the risk analysis is under development for the communities surrounding the Boston-NBL site and alternate sites ...demographic, population, and community characteristic data are being collected ...”<sup>45</sup>

Judge Saris also asked the plaintiffs to submit suggestions for a Community Relations Plan. As a result, plaintiffs submitted to the Court that the defendants needed to develop a much more comprehensive network of contacts and a more effective method of communicating with those contacts and the community at large. This communication network and method must then be utilized to give ample advance notice of public meetings on a sequence of relevant topics, chaired by a neutral and respected moderator.<sup>46</sup> NIH and BU largely ignored the plaintiffs’ submission, and instead proceeded with their own “NEIDL Community Relations Plan” (which plaintiffs have only received in draft form) that did not incorporate the core of the plaintiffs’ suggestions. BU’s lawyer stated that:

the essence of the proposal was for BU/BMC to establish relationships with community organizations located within a ten-radius of the Laboratory, a suggestion so far beyond the realm of the possible that it could only have been made to ensure that, however extensive the community relations plan developed by BU/BMC, there would be room to criticize it as inadequate.<sup>47</sup>

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<sup>44</sup> *Allen et al. v. NIH et al*, Defendants’ Notice, Doc. # 40-1, at 2-3. (January 9, 2007) (On electronic docket of Case 1:06-cv-10877-PBS).

<sup>45</sup> *Id.*

<sup>46</sup> *Allen et al. v. NIH et al*, Plaintiffs’ Community Outreach Proposal, Doc. # 4, at 1. (January 10, 2007) (On electronic docket of Case 1:06-cv-10877-PBS).

<sup>47</sup> Letter from John Stevens, *esq.* to Andrew Rainer, *esq.* on June 27, 2007 (on file with author).

The assumption of this response is that the plaintiffs are just troublemakers whose goal is to find fault with BU rather than to protect their rights and their families.

Months after its expected release, NIH announced in the Federal Register the availability of a “Draft Supplementary Risk Assessments and Site Suitability Analyses for the National Emerging Infectious Diseases Laboratory – Boston University” (“Draft Supplemental Assessment”). As a result of Judge Saris’ directive, NIH was required to conduct a public meeting in accordance with NEPA, and to conduct a 90-day public comment period. The Safety Net Coalition successfully organized hundreds of residents and concerned citizens to attend the public meeting in historic Faneuil Hall. Before NIH started its formal presentation of the Draft Supplemental Assessment, an NIH moderator explained that people would be able to make comments after the power point presentation. One gentleman shouted out from the audience, “I have got a comment: we don’t want it here!” At which point, people started to cheer, and then people began to rise from their seats and clap loudly, and for two straight minutes hundreds of people clapped, and reveled in their collective power in the “Cradle of Liberty”<sup>48</sup> before allowing the NIH staff person to continue. Scores of people spoke and voiced specific concerns about the latest analysis, but also about the overall inadequacy of NIH to consider community concerns. Few supporters of the Biolab spoke with the exception of some union representatives whose members were on the job, and some older African-American residents of Roxbury who had connections to BU. The intensity of the emotion from residents, scientists, peace activists, public health experts who have long waited for the federal government to listen to their point of view was overpowering.

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<sup>48</sup> Faneuil Hall has been called the “cradle of liberty” ever since a speech by James Otis in 1763 calling it “the hall in the cause of liberty.” See <http://www.celebrateboston.com/sites/faneuilhall.htm>

One of the individuals in the audience was the Secretary of the Executive Office of Energy and Environmental Affairs (EEA) for the newly elected Governor Deval Patrick. Secretary Bowles is the highest-ranking environmental official in the Commonwealth of Massachusetts, and is a member of Governor Patrick's "cabinet." Secretary Bowles did not speak, in fact, he was in plain clothes, unrecognized until he introduced himself to one of the authors.

Seven days after meeting in Faneuil Hall (September 20, 2007), the Patrick Administration announced its decision to engage, at a cost of \$50,000, the National Research Council (NRC) of the National Academies of Sciences to conduct an independent peer review of NIH's Draft Supplemental Assessment. Secretary Bowles explained a couple weeks later in a meeting with Safety Net and Governor Patrick himself that this lab presents risks that are "beyond the immediate expertise" of the MEPA office, and the NRC is capable of assembling an independent group of experts in infectious disease research, risk analysis and biosafety. The decision by Secretary Bowles and Governor Patrick was not made solely on his attendance at Faneuil Hall. Safety Net had spent considerable time educating the new Administration about the history of the proposed project during the Romney Administration, and BU and NIH's continued failure to comply with state and federal laws.<sup>49</sup>

The National Research Council held one open session on October 19, 2007 in Washington D.C.. Plaintiffs were allowed to have their own experts share their analysis

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<sup>49</sup> Tellingly, we later learned that after an exhaustive meeting with the Safety Net Coalition in April 2007, EEA met with BU whose arrogance and complete dismissal of any possibility of harm pushed the new Administration to ask more questions.

with the NRC. As a result, Dr. David Ozonoff<sup>50</sup> via teleconference and Dr. Marc Lipsitch<sup>51</sup> in person provided critique of NIH's Draft Supplemental Assessment. Both of these men took a risk speaking out against an NIH analysis of an NIH funded project at BU. NIH provides the vast majority of funding in their respective fields, and Dr. Ozonoff is on the faculty at BU. Others we approached were not willing to take the risk. Their analyses were critical in the NRC's eventual findings. Dr. Lipsitch concluded that the Draft Supplemental Assessment "understate[d] the risks of the National Biocontainment Laboratory in general and the BL-4 facility in particular."<sup>52</sup> He made this conclusion based on a detailed critique of the model structure as well as the specific agents chosen. And, Dr. Ozonoff summed up his view of the NIH analysis by saying,

I conclude this is an elaborate exercise in decision justification, buried under an almost stupefying level of detail. The gerrymandering of the agents used in the analysis would be enough to disqualify it, but the distorted analysis of the Environmental Justice component, which is at the heart of the assessment, is egregious and shows a lack of respect for the community.

The NRC findings, released at the end of November 2007, echoed many of Dr. Lipsitch and Dr. Ozonoff's comments.

NRC found that NIH's Draft Supplemental Assessment was not "sound or credible," and would not be accepted for publication in a scientific journal.<sup>53</sup> The NRC findings continued: "[b]y this, the committee means that the conclusions reached in the

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<sup>50</sup> Professor of Environmental Health at Boston University School of Public Health, founding Chair of the Department of Environmental Health, physician and chronic disease epidemiologist.

<sup>51</sup> Professor at Harvard School of Public Health.

<sup>52</sup> Dr. Lipsitch's PowerPoint Presentation available at the National Academies Public Access Records Office. Email request to PARO@nas.edu [with the following information](#): **PROJECT**: Technical Input on the NIH's Draft Supplementary Risk Assessments and Site Suitability Analyses for the National Emerging Infectious Diseases Laboratory, Boston University. **PIN#** BLSX-K-07-04-A.

<sup>53</sup> Technical Input on the National Institutes of Health's Draft Supplementary Risk Assessments and Site Suitability Analyses for the National Emerging Infectious Diseases Laboratory, Boston University: A Letter Report. [http://books.nap.edu/openbook.php?record\\_id=12073&page=1](http://books.nap.edu/openbook.php?record_id=12073&page=1)

report are not adequately supported by the analyses nor are they credible.” The NRC had concerns about the lack of transparency, the modeling work and the pathogens that were selected for analysis. The NRC was under the mistaken impression created by NIH that the community had picked the pathogens which is untrue with the exception of Ebola.<sup>54</sup> Even still, the NRC felt that NIH should have picked the most highly infectious agents rather than agents like Rift Valley Fever Virus.<sup>55</sup> Most importantly, the NRC found that the Assessment “did not adequately consider the public health and safety impact of the [biolab] on Boston’s South End, an environmental justice community, in comparing the risk with alternative locations for the laboratory.” The Commonwealth of Massachusetts submitted the NRC report as its formal comment on NIH’s Draft Supplemental Assessment.

In light of NRC’s broadly publicized criticism<sup>56</sup> of the NIH Draft Supplemental Assessment and the Supreme Judicial Court of Massachusetts’ ruling, Judge Saris asked what NIH and BU planned to do. In response in January of this year, NIH filed a timeline with the Court, estimating that an additional, corrected analysis would not be complete until April 2009. At that point, litigation over whether BU and NIH violated NEPA would resume. Since the Court’s order prohibiting BU and NIH from operating without court approval is still in effect, the new timeline means that the laboratory cannot open

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<sup>54</sup> CLF, LCCR and Rainer submitted formal comments on Draft Supplemental Assessment, in part, they made plain that NIH’s justification is false. The lawyers attended the public meetings and members of the public did not mention the pathogens (with the exception of Ebola). In fact, at the meetings to discuss which pathogens should be included in the supplemental review, NIH distributed its own list of potential viruses, Rift Valley Fever, Sabia Virus and monkey pox were not even on the list.

<sup>55</sup> The analysis of Rift Valley Fever provided the convenient outcome that “because RVF is a mosquito-borne disease that can affect livestock as well as human [sic], RVF transmission was actually greater” in the suburban and rural locations as compared to the Boston location. Draft Supplemental Assessment, at IX-1, available at [http://www.nems.nih.gov/aspects/nat\\_resources/programs/nepa2.cfm](http://www.nems.nih.gov/aspects/nat_resources/programs/nepa2.cfm). In other words, because cows can get RVF and there are more cows outside of Boston, the risk is actually greater in those locations. Interestingly, RVF is NOT transmissible person-to-person.

<sup>56</sup> Stephen Smith, The Boston Globe (above the fold) “US review of BU biolab inadequate, panel finds” November 30, 2008.

until the end of 2009 or beginning of 2010 at the earliest. BU and NIH had planned to open in the fall of 2008.

Most recently, in March 2008, the NIH Director, Dr. Zerhouni, announced in a press release that NIH would create a “Blue Ribbon Panel” to “review current risk assessments and provide independent technical expertise and guidance.”<sup>57</sup> In the first meeting held in Washington D.C., Dr. Zerhouni told the panel “we are not here because we want you to rubber stamp what we have done... there are no foregone conclusions.”<sup>58</sup> This statement is a hopeful sign that NIH will comply with the law, and actually reconsider the decision in light of the new environmental review that will ostensibly flow from this “Blue Ribbon Panel.” But, NIH’s consistent legal position has been that the “underlying decision” to place the lab in this location has been made, and will not be questioned.

In NIH’s view the environmental reviews are to address the “safety concerns” of the community. The plaintiffs will continue to insist that in accordance with NEPA NIH must conduct a scientifically sound environmental analysis that assesses whether or not the potential risk to the environment (including human health) would be less in a different location. This analysis must consider the effects on the particular communities that surround the lab. The results of a legitimate environmental review must be used to inform a new decision-making process, it cannot justify NIH’s illegal decision to give BU \$148 million dollars<sup>59</sup> without proper analysis.

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<sup>57</sup> <http://www.nih.gov/news/health/mar2008/od-06.htm>

<sup>58</sup> Stephen Smith, The Boston Globe, “For bioterror lab, a long road seen: NIH chief expects no quick review of BU facility plan.” March 13, 2008.

<sup>59</sup> NIH increased the original grant award from \$128 million to \$148 million.

In addition, plaintiffs and other members of the Safety Net Coalition are concerned that the community is still being left out of the process. NIH's panel took place in Washington D.C. not in Boston. It was a "public meeting" and available on the web, but many low-income residents do not have access to the internet. Unlike the National Research Council, NIH did not invite any residents, plaintiffs or plaintiffs lawyers to give another perspective. As a result, plaintiffs are continuing to communicate with the media and ensure that the residents' views are included in the dialogue even when not officially "invited."<sup>60</sup>

In sum, the legal action has, thus far, had positive effect in its efforts to promote environmental justice. The residents' questions and concerns were repeatedly dismissed or ignored before the litigation ensued. With the affirmation of the National Research Council and the state and federal judges, the director of NIH himself has finally had to listen and respond, as evidenced by his charge to the "Blue Ribbon Panel," "we need to do this right, even if it takes a long time." Hopefully, "to do it right" means to listen to residents legitimate concerns and to follow state and federal law. Fortunately, while NIH attempts to get it right after five years, NIH and BU cannot operate the lab without the approval of the state and federal courts. The lawsuits have succeeded in delaying the opening from fall of 2008 until at least late 2009 or early 2010. This additional time will allow the community activists to continue to organize and advocate in the political arena, and hopefully achieve environmental justice for the residents of Roxbury and the South End.

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<sup>60</sup> See e.g., <http://www.mysouthend.com/index.php?ch=blog&sc=&sc2=news&sc3=&id=71265>

## V. Conclusion

In late 2001, the Department of Homeland Security quickly resurrected research on biological weapons. The new agency seized upon the anthrax attack in October 2001, in which inhalable anthrax was sent through the US mail to certain congressional politicians and journalists (but ultimately killed five postal workers), to justify and market a bioweapons research agenda. Although the anthrax incident has remained veiled in secrecy, it is strongly suspected that a US government scientist with access to the strain of weaponized anthrax sent through the mail committed this crime.<sup>61</sup> It is further suspected that this domestic terrorism was a deliberate act to pre-dispose the public for a resurgence of biological warfare research.<sup>62</sup>

From the end of World War II until the late 1960s, a highly secretive offensive biological weapons research program existed and gained momentum in the United States. In 1969 President Nixon halted the program for reasons of its potentially gruesome consequences and the stimulus for bioweapons proliferation in the Third World that it provided.<sup>63</sup> Furthermore, the US nuclear weapon arsenal already gave the country vast overkill capacity. Soon after, the US government signed and ratified the International Biological and Toxins Weapons Convention, which outlaws the production of any biological weapons; and domestic implementing legislation was passed in 1989.<sup>64</sup> The resurrection of biowarfare research in 2001 is one of the militaristic actions taken under

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<sup>61</sup> Boyle, Francis. (2005). *Biowarfare and Terrorism*. Atlanta, Georgia: Clarity Press, Inc.

<sup>62</sup> Id.

<sup>63</sup> Id.; See also, Guillemin, Jean. (2005). *Biological weapons: From the invention of state-sponsored programs to contemporary bioterrorism*. New York: Columbia University Press.

<sup>64</sup> Boyle, Francis. (2005). *Biowarfare and Terrorism*. Atlanta, Georgia: Clarity Press, Inc.

the banner of fighting terrorism and is strongly suspected to be in violation of the biological weapons convention.<sup>65</sup>

Over the past 6 years, in the bullish US climate of the “war on terrorism,” record funding has been allocated to biodefense-related activities, in fact, more real dollars than were spent to develop the atomic bomb.<sup>66</sup> In dozens of new planned facilities, research on the most lethal bacteria and viruses with no known cure will be conducted in an atmosphere of secrecy, with hand-picked internal review boards and no public oversight or accountability. Fort Detrick, Maryland, a longstanding military base and research facility, is the site of the largest biodefense lab being built in the US. Here biowarfare pathogens will be created, including potentially new genetically engineered viruses and bacteria, in order to simulate potential bioweapons attacks by terrorist groups. Novel, lethal organisms and methods of delivery in biowarfare will be tested, all justified as necessary in order to study them and develop a figurative bioshield against them.<sup>67</sup>

The proponents of the newly resurrected biodefense research, among them Boston University, hail the potential therapeutic benefits of their research, such as vaccines for previously incurable diseases, including Ebola, or for novel bio-engineered disease organisms that may be used in a terrorist attack. However, seasoned critics argue against the biodefense research proliferation for reasons of public health, unpredictable risk, lack of transparency, and weapons proliferation with pressure to use offensively in war. In 2005, more than 750 prominent life sciences researchers protested the increase of

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<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> Warrick, Joby. (2006, July 30). “The secretive fight against bioterror” available at [www.washingtonpost.com/wp-dyn/content/article/2006/07/29/AR2006072900592.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/07/29/AR2006072900592.html); Warrick, Joby. (2006, July 31). “Custom-built pathogens raise bioterror fears,” available at [www.washingtonpost.com/wpdyn/content/article/2006/07/30/AR2006073000580.html](http://www.washingtonpost.com/wpdyn/content/article/2006/07/30/AR2006073000580.html)

bioterror research at the expense of public health research, arguing that funding for drug-resistant TB, HIV/AIDS, and flu has declined as biodefense funding has escalated.<sup>68</sup> In 2006, NIH spent \$3.1 billion on infectious disease research and \$1.77 billion on biodefense research.<sup>69</sup> Biosafety experts have warned that the greater the number of labs and people working on bioweapons/biodefense research, the greater the risks of worker infection, public exposure, accident in transport, security system failure, sabotage, deliberate release, and hostile use.<sup>70</sup> Policy analysts also caution that suspicions about a country's clandestine biodefense activities run the risk of instigating an arms race in biological weapons.<sup>71</sup> All of these points of analysis have also been raised by scientists in Boston forums on the Biolab.

The local conflict between an environmental justice community and a powerfully supported medical research center within Boston University is a microcosm of the macroscopic struggle between conflicting ideologies on what constitutes the security and public health needs of the community and the country. Are not, as many of the Biolab critics contend, our most acute insecurities and terrors generated from social policies within – fears of homelessness, catastrophic illness without health insurance, income inequality not seen since the Gilded Age; racial residential and school segregation that sustain a nation divided by race and racism; and record defense spending and international sale of weapons at the expense of public health research and public

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<sup>68</sup> Scherer, Michael. (2005, March 1). "Health warning," *Mother Jones*.

<sup>69</sup> See also ,Lynn Klotz, "Casting a Wider Net for Countermeasure R&D Funding Decisions," *Biosecurity and Bioterrorism: Biodefense Strategy, Practice and Science*, Vol 5, No. 4, 2007.

<sup>70</sup> See United States Government Accountability Office report "High-Containment Biosafety Laboratories" (October 4, 2007) available at <http://www.gao.gov/new.items/d08108t.pdf>

<sup>71</sup> Boyle, Francis. (2005). *Biowarfare and Terrorism*. Atlanta, Georgia: Clarity Press, Inc.; Guillemin, Jean. (2005). *Biological weapons: From the invention of state-sponsored programs to contemporary bioterrorism*. New York: Columbia University Press.

security? Could not Boston University choose to distinguish itself as an urban university whose medical center would be a center of excellence in research and intervention on health disparities related to race, racial segregation, poverty and economic isolation--the socio-economic face of the community within which it resides? Rather it has run, furtively, toward the irresistible and heady mix of \$148 million for biodefense research and marketed the future research as therapeutic, with a paternalism that suggests it knows better than the community what is in the community's best interest. The legal activism described in the paper and in process needs the companion force of continued political organizing, given the real yet unfinished gains thus far.