

research on infectious diseases and bioterrorism agents. The Texas Research Park in San Antonio, operated by the Texas Research and Technology Foundation, was one of the six alternative sites that DHS chose to evaluate based on specified evaluation criteria and an Environmental Impact Statement.

3. On December 4, 2008, DHS issued a Preferred Alternative Selection Memorandum and a Final Environmental Impact Statement (“FEIS”) naming the Manhattan Campus Site in Manhattan, Kansas as the Preferred Site Alternative for the NBAF. In the Memorandum, TBAC’s proposed location of the Texas Research Park Site was ranked second behind the site in Kansas. DHS also identified the Manhattan Campus Site as the Preferred Alternative in the associated FEIS. On January 16, 2009, DHS issued a Record of Decision (“ROD”) to implement the Preferred Site Alternative and construct and operate the NBAF on the Manhattan Campus Site.

4. TBAC protests DHS’s award decision for the following reasons:

a. DHS acted unreasonably, arbitrarily, and capriciously and violated the National Environmental Protection Act (“NEPA”) when it selected the Manhattan Campus Site by ignoring its own findings with respect to the risk of catastrophic damage from severe tornadoes, posing grave risk to public health and safety. DHS also abused its discretion by failing to rigorously and objectively weigh, on a site-by-site comparative basis, the relative probability of a tornado strike, the probable severity of the tornado, the gravity of the resulting injury, and the burden of adequate precautions, including the comparative costs of constructing a tornado resistant facility. Manhattan, Kansas is located in the heart of Tornado Alley, an area of the central Great Plains that is prone to annual outbreaks of the most severe and devastating tornadoes, with wind speeds in excess of 200 miles per hour. In the FEIS, DHS specifically recognized that a moderate to severe tornado would cause catastrophic consequences to the NBAF, including the destruction of the exterior and interior walls and the release of deadly pathogens that would potentially decimate the U.S. cattle industry, endanger the health and safety of other livestock, wildlife and

humans and result in billions of dollars of damages. Furthermore, in the FEIS, DHS noted that according to its own construction specifications, the NBAF would not be built to withstand wind speeds in excess of 119 miles per hour, despite the fact that only a moderate F-2 tornado, a common occurrence in Kansas, has wind speeds of 113 to 157 miles per hour.¹ See FEIS p. 3-431. DHS failed to acknowledge the likelihood that the Manhattan Campus Site may face a much greater threat than an F-2 force tornado.² Despite its affirmative knowledge of this well-known hazard, DHS did not conduct a site-specific evaluation of the likelihood that a tornado would strike the NBAF or the likely severity or strength of the tornado. DHS failed to rigorously and objectively weigh, on a site-by-site comparative basis, the relative probability of a tornado strike, the probable severity of the tornado, the gravity of the resulting injury, and the burden of adequate precautions, including the comparative costs of constructing a tornado resistant facility.

b. DHS improperly selected the Manhattan Campus Site by failing to properly evaluate the proposed sites in accordance with the evaluation criteria. Initially, DHS assigned ratings based on four evaluation criteria specified in its solicitation for Expressions of Interest: proximity to research, proximity to workforce, acquisition, construction and operations (ACO), and community acceptance. However, these criteria were arbitrarily and capriciously applied, in numerous ways. For example, DHS erroneously and improperly concluded that the Kansas site had superior research capabilities to those in San Antonio. DHS improperly evaluated San Antonio's proximity to a veterinary school, disregarding its proximity to Texas A&M University and Texas Tech University. In addition, DHS unreasonably relied on the Manhattan Campus Site's offer of access to the "existing Biosecurity Research Institute ("BRI")." The BRI is not

¹ The Fujita Scale, the commonly accepted measure of tornado intensity, has five classifications. An F-2 tornado, which occurs widely each year in the United States, has wind speeds of 113 to 157 miles per hour. An F-3 tornado has wind speeds of 158 to 206 miles per hour, and an F-4 tornado, such as the one that struck the Manhattan, Kansas site in June 2008, has wind speeds of 207 to 260 miles per hour.

² In March 2007, an F-5 tornado struck to the southwest of the Manhattan Campus Site, causing enormous damage and killing 11 people. See *The Wichita Eagle, Insured Losses From Twister: \$153 Million*, June 21, 2007. Also, on June 11, 2008, an F-4 tornado struck less than one mile from the Manhattan Campus Site, causing some \$40 million in damage,

currently operational and is projected to house only two researchers, neither of whom is experienced in select agent research. Although Texas was evaluated to have the highest rating among all sites, DHS arbitrarily modified the results by rounding up the Kansas site rating from 90.5 and rounding down the Texas site rating from 91.5.

c. DHS acted unreasonably, arbitrarily, and capriciously by imposing additional financial requirements in addition to the four stated criteria by which the sites were to be evaluated. In March 2008, DHS reversed its prior representations and solicited financial contributions from each of the sites and gave an unreasonably short period of time for the sites to obtain the funds to pay to DHS to construct the NBAF. DHS imposed these requirements despite the fact that the Texas legislature was not in session at the time and could not respond by the March 31, 2008 deadline. DHS further acted unreasonably, arbitrarily and capriciously by giving undue weight to Kansas' financial offering in selecting it as the site for NBAF as opposed to the publicly stated selection criteria.

d. DHS' decision to select Kansas was also arbitrary and capricious in that it resulted from improper and unfair political influence. DHS officials informed TBAC that during site visits, they would not meet with any state and federal elected officials from any States competing for the NBAF site selection. Nevertheless, DHS officials met with members of the Kansas consortium at the Manhattan, Kansas site, including both state and federal elected officials (including Kansas Senators Roberts and Brownback), without the presence of counsel as required by DHS policy. DHS officials also met with Representative Bennie Thompson of Mississippi. Neither San Antonio nor other proposed sites were afforded this unique access.

5. But for DHS's improper, arbitrary and capricious evaluations and violation of NEPA, TBAC's Texas Research Park would have been chosen as the site for the NBAF.

6. TBAC respectfully requests that the Court declare that DHS's decision to select the

including \$20 million in damage to the Kansas State University campus. *See* The Manhattan Mercury, *Among Several*

Manhattan Campus Site was illegal and therefore null and of no legal force and effect, and direct DHS to name the Texas Research Park as the site for the NBAF. TBAC also requests that the Court issue a mandatory injunction prohibiting any further performance or expenditure by or on behalf of the United States to use the Manhattan Campus Site for the NBAF, including enjoining DHS from procuring or paying for any site-specific design services for the NBAF, and from proceeding with DHS's solicitation of proposals and/or award of any contract to construct the NBAF in response to Solicitation No. HSFLBP-09-R-00001, until such time as DHS has lawfully and properly conducted a site selection for the NBAF.

PARTIES

7. Plaintiff TBAC is a non-profit organization comprised of institutions that are highly regarded in the research community and which have exceptional expertise relative to the NBAF mission. The consortium is made up of San Antonio's leading biomedical research institutions, which have extensive experience in conducting maximum containment research on infectious diseases and bioterrorism agents. The members of the TBAC consortium are the Southwest Foundation for Biomedical Research, the Texas Research and Technology Foundation, the University of Texas at San Antonio, the University of Texas Health Science Center at San Antonio, and Brooks City-Base Development Authority. On March 31, 2006, the Consortium submitted three proposals in response to the DHS Expression of Interest offering three sites for the NBAF, including the Texas Research Park.

8. The Defendant is the United States.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1491(b).

10. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1491(b).

FACTUAL BACKGROUND

The National Bio- and Agro-Defense Facility

11. DHS's responsibilities include detecting, preventing, protecting against, and responding to terrorist attacks within the United States. These responsibilities, as applied to the defense of animal agriculture, are shared with the United States Department of Agriculture ("USDA") and the United States Department of Health and Human Services ("HHS").

12. DHS and USDA determined that a capability gap existed that must be filled in by integrated research, development, test, and evaluation infrastructure for combating agricultural and public health threats posed by foreign animal and zoonotic diseases. In order to bridge this capability gap and to comply with the Homeland Security Presidential Directive 9 ("HSPD-9"), "Defense of United States Agriculture and Food," DHS proposed to build the NBAF, an integrated human, foreign animal, and zoonotic disease research, development, test, and evaluation facility containing Biosafety Level-2 (BSL-2), Biosafety Level-3 Enhanced (BSL-3E), Biosafety Level-3 Agriculture (BSL-3Ag), and Biosafety Level-4 (BSL-4) laboratories. BSL-3 and BSL-4 laboratories are highly specialized, maximum containment facilities designed to study the most deadly pathogens in the world, including those potentially weaponized for use as bioterrorism agents. DHS intends to construct a very large (520,000 square foot) BSL-4 lab as a part of the NBAF. Only three such labs are currently operational in the United States.³ Researchers in a BSL-4 lab are required to wear "spacesuits" with their own air supply and undergo extensive decontamination procedures each time they exit the lab due to the fact that the pathogens being researched result in certain death to any organism they infect. A very substantial public interest exists in ensuring that these laboratories are built to the very highest safety standards to protect the

³ A fourth BSL-4 lab was built with federal funding at the University of Texas medical school in Galveston, Texas but is indefinitely shut down as a result of catastrophic damage caused by Hurricane Ike, which struck Galveston in September of 2008.

public, the environment, and the American economy from the potentially devastating harm resulting from an accidental release of such deadly pathogens into the surrounding community.

13. The NBAF will enable basic and advanced research, diagnostic testing and validation, countermeasure development and diagnostic training for human pathogens, high-consequence zoonotic disease agents and foreign animal diseases with potentially devastating impacts to U.S. agriculture and public health.

14. The NBAF will initially focus research on African Swine Fever, Classical Swine Fever, Foot and Mouth Disease, Japanese Encephalitis, Rift Valley Fever, Nipah and Hendra Viruses, and Contagious Bovine Pleuropneumonia. Outbreaks of highly contagious Foot and Mouth Disease, in recent years in the United Kingdom and in the United States in the 1950s, have had crippling impacts on the cattle industry, requiring the mass slaughter of millions of animals. Manhattan, Kansas, is located in close proximity to the heaviest concentration of cattle in the nation.

15. The NBAF will also enhance the national bio-defense complex by modernizing and integrating agricultural biocontainment laboratories for foreign animal disease, human pathogens, and zoonotic diseases. The NBAF would replace the existing Plum Island Animal Disease Center (“PIADC”), where much of the BSL-3Ag⁴ research on foreign animal diseases is performed. The PIADC facility was originally commissioned by Congress in the 1950s to address the threat to cattle of Foot and Mouth Disease.

DHS Seeks Expressions of Interest

16. Congress appropriated money for site selection and other pre-construction activities for the NBAF. For example, in FY2006, Congress appropriated \$23 million to select a site and conduct other pre-construction activities. *See* H.Rept. 109-241 to accompany H.R. 2360 (P.L. 109-90), p. 78. In FY2007, an additional \$23 million was appropriated for site selection and other

pre-construction activities. *See* H.Rept. 109-699 to accompany H.R. 5441 (P.L. 109-295), p. 168. In FY2008, Congress appropriated \$11 million to continue environmental studies necessary to select a site for NBAF. *See* P.L. 110-161, Consolidated Appropriations Act, 2008. Congress did not designate a specific site upon which to build and construct the facility.

17. In 2006, DHS began what it called a competitive site selection process to identify and evaluate potential candidate sites for the NBAF. DHS issued a Public Notice soliciting Expressions of Interest (“EOI”) for potential sites for the NBAF in the *Federal Business Opportunities* on January 17, 2006, and in the *Federal Register* on January 19, 2006. *See* 71 FR 3107 - 3109. In the Notice, DHS solicited Expressions of Interest from Federal agencies, State and Local government, industry, academia, interested parties and organizations for potential locations with a minimum of 30 acres that would accommodate the construction and operation of the NBAF. The Notice explicitly stated that a consortium would be an appropriate respondent.

18. DHS stated in the Notice that it would ultimately compile a short list of sites for analysis as reasonable alternatives to be considered in a NEPA Environmental Impact Statement (“EIS”), which would assess the environmental impacts of constructing and operating the NBAF facility at the various alternative sites.

19. NEPA requires federal agencies to examine the environmental impacts of their proposed actions in an EIS before decisions are made. Agencies must present the relative environmental impacts of the proposal and the alternatives in comparative form. They also must rigorously explore and objectively evaluate all reasonable alternatives, including retaining and upgrading the existing PIADC facility. For proposed actions that could be impacted by severe weather such as tornadoes or hurricanes or other natural disasters such as earthquakes or floods, agencies must weigh the probability of accident, the gravity of the resulting injury and damage and the burden of adequate precautions and reconstruction.

⁴ A BSL-3Ag is a unique type of laboratory with special features within the BSL-3 category. BSL-3Ag laboratories are

20. DHS stated in the Notice that it would evaluate each EOI submission using four site criteria categories: (i) research capabilities in areas relevant to the NBAF mission; (ii) the existence of a trained workforce for the construction and operation of the NBAF within reasonable proximity to the site; (iii) site-specific considerations relating to the acquisition of the site and construction and operation of the NBAF; and (iv) community acceptance. The community acceptance criterion was of paramount importance due to extreme public concern regarding the safety of maximum containment laboratories.⁵ DHS further specified sub-criteria it would consider under each of the four site criteria categories. Based on these criteria, DHS was to determine if a site should be further evaluated as part of the site planning process. *See* 71 FR 3108.

21. DHS required the following seven categories of information for each proposed NBAF location: (1) a description of the consortium/organization, its capabilities to support the location of the NBAF at its recommended site, and its interest in DHS's NBAF Program; (2) letters of support for locating the facility at the site; (3) a description of how the proposed site addressed the four site criteria categories; (4) a map showing the location of the potential site with specific indentifying characteristics; (5) a site description including, among other things, ownership, total site acreage and acreage available for development, existing physical infrastructure, current activities, estimated cost as tenant, access control systems, bioagent and hazardous materials handling at the site, waste management activities and capabilities for solid and liquid waste, and previous regulatory compliance problems and past/current environmental concerns/contamination and clean up; (6) availability/access to utilities at the site for state-of-the-art biocontainment laboratory; and (7) safety and occupational health, risk, management and environmental surveillance at the site. *See* 71 FR 3109.

required to conduct research on biological agents in large animal species, such as farm animals.

⁵ DHS disqualified a large number of the 29 sites originally under consideration for the NBAF due to strong community opposition based on safety concerns and/or because they lacked the research capabilities or proximity to research capabilities related to the NBAF mission.

22. DHS received twenty-nine responses to the EOI. *See* Final Selection Memorandum for Site Selection, p. 2. TBAC submitted responses that proposed three different sites in San Antonio for the NBAF, including the Texas Research Park. *See id.*, pp. 21, 26.

23. DHS evaluated all of the submissions, purportedly assessing each submission's strengths, weaknesses and deficiencies against the criteria and associated sub-criteria.

24. On August 9, 2006, DHS down-selected 18 sites submitted by 12 consortia, including all three San Antonio sites presented by TBAC, for further review.⁶ *See id.*, p. 2.

25. DHS originally planned for one single down-select for the NBAF. However, there were two down-selects during the NBAF evaluation process, the first on August 9, 2006 and the second on July 11, 2007. *See* Preferred Alternative Selection Memorandum, pp. 2, 4.

DHS's December 8, 2006 Letter Establishing Preferences

26. On December 8, 2006, DHS sent a letter to the 12 remaining consortia. This letter requested additional information to complete the next phase of the evaluations, communicated DHS's "preferences" within each of the four evaluation criteria, provided instructions on how to submit the requested information, and provided information on the next steps in the site selection process. DHS mandated that the requested information be postmarked by February 16, 2007.

27. DHS did not include financial requirements until this point in the NBAF selection process.

28. In its December 8 letter, DHS stated it would give strong weight to six specific "preferences" in the next phase of the evaluation. Among other things, DHS noted in this letter that it would give strong preference in the acquisition/construction/operating criteria for "in-kind

⁶ The 12 consortia consisted of the University of California and Lawrence Livermore National Laboratory, the Georgia Consortium for Health and Agro-Security, the Heartland BioAgro Consortium, the Kentucky and Tennessee NBAF Consortium, the Mid-Atlantic Bio-Ag Defense Consortium, the Gulf States Bio and Agro-Defense Consortium, the University of Missouri at Columbia NBAF Consortium, the North Carolina Consortium for the NBAF, the Oklahoma State University Consortium, Texas A&M University and the NBAF Consortium, the Texas Bio and Agro-Defense Consortium and the University of Wisconsin Consortium.

contributions” to defray infrastructure costs (*e.g.*, deeded land at no cost, new or enlarged roadways, expanded sewer, electricity, water, chilled water, and steamed water) offered to DHS.

The Second Round of Site Evaluation

29. After receiving the requested additional information and in-kind contributions from the consortia in February 2007, an evaluation team of DHS, HHS and USDA employees conducted visits to the seventeen remaining sites (one offeror had removed its site from consideration). *See* 74 FR 3067. The evaluation teams provided recommendations to Rear Admiral Jay Cohen (ret.), the DHS Under Secretary for Science and Technology and the DHS Selection Authority for the NBAF (sometimes referred to as the Decision Authority). *See* Final Selection Memorandum, p. 4.

30. On May 7 and 8, 2007, DHS conducted site visits for each of the proposed sites in San Antonio. During this visit, DHS did not conduct an extensive visit to the city or surrounding campuses or collaborative research institutions.

31. In advance of the site visits scheduled in April and May of 2007, DHS advised all 17 sites still under consideration that strict limitations would be enforced on contacts between consortium representatives and DHS officials and members of the site visit task force (made up of representatives of DHS, HHS and USDA). For example, consortium representatives were not permitted to take DHS officials or task force members to lunch or dinner, otherwise entertain them, provide transportation for them, or otherwise have any contact with them except within the confines of a rigidly controlled site visit. These same restrictions also applied to the site visit made by Under Secretary Cohen to each of the 17 sites in May of 2007, during which he allowed two representatives from each consortium to accompany him on a brief tour of the site lasting approximately 20 minutes. Apart from these tightly controlled site visits, Under Secretary Cohen

advised that he would not meet with consortia representatives, including elected officials⁷, at any of the sites.

32. Notwithstanding the foregoing restrictions, Undersecretary Cohen disregarded the advice of DHS counsel and met with representatives of the Kansas consortium at the Manhattan Kansas site, including Kansas Senators Roberts and Brownback, on different occasions, without a DHS attorney present. San Antonio was not afforded this unique access. High level Kansas elected officials, including Governor Kathleen Sibelius and Senators Roberts and Brownback, also lobbied Under Secretary Cohen directly in an effort to induce him to select the Manhattan, Kansas site for the NBAF.

33. Undersecretary Cohen also met with Representative Bennie Thompson of Mississippi, the new Chairman of the House Homeland Security Committee, on a number of occasions prior to the down-select announcement, including in Mississippi at Tougaloo College (Thompson's alma mater), while San Antonio and other sites were not afforded such access.

34. The Kansas Consortium efforts were led by Tom Thornton, a former staffer of Illinois Congressman and Speaker of the House Dennis Hastert, who, with Hastert's intervention obtained an earmark for a project in Illinois in 2005 from an arm of the Defense Department headed by Navy Admiral Jay Cohen. In 2006, Admiral Cohen left the Pentagon to become Under Secretary of DHS with direct responsibility for the NBAF site selection. At about the same time, Thornton was hired to lead the Kansas NBAF effort, who then retained former Congressman Hastert to lobby Admiral Cohen to select the Kansas site.

35. In July 2007, DHS announced the second down-select, identifying five site alternatives, including TBAC's Texas Research Park, that surpassed others in meeting the DHS evaluation criteria, sub-criteria, and DHS "preferences." *See* Final Selection Memorandum, p. 1.

⁷ It should be noted that important elected officials, including the governors of Mississippi and Kansas, led the efforts in their states to attract the NBAF and participated directly in the process.

36. On July 10, 2007, DHS issued a Final Selection Memorandum for Site Selection for the five Second Round Potential Sites for the NBAF. In the Memorandum, the DHS Selection Authority determined, based on an “integrated assessment and evaluation of the strengths, weaknesses, and risks associated with each proposed site against DHS’s evaluation criteria and preferences,” that the following five sites would advance as reasonable alternatives in the Notice of Intent for the NBAF Environmental Impact Statement Process: Manhattan, Kansas (Kansas State University), Athens, Georgia (University of Georgia, S. Milledge Avenue), San Antonio, Texas (Texas Research Park), Granville County, North Carolina (Umstead Research Farm), and Madison County, Mississippi (Flora Industrial Park). *See id.*, pp. 1, 17; *see also* 72 FR 41764 - 41765.

37. The memorandum described the four evaluation criteria and sub-criteria based on DHS’s stated preferences. However, DHS never indicated what relative weight was to be applied to the criteria and also failed to explain why it chose that weighting. The memorandum also described the numerical process by which the criteria and sub-criteria were scored and the corresponding adjectival ratings associated with the evaluations. A numerical rating of 90-100 was Excellent, a rating of 80-89 was Very Good, a 70-79 was Satisfactory, a 50-69 was Marginal, and any score less than 50 was an Insufficient Score. *See* Final Selection Memorandum, pp. 5-6.

38. The Manhattan, Kansas site received the following ratings:

Heartland BioAgro Consortium, Manhattan, KS

Research	Workforce	ACO	Community Acceptance	Weighted Average Rating
94 Excellent	83 Very Good	91 Excellent	94 Excellent	91 Excellent

See id., p. 18.

39. The San Antonio, Texas (Texas Research Park) site received the following ratings:

**Texas Biological and Agro-Defense Consortium, San Antonio, TX
(Texas Research Park)**

Research	Workforce	ACO	Community Acceptance	Weighted Average Rating
87 Very Good	91 Excellent	95 Excellent	93 Excellent	91 Excellent

See id., p. 21.

40. The Weighted Average Rating for both the Manhattan Campus Site and the Texas Research Park were stated as 91; however the Texas site Weighted Average Rating was actually 1 point higher than the Kansas site. Although Texas was evaluated to have the highest rating among all sites, DHS arbitrarily and capriciously modified the results by rounding up the Kansas site rating from 90.5 and rounding down the Texas site rating from 91.5.

41. The Texas Research Park site received an initial rating of 95 - Excellent - for the Acquisition/Construction/Operation (“ACO”) evaluation factor. The Selection Authority noted that the ease of land conveyance was a significant strength as TBAC offered 100 acres at the Texas Research Park by special warranty deed as an in-kind contribution.

42. The Texas Research Park site received an initial rating of 87 - Very Good - for the Research evaluation factor. The Selection Authority noted that the Research Committee had some concern over the site’s lack of proximity to some research programs linked to the NBAF mission, but the Selection Authority determined that this weakness could easily be offset by the site’s strengths, including its proximity to the biomedical research community and BSL-3 and BSL-4 laboratories, community acceptance, and the attractive site package. The Selection Authority also noted a significant strength in its ability for strong collaboration with other entities within immediate proximity to the site and great strength in its close proximity to the biomedical research community.

43. The Selection Authority noted that he selected the Texas Research Park site for its significant strengths including its proximity to NBAF mission relevant research programs and

researchers at several academic research centers in San Antonio, the attractive site package, and the strong community support. The Selection Authority also stated that based on DHS's evaluation criteria and preferences, the Texas Research Park will meet the intended purpose and need to successfully build and operate the NBAF.

44. The Selection Authority also overruled the recommendation of the site evaluation team and included the Flora, MS site, despite its overall rating of 81 and the fact that nine other sites had higher ratings.

Notice of Intent for Preparation of Environmental Impact Statement

45. On July 31, 2007, DHS published a Notice of Intent in the *Federal Register* to prepare the NBAF FEIS to evaluate the environmental impacts of constructing and operating the proposed NBAF at each of the remaining five alternative sites. See 72 FR 41764 - 41765. The Notice of Intent stated that the competitive selection process to identify and evaluate potential candidate sites was complete and that DHS intended to select a single site for the construction of the NBAF.

46. Although not previously included in the competitive selection process, the Notice stated that DHS would also consider PIADC as a reasonable alternative to locate the new NBAF on the same property as the existing PIADC. In addition, DHS would consider a No Action Alternative. Under the No Action Alternative, the NBAF would not be constructed and DHS would continue to use the PIDAC with necessary investments in facility upgrades, replacements, and repairs so that it could continue to operate at its current capability level. The late addition of PIADC as an alternative demonstrates irregularity in the NBAF decision process.

DHS's Feasibility Study

47. On August 24, 2007, DHS issued its Feasibility Study for the NBAF. DHS stated that the purpose of the Study was to explore the programmatic, technical, and non site-specific

requirements for this project in order to make a determination as to the feasibility of the project and the conceptual design as a result of the efforts of the study.

48. The Feasibility Study stated that the design and construction of structural systems for the NBAF would conform to numerous specified codes and standards. Among the design criteria, DHS prescribed that the facility would be designed to withstand wind speeds up to 90 m.p.h. *See* Feasibility Study, Section 5.2.2, p. 6.

49. In the Feasibility Study, DHS emphasized that “[t]he perimeter framing must be designed and constructed to prevent progressive collapse of the exterior of the building, thereby providing an opportunity for safe evacuation of the building in the case of an external catastrophic event.” *See* Feasibility Study, Section 5.2.2, p. 1 (emphasis in original).

DHS’s Solicitation of Additional Contributions

50. At a number of public meetings and on teleconferences, James Johnson, the Chair of the DHS Steering Committee overseeing the NBAF site selection, stated that DHS would not give any consideration to offers or proposals from any of the consortia to assist in financing the construction or operation of the NBAF, apart from the requested infrastructure in-kind contributions submitted in 2007. On July 31, 2007, DHS announced in its Notice of Intent to prepare an FEIS that its “competitive selection process to identify and evaluate potential candidate sites, other than Plum Island, for the NBAF was recently completed.” *See* 71 FR 41764 - 41765.

51. Despite the fact that the deadline had long passed to submit proposals and that DHS had announced its evaluation process was complete, on February 29, 2008, Under Secretary Cohen sent a letter to at least some of the consortia requesting a “final offer” to provide funding to defray approximately \$100 million in identified construction costs. Under Secretary Cohen also solicited additional in-kind contributions (*i.e.*, land, funds, or other assets). The letter stated that in order to be considered, the offer must be received by DHS within thirty days, by March 30, 2008 (later changed to March 31, 2008 to fall on a weekday).

52. The February 29, 2008 letter stated that DHS had developed an internal Decision Process Plan, and that in addition to the FEIS, DHS was preparing a Threat Risk Assessment, a Site Cost Analysis, a Site Characterization Study, and a PIADC Facility Closure and Transition Study. DHS stated that its goal in the Site Characterization Study was to select a site with the least physical and geographical encumbrances so that the site may be developed without extremely complicated, costly, invasive, or lengthy construction or environmental mitigation techniques. The additional studies were to factor into DHS's final site selection decision.

53. The February 29, 2008 letter stated that the July 2007 Final Selection Memorandum would also factor into DHS's decision because that document analyzed the competitively selected site alternatives against DHS's communicated evaluation criteria and preferences.

Responses to DHS's Solicitation of Additional Contributions

54. As the Texas Legislature was not in session in Spring 2008⁸ and TBAC could not provide funding for construction costs on the scale requested by Under Secretary Cohen without an appropriation from the Legislature, TBAC requested an extension of time to respond to DHS's request. DHS unreasonably denied TBAC's request. Notwithstanding the unreasonable time constraints and the inherent unfairness of the process, TBAC submitted a proposal that included \$22.1 million in funding primarily from local government sources and additional in-kind contributions totaling \$43.7 million.

55. The consortium representing the Manhattan, Kansas site was able to secure and offer a \$105 million bond appropriation from the Kansas legislature within DHS's restricted 30-day "window" to offset the costs of the NBAF.⁹

56. Subsequently, on September 26, 2008, a letter signed by the Texas Governor, the Lieutenant Governor, and the Speaker of the House was submitted to Under Secretary Cohen

⁸ The Texas legislature is in session every other year from January through the end of May.

pledging to obtain a \$56.3 million legislative appropriation when the legislature reconvened, provided the Texas site was selected for the NBAF, bringing the total “offset” amount offered by TBAC to \$100 million. Under Secretary Cohen summarily rejected this offer as untimely.

⁹ See The Lawrence Journal-World, *Kansas Site Top Recommendation for NBAF Site*, Dec. 3, 2008.

DHS's Draft Environmental Impact Statement

57. DHS published a Notice of Availability of the NBAF Draft Environmental Impact Statement ("Draft EIS") on June 27, 2008. *See* 73 FR 36540 - 36542. The Draft EIS identified the six remaining alternative sites and invited public comments. The evaluation conducted during the NEPA process and presented in the NBAF Draft EIS documented the potential effects of the various alternatives on the natural and human environments on a local, regional, and national scale.

58. The Council on Environmental Quality's ("CEQ") "Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act" (CEQ Regulations 40 CFR 1500-1508), require an agency to identify a Preferred Alternative in its FEIS (40 CFR 1502.14).

59. DHS's Draft EIS did not identify a Preferred Alternative for the site of the NBAF. In the Draft EIS, DHS explained that it would select a single site for the NBAF as its Preferred Alternative to fulfill its statutory mission and responsibilities, giving due consideration to economic, environmental, technical, and other factors. DHS stated that the NEPA evaluation would be used in conjunction with other factors to assist DHS in identifying the Preferred Alternative in the NBAF FEIS.

60. Although the draft EIS was approximately 5,000 pages, DHS allowed only two months for commentary on the draft. *See* 71 FR 36541. Further, DHS did not immediately make available its Threat and Risk Assessment ("TRA"), Site Cost Analysis, Site Characterization Study, Plum Island Facility Closure and Transition Cost Study reports and other documents relied upon in preparation of the Draft EIS. DHS has never made its TRA publicly available for consideration, despite the fact that it is not a classified document.

DHS's Site Characterization Study

61. On July 25, 2008, DHS issued a Site Characterization Study ("Study") for the NBAF. DHS stated that its goal with the Study was to provide a detailed description and analysis to facilitate selection of a site with the least physical and geographical encumbrances so that the site may be developed without extremely complicated, costly, invasive, or lengthy mitigation techniques. The Study also indicated additional costs unique to each site, including any costs relating to any requirement for additional site work and/or specialized engineering in order to construct and operate the NBAF program.

62. The Site Characterization Study reflects DHS's evaluation of the parameters for the NBAF structural system. DHS specified its structural engineering assumptions based on a three-story concrete structure with a penthouse containing a concrete roof.

63. Among its design criteria, DHS specified that the NBAF structure would be constructed to withstand a wind speed load of 90 m.p.h. at the Manhattan Campus Site and three other sites (Athens, Georgia, Flora, Mississippi, and Butner, North Carolina). *See* Site Characterization Study, Sections 2A.5, p.1; 2B.5, p.1, 2C.5, p. 1; and 2D.5, p.1.

64. DHS stated that the NBAF structure would be constructed to withstand a wind speed load of 100 m.p.h. at the Texas Research Park. *See id.*, Section 2F.5, p. 1. DHS did not explain in the Study why it would be necessary to build a facility at the Texas Research Park site to withstand a greater wind speed than would be required at the Manhattan Campus Site and three other sites.

65. DHS stated that the NBAF structure would be constructed to withstand a wind speed load of 150 m.p.h. at PIADC. *See id.*, Section 2E.5, p. 1. DHS did not explain in the Study why it would be necessary to build a facility at PIADC to withstand a greater wind speed than would be required at the other alternative sites.

66. Although the DHS Study did not explain the differences in the wind load specifications at the Texas Research Park and PIADC sites, it did make clear in the Study that the indicated maximum wind load specifications were not intended to enable the NBAF to withstand tornadic winds. DHS explained that “[c]onstructing tornado-resistant facilities is extremely expensive because of the extremely high pressures and missile impact loads that tornadoes can generate.” *See id.*, Section 6, p. 4.

DHS’s Site Cost Analysis

67. On July 25, 2008, DHS issued its Site Cost Analysis estimating the relative costs associated with placing the NBAF at each of the alternative sites. This analysis includes all costs associated with the construction, operation and maintenance of the NBAF facility at each site for the intended purpose of providing a quantitative comparison of these costs for each site. *See Site Cost Analysis*, Section 2, p. 4. DHS’s goal was to minimize the construction, infrastructure and operating costs of the NBAF to be consistent with public health and safety, security, and environmental protection. *See id.*, Section 5, p.1.

68. The estimated construction costs in the Site Cost Analysis were based on the NBAF program as indicated in the Feasibility Study dated August 24, 2007. *See id.*, Section 2, p. 4. Therefore, DHS estimated construction costs based on the assumption that the NBAF would only need to withstand wind speeds no greater than 90 m.p.h.

69. At some point before or after selecting the Manhattan Campus Site, DHS determined that it would have to construct a facility at the Manhattan Campus Site that is capable of withstanding an F-3 tornado, or wind speeds of up to 206 m.p.h.

70. DHS never informed any of the consortia submitting proposals that it had decided it was necessary to construct an F-3 tornado-resistant facility at the Manhattan Campus Site. DHS first publicly announced its determination at the April 7, 2009 pre-proposal conference for the contract to construct the NBAF in response to Solicitation No. HSFLBP-09-R-00001.

71. DHS admits “constructing tornado-resistant facilities is extremely expensive because of the extremely high pressures and missile impact loads that tornadoes can generate.”

72. DHS did not include the cost to construct an F-3 tornado-resistant facility at the Manhattan Campus Site when it estimated the cost to construct the NBAF on the Manhattan Campus Site. DHS only estimated the construction cost based on the specification to withstand a 90 m.p.h. wind speed, or the equivalent of an F-1 tornado.

73. DHS also failed to consider that if it changed its orientation of the building on the Texas Research Park site, DHS could cut site construction costs by at least 20%.

74. Before the application of the “offsets” proposals submitted in response to Under Secretary Cohen’s February 2008 letter, the Manhattan Campus Site had a total project cost estimate of \$724,551,494. *See* Site Cost Analysis, Section 4, p. 3. The pre-offset total project cost estimate for the Texas Research Park site was \$652,377,478. *See id.* The initial construction estimate for Kansas was \$563,009,934, and the initial estimate for Texas was \$501,734,260.

DHS’s FEIS and Selection of the Manhattan Campus Site as the Preferred Alternative

75. DHS published the Notice of Availability for the NBAF FEIS in the *Federal Register* on December 12, 2008. The FEIS identified the Manhattan Campus Site as the Preferred Alternative. *See* 73 FR 75665 - 75667.

76. DHS explained the basis for its selection of the Manhattan Campus Site as its Preferred Alternative in Section 2.6 of the NBAF FEIS. *See* FEIS, p. 2-51. Additionally, DHS published a Preferred Alternative Selection Memorandum in December 2008, which describes in more detail the basis for DHS’s selection of the Preferred Alternative.

77. In the FEIS, DHS determined that the Manhattan Campus Site was the Preferred Alternative because there was strong community acceptance¹⁰ and the NBAF would be near existing research capabilities and a workforce relevant to the NBAF mission notwithstanding the

¹⁰ In fact, considerable local opposition exists to locating the NBAF at the Manhattan Campus Site.

fact that the Manhattan Campus Site only received a score of 83 for the Workforce criterion compared to the Texas Research Park's score of 91. *See* FEIS, p. 2-51; Preferred Alternative Selection Memorandum, p. 6.

78. Critical to DHS's assessment of the Manhattan Campus Site under the Research criterion was the site's access to the BRI, located in a campus hall bearing the name of Kansas Senator Pat Roberts. DHS praised the BRI's existing capacity and staff of expert scientists. However, in reality, the BRI biocontainment laboratories are not yet operational, and the BRI itself is lightly staffed by only 2 PhD-level scientists with limited experience in select agent research.

79. DHS unreasonably relied on the BRI to award the Manhattan Campus Site a 94 in the Research criterion, especially in contrast with the 87 it awarded the Texas Research Park under this criteria. The Texas Research Park's rating should have been much higher, and certainly higher than that given to the Manhattan Campus Site, considering that, in opposition to the Manhattan Campus Site's single BSL-3 lab, the Texas Research Park offers access to 12 currently operating BSL-3 labs, as well as a currently operational BSL-4 lab, which the Manhattan Campus Site does not offer.

80. While crediting the Manhattan Campus Site's small, hypothetical BRI facility, DHS unreasonably refused to credit the proposed veterinary facility planned by Texas A&M University to be constructed in San Antonio and found the Texas Research Park's lack of such a facility to be a significant issue.

81. DHS also relied on the Manhattan Campus Site's access to a medical school in Lawrence, one hour from Manhattan; the offered facility is in fact in Kansas City, over two hours away.

82. Similarly, while DHS cited the Manhattan Campus Site's location within an animal health corridor, in fact Manhattan is at the very end of that corridor, with limited access to its more than 200 mile length.

83. In assessing the relative risks of a catastrophic release of pathogens, however, DHS determined that construction and operation of the NBAF at the Manhattan Campus Site would be environmentally acceptable based on the unreasonable claim that “the risk of release of a pathogen was independent of where the NBAF was located.” *See* FEIS, p. 2-52; Preferred Alternative Selection Memorandum, p. 6. DHS wrongly assumed that the risk of structural damage to the facility from a tornado was the same regardless whether the facility was constructed in Kansas or on any of the other five sites.

84. DHS also specifically based its decision to select Kansas on the “offset” package obtained from the legislature, concluding that the Manhattan Campus Site was among the least expensive to construct, despite the fact the DHS estimated the cost to construct the NBAF in Kansas would exceed the cost in Texas by over \$72 million. *See id.*

DHS's Flawed Analysis of the Risks of Tornadoes at the Manhattan Campus Site

85. One of the most important considerations in selecting the site for the NBAF was the risk of an event that could result in a release of pathogens and gravely endanger public safety and the environment. DHS accordingly stated that its decision to select the Manhattan Campus Site as the Preferred Alternative was based on a hazard assessment that included an analysis of the potential risks to the public, livestock, and wildlife from biological material shipments; laboratory accidents; escape of an infected animal; mechanical failures; human errors; contact with contaminated or transiently colonized or infected workers, and natural phenomena events such as hurricanes or tornadoes; and terrorist acts. *See* FEIS, p. ES-14.

86. However, in its analysis, DHS utterly failed to properly consider the risk of catastrophic damage resulting from a moderate to severe tornado in Kansas.

87. DHS correctly concluded in the FEIS that the “primary hazard of the NBAF operations is the pathogen and the consequences of its release.” *See* FEIS, p. 2-47. DHS stated that there was a high likelihood for environmental life-threatening effects in the event of a release of any of the representative pathogens considered in the FEIS. *See* FEIS, p. 3-221. For example, Foot and Mouth Disease (“FMD”) is highly infectious and causes debilitating vesicular disease and death in all cloven-hoofed livestock and wildlife. *See* FEIS, p. 3-378.

88. The FEIS states that the economic consequences of an outbreak of FMD “are huge, and the potential loss of international markets can be devastating.” *See id.* DHS failed to consider, however, the fact that the nation’s cattle industry is concentrated in the area immediately surrounding Manhattan, Kansas. Thus the release of FMD in the Manhattan area would have more disastrous consequences to the nation’s food supply than at virtually any other location in the United States.

89. DHS acknowledged that one consequence of an accidental release of FMD would be the banning of exports of U.S. beef, the economic effect of which could reach as high as \$4.2

billion until the United States was declared foreign animal disease-free and foreign trade could resume. *See* FEIS, p. 2-39.

90. DHS failed to consider the more disastrous and obvious consequence of a release of FMD in the vicinity of Manhattan, Kansas, namely, the forced liquidation of a substantial portion of the U.S. cattle herds. For example, the 2001 outbreak of FMD in Great Britain resulted in the slaughter of over six million animals and a total cost estimated at \$15.22 billion.

91. Another representative virus, Rift Valley Fever (“RVF”), causes disease and death in cattle, sheep, and goats and has been reported in numerous species of mammals. *See* FEIS, p. 3-379. RVF is transmitted to animals and humans by infected mosquitoes, and a release of RVF could establish a continuous ecological cycle in the United States. *See id.* One to three percent of infected humans develop severe hemorrhagic fever and/or encephalitis, which may be fatal. *See id.*

92. The FEIS erroneously states that “the conceptual design of the NBAF is currently identified for 119 mph winds” and that “the 119 mph (156 mph for Plum Island) criteria [is] specified in the Feasibility Study for the NBAF.” *See* FEIS, p. 3-431. In fact, DHS’s Feasibility Study and Site Characterization Study both state that DHS will design the building at the Manhattan Campus Site to withstand wind speeds of only up to 90 m.p.h. *See* Feasibility Study, Section 5.2.2, p. 6; Site Characterization Study, Section 2A.5, p. 1.

93. The FEIS identifies the Fujita Scale, which is commonly used to distinguish between weak and strong tornadoes:

Table 3.4.3.1.1-1 — Severe Climatic Events

County	Event	Date	Time	Magnitude ^a	Property Damage (\$)
Clarke	Tornado	03/31/1973	18:15	F2	\$250 million
Clarke	Tornado	05/28/1973	15:20	F3	\$25 million

^aFujita Scale; F0 = gale winds <73 mph; F1 = moderate winds 73-112 mph; F2 = significant winds 113-157 mph; F3 = severe winds 158-206 mph; F4 = devastating winds 207-260 mph; F5 = incredible winds 261-318 mph; F6 = inconceivable winds >318 mph.

See FEIS p. 3-65.

94. If DHS were to construct the facility to withstand wind speeds of up to 90 m.p.h., as reflected in DHS's Feasibility Study, the facility would not be able to withstand even all F-1 tornadoes, which range from 73 to 112 m.p.h.

95. Even if DHS were to change the criteria upon which the parties based their proposals and construct the facility to withstand 119 m.p.h. winds, the facility would not be able to withstand all F-2 tornadoes, which range from 113 to 157 m.p.h.

96. DHS also concedes that "[i]f the NBAF took a direct hit from an F3 tornado [severe winds 158-206 mph], the exterior walls and roofing of the building would likely fail first. This breach in the exterior skin would cause a dramatic increase in internal pressures leading to further failure of the building's interior and exterior walls." *See* FEIS, p. 3-65.

97. DHS specifically acknowledged the threat of catastrophic damage from tornadoes in the FEIS and concluded that the building would not withstand the impact of a moderate-to-severe tornado, with catastrophic consequences. In the FEIS, the DHS found that:

Tornados and high-wind events can produce great damage to facilities. An F-3 tornado (Fujita scale) can have fastest quarter-mile wind speeds in the range of 158 to 207 mph and 3-s gusts in the range of 162 to 209 mph (NOAA).... Since the conceptual design of the NBAF is currently identified for 119 mph winds (156 mph for Plum Island), *it is credible to estimate unmitigated consequences associated with catastrophic failure of the NBAF structure.*

See FEIS, p. E-137 (emphasis added).

98. DHS also analyzed the impact of wind-generated missiles in a tornado, such as a wood plank, and concluded that, "[b]ased on these results, the proposed NABF conceptual design *is not expected to resist the effects of wind-blown missiles.*" *See* FEIS, p. E-142 (emphasis added).

Even though the analysis was based on the erroneous assumption that the building would be designed to withstand wind speeds up to 119 m.p.h. (the lower end of the range for an F-2 tornado), the FEIS still concludes that even a moderate F-2 or F-3 tornado would cause catastrophic damage to the NBAF. *See* FEIS, p. 3-432.

99. The FEIS also concludes that natural phenomena events, such as tornadoes, could result in a release of the pathogens with resulting catastrophic consequences. DHS explained that the central difference between the natural phenomena events and other accidents is that the natural phenomena events have a greater potential to impact the entire facility. Because of the extent of the impact of a tornado and other natural phenomena events, the amount of infectious biological material, chemicals, and radioactive substances available for release is greater. *See* FEIS, p. 3-432.

100. Notwithstanding DHS's recognition that the impact of a tornado on the NBAF could have devastating consequences, DHS did not consider whether any of the alternative sites was less likely to suffer a catastrophic tornado event than the others. The National Climatic Data Center of the U.S. Department of Commerce has made the simple, but true observation that "some parts of the world are much more prone to tornadoes than others."¹¹ The FEIS itself contains a chart that DHS obtained from the National Oceanic and Atmospheric Administration's internet site reflecting tornado probabilities in the United States. *See* FEIS, p. E-138. The chart reflects that states in Tornado Alley are more likely than other states to suffer violent tornadoes. Nevertheless, DHS summarily concluded that the risk was the same at all sites because "[t]ornado or hurricane events are a significant potential at the proposed sites and occur with wind speeds in excess of 150 mph." *See* FEIS, p. 3-432.

101. DHS did not conduct a comparative analysis in the FEIS of the relative risks and severity of tornadoes at each of the proposed sites.

102. DHS also did not conduct a comparative analysis of the relative costs necessary to construct a facility at each of the alternative sites that would be capable of withstanding tornadoes of the severity reasonably expected at each site.

¹¹ <http://www.ncdc.noaa.gov/oa/climate/severeweather/tornadoes.html>

103. In fact, as is well known (and at the forefront of the public's consciousness due to Hollywood classics like *The Wizard of Oz*), Kansas lies in the heart of Tornado Alley and is prone each spring to outbreaks of the most severe tornadoes.

104. A category F-4 tornado, with wind speeds reported at 188 m.p.h., actually struck the Manhattan Campus Site in June 2008, causing massive damage. Several Kansas Statute University campus buildings including Cardwell Hall, Ward Hall, Waters Hall, Weber Hall, Call Hall, the engineering complex, the Wind Erosion Laboratory and the Sigma Alpha Epsilon fraternity house were damaged. The damage at Kansas State University due to this tornado is estimated to exceed \$20 million. DHS listed this tornado in the FEIS, but did not explain why the occurrence of this tornado did not affect its conclusion that each of the sites was equally at risk to suffer a tornado of this magnitude, which DHS concluded would destroy the facility and result in a release of the pathogens.

105. In addition to the F-4 tornado that struck Manhattan in June 2008, an F-5 tornado, with wind speeds in excess of 260 m.p.h. struck to the southwest of Manhattan, Kansas in March 2007, literally obliterating the town of Greensburg and killing 11 people. DHS did not even mention this tornado in its FEIS.

106. DHS also ignored the fact that there were 187 tornadoes with four fatalities in Kansas in 2008, nor that there were 141 tornadoes in Kansas in 2007. It did not consider the fact that there were 17 tornadoes in Kansas in 2007 and 2008 that were classified as F-3 or higher, including one F-5 and three F-4 tornadoes. DHS also did not consider the other five F-5 tornadoes that have occurred in Kansas since 1955. DHS did not consider what would happen to the facility if an F-5 tornado strike occurs in Manhattan, Kansas.

107. When it evaluated each of the alternative sites based on the assumption that the risk of tornadoes applied equally to all sites, DHS repeatedly stated its conclusory opinion that a wind speed of 90 m.p.h. "was expected to occur on the average of only once over a fifty-year period."

DHS also stated that a wind speed of “170% of the code specified 50-year wind pressures,” which would be 153 m.p.h. or the equivalent of an F-2 tornado, “is expected to occur only once over a 500 year period.” *See* FEIS, p. 3-65. These absurd findings are flatly contradicted by the well-established facts with respect to the frequency and intensity of tornadoes in Kansas. DHS did not evaluate how often and in what magnitude wind speeds exceeding 90 m.p.h. actually occur at each of the alternative sites.

108. Despite the fact that there have been approximately 3,500 tornadoes in Kansas since 1950, DHS did not reevaluate its assumption that an F-2 tornado would only occur once in 500 years. DHS did not consider whether it needed to construct the NBAF to withstand a tornado more severe than an F-2 to protect human health and the environment, nor did it evaluate the cost it would incur to build such a facility (although DHS previously stated in the Characterization Study that it would be “extremely expensive”).

109. DHS did not explain its apparent position in the FEIS that building a facility that would not withstand a moderate-to-severe tornado was acceptable, although DHS previously emphasized in the Feasibility Study that “[t]he perimeter framing must be designed and constructed to prevent progressive collapse of the exterior of the building.” *See* Feasibility Study, Section 5.2.2, p. 1 (emphasis in original).

110. None of the other five sites under consideration are located in the high-risk “Tornado Alley” region, although the PIADC, located offshore in Long Island, New York, is vulnerable to Atlantic hurricanes. In particular, as the FEIS recognized, “[t]he severe weather in [the San Antonio] area is normally associated with tornadoes, but such events are fairly rare and isolated.” Despite acknowledging that tornadoes are rare in San Antonio, DHS nevertheless claimed that the risks and consequences of tornadoes are the same at every alternative site, including Manhattan, Kansas and San Antonio, Texas.

111. There is a substantial risk that the NBAF, if it were constructed in Kansas, would suffer a catastrophic release of deadly pathogens as the result of a tornado strike.

112. DHS did not reasonably account for the likelihood and consequences of this hazard when it evaluated the proposals and prepared the FEIS.

113. DHS did not evaluate the relative risk of a tornado event, the relative severity of a tornado event, and the relative cost to construct a tornado-resistant NBAF at the Manhattan and San Antonio sites.

114. DHS erroneously determined that the risk of accidental release was independent of where the facility was located.

115. DHS also erroneously determined that the likelihood of a release at any of the sites is extremely low. If DHS had conducted a comparative analysis, it obviously would have concluded that the risk of severe tornado events is far greater, and the cost of constructing a facility to withstand such tornadoes is far higher, at the Manhattan Campus Site than at the Texas Research Park site.

116. The FEIS also reflects that DHS's high-wind accident analysis was developed without considering a subsequent fire in the NBAF. DHS separately evaluated the risk of a facility fire and determined that a fire would result in significant consequences to the laboratory workers (involved and non-involved), as well as the public and the environment. DHS failed to consider the additional risk associated with a combined tornado-fire event.

117. In addition to failing to consider the cost of constructing a tornado resistant facility, DHS also failed to consider the cost and other adverse consequences of having to re-build the NBAF if it were to be hit by a tornado, including the years of delay to construct and bring a new facility operational.

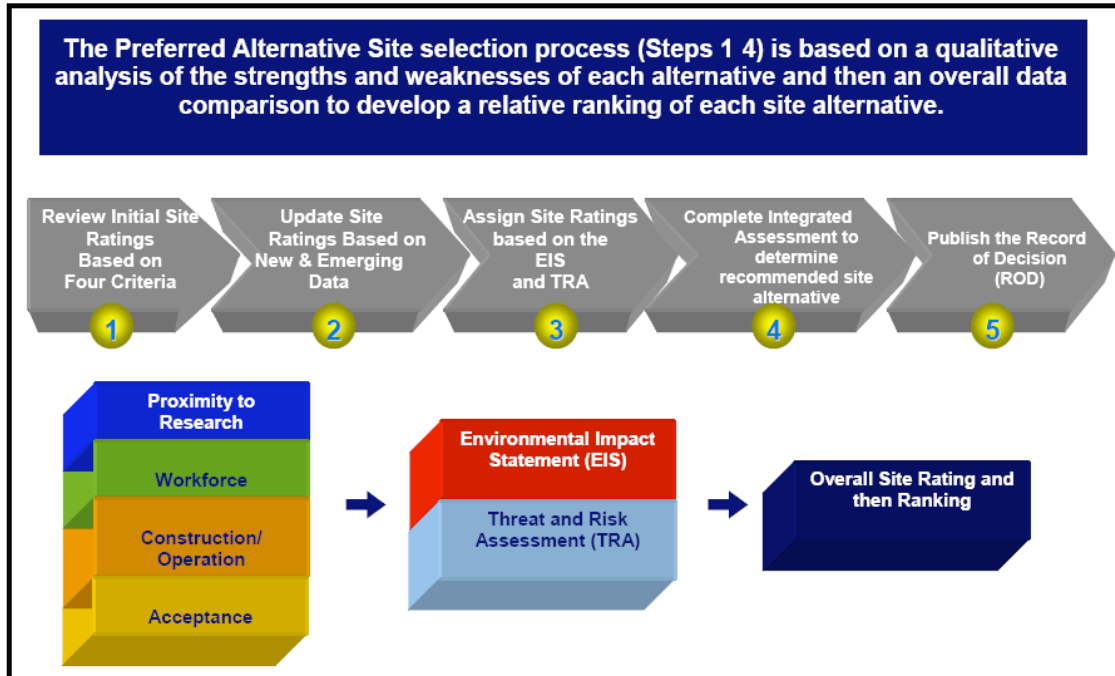
118. While no such analysis was conducted, it is obvious that constructing the facility to withstand winds in excess of 200 m.p.h., even if it were possible, would be at a prohibitive cost.

DHS's Preferred Alternative Selection Memorandum

119. As stated above, DHS published a Preferred Alternative Selection Memorandum in December 2008 detailing the basis for its selection of the Manhattan Campus Site as its Preferred Alternative. DHS stated that the Preferred Alternative selection process was an integrated assessment and evaluation of each site's strengths, weaknesses, and risks against DHS's evaluation criteria and preferences while considering the environmental effects and security findings.

120. DHS's Preferred Alternative site selection process involved a qualitative analysis of the strengths and weaknesses of each action alternative and then an overall data comparison to develop a relative ranking of each action alternative. *See Preferred Alternative Selection Memorandum*, p. 3. DHS also considered the No Action Alternative (*i.e.*, using the PIADC) and weighed it against the proposed action of constructing and operating the NBAF at the highest ranked site alternative to identify the Preferred Alternative. A Steering Committee, comprised of Federal employees with subject matter expertise from DHS, HHS and USDA, led the evaluation process and made recommendations to the DHS Decision Authority (sometimes referred to as the Selection Authority).

121. The Selection Memorandum stated that selection of the Preferred Alternative was based upon: 1) the site's ability to satisfy the evaluation criteria published in the Public Notice Soliciting EOIs; 2) the site's ability to satisfy the preferences communicated to all second round potential NBAF sites on December 8, 2006; 3) offers to offset site infrastructure costs submitted to DHS by March 31, 2008; 4) the environmental impacts identified in the NBAF FEIS; and 5) information contained in the TRA, Site Cost Analysis, Site Characterization Study, and Plum Island Facility Closure and Transition Cost Study reports. The Selection Memorandum contains this graphical representation of DHS's Preferred Alternative Site selection process:



See Preferred Alternative Selection Memorandum, p. 3.

122. The Selection Memorandum identified the possible ratings for each step in the evaluation process. For the Evaluation Criteria Ratings and Overall Site Rankings, a green rating equated to “Clearly Meets Overall Criteria” and a yellow rating equated to “Partial Fulfillment of Overall Criteria.” For the TRA Ratings, a green rating equated to “No Security Risks” and a yellow rating equated to “Acceptable Security Risks With or Without Mitigation.” For the FEIS Ratings, green equated to “No to Minor Environmental Impacts” and yellow equated to “Moderate Environmental Impacts.” *See id.*, p. 5.

123. Despite having concluded that the overall ranking of the Texas Research Park was 91.5 and that Kansas’s was 90.5, DHS gave both sites a 91 rating of Excellent. DHS evaluated the Manhattan Campus Site in Manhattan, Kansas, as having the Overall Ranking of 1 and Overall Rating of green. DHS evaluated TBAC’s Texas Research Park in San Antonio, Texas, as having the Overall Ranking of 2 and Overall Rating of yellow. For the TRA and FEIS ratings, the Manhattan Campus Site and Texas Research Park both received the same ratings of yellow and

green, respectively. The Selection Memorandum contains this graphical representation of DHS’s site selection rankings and ratings:

		Preferred Alternative					
		Manhattan, KS	San Antonio, TX	Athens, GA	Flora, MS	Butner, NC	Plum Island, NY
<i>Step 1: Review Initial Site Ratings based on Four Criteria</i>							
<i>Step 2: Evaluation Criteria Ratings</i>							
	PROXIMITY TO RESEARCH CAPABILITIES	G	Y	Y	R	G	Y
	PROXIMITY TO WORKFORCE	Y	G	Y	R	G	Y
	ACQUISITION / CONSTRUCTION / OPERATIONS	G	Y	Y	G	R	Y
	COMMUNITY ACCEPTANCE	G	G	Y	G	R	R
<i>Step 3: TRA and EIS Ratings</i>							
	THREAT AND RISK	Y	Y	Y	Y	Y	Y
	ENVIRONMENTAL IMPACTS	G	G	Y	G	G	G
<i>Step 4: Overall Site Rankings</i>							
	Overall Rating	G	Y	Y	R	R	R
	Overall Ranking	1	2	3	4	4	4

Step 2 and 4 Rating Legend		Step 3: TRA Rating Legend		Step 3: EIS Rating Legend	
G	Clearly Meets Overall Criteria	G	No Security Risks	G	No to Minor Environmental Impacts
Y	Partial Fulfillment of Overall Criteria	Y	Acceptable Security Risks with or without mitigation	Y	Moderate Environmental Impacts
R	Does Not Meet Overall Criteria	R	Unacceptable Security Risks	R	Significant Environmental Impacts

See id., p. 5.

124. The Decision Authority noted that in making his selection of the Manhattan Campus Site, the Steering Committee found that the FEIS and the TRA:

offered very little differentiation between the sites. In fact, the EIS stated that the risk of release of a biological pathogen from the NBAF was independent of where the NBAF was located. The Steering Committee determined that, based on its review of the EIS, the likelihood of a release of a biological pathogen was very low, given appropriate attention to the design, construction, and operation of the NBAF with an array of safety controls.... The Steering Committee found that the environmental impacts analyzed in the EIS and the site specific threats were all very similar and that there were only minor differentiators that could be found.

See id.

125. The Decision Authority explained in the Selection Memorandum that he did not select the Texas Research Park site as the Preferred Alternative “based on the site’s lack of

proximity to a Veterinary School or College of Agriculture and the lack of a competitive offset package.” Without providing any reasons or explanation for his conclusion, the Decision Authority also stated that the Texas Research Park’s rating for the ACO criterion was not as strong or competitive as the Manhattan Campus Site, contrary to the earlier decision and despite the fact that the Steering Committee rated Texas Research Park as a 95 and the Manhattan Campus Site as a 91 for this criterion. *See id.*, pp. 6-7.

126. In choosing the Manhattan Campus Site, the Decision Authority explained that he based his decision on numerous strengths offered by the Manhattan Campus Site, including its location near Kansas State University, its proximity to a workforce relevant to the NBAF mission, and strong community acceptance. The Decision Authority also determined that “[a]s stated in the EIS and agreed to by the Steering Committee, the risk of release of a pathogen was independent of where the NBAF was located.” The Decision Authority also selected Kansas because, “taking into consideration the offsets to infrastructure costs and ‘in-kind’ contributions offered by the consortia, the Manhattan Campus Site is among the least expensive location to construct and operate the NBAF.” *See id.*, p. 6.

DHS’s Record of Decision

127. DHS required comments to be submitted on the Preferred Alternative Selection no later than January 12, 2009, only thirty days after the decision was announced and with two major holidays included in the thirty days. Its Record of Decision was issued only four days after the end of the comment period.

128. On January 16, 2009, DHS issued an ROD on the proposed siting, construction, and operation of the NBAF based on information and analysis in the FEIS. In the ROD, DHS stated that it would implement the Preferred Alternative identified in Section 2.6 of the FEIS, which would result in construction of the NBAF at the Manhattan Campus Site in Manhattan, Kansas and

initiate the transition of mission activities and resources from the PIADC in New York. *See* 74 FR 3065 - 3080.

129. In addressing the issue of the additional offer of “offset” by the State of Texas, DHS stated in the ROD that “even if the Texas financial offsets had been included, the Manhattan Campus Site would still be the site offering the best value to the government.” *See* 74 FR 3076.

130. Including the financial offset offered but not even considered by DHS, the Total Project Estimate for Texas would have been \$552,377,479. With its \$105 million offset, the Total Project Estimate for Kansas was \$619,551,494. Thus, the Texas offer would have been approximately \$67,000,000 less than the Kansas offer if DHS had properly evaluated TBAC’s proposed offset.

131. On March 12, 2009, DHS issued Solicitation No. HSFLBP-09-R-00001 for the construction of the NBAF at Manhattan, Kansas. The date for submission of proposals is May 14, 2009.

COUNT I:

DHS VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT

132. TBAC incorporates the allegations in paragraphs 1 through 131 as if fully set forth herein.

133. Before making its site selection decision, DHS was required under NEPA to examine in an EIS the environmental impacts of its proposal to select the Manhattan Campus Site as the site upon which it will construct the NBAF.

134. DHS was required under NEPA to rigorously explore and objectively evaluate all reasonable alternatives to selecting the Manhattan Campus Site as the site upon which it will construct the NBAF.

135. DHS also was required under NEPA to evaluate, in comparative form, the relative environmental impacts of selecting each of the six alternative sites as the site upon which it would construct the NBAF.

136. DHS knew that there was a significant potential for tornadoes at the Manhattan Campus Site and that the NBAF could suffer a catastrophic release of deadly pathogens as the result of a moderate to severe tornado.

137. DHS did not conduct a site-specific evaluation of the likelihood that a tornado would strike the NBAF or the likely severity or strength of the tornado.

138. DHS also failed to evaluate the relative environmental impacts of tornadoes at each of the sites in comparative form, but rather expressed the conclusory and absurd assumption that the risk of catastrophic damage from tornadoes was equally applicable to all six sites under consideration.

139. DHS failed to rigorously and objectively weigh, on a site-by-site comparative basis, the relative probability of a tornadic event, the probable severity of the tornado, the gravity of the resulting injury, and the burden of adequate precautions, including the comparative costs of constructing a tornado resistant facility.

140. Had DHS conducted an objective site-by-site comparative analysis, it would have concluded that the risk of tornadoes, and more severe tornadoes, is greater in Manhattan, Kansas than it is in San Antonio Texas.

141. Had DHS conducted an objective site-by-site comparative analysis, it would have concluded that the risk of a catastrophic release of pathogens as a result of tornadic events is greater in Manhattan, Kansas than it is in San Antonio Texas.

142. Had DHS conducted an objective site-by-site comparative analysis, it would have concluded that the cost to build a tornado-resistant facility would be less in San Antonio, Texas than it would be in Manhattan, Kansas.

143. TBAC was prejudiced by DHS's violation of NEPA because DHS would have selected the Texas Research Park as the site for the NBAF but for DHS's statutory violation.

COUNT II:

DHS'S SELECTION OF THE MANHATTAN CAMPUS SITE FOR THE NBAF LACKED A RATIONAL BASIS BECAUSE THE RISK OF A RELEASE OF PATHOGENS DUE TO TORNADOES IS NOT THE SAME AT ALL OF THE SITES

144. TBAC incorporates the allegations in paragraphs 1 through 131 as if fully set forth herein.

145. DHS knew that there was a significant potential for tornadoes at the Manhattan Campus Site and that the NBAF could suffer a catastrophic release of deadly pathogens as the result of a moderate to severe tornado.

146. Nevertheless, DHS selected the Manhattan Campus Site for the construction of the NBAF by making the objectively false determination that the risk of a release of pathogens and the resulting economic consequences were independent of where the NBAF was located.

147. DHS did not conduct a site-specific evaluation of the likelihood that a tornado would strike the NBAF or the likely severity or strength of the tornado.

148. DHS failed to rigorously and objectively weigh, on a site-by-site comparative basis, the relative probability of a tornadic event, the probable severity of the tornado, the gravity of the resulting injury, and the burden of adequate precautions, including the comparative costs of constructing a tornado resistant facility.

149. Had DHS conducted an objective site-by-site comparative analysis, it would have concluded that the risk of tornadoes, and more severe tornadoes, is greater in Manhattan, Kansas than it is in San Antonio Texas.

150. Had DHS conducted an objective site-by-site comparative analysis, it would have concluded that the risk of a catastrophic release of pathogens as a result of tornadic events is greater in Manhattan, Kansas than it is in San Antonio Texas.

151. Had DHS conducted an objective site-by-site comparative analysis, it would have concluded that the cost to build a tornado-resistant facility would be less in San Antonio, Texas than it would be in Manhattan, Kansas.

152. DHS's determination that the risk of a release of pathogens as a result of a tornadic event and the economic consequences of a release were the same at each of the proposed sites was arbitrary, capricious, lacked a rational basis, and was otherwise in violation of law and regulation.

153. TBAC was prejudiced because DHS would have selected the Texas Research Park as the site for the NBAF but for DHS's arbitrary and capricious determination that the risks and consequences of tornadoes was the same at each of the proposed sites.

COUNT III:

DHS FAILED TO PROPERLY EVALUATE THE PROPOSED SITES IN ACCORDANCE WITH THE EVALUATION CRITERIA AND PREFERENCES

154. TBAC incorporates the allegations in paragraphs 1 through 131 as if fully set forth herein.

155. The Texas Research Park site received an initial rating of 95 - Excellent - for the ACO evaluation factor in the July 2007 Selection Memorandum. The Selection Memorandum explained that receiving a score of 90-100 meant that the Selection Authority concluded that the site wholly conforms with the stated preferences related to this evaluation factor.

156. The Selection Authority downgraded TBAC's proposal to Yellow (Partial Fulfillment of Overall Criteria) for the ACO evaluation factor in the Preferred Alternative Selection Memorandum.

157. The Selection Authority did not explain why it downgraded TBAC's proposal for the ACO evaluation factor.

158. To the extent the Selection Authority downgraded TBAC's proposal based on its response to DHS's February 29, 2008 letter requesting TBAC provide additional funding to defray the cost of constructing the NBAF and other in-kind contributions, the Selection Authority's

decision was both contrary to the stated evaluation criteria and lacked a rational basis because TBAC offered an additional \$22.1 million in funding and additional in-kind contributions totaling \$43.7 million in response to the February 29, 2008 letter.

159. The Texas Research Park site received a initial rating of 87 - Very Good - for the Research Factor and the Selection Authority noted significant and great strengths for its proximity to research capabilities; however, the site was assigned a yellow rating in the Preferred Alternative Selection Memorandum equating to only partial fulfillment of the overall criteria.

160. Additionally, the July 27, 2007 Final Selection Memorandum stated that based on DHS's evaluation criteria and preferences, the Texas Research Park would meet the intended purpose and need to successfully build and operate NBAF; however, the Preferred Alternative Selection Memorandum gave the Texas Research Park site a yellow overall rating.

161. DHS's assignment of a yellow rating for the ACO factor, a yellow rating for the Research factor and the overall rating of yellow was arbitrary, capricious, lacked a rational basis, and was otherwise in violation of law and regulation based on the record of evaluation for the Texas Research Park site.

162. Had DHS evaluated the offered sites in accordance with the announced evaluation criteria, the Texas Research Park would have been selected as the site the NBAF.

COUNT IV:

DHS ARBITRARILY AND CAPRICIOUSLY EVALUATED THE SITES BY UTILIZING THE COST OFFSET PACKAGES AS AN EVALUATION FACTOR

163. TBAC incorporates the allegations in paragraphs 1 through 131 as if fully set forth herein.

164. The Expression of Interest publicly filed by DHS required offerors to provide specific information for each proposed NBAF location and stated that each submission would be evaluated against the following evaluation criteria: research capabilities; workforce; acquisition/construction/operating; and community acceptance.

165. The availability of financial incentives to “offset” the NBAF costs was not included in any *Federal Register* notice, and the NBAF Program Manager repeatedly stated prior to February 2008 that the consortia proposing the sites would not be asked or permitted to bear any of the construction costs.

166. In late February 2008, DHS requested verification of final offers from the consortia sponsoring the remaining sites regarding in-kind contributions and funding. DHS also requested “offsets” to the site infrastructure costs, which could consist of land, funds, and other assets. DHS required each site to deliver its response within thirty days, by March 31, 2008.

167. In March 2008, the HBC consortium representing the Manhattan Campus Site was able to secure a \$105 million bond from the Kansas legislature to offset the costs of the NBAF.

168. As the Texas legislature was not in session, TBAC was unable to secure funding from the State of Texas in the short time period required by DHS, and a request for an extension of time was denied by DHS. Because TBAC could not obtain funding from the Texas legislature, it was only able to offer DHS an additional \$22.1 million in funding and additional in-kind contributions totaling \$43.7 million.

169. In September 2008, approximately four months before DHS selected the Manhattan Campus Site, the Texas Governor, the Lieutenant Governor, and the Speaker of the House delivered a letter to DHS explaining that the Texas legislature was not in session when the “offsets” were requested, but pledged a legislative appropriation of \$100 million for NABF construction costs. DHS rejected this “offset” package as untimely.

170. One of the items considered in the Preferred Alternative Selection Memorandum was the offsets to the site infrastructure costs that were offered by each site.

171. DHS actions demonstrate that it chose the Manhattan Campus Site primarily because of the substantial, unconditional offset package, stating that taking into consideration the

offsets and contributions the Manhattan site was among the least expensive to construct and had among the lowest planned operation costs of all the Site Alternatives.

172. DHS stated that one of the primary reasons it did not choose the Texas site was because of the lack of a competitive offset package.

173. In performing the evaluation of the Preferred Alternative Site, DHS relied heavily on state and local funding for offsets and in-kind contributions offered by the consortia sponsoring the different sites even though the funding was never publicly described or listed as an evaluation criteria.

174. The estimated project costs for the Manhattan Campus Site were more than \$67 million higher than the Texas Research Park before the application of the offsets and contributions, and the Kansas site could not be considered the site offering the best value to the government.

175. DHS's consideration of the additional offsets and funding offered by each site in March 2008 when it selected the Manhattan Campus Site as the Preferred Alternative Site was arbitrary, capricious, lacked a rational basis, and was otherwise in violation of law and regulation.

176. Alternatively, DHS's refusal to consider TBAC's pledge to provide \$100 million for NBAF construction costs was arbitrary, capricious, lacked a rational basis, and was otherwise in violation of law and regulation.

177. Had DHS not improperly considered the additional offsets and funding offered by each site in March 2008 when it selected the Manhattan Campus Site as the Preferred Alternative Site, the Texas Research Park would have been selected as the site the NBAF.

COUNT V:

DHS ARBITRARILY AND CAPRICIOUSLY ESTIMATED THE COSTS REQUIRED TO CONSTRUCT THE NBAF AT THE MANHATTAN CAMPUS SITE

178. TBAC incorporates the allegations in paragraphs 1 through 131 as if fully set forth herein.

179. In the Preferred Alternative Selection Memorandum, DHS selected the Manhattan Campus Site for the NBAF based in part on its determination that the Manhattan Campus Site is among the least expensive locations to construct and operate the NBAF.

180. The estimated project costs for the Manhattan Campus Site were more than \$67 million higher than the Texas Research Park, and the Kansas site could not be considered the site offering the best value to the government.

181. DHS's estimated project costs for the Manhattan Campus Site were based on the assumption that DHS would only build a facility to withstand wind speeds of up to 90 m.p.h.

182. At some point before or after it selected the Manhattan Campus Site, DHS determined that it would have to construct a facility at the Manhattan Campus Site that is capable of withstanding an F-3 tornado, or wind speeds of up to 206 m.p.h.

183. DHS admits that “[c]onstructing tornado-resistant facilities is extremely expensive because of the extremely high pressures and missile impact loads that tornadoes can generate.”

184. DHS did not include the cost to construct an F-3 tornado-resistant facility at the Manhattan Campus Site when it concluded that the Manhattan site was among the least expensive to construct and offered the best value to the Government.

185. DHS's failure to include the cost to construct an F-3 tornado-resistant facility at the Manhattan Campus Site when it concluded that the Manhattan site was among the least expensive to construct and offered the best value to the Government was arbitrary, capricious, lacked a rational basis, and was otherwise in violation of law and regulation.

186. Had DHS not improperly failed to include the cost to construct an F-3 tornado-resistant facility at the Manhattan Campus Site when it concluded that the Manhattan site was among the least expensive to construct and offered the best value to the Government, the Texas Research Park would have been selected as the site the NBAF.

COUNT VI:

DHS ARBITRARILY AND CAPRICIOUSLY REQUIRED THE TEXAS RESEARCH PARK SITE TO WITHSTAND HIGHER WIND SPEEDS THAN THE MANHATTAN CAMPUS SITE

187. TBAC incorporates the allegations in paragraphs 1 through 131 as if fully set forth herein.

188. The Site Characterization Study provided a detailed description and analysis to facilitate selection of a site with the least physical and geographical encumbrances and also indicated any additional costs unique for each site, including any costs relating to any specialized engineering in order to construct and operate the NBAF program.

189. Among its design criteria, DHS specified that the NBAF structure would be constructed to withstand a wind speed load of 90 m.p.h. at the Manhattan Campus Site and three other sites (Athens, Georgia; Flora, Mississippi; and Butner, North Carolina).

190. DHS stated that the NBAF structure would be constructed to withstand a wind speed load of 100 m.p.h. at the Texas Research Park.

191. DHS did not explain in the Study why it would be necessary to build a facility at the Texas Research Park site to withstand a greater wind speed than would be required at the Manhattan Campus Site and three other sites.

192. Requiring the Texas Research Park site to withstand higher wind speeds than the Manhattan Campus Site was arbitrary, capricious, lacked a rational basis, and was otherwise in violation of law and regulation.

193. Had DHS not improperly required the Texas Research Park site to withstand higher wind speeds than the Manhattan Campus Site, the Texas Research Park would have been selected as the site the NBAF.

COUNT VII:

DHS BREACHED AN IMPLIED-IN-FACT CONTRACT UNDER 28 U.S.C. § 1491(b), 48 C.F.R. § 1.102(b)(3) and 48 C.F.R. § 1.102-2(c)(3)

194. TBAC incorporates the allegations in paragraphs 1 through 131 as if fully set forth herein.

195. When DHS solicited Expressions of Interest for potential sites for the NBAF, it required the prospective offerors to provide detailed submissions and informed offerors that the agency would evaluate each submission using four site criteria categories and multiple sub-criteria under each of the four categories.

196. By issuing a competitive solicitation for EOIs and generating responsive offers, DHS created an implied contract to treat all EOIs fairly and honestly and evaluate proposals evenhandedly against common requirements and evaluation criteria.

197. The Federal Acquisition Regulation requires and obligates the government to act with integrity, fairness and openness, and the government breaches its obligations to offerors when it fails to act accordingly.

198. DHS breached its implied-in-fact contract with TBAC to consider all proposals fairly and honestly by failing to properly and evenhandedly evaluate the proposed sites in accordance with the stated evaluation criteria and prepare an FEIS that complied with its obligations under NEPA. DHS also arbitrarily and capriciously selected the Manhattan Campus Site based primarily on Kansas's response to DHS's solicitation of additional in-kind contributions, effectively conducting a last-minute auction of where the NBAF would be sited.

199. DHS's actions in selecting the Manhattan, Kansas site for the NBAF were a clear and prejudicial violation of the government's requirements and obligations and a breach of its implied-in-fact contract with TBAC.

200. Had DHS not breached its implied-in-fact contract with TBAC, the Texas Research Park would have been selected as the site the NBAF.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, TBAC prays that this Court grant the following

relief:

A. A Preliminary Injunction be issued by this Court, to be in effect until a final evidentiary hearing, if necessary, and a ruling on the merits of this protest: (1) restraining DHS from proceeding with its solicitation of proposals and/or award of any contract to construct the NBAF in response to Solicitation No. HSFLBP-09-R-00001; (2) restraining any further work to be performed in conjunction with the construction and operation of the NBAF, including procuring or paying for any site-specific design services for the NBAF; and (3) restraining DHS from expending any additional funds on this procurement;

B. A Declaratory Judgment be issued that DHS's selection of the Manhattan Campus Site for the construction and operation of the NBAF was arbitrary, capricious, and an abuse of discretion and otherwise contrary to law, and an order directing that DHS name the Texas Research Park as the Preferred Alternative;

C. A Permanent Injunction consistent with and enforcing the Court's Declaratory Judgment be issued;

D. An Order awarding TBAC its costs and reasonable attorneys' fees be issued; and

E. An Order granting such other and further relief as the Court deems necessary, just and proper be issued.

Respectfully submitted,



T. Michael Guiffre
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6441
(202) 457-6315 (facsimile)

Counsel for Plaintiff Texas Bio- & Agro-
Defense Consortium

Dated: April 23, 2009

Of Counsel

Elizabeth M. Gill

Patton Boggs LLP

2550 M Street, N.W.

Washington, D.C.

(202) 457-6000

(202) 457-6315 (facsimile)

VERIFICATION

I have reviewed the foregoing complaint and attest that the facts stated therein are true and correct to the best of my knowledge.

NAME

Sworn to me on this _____ day of April, 2009.

Notary Public