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August 4, 2008

VIA OVERNIGHT MAIL

Dr. Samuel Bodman, Secretary
Department of Energy
1000 Independence Ave., S.W.
Washington, D.C. 20585

David L. Bibb
Acting Administrator
U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405

Re: Relocation of Non-Nuclear Production And Procurement Activities From The
Bannister Federal Complex In Kansas City, Missouri

Dear Secretary Bodman and Acting Administrator Bibb:

We are writing on behalf of the Natural Resources Defense Council (NRDC) to raise serious concerns regarding the recent Department of Energy National Nuclear Security Administration's (DOE/NNSA) decision, made in conjunction with the General Services Administration (GSA), to abandon the legacy of contamination at the Bannister Federal Complex in Kansas City, Missouri, and to move the production and procurement of non-nuclear components of nuclear weapons to a new, privately developed and locally-financed facility in a greenfield outside the City center (the Botts Road site). NRDC's partner organizations in the Nuclear Weapons Complex Consolidation (NWCC) network – including Nuclear Watch New Mexico, Tri-Valley CAREs, the Project on Government Oversight, and Physicians For Social Responsibility (Kansas City Chapter) – share these concerns.

As explained in more detail below, in order to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq., DOE/NNSA and GSA must withdraw their April 2008 Finding of No Significant Impact (FONSI) on this project and prepare a comprehensive Environmental Impact Statement (EIS) before deciding whether, and how, to modernize its production and procurement activities for non-nuclear components of nuclear weapons. Given (a) the extensive contamination at the Bannister Complex and the serious public health risks associated with that contamination; (b) the as-yet unresolved impacts associated with developing



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the Botts Road site; (c) the serious questions whether the agencies' proposed financing scheme for the new facility complies with the Public Building Act, 40 U.S.C. § 3302, and federal Anti-Deficiency Act (ADA), 31 U.S.C. § 1341; and (d) the integral relationship between this project and DOE/NNSA's overall effort to "transform" its nuclear weapons complex, it is apparent that the agency's decision regarding the modernization and relocation of its non-nuclear component fabrication capabilities is a "major federal action[] significantly affecting the quality of the human environment," 42 U.S.C. § 4332(C), thereby requiring an EIS. The EA and FONSI must also be set aside in light of the agencies' unlawful commitment to the construction of this new plant even before the NEPA process began, and commensurate failure to meaningfully consider and obtain public input concerning reasonable alternatives as required by NEPA.

Background

Over the past fifteen years, DOE – and now NNSA – has considered various options for manufacturing and/or procuring the non-nuclear components of nuclear weapons, which comprise upwards of 85% of each weapon. While these activities historically occurred at several different facilities, in 1993 DOE decided to consolidate most nonnuclear component production and procurement activities at its Kansas City Plant (KCP), situated within the GSA-administered Bannister Federal Complex in Kansas City, Missouri. In 1996, as part of the Stockpile Stewardship and Management Programmatic EIS (SSM PEIS) on the entire nuclear weapons research and production complex, DOE considered whether these activities should occur at other sites, including Sandia National Laboratory (SNL). At that time DOE decided that the environmentally preferred alternative was to downsize the existing facilities at the KCP rather than move elsewhere.

In December 2007, DOE/NNSA and GSA issued a Draft Environmental Assessment (DEA) proposing to move the KCP to a new building to be constructed outside the center of Kansas City, on land currently zoned for agriculture – the Botts Road site. Construction of the plant and associated local infrastructure improvements are to be funded with a combination of private and local revenue bond financing that appear to rely on a complex scheme of sublease payments flowing from NNSA to an entity called the Kansas City Planned Industrial Expansion Authority (PIEA) – via pass through payments from NNSA to GSA to the project developer to PIEA. The scheme contemplates that by way of these payments the developer – not NNSA or even GSA – will acquire title to the facility at the end of twenty years. Nonetheless, the PIEA bond financing is to be guaranteed with a 20 year lease by NNSA for the new Botts Road facility.

GSA obtained an option to acquire the property long before the DEA was prepared. In the DEA DOE/NNSA did not meaningfully consider moving this aspect of the overall nuclear stockpile and production activities to another location outside Kansas City, even though there are several facilities around the country where these activities could occur. The DEA also did not consider the legacy of contamination at the KCP, and the need to remediate the site should DOE/NNSA decide to move out.

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In the meantime, in January 2008 DOE/NNSA issued a Draft Supplemental EIS (SEIS) on the agency's proposal for transformation of its nuclear weapons complex. Although the production of non-nuclear parts for these weapons is plainly an integral part of that process, the KCP was the only NNSA site not considered in the Draft SEIS. Nonetheless, the other nuclear-weapons related activities at some of the locations where the KCP could be moved – such as Sandia National Laboratory (SNL) – were considered in the Draft SEIS.

Many who commented on the DEA complained that NNSA and GSA had unlawfully rejected serious consideration of moving the KCP to other sites such as SNL. In response, DOE/NNSA hired a contractor with close DOE ties to expand a previous cost study to include analysis of moving KCP operations to alternative sites. The expanded study essentially concluded that housing the new facility at the Botts Road site was the most economical alternative because DOE/NNSA had already made several years of progress toward that end.

DOE/NNSA and GSA issued a Final EA (FEA) and FONSI in April 2008. See 73 Fed. Reg. 23,244 (Apr. 29, 2008). Responding to the concerns about alternatives, in the FEA the agencies added several alternatives that had not been included in the DEA – including moving the KCP to other sites, including SNL. However, the agencies did not reopen the EA to further public comment. The FEA also did not add any discussion of the costs or environmental considerations associated with the massive cleanup of the KCP that will be required should DOE/NNSA leave the facility.

Discussion

NEPA, and the statute's binding implementing regulations – issued by the Council on Environmental Quality (CEQ) – provide that although an agency may prepare an EA in order to determine whether an EIS is required, an EIS is mandatory whenever the impacts of a major federal action may be significant. 40 C.F.R. § 1501.4(b); 42 U.S.C. § 4332(c). The CEQ regulations identify a series of “significance” factors that must be considered to determine whether the action may be significant, any one of which is sufficient to require an EIS. The factors of particular relevance here include (a) whether the project will have “highly uncertain” or “highly controversial” effects; (b) “[t]he degree to which the proposed action affects public health or safety”; (c) the presence of “[u]nique characteristics of the geographic area such as proximity to . . . wetlands”; (d) whether the project is “related to other actions with individually insignificant but cumulatively significant impacts”; or (e) whether it “threatens a violation of Federal” law. 40 C.F.R. § 1508.27(b). Moreover, these factors must be evaluated with reference to “the locality” where the action is taking place. Id. § 1508.27(a).

The decision to abandon the highly contaminated KCP itself implicates several of these significance factors, as it poses both highly uncertain and highly controversial environmental threats that plainly affect local public health and safety. See, e.g., Karen Dillon, Former Bannister Plant's Future A Worry, Kansas City Star, June 6, 2008. Although there is no dispute the KCP plant is highly contaminated as a result of DOE's decades of manufacturing there, the

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agency has not even begun to consider the steps necessary to remediate that contamination – which must occur if the agency is going to leave the site. The controversy surrounding that contamination, the uncertainty regarding its scope and the scope of the cleanup that will be necessary, and the threats the site poses to public health and safety in the area alone mandate an EIS.

The agencies claim that remediation of the KCP need not be considered as part of this NEPA process because no cleanup decision for the site has been made. This argument is specious. Under the no action alternative, DOE/NNSA would remain at the KCP, the present environmental monitoring systems would continue, and it may be years before a final cleanup occurs. On the other hand, should NNSA/DOE leave the site, new monitoring systems will have to be developed to account for the lack of ongoing production at the facility; a survey of the legacy of contamination at the site will inevitably need to be conducted; and a final remediation plan will have to be developed and implemented. Given the starkly different environmental impacts associated with these alternatives, DOE/NNSA has no basis for claiming that the KCP cleanup issue may be ignored. See, e.g., NRDC v. DOE, No. 04-4448, 2007 WL 1302498 (N.D. Cal. May 2, 2007) (mandating an EIS for DOE's cleanup of another contaminated production facility). Moreover, at bare minimum, the cleanup is an “indirect effect” of moving the KCP – an effect the CEQ regulations squarely require agencies to consider. 40 C.F.R. § 1508.8(b) (“indirect effects . . . are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable”); see State of Idaho v. ICC, 35 F.3d 585, 596-97 (D.C. Cir. 1994) (rejecting agency's promise to address the foreseeable impacts of a project at some point in the future; an “overarching examination of environmental problems” must be conducted “at the time the [relevant] decision is made”).

Accordingly, the significance factors for projects with uncertain or controversial environmental effects and public health risks are plainly triggered here. So too is the factor for unique geographic areas, since the EA indicates there are wetlands on the Botts Road site. 40 C.F.R. § 1508.27(b)(3). Indeed, as with the KCP cleanup, the agencies must finish their analyses of the wetlands issue, including completing the Clean Water Act Section 404 process, before making their final NEPA decision here.

DOE/NNSA's plan to use tax-exempt public industrial bond financing and then enter into a long-term lease for the Botts Road site implicates yet another significance factor – for a project that “threatens a violation of Federal . . . law or requirements imposed for the protection of the environment.” 40 C.F.R. § 1508.27(10). Although the agencies purport to be proceeding under the authority of the Public Building Act, 40 U.S.C. § 3302, et. seq., in fact that statute can only be used for buildings “for use as office or storage space or both by one or more federal agencies or mixed-ownership Government corporations,” id. § 3301(5)(A), and, in any event, specifically excludes buildings that involve “chemical manufacturing or development projects” or are associated with “nuclear production, research or development projects,” id. § 3301(5)(C)(v) –

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exclusions that plainly apply to this facility. An EIS is therefore required to address these legal issues as well.¹

It is also well-established that an agency cannot avoid an EIS by segmenting a larger project into smaller pieces. One Thousand Friends of Iowa v. Mineta, 364 F.3d 890, 894 (8th Cir. 2004). The agencies' decision here constitutes unlawful segmentation in at least three ways.

First, the agencies are unlawfully segmenting the construction of a new facility from the cleanup of the KCP, which, as noted, must be considered here. Certainly considering the project as a whole – which involves both disposing of one site and acquiring another – there may be significant environmental impacts here.

Second, even as to the Botts Road site, the agencies have segmented away important environmental impacts by claiming that certain particularly hazardous production activities – such as chrome plating – will be conducted off-site. Unless and until these activities are no longer occurring at the KCP, the agencies must assume they will occur at the Botts Road site as well, and in any event the impacts in any new location also must be considered.

Moreover, if in fact this and other activities will occur at other “outsourced” locations, the agency has no coherent rationale for having refused to consider dividing other aspects of this process among other locations, be they other private companies or other NNSA components, such as SNL. The agencies cannot on the one hand claim that dividing up KCP activities is unreasonable because it is more efficient to do all of these activities in one place – the rationale provided for rejecting various multi-site alternatives – and at the same time segment away the impacts of certain activities by claiming that they will be done elsewhere.

Third, the agencies' unlawful segmentation here is evidenced by the close relationship between this project and the overall stockpile management modernization project that DOE has initiated. Producing the non-nuclear parts for nuclear weapons plainly has no “independent utility” absent the production of the weapons themselves. Mineta, 364 F.3d at 894. Accordingly, the agencies also cannot avoid an EIS by segmenting this project from the larger effort underway.

The agencies' effort to ignore the broader SEIS also highlights a fundamental deficiency in the FEA itself – the failure to meaningfully consider alternatives that might consolidate the KCP's functions with other nuclear weapons-related activities at other DOE locations, such as SNL, that

¹ The project also appears to violate the ADA – which prohibits agencies from entering into multi-year financial commitments without a multi-year appropriation, 31 U.S.C. § 1341 – because the agencies intend to enter into a multi-year lease commitment without a multi-year authorizing appropriation to do so.

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are being considered in the SEIS. NNSA's effort to gloss over this deficiency by preparing a cost study and adding non-Kansas City alternatives to the FEA is insufficient for several reasons.

To begin with, the only reason the cost study concluded that moving to the Botts Road site would be the most economical alternative is because NNSA has already made significant progress toward obtaining the new facility, and it would take several more years to plan for the construction of a plant at SNL. Indeed, if that lead time is removed from the equation, the study showed that the cheapest option is to move these activities to SNL.

However, the agencies undeniable commitment to the Botts Road site even before the NEPA process began evinces the very kind of predetermination prohibited by the statute. See, e.g., Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000). Thus, for example, in Metcalf, the Ninth Circuit set aside an EA because the agency had entered into an agreement for the proposed activity before the EA was prepared, making the NEPA process a sham. Id. at 1143. Similarly, here, the agencies' rejection of non-Kansas City alternatives based on the significant progress made toward the Botts Road site demonstrates that they knew the outcome before the NEPA process even began. Indeed, since GSA was required to provide specific information to Congress about the proposed project pursuant to the Public Buildings Act – including where the new facility would be located – before it undertook this NEPA process, it is evident that the NEPA process merely validated a pre-ordained decision.

The agencies' unlawful predetermination is further evidenced by the decision to address the non-Kansas City alternatives for the first time in the FEA, without even providing another opportunity for public comment. In short, the fact that the agencies did not even permit the public to weigh in on these new alternatives demonstrates that they were not taking a "hard look" at them, as NEPA requires. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

Finally, the FEA also fails to adequately consider the environmental impacts of the alternatives that were originally considered. Indeed, while one of the alternatives provides for keeping these activities at the KCP – thus delaying the cleanup of the site to some indeterminate time in the future – others (including the chosen Botts Road site alternative) involve leaving the KCP, but, as noted, the EA entirely ignores the KCP cleanup.

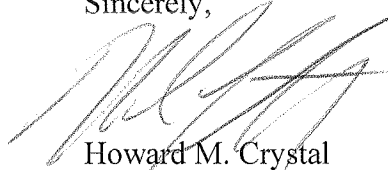
For all these reasons, DOE/NNSA and GSA must prepare an EIS on this project, and must insure that its NEPA process fully and fairly considers the environmental impacts of moving the KCP to the Botts Road site, and all reasonable alternatives to that proposal.

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Unless, within the next thirty days, the agencies are prepared to commit to preparing an EIS on this project, NRDC intends to seek judicial relief to prevent the agencies from proceeding with this project in violation of federal law.

Sincerely,



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