

March 28, 2007

BY EMAIL AND U.S. MAIL

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Dear Messrs. D'Agostino, Detwiler and Glenn and Ms. Williams:

I write to you on behalf of Nuclear Watch of New Mexico concerning proposed interim operations by Los Alamos National Laboratory's (LANL's) Bioscience Division at the BSL-3 laboratory at LANL.

As you know, while the BSL-3 facility has been constructed, there has as yet been no compliance with the National Environmental Policy Act (NEPA) with respect to that BSL-3 facility. The draft Environmental Impact Statement (EIS) currently being prepared for BSL-3 facility operations pursuant to NEPA has not even been released, much less a final EIS or Record of Decision (ROD). Yet NNSA is considering beginning operations that could be prejudicial in advance of the risk analysis and opportunity for public comment that NEPA mandates. We strongly urge you not to proceed with interim operations at the BSL-3 facility before approval of a ROD, as such operations would be unlawful under NEPA, and would run directly contrary to NEPA's philosophy of analyzing environmental impacts **before** a federal action is undertaken.

We have been informed that interim operations by the Bioscience Division at the BSL-3 facility would include the following:

- 1) DNA sequencing using a new technology, GS-20 DNA sequencer manufactured by 454 Life Sciences;
- 2) DNA analysis in support of Bioforensics Research and Development projects;

- 3) BSL-1 work consisting of organism culture and analysis for general biosafety readiness.

We further understand that some federal officials are claiming that these proposed interim operations at the BSL-3 facility would not violate NEPA because they are covered by Categorical Exclusions (CE) B.3.6 and/or B.3.12, contained in 10 C.F.R. § 1021.410. With respect to CE B.3.6, we understand the argument to be that interim operations fall within the LAN-05-004 CE, which covers "Chemistry Division Research and Development at LANL." As is clear from its title alone, however, this CE cannot possibly cover activities being carried out by LANL's Bioscience Division; rather, it covers only Chemistry Division activities. The two divisions have entirely different missions and activities. Moreover, nowhere does LAN-05-004 purport to cover any actions regarding DNA sequencing or analysis. And the only BSL-1 activities contemplated in LAN-05-004 focus on "metal interactions with proteins, protein purification, bioremediation, and protein spectroscopy." Clearly that is very different from "organism culture and analysis for general biosafety readiness," which is proposed to be done by the B-Division at the BSL-3 facility.

Nor could the B.3.12 CE authorize any of the proposed interim activities, because § 1021.410 forbids any of the CEs in that section from being used in furtherance of a proposal that is "connected (40 CFR 1508.25(a)(1)) "to an action with potentially significant environmental impacts. 10 C.F.R. § 1021.410(b)(3). The interim actions clearly are "connected" to the B-Division actions contemplated to occur at the BSL-3 facility after all NEPA work for the facility has been completed and approved because they are closely related to the contemplated BSL-3 actions and will facilitate those future biological uses of the facility. And, as NNSA's decision to prepare an EIS in connection with the BSL-3 facility confirms, those actions have potentially significant environmental effects. Further, we are aware of no external mechanism that can guarantee that once operations of any kind begin at the BSL-3 facility, they will remain limited to just BSL-1 activities.

The proposed interim use of the BSL-3 facility would clearly violate 40 C.F.R. § 1506.1, and DOE's "Guidance Regarding Actions That May Proceed During the National Environmental Policy Act (NEPA) Process: Interim Actions" (2003) also. Section 1506.1 prohibits interim actions while work on an EIS is taking place where such actions would either have an adverse environmental impact, or limit the choice of reasonable alternatives. 40 C.F.R. § 1506.1(a). In addition, where the EIS being prepared may be considered a "program" EIS, interim action cannot proceed unless such action

- (1) Is justified independently of the program; (2) Is itself accompanied by an adequate environmental impact statement; and (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

The LANL BSL-3 facility will be one of the first two BSL-3 facilities at any of NNSA's sites. Together with the proposed BSL-3 facility being planned for Lawrence Livermore National

Laboratory, the two facilities effectively constitute a new biological program being undertaken by NNSA. The proposal for interim activities at the BSL-3 facilities violates at least the second and third criteria listed above. As noted above, this proposal is not accompanied by adequate NEPA documentation. In addition, it would clearly "prejudice the ultimate decision on the program," by readying the facility for BSL-3 usage, and by predisposing NNSA to decide to allow BSL-3 activities to proceed at the LANL facility.

In addition to prejudicing the ultimate decision to be made concerning BSL-3 operations, a decision to conduct operations at the BSL-3 facility before issuance of a ROD will also create the public impression that the whole NEPA process is a meaningless exercise that will inevitably arrive at a predetermined decision. This also is contrary to the purpose of NEPA.

Furthermore, it cannot be said that the proposed interim actions will not have any adverse environmental impacts. BSL-1 work, while less risky than BSL-2, 3, or 4 work, still has inherent risks. Indeed, the Biosafety in Microbiological and Biomedical Laboratories (BMBL) description of BSL-1 refers expressly to "minimal potential hazard to laboratory personnel and the environment" -- underscoring that such actions clearly are not risk-free. And the DNA sequencing proposed to take place at the BSL-3 facility would use a new technology that, by virtue of being new, necessarily entails unknown risks that have not previously been experienced at LANL.

Moreover, NNSA's November 29, 2005 Notice of Intent (NOI) to prepare an EIS for the BSL-3 stated that one reason requiring preparation of an EIS was that "it was necessary to conduct additional seismic analysis of the location of the building on fill material on the sloping side of a canyon." This calls into question not just whether BSL-3 activities can be safely conducted before these issues are resolved through the EIS, but whether any operations can be safely conducted.

Finally, a decision to undertake interim operations at the BSL-3 facility, even if those operations are less dangerous than the BSL-3 actions contemplated for later operations at the facility, still will undermine the entire NEPA process by contradicting assurances given to the public in the NOI, first, that "[n]o operations of any type have been conducted in the facility," and second, that a "No Action Alternative" that contemplated no operation of the facility would be presented and analyzed in the EIS. The NOI's statement that it would address a No Action Alternative "under which the constructed facility would not be operated" plainly means no operations of any kind, and does not allow for different types of operation. A decision to proceed with interim operations would unlawfully eliminate that alternative, and seriously call into question the validity of the soon-to-be released draft EIS and the entire NEPA process. Moreover, it is likely that scoping comments would have been substantially different had the public been aware that, contrary to the assurances in the NOI, a decision would be made to use the BSL-3 facility for biological and chemical research before the NEPA process was completed.

For all of these reasons, the proposal to conduct interim work at LANL's BSL-3 facility would violate NEPA, NEPA regulations (including 40 C.F.R. § 1506.1), DOE's own NEPA


Messrs. D'Agostino, Detwiler and Glenn and Ms. Williams

March 28, 2007

Page 4

regulations, and DOE's NEPA Guidance. Therefore, no work should take place at the LANL BSL-3 facility until a legally adequate environmental impact statement has been completed and NNSA has issued a formal Record of Decision to operate, as the National Environmental Policy Act requires.

Very truly yours,

A handwritten signature in black ink, appearing to read "Alletta Belin". The signature is written in a cursive style with a distinct loop at the end of the last name.

ALLETTA BELIN