

February 25, 2011

Dr. Steven Chu, Secretary
Department of Energy
1000 Independence Avenue SW
Washington, DC 20585

By email to: the.secretary@hq.doe.gov

Re: Need for Re-Scoping the LANL BSL-3 EIS

Dear Secretary Chu:

We, the undersigned representatives of non-governmental organizations, respectfully request that the “Environmental Impact Statement for the Operation of a Biosafety Level-3 Facility at the Los Alamos National Laboratory, in Los Alamos, New Mexico (DOE/EIS-0388)” (hereinafter “LANL BSL-3 EIS”) be re-scoped in advance of the release of its draft.

The Environmental Protection Agency (EPA) declared in “Frequently Asked Questions”:

8. What is the public's role in the NEPA process?

The public has an important role in the NEPA process, *particularly during scoping*, in providing input on what issues should be addressed in an EIS and in commenting on the findings in an agency's NEPA documents. [Emphasis added, <http://www.epa.gov/compliance/resources/faqs/nepa/index.html>]

In this instance the public is being deprived of its right to that “particularly important role.” As you know, the initial scoping period for the LANL BSL-3 EIS ended on January 17, 2006, more than five years ago. Since then significant changes have occurred at the Los Alamos National Laboratory (LANL) and elsewhere. Some examples include a change in Lab management from a non-profit entity to a for-profit limited liability corporation. More directly relevant, in 2007 LANL completed an Updated Probabilistic Seismic Hazards Analysis (PSHA) that recognized greatly increased seismic risks at the Lab. The Biosafety Level 3 (BSL-3) building is located very close to the known seismic fault area in which the PSHA reported a 50 percent increase in the probabilistic seismic risk.

Additionally, two relevant and troubling incidents occurred at the Lawrence Livermore National Laboratory (LLNL) before the LANL BSL-3 EIS scoping period (and hence could have been commented upon), but did not come to the light of day until after it ended (thereby raising equaling troubling issues of transparency and full disclosure as well). One incident concerned unauthorized experiments that lacked approval by the Centers for Disease Control and Prevention (CDC); the second over sloppy packaging and transport of anthrax samples, which was serious enough to result in a \$450,000 fine against the University of California (UC), LLNL’s manager. Not unreasonably, this calls into question the quality of future operations at LANL, managed now by a corporate consortium that includes UC.

More broadly, in September 2009 the Government Accountability Office released its report “High-Containment Laboratories- National Strategy for Oversight is Needed,” whose title alone points to critical scoping issues (see more below).

Finally, two of the signatories below (Tri-Valley CAREs and Nuclear Watch NM) were co-plaintiffs in a lawsuit contesting the adequacy of the December 2002 LLNL BSL-3 Environmental Assessment. As a result, in October 2006 the Ninth Circuit Court of Appeals issued a memorandum opinion (D.C No CV-03-03926-SBA) that remanded the case to DOE to consider whether the threat of potential terrorist activity required preparation of an environmental impact statement (in contrast to just an environmental assessment). DOE subsequently issued Department-wide interim guidance on how to address “intentional destructive acts” in its NEPA processes. However, without re-scoping, the public was deprived of the opportunity to offer scoping comment pertaining to the LANL BSL-3 EIS on this important new requirement.

Council on Environmental Quality (CEQ) NEPA implementing regulation Sec. 1501.7 “Scoping” requires that:

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (Sec. 1508.22) in the Federal Register except as provided in Sec. 1507.3(e).

(a) As part of the scoping process the lead agency shall: ...

6. Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in Sec. 1502.25.
7. Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

Concerning #7 above NNSA published a Notice of Intent in the Federal Register on November 29, 2005, and stated it “expects to issue a draft BSL-3 EIS for public review in the spring of 2006.” It further stated that “[i]ssuance of the final BSL-3 Facility EIS is scheduled for late 2006.”

Obviously that did not occur. We now argue that National Nuclear Security Administration (NNSA) has a duty to re-publish a Notice of Intent in the Federal Register, updating “the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.” We emphasize that “preparation of environmental analyses” must begin with the scoping process (in this case re-scoping), as clearly called for by NEPA. According to the Department’s own NEPA implementing regulations, “It is DOE’s policy to follow the letter and spirit of NEPA; comply fully with the CEQ regulations; and apply the NEPA review process early in the planning stages for DOE proposals.” [CFR Part 1021 Sec. 1021.101

“Policy.”] In order to comply with the spirit of NEPA, we strongly suggest that DOE/NNSA re-scope the LANL BSL-3 EIS, since the old scoping process is now long stale.

Relevant to #6 above, we are concerned that additional reasonable alternatives will not be adequately analyzed in this new LANL BSL-3 EIS. In the 2005 Notice of Intent only three alternatives were set forth. We would add a fourth reasonable alternative – Operate the existing building as a BSL-1 or BSL-2-level and then, if truly needed, send LANL researchers offsite to BSL-3 laboratories not located at nuclear weapons laboratories. DOE must look outside its own agency to other agencies that are already housing BSL-3s, like CDC. Send the researchers to the bugs instead of bringing the bugs to the Labs. We think this to be a substantially different alternative from that of just operating the LANL BSL facility at either a BSL-1 or -2 level. In other words, we are arguing that this NEPA process should analyze formalization of a partnership with CDC as a reasonable and viable alternative.

Indeed, we argue that NNSA has a duty to look beyond itself and LANL. NEPA created the Council on Environmental Quality and endowed it with sweeping policy-making tools. In the CEQ’s “40 Frequently Asked Questions” the Council asks on behalf of the public and then responds:

2b. Must the EIS analyze alternatives outside the jurisdiction or capability of the agency or beyond what Congress has authorized?

A. An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered. Section 1506.2(d). Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies. Section 1500.1(a). [Emphasis added; <http://ceq.hss.doe.gov/nepa/regs/40/1-10.HTM#1>]

We therefore strongly request that DOE invite CDC to be a “cooperating agency” in this LANL BSL-3 EIS process. This is appropriate on its own merits since CDC manages existing BSL-3 facilities in which LANL researchers could conduct such research. Further, our fourth reasonable alternative has merit because according to the CDC’s own website:

The CDC Select Agent Program regulates the possession, use, and transfer of biological agents and toxins that could pose a severe threat to public health and safety (select agents)... The Select Agent Program promotes laboratory safety and security by

- Developing, implementing, and enforcing the select agent regulations,
- Providing guidance to the regulated community, and
- Inspecting facilities working with select agents.

[See <http://www.bt.cdc.gov/cdcpreparedness/dsat/>]

New Information. The LLNL violated regulations by conducting “restricted experiments” without proper approval, only to be discovered during an inspection by CDC in August 2005. But this information was not made public until after the LANL BSL-3 EIS scoping process ended. These restricted experiments used recombinant DNA that involved the deliberate transfer of a drug resistance trait to select agents not known to acquire the trait naturally. Because of the dangers involved in transferring drug resistance to select agents, restricted experiments require approval from the Secretary of the Department of Health and Human Services. Livermore Lab did not have that approval, but chose to run the experiments anyway. After discovering the illegal restricted experiments, the CDC required Livermore to destroy the research samples. Otherwise, LLNL may have lost CDC’s authorization for its select agent program.

To compound matters, these experiments were conducted around the time of an anthrax release caused by Livermore Lab in August-September 2005. The anthrax incident led to the exposure of five individuals and resulted in a \$450,000 fine against LLNL. The anthrax release also laid bare a variety of errors and deficiencies within the Livermore Lab’s select agent program, including in the Lab’s response to the mishap, but again this information did not become available to the public until after the LANL BSL-3 scoping process ended.

We submit that what occurred at LLNL is highly relevant to what can occur at LANL. The issue of why the CDC, the regulator, should be a “cooperating agency” in this LANL BSL-3 EIS is a good example of why re-scoping should have occurred. It would have provided the opportunity for interested members of the public to request CDC’s active participation.

As previously mentioned, in October 2009 the United States Government Accountability Office (GAO) released its report entitled “High-Containment Laboratories- National Strategy for Oversight is Needed,” that has significant bearing on existing and proposed NNSA BSL-3 facilities. Following the Report's release, subcommittee hearings were held in both the United States Senate and House of Representatives where Nancy Kingsbury, Ph.D. and Managing Director at the GAO, gave testimony warning members of the grave concerns that the Report identified relating to the proliferation of high-containment laboratories working with dangerous biological pathogens. This is because the deliberate or accidental release of biological agents can have disastrous consequences by exposing workers and the public to dangerous pathogens.

Specifically, the Report (<http://www.gao.gov/new.items/d09574.pdf>) found a failure of systems and procedures at high-containment laboratories that revealed a failure to comply with regulatory requirements; safety measures that were not commensurate with the level of risk to public health posed by laboratory workers and pathogens in the laboratories; and the failure of agencies to fund ongoing facility maintenance and monitor the operational effectiveness of laboratory physical infrastructure.

The Report also highlighted that (1) an ill-intentioned insider can pose a risk not only by passing on confidential information, but also by removing dangerous material from high-containment laboratories; and (2) it is impossible to have completely effective inventory control of biological material with currently available technologies. It further directed laboratory operators to develop and work through potential failure scenarios and to use that information to develop and put in

place mechanisms to challenge procedures, systems, and equipment to ensure continuing effectiveness. This point significantly relates to the concern that NNSA BSL-3 facilities may be especially vulnerable to a terrorist attack, which the public was deprived of the opportunity to comment in the 2005 scoping process.

In the time since initial scoping there has been, in addition to scientific and technical evolution not contemplated in that initial process, a major economic dislocation that has changed the allocation, availability and cost of human and produced resources that are required for the Biosafety facility. Such changes need to be considered in order to adequately assess the appropriateness of operating the facility in the proposed location, if at all. Anything less is not in accord with the underlying purposes of the evolution in preparation of an environmental impact statement. To completely ignore the effect of passing time and ensuing social change upon the substantive basis of a proposal for a very large expenditure of taxpayer funds is an unacceptable elevation of form over substance. Failure to conduct a timely scoping process leading to a timely EIS means that the appropriate cost-benefit analyses and proper consideration of the impacts upon the human and natural environment have not and will not take place for this project.

A 2011 BSL-3 EIS is an entirely different process than what was first started in 2001. [*Please note that process ended in DOE withdrawing the 2002 environmental assessment in 2004 and the new scoping process began later that year, which ended in January 17, 2006.*] A new EIS process is needed to make this 2011 draft EIS timely and relevant. Under Council of Environmental Quality Regulations, it is contemplated that this process starts from the beginning. 40 C.F.R. §§ 1500 – 1508.28. That means new scoping takes into account the changes of the past half-decade and relates those changes to the process and evolved content of the EIS. One finds it difficult to imagine that a reviewing court would accept an EIS based upon more than a half-decade old scoping process. If the scoping has not changed since 2006, surely a 2011 EIS will be out of date by the time it is released. We can only hope that the 2011 draft will NOT rely on the 2002 environmental assessment to evaluate risks.

Apparently, there are no hard and fast deadlines associated with this EIS, as the half-decade delay between scoping and EIS attest. Thus, adding another several months for new scoping and a realignment of the EIS product with the results of that scoping process will not have any programmatic impact. However, no matter where one stands on the efficacy of this proposed project, new scoping will undoubtedly improve the EIS and, most importantly, put into effect the public policy of the National Environmental Policy Act and Council on Environmental Quality Regulations, which DOE purports to follow in both spirit and letter. To close, we strongly urge DOE/NNSA to re-scope the LANL BSL-3 environmental impact statement.

Thank you for your consideration. Should you have any questions please contact Jay Coghlan or Scott Kovac at Nuclear Watch New Mexico (505.989.7342; info@nukewatch.org).

Sincerely,

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