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BY HAND and EMAIL (rick.sullivan@state.ma.us)

Secretary Richard K. Sullivan, Jr.
Executive Office of Energy and Environmental Affairs
100 Cambridge Street, Suite 900
Boston, MA 02114

**Re: National Emerging Infectious Diseases Laboratories, Boston University
Draft Record of Decision on MEPA Waiver Request, EOEEA #12021**

Dear Secretary Sullivan:

We represent the plaintiffs — concerned community members, the Conservation Law Foundation (“CLF”) and the Lawyers Committee for Civil Rights Under Law of the Boston Bar Association (the “Lawyers Committee”) — in state and federal cases regarding the proposed National Emerging Infectious Diseases Laboratories (the “NEIDL”) at Boston University Medical Center. *Ten Residents of Boston v. Boston Redevelopment Authority, et al.*, Civil Action No. 5-0109-BLS1 (consolidated with No. 5-02665) (Suffolk Sup. Ct.); *Allen, et al. v. National Institutes of Health, et al.*, Civil Action No. 06-10877-PBS (D. Mass.). On September 27 and October 19, 2011 we provided comments opposing Boston University’s (“BU’s”) request for a Phase One waiver from applicable MEPA regulations for research in BSL-1, BSL-2, and BSL-3 areas of the NEIDL (the “Waiver Request”). We now write to comment on the Draft Record of Decision (“DROD”) and Certificate on the Notice of Project Change (the “NPC Certificate”), both dated December 2, 2011. Although our clients continue to oppose a waiver that would permit research in *any* area of the laboratory, a waiver, if granted, should be limited to research in BSL-1 and BSL-2 areas of the NEIDL only.¹ You should not consider allowing research in BSL-3 areas of the NEIDL until you have had a full opportunity to review the supplemental final

¹ Our clients maintain that the waiver request should have been completely denied for the reasons stated in our letters dated September 27 and October 19, 2011 and reserve their rights to so argue in the future. As explained in those letters, BU has failed to meet the criteria in 310 CMR 11.11 for any waiver. Further, although BU requested leave to submit additional information to EOEEA in support of the waiver request on October 11, its only additional submission was a letter dated October 24 purporting to “clarify” its Notice of Project Change/Phase One Waiver Request. That submission did not include any new substantive information or provide any further rationale for granting the waiver, and our clients continue to rely on their September 27 and October 19, 2011 letters.

environmental impact review for the NEIDL (the “SFEIR”) as required by the Superior Court and the Supreme Judicial Court of Massachusetts.²

Through this letter, our clients provide the following comments on the Secretary’s Draft Decision granting a waiver for BSL-1 and BSL-2 research at the NEIDL, but denying the waiver request for BSL-3 level research. Our clients appreciate that the Secretary recognizes, as the courts have, that there is a significant difference between BSL-2 and BSL-3 level research, and the risks associated with that research.

I. A waiver should be limited to BSL-1 and BSL-2 research at the NEIDL only.

We are pleased that both the DROD and the NPC Certificate reflect the concerns of area residents, our clients and other community members regarding the risks posed by research on highly contagious pathogens at the NEIDL. Were the requested waiver to be granted, research on these contagious pathogens would be permissible in the BSL-3 areas of the NEIDL. Our clients continue to have grave concerns about BSL-3 level research at that location, and are relieved that the DROD and the NPC Certificate have rejected that portion of the waiver request.

The potentially lethal risks associated with research in BSL-3 areas of the NEIDL are fully described in our prior letters and need not be repeated here. These risks have also been recognized by both BU and your office. As the NPC Certificate states, these risks are acknowledged in BU’s description of BSL-3 lab space. As you also note in the NPC Certificate, the National Research Council (“NRC”) committee reviewing the pending Draft Supplementary Risk Assessment for the NEIDL has explained that certain agents typically studied in BSL-3 laboratories —such as pneumonic plague and SARS virus—may in fact present more serious potential risks than some BSL-4 agents.³ Thus, the DROD rightly prohibits research in BSL-3 areas of the lab until BU submits an adequate SFEIR and you review and certify it. The NPC Certificate also appropriately rejects BU’s contention that “the only risks associated with the project lie in the research that will be performed in BSL-4 laboratories.” NPC Certificate at 9. As is clear from the facts, and the analysis generated by both BU and your office, your office’s review and certification of an adequate SFEIR prior to permitting BSL-3 level work to take place is necessary to ensure compliance with MEPA and to help avoid unacceptable risks to the environmental justice communities of the South End and Roxbury.

² BU has recently filed a clarifying letter with the secretary, dated December 14, 2011, asking that BSL-1 and BSL-2 activities be permitted to take place anywhere in the NEIDL, and not be limited to facilities previously designated as BSL-1 and BSL-2 lab space. If the secretary grants the waiver to permit BSL-1 and BSL-2 level research in the NEIDL at this time, our clients are not concerned about where in the NEIDL that research is performed, so long as appropriate safety measures are provided for all research that is being done.

³ There is also dispute in the scientific community as to whether certain research tasks should be performed in BSL-3 or BSL-4 lab areas. As a result, easily communicable and dangerous pathogens such as the 1918 pandemic flu virus and the avian flu virus have been studied in BSL-3 laboratories. Jocelyn Kaiser, *1918 Flu Experiments Spark Concerns About Biosafety*, *Science*, Vol. 306 (Oct. 22, 2004) (Available at mindfully.org/Health/2004/Biohazard-1918-Flu22oct04.htm).

Equally important, EOEEA is “‘legally barred’ by prior judicial decisions from acting on [BU’s] waiver request for BSL-3 level research until [you] are able to independently review the risk assessment for the contagious pathogens proposed for study by BU at the Biolab.” *Id.* at 6. These judicial decisions require EOEEA to review the SFEIR, without deference to NIH’s review of the federal SFEIS. *Id.* Pursuant to the Court decisions relating to this matter, the SFEIR must assess “laboratory research that may qualify as BSL-3 and BSL-4,” including worst case scenarios for the release of pathogens in either type of lab. *Id.* at 9. It must also include an adequate assessment of alternative locations for the project. *See also Allen v. Boston Redevelopment Authority*, 450 Mass. 242, 257, 259 (2007) (holding that prior risk assessment “inadequately addressed the consequences of a release of contagious pathogens from the Biolab,” and “never addressed [reasonable alternatives]...even insofar as to explain that locations outside the South End would not, for whatever reasons, be feasible.”). As you also state, the SFEIR should “address the Metropolitan Area Planning Council’s concern regarding the transport of hazardous materials to and from the project site.” NPC Certificate at 9. Where BU has thus far not taken any of these steps, EOEEA cannot legally grant a waiver for BSL-3 level research.

The limitation of the waiver, as described in the DROD, to only BSL-1 and BSL-2 level research is also appropriate in light of the history of the NEIDL proposal. As described in the NPC Certificate, the NEIDL proposal has been the subject of ongoing federal and state litigation, along with oversight by the NRC and NIH Blue Ribbon Committees, and significant public controversy, all of which are consequences of BU’s failure to prepare a scientifically adequate FEIR or FEIS. The denial of the requested waiver, a waiver that would permit BSL-3 level research at the NEIDL, maintains your authority to review the final SFEIR produced by this lengthy process and ensures that the concerns of community members, the courts, and the oversight committees are addressed.

II. Your final decision on the waiver should explicitly deny BU’s request for a waiver to perform BSL-3 level research.

As stated in our prior letters, BU has repeatedly provided vague and incorrect information regarding this project, has often refused to meet with community members, and has set meetings at times and locations that are inconvenient or inaccessible to those community members most affected. BU has also failed to disclose information regarding a tularemia infection in its laboratories, allowed unpermitted sewer discharges from its facilities, and had a fire in one of its BSL-3 laboratories. This conduct has, understandably, engendered significant community distrust. The waiver request, an attempt to evade a significant portion of the MEPA process, has only intensified and provided further justification for that distrust among the members of the community.

It is therefore crucial that your final decision on the waiver request state in unequivocal terms that the waiver applies to BSL-1 and BSL-2 level research *only*. In the DROD you “propose to grant the waiver requested for this project, which will allow the proponent to proceed with all applicable permitting necessary for the utilization of BSL-2 research space in

the NEIDL Building prior to preparing an SFEIR/risk assessment for the entire project.” It would be preferable to state more plainly that you are “denying the waiver request to the extent it applies to research in BSL-3 areas of the NEIDL or to BSL-3 level research at the NEIDL.” Such language would clarify to BU and the public that BSL-3 level research at the NEIDL is not permitted until you have certified an SFEIR.⁴

Your final decision should also include the more fulsome background and history of the NEIDL project that you present in the NPC Certificate rather than the more limited account that is contained in the DROD. This discussion demonstrates why you cannot legally permit any BSL-3 level research prior to your independent review of the SFEIR. The final decision should also reflect the fact that your review is independent of any review conducted by NIH.

III. Your final decision should include conditions to ensure that BU engages in only BSL-1 and BSL-2 level research at the NEIDL pursuant to the waiver.

The final decision should also include enforceable conditions preventing BU from intentionally or accidentally flouting the terms of a limited waiver and proceeding with BSL-3 level research or with research on pathogens that should only be studied in BSL-3 areas. EOEEA should retain its power to revoke the waiver that it has granted if BU does not comply with these conditions. The DROD includes one such condition requiring the MWRA to incorporate clear and enforceable language into the Sewer Use Discharge Permit in order to ensure that only BSL-2 work is conducted at the NEIDL. That condition should be applicable to *all* future permits required for operation of the NEIDL.

The final decision should also include conditions that require BU to “work with community members to address their ongoing concerns,” as you urge BU to do in the NPC Certificate. First, BU should be required to disclose the pathogens that it intends to study in the BSL-1 and BSL-2 laboratories to EOEEA and the public at least thirty days before they are stored or used at the NEIDL. That disclosure should also be reviewed by the community advisory board proposed below. BU has been unwilling to disclose the pathogens it intends to study in the past, despite multiple requests from our clients and other community members. If BU is granted a waiver for BSL-2 level research pending completion of an SFEIR, it must, at the very least, meaningfully inform community members of the pathogens it intends to bring into their midst.

Second, EOEEA and BU should establish a community oversight board to review such disclosures and monitor BU’s compliance with the terms of the waiver. Although the NPC Certificate cites BU’s Institutional Biosafety Committee (“IBC”) and Community Liaison

⁴ You suggest in the NPC Certificate that BU may choose “to file a future NPC and waiver request on BSL-3 activities after NIH completes its review and BU provides sufficient information on BSL-3 to meet the requirements of the SFEIR.” That suggestion should not be included in your final decision. Granting BU a waiver request following NIH review, but prior to your review of the SFEIR, would unnecessarily deprive you of your authority to review the SFEIR and the cumulative impacts of the project without saving BU a significant amount of time in opening the remaining areas of the NEIDL.

Committee (“CLC”) as community oversight mechanisms, neither entity adequately represents the surrounding communities. The IBC and the CLC are both BU entities with members selected by BU’s administration. Both have proven woefully inadequate at representing community concerns. The CLC does include community members, but those members are selected by the Provost of the BU Medical Campus and the CEO of Boston Medical Center, not the community. Our clients and other community members have repeatedly voiced their concerns to the CLC that its meetings are poorly advertised or not open to the public and held at times that community members cannot reasonably be expected to be available (e.g., 9:00 am on weekdays). Community members have also noted that seats on the CLC rotate infrequently. Even when there are vacancies, applicants to the CLC are not notified if they have been selected or denied. For instance, the chairs of two of the South End’s largest affordable housing taskforces have repeatedly applied for a position on the CLC and received no response.

In light of these shortcomings, and the need for community oversight to ensure enforceability of the waiver, we request that your final decision require BU to establish an oversight board composed of representatives of the plaintiffs, scientists and community members prior to any future research at the NEIDL, including BSL-1 and BSL-2 level research. The board should be tasked with reporting any violations of the final waiver decision and concerns with the safety of the laboratory to you or to the appropriate permitting authority. It must also have authority to review BU’s proposals to study specific pathogens, including those in BSL-1 and BSL-2 areas of the NEIDL. The board should also be asked to independently review the SFEIR and provide comments. Community board members and at least some of the scientists should be elected by residents of the affected neighborhoods and should serve terms of three years or less. The board’s meetings should be held in the affected Roxbury and South End communities at times that are convenient for working members of the community.

As we have previously noted, Paragraph 14 of EOEEA’s Environmental Justice Policy requires you to provide enhanced public participation for projects affecting EJ communities. Thus far, opportunities for public participation are anything but “enhanced.” Establishing a disclosure mechanism and a real *community* oversight board is a promising method for fulfilling some of the goals of the Policy as well as addressing your desire that BU work with members of the “already compromised Environmental Justice community” affected by the NEIDL. Such a group would offer a vehicle for dialogue on issues involving the NEIDL and would help to undo the mistrust engendered by BU’s past behavior.⁵

IV. Conclusion

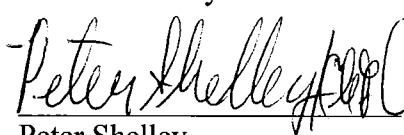
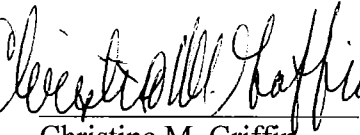
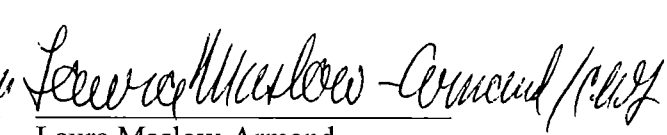
Our clients appreciate the work you have done so far in drafting a DROD and NPC Certificate that recognize their concerns with the NEIDL and that preserve your authority to

⁵ A community advisory board could also foster a dialogue between BU and the community regarding the *Alternative Vision* developed by our clients and other community members for the NEIDL. To this point, BU has largely ignored the *Alternative Vision* despite the fact that it provides BU with a method for moving forward with operation of the NEIDL in a way that addresses community needs and concerns. We would be happy to provide your office with a copy of the *Alternative Vision* proposal upon request.

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thoroughly review the SFEIR for BSL-3 and BSL-4 areas of the lab. We ask that you incorporate our comments above into your final decision to further strengthen the DROD and to adequately protect members of the affected communities and the public.

Thank you.

		
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