

September 27, 2011

**BY EMAIL**

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

**Re: National Emerging Infectious Diseases Laboratories  
Boston University's MEPA Waiver Request  
EOEEA #12021**

Dear Secretary Sullivan:

This letter provides comment from the Conservation Law Foundation (CLF) on Boston University's (BU) request for a Phase One Waiver for its proposed National Emerging Infectious Diseases Laboratories (NEIDL). CLF is a plaintiff in federal litigation regarding the proposed NEIDL. See *Allen et al. v. National Institutes of Health et al.*, Civil Action No. 06-10877-PBS (D. Mass.). CLF is a nonprofit, member-supported, public interest advocacy organization that works to solve the environmental problems that threaten the people, natural resources and communities of New England. CLF urges you to deny BU's waiver request.

BU's requested waiver would relieve the requirement for MEPA review of BSL-1, BSL-2, and BSL-3 research facilities at the NEIDL. Though BU does not plan to operate BSL-3 laboratories until its "risk assessment" (BU's term for its DSFEIR/S) is complete, BU would not obtain MEPA review or certification prior to operating those labs. BSL-1-3 labs constitute 86% of the area of the NEIDL building. BU's characterization of this area as "Phase One" of the project is euphemistically inaccurate. 310 CMR 11.11(4) provides that Phase One waiver approval may be appropriate for "partial waivers," but BU's request to waive MEPA review for 86% of the project looks like an attempt to evade MEPA review. As you well know, this is a highly contentious project that has been in litigation for some time. Allowing BU to avoid comprehensive MEPA review for the large majority of the project would be improper given the serious nature of the risks involved.

**I. BU has Failed to Meet the Regulatory Requirements for Issuance of a Phase One Waiver.**

MEPA regulations provide that a waiver is appropriate only where strict compliance with regulatory requirements (a) would result in an undue hardship for the Proponent, unless based on delay in compliance by the Proponent, and (b) would not serve to avoid or minimize Damage to the Environment. 301 CMR 11.11(1). BU has not, and cannot, show that either of these standards has been met.

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**A. Denial of BU's Waiver Request will not Cause Undue Hardship**

The basis for BU's claim that it will suffer undue hardship if its waiver request is not granted is that the university has invested nearly \$200 million in the NEIDL (including federal grant money) only to have the facility sit unused because compliance with MEPA and NEPA has "taken longer than anticipated." BU has conveniently left out two essential pieces of information.

First, BU's own failure to prepare an adequate EIR during either of its first two attempts is the primary reason the MEPA process has taken "longer than anticipated." BU's first attempt to prepare an FEIR was found insufficient by the Massachusetts Supreme Judicial Court (SJC), which held that BU:

"inadequately addressed the consequences of a release of contagious pathogens from the Biolab, potentially denying State agencies the opportunity for meaningful review of the environmental impact of such a release and consideration of the measures that would be necessary to mitigate environmental damage...[and] never addressed [reasonable alternatives] ... even insofar as to explain that location outside the South End would not, for whatever reasons be feasible."

*Allen v. Boston Redevelopment Authority*, 450 Mass. 242, 257, 259 (2007). The Court also noted that "[t]he release of a highly virulent and contagious pathogen from the Biolab would present numerous and unique challenges for State agencies, which those agencies likely would not confront if the release involved a noncontagious pathogen." *Id.* at 257.

BU's DSFEIR (second attempt) was reviewed by a National Research Council (NRC) committee of the National Academy of Sciences at your office's request. The NRC determined that the DSFEIR was not sound and credible, had not adequately identified and thoroughly developed worst case scenarios, and did not contain the appropriate level of information to compare the risks associated with alternative locations.<sup>1</sup>

The NRC was again engaged, this time by the National Institutes of Health (NIH), to review their third attempt to prepare an adequate EIR. The NRC determined last November that it could not "endorse the illustrative analyses presented as scientifically and technically sound or likely to lead to a thorough analysis of the public health concerns previously raised by the NRC."<sup>2</sup> This analysis, which has been significantly delayed because of the many problems NIH confronted during its development, is still underway.

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<sup>1</sup> National Research Council, *Technical Input on the National Institute of Health's Draft Supplementary Risk Assessments and Site Suitability Analyses for the National Emerging Infectious Disease Laboratory, Boston University, A Letter Report* at 2 (2007).

<sup>2</sup> National Research Council, *Continuing Assistance to the National Institutes of Health on Preparation of Additional Risk Assessments for the Boston University NEIDL, Phase 2* at 8 (2010).

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It was precisely the likelihood that your office might be denied the opportunity to review a full calculation of the risks associated with this project that motivated the SJC to make the statement above. BU's waiver request seeks to again deny your office of essential information regarding the NEIDL – this time by getting permission to skip the process rather than merely omitting critical information as before. Any hardship BU experiences from this regulatory process is due only to its own inability to draft a complete and scientifically sound analysis in its prior attempts to complete the EIR. BU should not be permitted to rely on its own history of poor performance as justification for the issuance of a waiver.

Second, despite sound precedent that MEPA and NEPA analyses are to be completed prior to significant investment in a particular project and location, BU took for granted that it would receive final approval from your office and proceeded to construct the NEIDL building ahead of completing the permitting process at **its own risk**. BU cannot now claim that it will suffer “undue hardship” because it decided moving ahead with construction was a risk it was willing to take. BU's view that justifying its project to MEPA after the fact is merely an unnecessary source of delay should not affect the integrity of your office's review of this complex project.

**B. Full MEPA Review is Required to Avoid and Minimize Damage to the Environment**

CLF joins in the comments of its co-counsel, Anderson & Kreiger (dated September 27, 2011) that BU's waiver request does not meet the criteria at 301 CMR 11.11(4), and offers additional comment on 301 CMR 11.11(4)(a) (a finding that strict compliance with MEPA would not serve to avoid or minimize damage to the environment must be based on evidence that the potential environmental impacts of phase one, taken alone, are insignificant).

The Superior Court and SJC, having reviewed BU's first FEIR, unequivocally determined that this project carried the risk of extreme environmental impacts. Judge Gants, at the time in the Superior Court, stated that the pathogens that could be researched at the NEIDL could “commence a deadly epidemic if any leave the laboratory” and that:

“[t]he potential of catastrophic environmental harm arising from a project... affect[s] the amount of information that a court reasonably may expect to be contained in the Final EIR for the Secretary rationally to conclude that the EIR has adequately and properly accomplished the objectives the Secretary herself set forth—to ‘ensure that a project proponent... fully discloses environmental impacts of a proposed project...’”

*Ten Residents of Boston v. Boston Redevelopment Authority et al.*, 21 Mass. L. Rptr. 324, 2006 WL 2440043 (Mass. Super., Aug. 2, 2006). Because BU's first FEIR did not adequately provide such information, Judge Gants vacated the Secretary's Certification. Affirming Judge Gants' decision, the SJC made quite clear that the release of a contagious pathogen from the NEIDL would result in “damage to the environment.” The Court stated that:

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“[t]he final EIR failed to analyze **the likely damage to the environment** caused by the release of a *contagious* pathogen, whether through laboratory accident, escape of an infected research animal, theft, terrorism, or transportation mishap, which is a critical consideration in a densely populated urban area... The absence of any information in the final EIR about such a contingency, **one likely to cause damage to the environment**, was a substantial oversight.”

*Allen*, 450 Mass. at 256-257 (emphasis added) (internal citations omitted). The Court’s focus was clearly on the danger posed by a potential release of contagious pathogens from the NEIDL into the surrounding densely populated urban environment. This concern relates to all of the labs in the NEIDL, and not just BSL-4 facilities. BU acknowledges that BSL-3 areas include pathogens “that may have serious or lethal consequences” and therefore that these areas are “restricted to only those that have proper training and security access.” Waiver Request at A-3.

Both the Superior Court and the SJC found that this project could cause significant damage to the environment – a finding that does not allow the issuance of a MEPA waiver. BU’s struggles since the SJC decision to quantify the environmental risk posed by the NEIDL only highlight the importance of full MEPA review for this project. Further, BU’s waiver request, which was only six pages despite the complexity of the proposed project, failed to provide any detailed analysis regarding environmental impacts of the BSL-1, 2, and 3 labs for which it seeks a waiver. This waiver request hardly provides you with the evidence necessary to support a finding that strict compliance with MEPA would not serve to avoid or minimize damage to the environment. In light of the courts’ decisions and the inadequacy of BU’s waiver request, your office has no reason to believe that a Phase One waiver is appropriate for this project.

## **II. The Issuance of a Waiver to for this Project Contravenes EOEEA’s Environmental Justice Policy.**

The issuance of a Phase One waiver to BU would violate paragraphs 14 and 15 of EOEEA’s Environmental Justice Policy. The NEIDL is located in the Roxbury/South End area, a recognized EJ community.<sup>3</sup> The siting of the NEIDL, a project that exceeds thresholds for wastewater,<sup>4</sup> in an EJ community triggers the following additional MEPA requirements pursuant to the EJ Policy.

Paragraph 14 of the EJ Policy requires enhanced public participation during MEPA review of the NEIDL. CLF understands that your office denied requests from many members of the public for a formal comment period and a public hearing prior to the issuance of your draft decision. The absence of opportunity for sufficient public comment during the waiver decision-making process is a strong reason why BU’s waiver request should be denied. In contrast to the waiver review process, the MEPA regulations provide a number of opportunities for public comment during the

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<sup>3</sup> See MassGIS Environmental Justice Viewer.

<sup>4</sup> See FEIR Certificate re Biosquare Phase II (Nov. 15, 2004).

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regular EIR review process. For example, pursuant to 310 CMR 11.08(3), your office “may hold public hearings, informal workshops, or public meetings at appropriate times prior to and during preparation of an EIR.” Ms. Valley Bartlett asserted in her September 16, 2011 letter, which was sent in response to public requests for additional comment opportunities during this waiver review process, that “the MEPA Office does not hold public hearings as that term is commonly used.” However, the regulations clearly provide that your office may hold public hearings during the EIR process. Further, the comment period for EIRs is 30 days, with the possibility of extension (310 CMR 11.08(4)), whereas, the comment period for waivers is much shorter - only 14 days - with no explicit provision for extensions (310 CMR 11.11(6)). More problematic is the fact that, according to the regulations, the comment period for waiver applications occurs only **after** a draft decision has been issued by your office. In contrast, the comment period for EIRs occurs as soon as the EIR is received and posted by your office and **before** you engage in your formal review of the EIR. This sequence is far preferable, as the comments you receive can then inform your analysis from the start, prior to issuing a decision.

Certainly paragraph 14 of the EJ Policy provides you with a sufficient basis to expand the public comment opportunities for a waiver request; however, according to Ms. Valley Bartlett’s letter, your office is unwilling to take that step. CLF believes that your office’s refusal to enhance public participation opportunities during the waiver request review process contravenes the EJ Policy. As you have heard often, BU’s conduct over the past eight years has engendered significant community distrust regarding this project. Your refusal to allow meaningful opportunity for public comment – in the form of both written and oral comments **before** a draft decision is issued - contributes to the community’s perception that their voices are not heard on this issue. This deficiency in public process is precisely what the EJ Policy strives to correct. Going forward, in order to comply with the EJ Policy’s requirement for enhanced public participation, the waiver request must be denied in order to allow your office to engage in the enhanced public comment and hearing opportunities provided for EIRs in the MEPA regulations.

Additionally, Paragraph 15 of the EJ Policy requires enhanced analysis of environmental impacts and mitigation for the NEIDL. According to the Policy, enhanced analysis could include analysis of site planning and operational alternatives, and data on baseline public health conditions within the affected EJ Population, among others. Siting in a dense urban EJ community is a primary concern with this project. Pursuant to the EJ Policy, your office should engage in an enhanced analysis of health data and siting alternatives in order to make careful findings on this subject. Granting a waiver for 86% of the NEIDL does precisely the opposite; it denies you the ability to perform an adequate review pursuant to the MEPA regulations and an enhanced review as required by the EJ Policy.

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**Conclusion**

BU has misrepresented to you that the only risks associated with this project lie in the research that will be performed in BSL-4 laboratories. As the SJC noted, the threat posed by this project is research on extremely contagious biological agents that pose the risk of serious environmental harm to an already compromised environmental justice community. These concerns are not limited to BSL-4 laboratories.

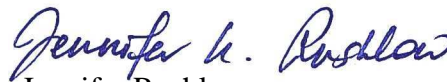
These are complex scientific issues that make analysis of risk particularly challenging. In our view, this is the type of development project and community for which the protections of the EOEEA EJ Policy were intended, making regulatory shortcuts particularly inappropriate. As such, CLF respectfully requests that you deny BU's Phase One waiver request and allow the MEPA process to proceed unabridged.

If you have any questions, we can be reached at 617-350-0990. Thank you for the opportunity to submit comments and for your consideration.

Sincerely,



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Senior Counsel



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