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Department of Energy
Washington, DC 20585

August 16, 2019

MEMORANDUM FOR THE UNDER SECRETARY FOR SCIENCE

THROUGH: MARK W. MENEZES
UNDER SECRETARY OF ENERGY

FROM: MATTHEW B. MOURY
ASSOCIATE UNDER SECRETARY FOR
ENVIRONMENT, HEALTH, SAFETY AND SECURITY

SUBJECT: **ACTION**: Recommendation for Approval of a Permanent Variance to Use the California Occupational Safety and Health Administration's Safety and Health Regulations in Lieu of Specific Provisions of Title 10, Code of Federal Regulations, Part 851, *Worker Safety and Health Program,* for the Worker Safety and Health Pilot at the Lawrence Berkeley National Laboratory (LBNL)

ISSUE: Whether to approve a permanent variance request made by the Regents of the University of California, as operators of the Lawrence Berkeley National Laboratory (LBNL), from specified provisions in 10 Code of Federal Regulations, Part 851, *Worker Safety and Health Program* (10 CFR Part 851), Subparts B and C, and Appendix A. This variance request was submitted as a part of a pilot, as outlined in the *Approval of a Worker Safety Pilot at SLAC and LBNL* memorandum, which was approved by the Deputy Secretary on September 10, 2018 (Attachment 1).

The Deputy Director for Field Operations within the Office of Science (SC), indicates that SC at Headquarters and the Bay Area Site Office endorse this permanent variance request for the pilot (Attachment 2).

BACKGROUND: Title 10 CFR § 851.3 defines a contractor as: *any entity, including affiliated entities, such as a parent corporation, under contract with DOE, or a subcontractor at any tier, that has responsibilities for performing work at a DOE site in furtherance of a DOE mission.* In performing its Department of Energy (DOE) mission, LBNL and its subcontractors are required to comply with the provisions in 10 CFR part 851, which establishes the framework for a worker protection program that will reduce or prevent occupational injuries and illnesses, and accidental losses by requiring DOE contractors to provide their employees with safe and healthful workplaces.

For the worker safety and health pilot, LBNL is seeking a permanent variance from specified provision of 10 CFR Part 851, Subparts B and C, and Appendix A. LBNL proposes to use title 8, California Code of Regulations (CCR), section 3203 (8 CCR

§ 3203), instead of the specified provisions in Subpart B, and comply with applicable California Occupational Safety and Health Administration (Cal-OSHA) regulations in lieu of the specified requirements in 10 CFR Part 851, Subpart C, and Appendix A. Where there are gaps between the requirements of 10 CFR Part 851 and Cal-OSHA, LBNL's application commits to comply with 10 CFR Part 851.

Cal-OSHA regulations and 10 CFR Part 851 are both intended to provide workers with a workplace that is safe and healthful. In those cases where provisions of 10 CFR Part 851, Subparts B and C, and Appendix A are not adequately covered by Cal-OSHA regulations, or in some cases go beyond Cal-OSHA regulations, LBNL proposes to incorporate those specific sections of 10 CFR Part 851 and existing contract provisions into the DOE-approved Injury and Illness Protection Program (IIPP), as needed, in order to "provide workers a place of employment which is as safe and healthful as would result from compliance with the standard[s] from which the variance is sought," as required by 10 CFR § 851.31(d)(2)(ii).

The Under Secretary who has primary line management responsibility for a contractor is authorized to approve variances requested by those contractors, consistent with the procedures provided in 10 CFR Part 851, Subpart D, *Variances.* The regulation also requires the Associate Under Secretary for Environment, Health, Safety and Security (AU) to provide a recommendation to approve, approve with conditions, or deny the variance. AU recommends that the Under Secretary for Science approve the variance requested by LBNL, with the conditions outlined below.

LBNL's variance request proposes to establish, implement, and maintain an effective IIPP, as required by 8 CCR, section 3203, using a combination of applicable Cal-OSHA regulations and by incorporating existing contract provisions and certain provisions of 10 CFR Part 851 into the IIPP, as needed to provide its "workers a place of employment which is as safe and healthful as would result from compliance with" the 10 CFR Part 851 requirements from which a variance is sought. As proposed, the IIPP would be approved by the appropriate Head of DOE Field Element. Table 1 of the LBNL variance request (Attachment 3) identifies specific Cal-OSHA or relevant California Department of Labor Regulations that would provide workers a place of employment which is as safe and healthful as would result from compliance with the standards from which the variance is sought, and identifies areas not adequately covered by the California regulations. LBNL's variance request commits to include some 10 CFR Part 851 and existing contract requirements in the IIPP where those gaps exist.

Based upon a review by my office, I recommend approval of the LBNL variance application, conditioned on LBNL's adherence to the commitments made in Table 1 of the variance application to adopt and implement in its IIPP the combination of 10 CFR Part 851 requirements and California regulations indicated, except that, and in addition, approval should also be conditioned upon LBNL's agreement to include contract provisions with each of its subcontractors performing work in furtherance of a DOE mission at the LBNL site that require the subcontractors to adhere to the applicable

provisions of the LBNL variance and either adopt the LBNL IIPP or develop their own LBNL-approved IIPPs that are consistent with the LBNL variance.

SENSITIVITIES: Substituting 10 CFR Part 851 worker safety standards that were first instituted in 2006, for CAL-OSHA standards at LBNL would be the most significant initiative the Department has taken to make use of alternative, but as safe and healthful worker safety and health standards.

POLICY IMPACT: None.

URGENCY: Approval of the variance is needed so that LBNL can start benefitting from using a larger pool of highly qualified contractors that are already familiar with the CAL-OSHA Standard for the conduct of work at LBNL.

RECOMMENDATION: That you approve, with the conditions as noted, this permanent variance for the worker safety and health pilot at LBNL.

APPROVE: PMO DISAPPROVE: _____ NEEDS DISCUSSION: _____ DATE: AUG 2 9 2019