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Department of Energy
Washington, DC 20585

June 2, 2020

MEMORANDUM FOR THE UNDER SECRETARY FOR NUCLEAR SECURITY

THROUGH: MARK W. MENEZES
UNDER SECRETARY OF ENERGY

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

SUBJECT: **ACTION**: Approval of a Permanent Variance to Use the California Occupational Safety and Health Administration's Safety and Health Regulations in Lieu of Title 10, Code of Federal Regulations, Part 851, *Worker Safety and Health Program*

ISSUE: Whether to approve a permanent variance request made by the Lawrence Livermore Nuclear Security, LLC (LLNS), as the contractor operator of the Lawrence Livermore National Laboratory (LLNL) from specified provisions in title 10, Code of Federal Regulations (CFR), Part 851, *Worker Safety and Health Program* (10 CFR Part 851), subparts B and C, and appendix A (attachment 1). The variance would also apply to subcontractors to LLNS. This variance application was submitted in connection with a pilot project launched by the National Nuclear Security Administration's (NNSA) Office of Safety, Infrastructure and Operations (NA-50) and will only apply to the construction of the new Emergency Operations Center (EOC) at Lawrence Livermore National Laboratory (LLNL).

BACKGROUND: One of NNSA's missions is to build facilities supporting our national security and to do so in a timely and cost-effective manner.

The fiscal year 2018 National Defense Authorization Act, under Section 3111, *Nuclear Security Enterprise Infrastructure Modernization Initiative*, authorized the creation of a process that would streamline the Administrator's ability to effectively and efficiently carry out the construction of non-nuclear facilities that have a total estimated project cost of less than $100 million. The NNSA Administrator, in exercising this authority, approved a pilot in June 2019 to include LLNL's EOC as one of these projects.

Title 10, CFR Part 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, LLNS 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 a safe and healthful workplace.

LLNS adheres to provisions of 10 CFR Part 851 and has trained its workforce to comply with these provisions. However, LLNS has faced significant challenges when hiring subcontractors to perform work. Subcontractors are required to operate under the Occupational Safety and Health Administration's regulations or their state-approved occupational safety and health program, and are not always familiar with the specific provisions of 10 CFR Part 851. This narrows the pool of qualified candidate subcontractors, which reduces competition and potentially drives up costs. In addition, LLNS must train subcontractors to comply with 10 CFR Part 851, which, at times, involves significant time commitment and increased costs.

For the construction of the new EOC, LLNS is seeking a permanent variance from specified provision of 10 CFR Part 851, subparts B and C, and appendix A. LLNS and its subcontractors will adhere to title 8, California Code of Regulations (CCR), section 3203 (8 CCR § 3203), instead of the provisions in subpart B, and comply with applicable California Occupational Safety and Health Administration (Cal/OSHA) regulations in lieu of the 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, LLNS commits to comply with 10 CFR Part 851.

Cal/OSHA regulations and 10 CFR Part 851 are both intended to provide workers with a safe and healthful workplace. In those cases where the 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 and California Department of Labor Regulations, LLNS and its subcontractors will incorporate those specific sections of 10 CFR Part 851 and existing contract provisions into their DOE-approved Injury and Illness Protection Program (IIPP) 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 section 851.31(d)(2)(ii).

The Under Secretary for Nuclear Security, who has primary line management responsibility for contractors and contracts under programmatic purview, 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 Nuclear Security approve this variance requested by LLNS, with the conditions outlined below.

LLNS' variance request proposes to establish, implement, and maintain an effective IIPP, as required by 8 CCR, section 3203, 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. Tables 1, 2, and 3 of the LLNS variance application (attachment 2) identifies specific Cal/OSHA or other relevant California 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. LLNS' 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, with conditions, of the LLNS variance application. The recommended approval is conditioned on LLNS':

- Adherence to the commitments made in Tables 1, 2, and 3 of the LLNS variance application to adopt and implement in its IIPP the combination of 10 CFR Part 851 requirements, and the California regulations indicated;
- Agreement to include contract provisions with each of its subcontractors performing work in furtherance of a DOE mission at the LLNS site that require the subcontractors to adhere to the provisions of the LLNS variance and either adopt the LLNS IIPP or develop their own IIPPs that are consistent with the LLNS variance;
- Incorporating the full set of applicable regulatory requirements, and any required by amendments or revisions to 10 CFR Part 851 or California safety and health regulations; and
- Terminating the variance upon completing the construction of the new EOC at LLNL.

In addition, LLNS must ensure that each subcontractor with its own IIPP:

- Has IIPP approved consistent with terms of Management and Operating contract that adheres to the commitments made in Tables 1, 2, and 3 of the LLNS variance application to adopt and implement in its IIPP the combination of 10 CFR Part 851 requirements and Cal/OSHA regulations indicated for the work being performed at the site in furtherance of a DOE mission;
- Incorporates the full set of applicable regulatory requirements; and
- Has contract provisions to cover areas where there are gaps between 10 CFR Part 851 and Cal/OSHA requirements.

SENSITIVITIES: Substituting 10 CFR Part 851 worker safety and health standards for Cal/OSHA standards at LLNS is a significant initiative 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 LLNS can start benefitting from using a larger pool of highly qualified contractors that are already familiar with the Cal/OSHA standards for the conduct of work at LLNS.

RECOMMENDATION: That you approve, with the conditions as noted, this permanent variance for the construction of a new Emergency Operations Center at Lawrence Livermore National Laboratory.

APPROVE: ✓ DISAPPROVE: _____ NEEDS DISCUSSION: _____ DATE: 6/3/2010