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SUFFOLK, ss.

SUPERIOR COURT
NO. 2005-00109-BLS2 &
NO. 2005-02665-BLS2

TEN RESIDENTS OF BOSTON[1]
Plaintiffs

vs.

BOSTON REDEVELOPMENT AUTHORITY and its Director MARK MALONEY, et al.[2]
Defendants

AMENDED MEMORANDUM OF DECISION AND ORDER ON THE PARTIES' CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

This is an action by ten Boston residents who seek to block the construction in their neighborhood of a biocontainment laboratory that will be used to research infectious diseases. (LAT) The lab is to be built by Boston University (BU) and is funded by the National Institute of Health (NIH). The Secretary of Energy and Environmental Affairs for the Commonwealth (the Secretary) has certified that the environmental impact report for the project complies with the Massachusetts Environmental Protection Act (MEPA), G.L.c. 30, §§61-62I and its implementing regulations, 301 Code Mass. Reg. 11.00. The case is now before this Court challenging this

[1]Klare Allen, Rose Arruda, Jeanette Avant, Dolly Battle, Alma Feliciano, Angela Francis, Joan Francis, Cornelius Reddick, Diane Williams, and Trena Williams

[2]The Executive Office for Administration and Finance and its Secretary, Eric Kriss; the Division of Capital Asset Management and its Commissioner, David Perini; the Office of Commonwealth Development and its Chief, Douglas Foy; the Department of Housing and Community Development and its director, Jane Gumble; the University Associates Limited Partnership; the Trustees of Boston University; and the Boston Medical Center Corporation.

decision by way of cross motions for judgment on the pleadings. [3] After thorough consideration of the party's submissions and careful review of a United States District Court judge's decision in a parallel federal action, this Court concludes that the plaintiffs' motion must be **Denied,** and the defendants' motion must be **Allowed**.

BACKGROUND

I. Procedural Background

In October 2002, the NIH requested proposals for the construction of a national biocontainment laboratory that would study the most dangerous pathogens. The purpose was to research those pathogens that could be used as part of terrorist attack and develop ways to diagnose and treat the diseases that they cause. The Trustees of BU submitted a proposal to build the lab on Albany Street in Boston's South End. On September 30, 2003, the NIH approved a grant of $128 million to BU to construct it. The site and the proposed facility are now known as the National Emerging Infectious Diseases Laboratory (NEIDL).

Pursuant to MEPA, proponents of such a project must prepare and submit to the Secretary an Environmental Impact Report (EIR) discussing the potential impact of the project on the environment. In July 2004, a Final EIR for the project (the FEIR) was filed with the Secretary. The FEIR contained a so-called "worst case" analysis that focused on the public health impact if anthrax were released from the lab into the environment. The Secretary certified that the FEIR complied with MEPA. The plaintiffs brought this action in 2005 and also instituted a federal action against the NIH around the same time.

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[3] The plaintiffs have also challenged the propriety of a land transfer from the Boston Redevelopment Authority to BU for use in constructing the biolab. This Court deals with that issue in a separate memorandum of decision to be issued shortly.

In 2006, this Court (Gants, J.) vacated the Secretary's decision, concluding that the FEIR was facially deficient in two respects. First, it did not have a "worst case" analysis that involved the hypothetical release of a pathogen that can spread (unlike anthrax) through person-to-person contact. Second, the FEIR did not consider alternative locations for the lab -- specifically, whether environmental risks would be significantly diminished if the lab were located in a suburban or rural location. On review, the Supreme Judicial Court affirmed, holding, as the lower court had, that the Secretary's action was" arbitrary and capricious" and lacked a "rational basis." Allen v. Boston Redevelopment Auth., 450 Mass 242 (2007) ("Allen").

Thereafter, the Secretary issued a Certificate Following Remand which required the creation of a Supplemental FEIR (the SFEIR). This SFEIR was to address not only the deficiencies identified by this Court but two additional areas of concern. Specifically, the Secretary required the SFEIR to: 1) develop a "worst case" scenario that analyzed the risk of infection arising from the accidental or malevolent release of a contagious pathogen; 2) identify and assess feasible alternative locations for the lab, at least one of which should be in an area less densely populated than Boston's South End; 3) identify mitigation measures for any potential impact upon the public in the event a contagious pathogen were released; and 4) incorporate responses to public comments about the project and its risks to the extent relevant.

With the development of the lab stayed, the NIH and BU agreed to coordinate their efforts to comply with both state and federal requirements. The NIH prepared an environmental impact study, and submitted the study to a committee of eleven experts from the National Research Council (NRC). This committee found that this study was inadequate. The NIH created a second panel of experts, the Blue Ribbon Panel, to advise the NIH on how to improve the

study. The Blue Ribbon Panel included sixteen scientists, all experts in the fields of infectious disease, public health, biosafety, biodefense, and environmental justice. In addition, the NIH asked the NRC Committee to conduct an independent review. Over the next four years, the NIH, working with a consulting firm, Tetra Tech, developed what would become the Final Supplementary Risk Assessment (FSRA). The FSRA became an integral part of the SFEIR.

On January 9, 2013 the defendants submitted the SFEIR to the Secretary. The SFEIR included the entirety of the FRSA submitted by the NIH in the companion federal case. The 2,700-page FSRA consists of eleven separate chapters and is described in great detail in the federal court's decision in the related federal action. See Memorandum and Order dated September 30, 2013 at pp. 9-34 in Allen v. Nat'l Institute of Health, No. 06-10877 (Saris, J.) (the "Federal Action"). At the hearing on the instant motions, the parties agreed that Judge Saris accurately described the report, summarized by chapter as follows.

II. The Supplemental Report

The first chapter of the FSRA states the purpose of the study. The study analyzes thirteen pathogens that could be present at the lab. Seven of the pathogens are classified as level-three pathogens, while six are classified as level-four pathogens. Pathogens are not classified based on the ease by which they spread, but on the risk they pose to an infected person. Level-four pathogens are the most deadly. For each of the thirteen pathogens, the report sought to discover what could go wrong at the lab that would cause a release of the pathogen, what the probability of that release was, and what consequences would ensue.

The second chapter analyzes the design and operation of the proposed facility. A facility studying level-four pathogens is required to have safeguards against natural disasters, accidents,

and malevolent attacks which go beyond those safeguards required for level-three labs. These additional features include isolation of the level-four lab within the facility, negative-air pressure,[4] interlinked airlocks, additional high-efficiency particle air filters, staff screening and training, and electronic security measures including pass-cards and biometric scanners. The chapter also discusses the response capabilities at the Boston site as well as at the two alternative sites in Tyngsborough, Massachusetts and Peterborough, New Hampshire (the suburban and rural alternative sites, respectively).

The third chapter discusses the characteristics of the thirteen pathogens included in the study. The level-three pathogens studied were: 1) Bacillus Anthracis; 2) Francisella Tularensis; 3) Yersinia Pestis; 4)1918 H1N1 Influenza virus; 5) SARS-associated Coronavirus; 6) Rift Valley Fever virus; and 7) Andes virus. Bacillus Anthracis, Yersinia Pestis, H1N1 Influenza, and SARS-associated Coronavirus can be spread by air. The level-four pathogens were: 1) Ebola virus; 2) Marburg virus; 3) Lassa virus; 4) Junin virus; 5) Tick-Born Encephalitis virus; and 6) Nipah virus. Only the Junin virus has been shown to spread through the air.

The fourth chapter identifies reasonably foreseeable accidents or events that would cause the release of a pathogen from the facility. The report identifies over 300 potential events that fit into five basic scenarios. The report concludes that these five scenarios reasonably represent all potential events and the risks associated with each. The five events are: 1) needlestick; 2) centrifuge release; 3) earthquake, including one that would destroy the lab and release all pathogens; 4) aircraft crash; and 5) malevolent attack. The probability of an earthquake or airplane crash devastating enough to cause a dangerous pathogen release was calculated to be

[4] If the lab is opened, air is pulled in from the outside reducing the risk of dispersal of contaminants.

once in 10,000 to one million years. The probability of a malevolent attack (like terrorism) is essentially unknowable but is discussed in more detail in chapter six of the report. The other scenarios would infect only lab workers initially. As to the risk that would occur, one study of five level-four labs found that there had not been a single infection in 700,000 worker hours of operation. At level-three labs studied, there had been only one clinical infection and four asymptomatic infections in 3.2 million worker hours of operation between 1982 and 2003.

Chapter five looks at the risks of a pathogen release after an accident in transporting pathogens to and from the lab. Given the amount of packaging required for transporting level-three and level-four pathogens, the study determined that the likelihood that a pathogen would be released during a transport accident was less than once in one million years.

Chapter six assesses the threat of malevolent acts. The study was unable to calculate the likelihood of such an attack, since there is no accurate model for predicting them. The details of the threat assessment were sealed for security reasons. However, the predicted consequences of a malevolent attack were considered to be less than or equivalent to the worst-case accident scenario, the earthquake. In comparison to an earthquake, most malevolent acts pose less danger than an earthquake because the earthquake scenario hypothesizes the release of all of the pathogens in the lab. The study concludes that there is no significant difference in the threat of malevolent attacks among the three sites considered, including Boston.

The seventh chapter examines whether any of the pathogens considered would, upon release, become established in the environment in animals, soil, or water supplies. Four of the level-three pathogens studied are capable of becoming established. Only one of the level-four pathogens studied, Tick-Born Encephalitis virus, could become established but in order to do so,

it would have to mutate to be carried by local ticks. The tick that carries the virus in its present state is not endemic to New England.

Chapter eight considers what would happen if any of the thirteen pathogens were released within the lab or outside in the community, and analyzed the extent to which any of the five scenarios described in chapter four would result in infection or death. The report determined probabilities based on a special methodology which had both qualitative and quantitative components; it concluded that the probability of infection and death were quite low. For example, the likelihood that a lab worker would become infected from an undetected needlestick or centrifuge release was calculated to be once in one hundred to 10,000 years for level-three pathogens. An unknown exposure to a level-four pathogen was not considered to be even plausible within the life of the facility. In the event of an earthquake destroying the entire facility, the highest probability of infection was related to the Rift Valley Virus (a level 3 pathogen) and that was once per 100,000 years.

Chapter nine evaluates the possibility of secondary transmission – that is, the extent to which an infected lab worker could transmit the pathogen to a member of the general public. The report concludes that the probability of secondary infections is so low that none is likely to occur for any of the pathogens over the fifty year life of the lab. The report also concluded that there were no statistically significant differences in the risk of secondary infection among the three sites considered. Although workers are more likely to use public transportation at the Boston site, the risk of transmission because of the use of public transportation cannot be calculated since there is no reliable data on mass transit transmission.

Chapter ten addresses whether the project complies with Executive Order 12,898: Federal Actions to Address Environmental Justice in Minority and Low-Income Populations. The report acknowledges that the minority and low-income populations are higher in at the Boston site than at the Tyngsborough suburban location or the Peterborough rural location. However, the report concludes that the risk of direct pathogen exposure to populations within a two kilometer radius of the lab is extremely low. As to secondary transmissions, those at greatest risk would be the infected individual's social contacts, and it is entirely unpredictable as to whether they would live close to the lab or farther away.

Chapter eleven gives the overall conclusions of the report. The conclusion, broadly stated, is that the risk of release and infection at any of the three potential lab sites is extremely low, and that the greatest risk is to those working in the facility, not to the general public. Only one pathogen evaluated had a possibility of infecting a lab worker within the fifty year expected lifespan of the facility. The study determined that none of the pathogens examined had any probability of infecting the general public during the life of the lab. There are slightly smaller risks to the general public at the suburban and rural locations, but the difference in risk is not substantial. The report concludes that the risk to the public at all three potential locations is beyond reasonably foreseeable.

III. Public Input and the Conclusions of the Experts

During the drafting of the FSRA, the NIH held seven meetings with the public between 2008 and 2010, four of them in Boston. Two of those four were held in the Roxbury area. On April 18, 2012, after a draft supplemental risk assessment was released but before the final report, another public meeting was held in Roxbury. Written comments were received during a

comment period. BU has also created a Community Liaison Committee that includes members of the public who live in the South End and Roxbury. See Community Liaison Committee, National Emerging Infectious Disease Laboratory, http://www.bu.edu/neidl/community/clc (last visited May 12, 2014).

The Blue Ribbon Panel and the NRC Committee of experts spent considerable time critiquing the report and updating it with additional data or analysis each time one of the expert panels perceived a deficiency. After numerous meetings over four years, the Blue Ribbon Panel concluded that the study was "unprecedented in its scope, breadth and complexity" and "is the most scientifically sound, rigorously conducted study that is possible at this point." The NRC committee reached a similar conclusion, stating that the NIH and the Blue Ribbon Panel had "gone to unprecedented lengths to improve the risk assessment" and that "no further advice from this group would be useful nor should it be required."

IV. **The SFEIR Certificate and Subsequent Proceedings**

On March 1, 2013, the Secretary certified that the SFEIR "adequately and properly complies" with MEPA and its implementing regulations. After the Administrative Record ("A.R."), was filed with this Court, the parties moved for judgment on the pleadings. In the meantime, the parties cross moved for summary judgment in the Federal Action. On September 30, 2013, before hearing on the instant motions, U.S. District Judge Patti Saris, in a lengthy memorandum of decision, allowed the defendants' motion and denied the plaintiffs' motion and their request for injunctive relief.

DISCUSSION

MEPA establishes a process, supervised by the Secretary, which involves the preparation and drafting of environmental impact reports or EIRs so that interested state agencies and the public have available to them all relevant information before a project is allowed to proceed. Enos v. Secretary of Envt'l Affairs, 432 Mass. 132, 136, 139 (2000); see also 300 C.M.R. §11.01(a). The Secretary is not therefore making a substantive decision regarding the benefits of a project as compared to its potential negative impact on the environment: that role is performed by the agencies which provide permits for the project or financial assistance. Allen, 450 Mass. at 247. Accordingly, in certifying that the NEIDL complied with MEPA, the Secretary was not expressing an opinion on the merits of the project but was instead signaling that, as a disinterested public official with expertise in environmental matters, she has determined that the information gathering process for the project is in compliance with the statute. The Secretary has "broad discretion" in deciding whether the information gathering process was adequate. Sierra Club v. Commissioner of the Dep't of Envt'l. Mgmt., 439 Mass. 738, 748 (2003) ("Sierra Club").

"The informal and informational public consultation permitted under EIR review and the Secretary's certification are not adjudicatory proceedings." Sierra Club, 439 Mass. at 747. Because the Secretary's review is less formal then normal agency review, this Court's inquiry is significantly more limited than it would be in an ordinary administrative appeal under G. L. c. 30A. The Secretary's certification that an FEIR is in compliance with MEPA may be vacated only if it is "arbitrary and capricious" or illogical – that is, without a "rational basis." Id. at 748-749. On the other hand, deference to the Secretary's decision does not mean indifference to

obvious deficiencies in the EIR, if such exist. Moreover, as this Court noted in the 2006 decision vacating the Secretary's original certification, the potential of catastrophic environmental harm that could arise from this particular project "does affect 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" MEPA compliance. Ten Residents of Boston v. Boston Redevelopment Auth., 21 Mass. L. Rep. 324, 330, 2006 WL 244043 at * 10 (2006) (Gants, J).

In determining whether the Secretary had a rational basis for certifying the SFEIR for the NEIDL, this Court examines it contents in terms of the standards set forth by MEPA and its underlying regulations. Section 62B of the statute requires that an EIR contain statements describing "the nature and extent of the proposed project and its environmental impact; all measures being utilized to minimize environmental damage; any adverse short-term and long-term environmental consequences which cannot be avoided should the project be undertaken; and reasonable alternatives to the proposed project and their environmental consequences." As explained above, Judge Gants, applying this statutory standard, identified two major deficiencies in the 2005 FEIR. First the FEIR failed to analyze a true "worst case scenario" event – that is, the release from the lab of a contagious pathogen. Second, the FEIR failed to look at feasible available alternative sites and determine whether such alternatives would decrease the risk of damage to the environment.

The plaintiffs contend that the 2013 SFEIR contains four major deficiencies: 1) it fails to adequately assess the probability of a pathogen release and its consequences; 2) it does not adequately consider and compare the alternate locations; 3) it contains inadequate mitigation

measures; and 4) it does not satisfactorily respond to public comment. This Court is not convinced any of these perceived shortcomings provide a basis for vacating the Secretary's decision. Indeed, the FSRA, a main component of the SFEIR, not only addresses the questions that Judge Gants had about the original FEIR but goes well beyond what his decision required. I will address each of the plaintiffs' arguments in turn.

A. Probability and Impact of Pathogen Release

Plaintiffs' primary concern is that the SFEIR does not adequately describe the risks of the NEIDL and instead relies on questionable assumptions and incomplete data. In support of this position, they make several arguments, none of them persuasive.

First, the plaintiffs contend that the SFEIR failed to adequately analyze environmental impacts as required by MEPA because the FSRA which it incorporated focused simply on the probability that a pathogen could be released from the lab without assessing the damage that would ensue. The plaintiffs thus appear to be drawing a distinction between an assessment of a risk and the consequences that could occur if the risk is realized. The consequence here, however, is the infection of a lab worker and/or one or more members of the general public,[5] and the risk assessments in the FSRA expressly stated that they concerned that consequence. By determining the likely risk that such infections could occur (as opposed to the number of people who would die because of these infections) does not seem inappropriate, much less can it be said that the analysis lacked a rational basis.

The plaintiffs then attack the manner in which the SFEIR analyzed those risks, maintaining that it is flawed. They point out that the SFEIR took three hundred incidents described as

[5] It goes without saying that such a consequence would be quite serious since some of the diseases being studied have no known cure.

occurring at comparable biocontainment facilities and then folded them into five allegedly representative scenarios. It then failed to consider the possibility that multiple events could take place simultaneously or to consider the aggregate risks of all five scenarios together. The result (according to the plaintiffs) is that the SFEIR seriously understates the actual risk of a pathogen release. Particularly in light of the standard that applies to judicial review of the Secretary's decision, this Court concludes that this argument is without merit.

Certainly, the process that was followed in order to make the risk assessments the plaintiffs challenge was a thorough one. The FSRA was reviewed by two independent panels of experts in the fields of infectious disease and public health. There were instances during the process of creating the FSRA when the NIH presented its findings to the NRC Committee and it would indicate that the analysis was incomplete. The NIH then created the Blue Ribbon Panel to advise the NIH on how to improve the study. The outcome of these efforts was the identification of five general scenarios that, according to these experts, took into account all the risks posed by 300 separate events. When assessing the risk of these five general scenarios, the report assumed that in each scenario, everything that could go wrong would go wrong; it then calculated the risk that this could happen using a specific methodology. This went well beyond what Judge Gants had deemed to be necessary – namely, the inclusion of one worst case scenario involving the release of a single contagious pathogen.

As to consequences that would occur from the release of a contagious pathogen, Chapter eight of the FSRA contains estimates of initial infections resulting from the various scenarios, and Chapter nine examines the probability that initial infections might lead to secondary infections among the general public. Significantly, the SFEIR concluded that no secondary

infections are likely to occur for any of the pathogens used at the lab during the fifty year life of the facility. As the SFEIR stated, "while there can be no such thing as no risk, the results of the analysis demonstrate that the risk of the infections resulting from accidents or malevolent acts at the NEIDL are generally very low to only remotely possible." Indeed, the pathogen posing the greatest risk of infection (pneumonic plague) is a level 3 pathogen, and there are already labs located in Boston and Cambridge studying level 3 pathogens, suggesting that a lab doing research on level 4 pathogens does not pose a risk that is any more significant.

Finally, the plaintiffs argue that the FSRA failed to take into account the possibility that different worst case scenarios could occur simultaneously, and furthermore did not aggregate the risk of all five scenarios considered together. The FSRA did in fact consider the possibility of two independent events occurring at the same time, and concluded that the likelihood was "beyond reasonably foreseeable." As to two concurrent events which have a common cause (for example, a malicious actor removing pathogens from an earthquake compromised facility), that too was addressed in the risk assessment and found to be small. As to aggregating the risk for all possible scenarios, that was specifically discussed with the Blue Ribbon Panel and it was determined that such an approach would not be appropriate and that in an event, the earthquake and needlestick scenarios were "reasonable approximations of the total public risk for direct and indirect exposures." Plaintiffs may disagree with these conclusions but do not explain why they are unreasonable, much less why the Secretary was irrational or illogical in accepting them.

B. Analysis of Alternate Locations

Plaintiffs next focus on the FSRA's consideration of alternative locations and contend that it failed to take into account important differences between the sites as required by 301 Code

Mass. Reg. 11.07(6) (f) (stating that EIR must contain a "description and analysis of alternatives to the project including: . . . an analysis of the principal differences among the feasible alternatives under consideration, particularly regarding potential environmental impacts"). The plaintiffs make three points: 1) that the risk assessment relied on a "10 minute assumption" for transmission of an infection that is unsupportable; 2) that it did not factor in the role public transportation would play in spreading a pathogen once released; and 3) that it did not consider the likelihood that a terrorist attack or other malevolent act was more likely in Boston than at the rural and suburban sites.

With regard to the "10-minute assumption," the plaintiffs contend that there is no scientific basis for concluding that an individual must be in contact with another for at least ten minutes in order to transmit an infection. In support of their position, plaintiffs cite two scholarly articles which suggest that brief, casual exposure may be enough. As defendants note, however, both of these articles were cited in the FSRA and indeed, the author of one article, Dr.Stephen Eubank, was a member of the Blue Ribbon Panel that engaged in the analysis plaintiffs question. In fact, the FSRA did not, as plaintiffs contend, ignore all contacts between people of a shorter duration: the initial risk assessment and the probability of transmission for each pathogen were derived from published data observed during historical outbreaks, regardless of duration of contact. A.R. pp. 3169-3179; 3213-3269. That analysis showed that the likelihood of secondary infection was extremely unlikely to occur during the life of the facility, regardless of where it was located. The Blue Ribbon Panel did use a 10- minute assumption in its comparative analysis that used a computer model to determine the number of social contacts between individuals at the different locations. It did so because there "there are

no well-established, validated methods" regarding secondary transmission and social contact that is brief in duration. That comparison revealed no statistical difference between the secondary transmission rates at the Boston site and those at the two alternative locations. After reviewing this methodology, the NRC Committee concluded, "the modeling of secondary transmission [is] satisfactory and the assumptions made in this chapter [nine] are transparent." The Secretary's acceptance of this was not irrational or illogical.

As to public transportation, the plaintiffs argue that, because workers at the Boston site are significantly more likely to use mass transit than those at the suburban and rural sites, it is logical to assume that infection would spread more quickly if the lab were located in Boston. Notwithstanding this, the FSRA did not consider how the use of public transportation would increase the risk of secondary transmission. Defendants concede that the use of public transportation was not taken into account, but maintain that there was a very good reason for that: there is no scientific reliable data that currently exists which assesses the correlation between public transit ridership and the risk of acquiring infection. Plaintiffs do not disagree, but contend that the NIH and BU had the ability to conduct their own studies. In this Court's view, however, there is no affirmative obligation under MEPA to create data where none yet exists; the obligation lies instead in gathering as much existing information about a project as is reasonably available, and that obligation was fulfilled.

Finally, the plaintiffs contend that the SFEIR did not adequately assess the risks of a malevolent act because it did not consider the fact that the likelihood of such an occurrence was greater if the NEIDL is located in Boston. First, an entire chapter (chapter six) of the FSRA is devoted to assessment of this risk and actually identifies and analyzes site specific threats and

crime information, site vulnerabilities, and "target attractiveness." A.R. 2528-2531. Second, the risk posed as a result of a malevolent act is less than (and at worst, equal to) that resulting from an earthquake; which could occur anywhere. Although an earthquake is an act of nature and a malevolent act is a deliberately premeditated one, it does not necessarily follow (as plaintiffs argue) that the latter is more likely to occur if the biolab were located in Boston. As the FSRA threat assessment concluded, the likelihood of a malevolent attack is ultimately incalculable. Third, as the FSRA points out, Boston is better able to respond to an act of terrorism than the suburban or rural sites, since it has more emergency medical personnel, more police and firefighters, and a centralized emergency operation center. In short, the NRC Committee found the FSRA assessment to be adequate, giving the Secretary a rational basis on which to conclude that the SFEIR met MEPA standards.

D. Mitigation Measures

The plaintiffs argue that the SFEIR failed to adequately recommend measures to mitigate the danger to the public as required by 301 Code Mass. Reg. §11.07(6)(j). (stating that the EIR "shall specify in detail the measures to be taken...to avoid minimize an mitigate potential environment impacts") In fact, the SFEIR not only considered mitigation measures but determined that the low risks posed by the NEIDL are due in large part because of the mitigation measures that will be implemented at the facility. These measures are spelled out in the second chapter of the FRSA: they include continuous training of staff and security personnel, appointment of a chief safety officer with the authority to stop any operation he or she deems to present a hazard, a lab safety coordinator responsible for implementing the safety protocols, and a safety committee to review on an ongoing basis, the lab's safety procedures and revise them as

necessary. In short, the Secretary had a rational basis for certifying that the SFEIR adequately addressed mitigating measures.

D. Response to Public Comment

The plaintiff do not -- nor can they – claim that there was insufficient public input before the Secretary acted. As noted above, during the drafting of the FSRA, the NIH held seven meetings with the public between 2008 and 2010, four of them in Boston; another meeting was held in Roxbury in 2012 before the SFIER was released, followed by a written comment period. Plaintiffs maintain, however, that the response to these comments and questions about the lab was not adequate. First, the plaintiffs argue that the SFEIR failed to address those who were concerned that the use of public transportation might enhance the risk of secondary infection. As discussed above, however, the FSRA did consider the issue of public transportation and determined that it was not possible to analyze, on a quantitative basis, how that would affect the risk. Second, plaintiffs contend that the SFEIR did not adequately consider the possible impact of the lab on low-income and minority populations. This too, was addressed, however: although the population surrounding the Boston site is comprised of over fifty percent low income and minority's residents, the risk of primary infection (as explained in the FSRA) is so low that, regardless of where the lab is located, there is little increased risk of a secondary transmission and thus the impact on minority and low income populations is insignificant. Moreover, if a lab worker is infected, those at greater risk of secondary infection will be the worker's social contacts, who will not necessarily live near the biolab site.

CONCLUSION AND ORDER

The plaintiffs' motion for judgment on the pleadings (paper # 80) is **DENIED**, and the Defendants' motion for judgment on the pleadings (paper # 82) is **ALLOWED**x

Janet L. Sanders
Justice of the Superior Court

Date: May 19, 2014