

No. 04-17232

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

TRI-VALLEY CARES, NUCLEAR ) WATCH OF NEW MEXICO, ) MARYLIA KELLEY, JANIS ) KATE TURNER, TARA ) DORABJI, HENRY C. FINNEY ) and CATHERINE SULLIVAN, )  <p style="text-align: center;">Plaintiffs-Appellants,</p> v. )  UNITED STATES DEPARTMENT ) OF ENERGY, NATIONAL ) NUCLEAR SECURITY ) ADMINISTRATION, LAWRENCE ) LIVERMORE NATIONAL ) LABORATORY, and LOS ) ALAMOS NATIONAL ) LABORATORY, )  <p style="text-align: center;">Defendants-Appellees.</p>	No. 04-17232 DC No. CV-03-03926-SBA  <b>APPELLANTS' URGENT          MOTION FOR STAY          PENDING APPEAL UNDER          CIRCUIT RULE 27-3(b) AND          SUPPORTING          MEMORANDUM</b>  <u><b>DECISION NEEDED BY          MARCH 15, 2006</b></u>
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CIRCUIT RULE 27-3 CERTIFICATE

I, Stephan C. Volker, counsel for plaintiffs and appellants Tri-Valley CARES, et al., hereby certify the following information in accordance with Circuit Rule 27-3(a)(3)(i)-(iii):

i) The telephone numbers and office addresses of the attorneys for the parties are as follows:

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ii) Facts showing the existence and nature of the claimed emergency are as follows:

Defendants and appellees United States Department of Energy, et al. (“appellees”) propose to operate a bioagent testing facility at

Lawrence Livermore National Laboratory (“LLNL”) within the San Francisco Bay Area. The facility would aerosolize and test on live animals deadly organisms that have the potential to be used in biological warfare (“bioagents”), including live bacteria and fungi such as *Bacillus anthracis* (anthrax), *Yersinia pestis* (plague), *Clostridium botulinum* (botulism), *Coccidioides immitis* (San Joaquin Valley fever), *Brucella spp.*(brucellosis), *Francisella tularensis* (tularemia) and *Rickettsia spp.* (typhus, Rocky Mountain spotted fever). See Appellants’ Excerpts of Record (“ER”), Volume 1, Tab 2 at pages 19, A-24-38, C-5.

Operation of this facility could have a significant effect on the environment should these organisms be released. Appellees intend to send and receive about 60 shipments of deadly bioagents per month through the U.S. Postal Service and other carriers . 1ER2 (Environmental Assessment (“EA”)):22. As documented in Appellants’ Opening Brief and summarized in the motion which follows this certificate, the deadly bioagents tested at this facility could escape to the environment through earthquake, fire, terrorist attack, sabotage, operator error or failure of the containment filters through which air in the facility would be exhausted to the outside. An earthquake on the nearby Greenville, Las Positas or Mt. Diablo thrust faults could cause structural damage resulting in the release of bioagents to the environment.

The Greenville and Las Positas faults are active and very close to the LLNL site. 3 Excerpts of Record (“ER”) 8 (Professor Robert

Curry):¶ 6. In January 1980, the Greenville fault experienced a magnitude 5.9 earthquake in the Livermore area, injuring 44 people and causing \$10 million damage to the LLNL including fallen ceiling tiles, fallen bricks from chimneys, broken gas and water lines, broken windows, and displacement of mobile structures (such as the proposed bio-testing modular facility) from supporting foundations. 3ER8:¶¶ 6-8. In rejecting public requests for an environmental impact statement (“EIS”) addressing this hazard, appellees told the public that there were “no active faults . . . in proximity to the location of the proposed facility.” 1ER2 (EA):36.

These active faults are capable of producing earthquakes that the facility is not designed to withstand. According to appellees’ EA, the facility is designed to withstand an earthquake generating a lateral acceleration of .6 g. 1ER2(EA):36. Recent earthquakes of a magnitude comparable to the earthquakes that the local faults could generate have produced ground accelerations in excess of 0.6 g. 3ER8 (Curry):¶ 10. The Mt. Diablo thrust fault located north of Livermore is capable of producing a quake with a Richter magnitude of at least 6.75, only slightly less than the 6.9 to 7.0 magnitude Loma Prieta quake of 1989. 3ER8 (Curry):¶ 10. The latter quake generated ground accelerations of 0.68 g at a distance of 7 kilometers from the epicenter. The 2004 Parkfield quake near Hollister, California registered a Richter magnitude of 6.0 but generated ground accelerations of 1.31g, more than double the force that the BSL-3 facility is designed to withstand. Declaration of Robert R. Curry,

Ph.D., in Support of Appellants' Emergency Motion for Injunction Pending Appeal, ¶ 6.

In addition, the Las Positas fault, which is located adjacent to LLNL, is capable of causing surface displacement including subsidence which could crack foundations and trigger structural failure as occurred during the 1980 quake on the nearby Greenville fault. 3ER8 (Curry):¶ 14. The 1980 Greenville quake resulted in extensive "surface rupture" that was observed for a distance of 6 kilometers along the Greenville fault, and traveled as far north as Interstate Highway 580 – the freeway located one mile north of LLNL. 1ER2(EA):37 (Fig. 3-3); 3ER8 (Curry):¶ 8. In approving this BSL-3 facility, appellees misled the public by representing that "[t]he effect of seismic activity is likely to be confined to groundshaking *with no surface displacement.*" 1ER2(EA):36, emphasis added.

Los Alamos National Laboratory (LANL) is also planning to operate a BSL-3 facility that was originally challenged in this lawsuit. LANL withdrew its Environmental Assessment for this facility and announced on November 29, 2005 that the appropriate level of review for this facility is a full Environmental Impact Statement, noting among other factors the need for more detailed earthquake safety studies. 70 Fed.Reg. 71490-91 (November 29, 2005).

Due to LLNL's location across the street from residential neighborhoods and proximity to the densely populated Bay Area, this facility could have a catastrophic impact on public health and safety should bioagents be released during an earthquake. According to Dr.

Matthew McKinzie, a physicist and expert in modeling the environmental impact of the inadvertent release of bio-agents, if just 5 grams of Anthrax (about 2 teaspoons of dry spores) were released while a gentle breeze blew toward San Francisco, over one-half million people would be exposed to a potentially lethal dosage, corresponding to more than 10,000 fatal Anthrax infections without antibiotic treatment. 3ER10 (McKinzie):¶10.

Because of the facility's significant potential adverse impact on the environment, appellees agreed not to commence operation of the facility during the pendency of the district court proceedings. Stipulation Setting Briefing and Hearing Schedule and Staying Operation of Projects Under Review and Order Thereon, filed December 15, 2003, ¶ 8. Following the district court's entry of summary judgment against appellants, the undersigned counsel has repeatedly contacted appellees' counsel to inquire whether appellees would continue the stay of operations previously in effect. Counsel for appellees subsequently notified appellants that appellees would commence operation of the facility during April 2006. Declaration of Stephan C. Volker in Support of Appellants' Emergency Motion for Injunction Pending Appeal, ¶ 2 and Exhibit 1.

iii) When and how counsel for the other parties were notified and whether they have been served with the motion.

On February 14, 2006, counsel for appellants notified counsel for appellees, Todd S. Aagaard, that appellants would file a motion

for stay of operation of the facility pending appeal. On the same date, appellants served counsel for appellees with this motion.

I declare under penalty of perjury that the foregoing facts are true and correct and supported by the record references as indicated, and that this declaration was executed on February 14, 2006 in Oakland, California.

Dated: February 14, 2006

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STEPHAN C. VOLKER  
Law Offices of Stephan C. Volker  
Attorney for Appellants Tri-Valley  
CARES, et al.

Plaintiffs and appellants Tri-Valley CARES, et al. (“appellants”) hereby move this Court for an injunction staying commencement of operation of the bioagent testing laboratory whose approval is challenged in this proceeding pending disposition of this appeal. This motion is brought pursuant to Ninth Circuit Rule 27-3(b) which provides for the filing of emergency motions where the “movant certifies that to avoid irreparable harm, action is needed by a specific date or event but not within 21 days.”

Defendants-appellees United States Department of Energy, et al. (“appellees”) have advised appellants that they expect to commence operation of this BSL-3 facility during April, 2006. Declaration of Stephan C. Volker in Support of Appellants’ Urgent Motion for Stay Pending Appeal filed herewith at ¶ 2. Because delivery of the deadly bioagents such as anthrax, plague and Hanta virus would occur before the facility commences operation, it appears

that injunctive relief to prevent delivery of these bioagents and to avoid potential irreparable harm to the environment is needed in about one month, as documented in the foregoing Circuit Rule 27-3 Certificate.

Due to the risk of earthquake damage and subsequent release of bioagents into the densely populated surrounding urban areas, appellees' threatened operation of the bioagent testing facility poses an imminent threat of irreparable harm to appellants and to the public. Appellees' threatened operation of the facility would also prejudice this Court's ability to maintain the status quo and to enforce the provisions of the National Environmental Policy Act, 42 U.S.C. section 4321 et seq., which requires appellees to first prepare an EIS before approving any project which may have a significant effect on the environment, such as the proposed bioagent testing facility.

Bond should be set at a nominal amount in light of the fact that appellants are non-profit public benefit conservation organizations (and their members) that have brought suit in order to ensure that appellees comply with federal environmental and public disclosure laws. *People of State of California ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985); *The Wilderness Society v. Tyrrel*, 701 F.Supp.1473, 1492 (E.D.Cal. 1988) (noting that "if these types of groups were 'required to post substantial bonds . . . in order to secure preliminary injunctions', the bonds might undermine mechanisms for private enforcement of environmental law," citing *Friends of the Earth v. Brinegar*, 518 F.2d

322, 323 (9th Cir. 1975)). Appellants are non-profit organizations and concerned citizens with extremely modest economic resources. Declaration of Marylia Kelley in Support of Appellants' Emergency Motion for Injunction Pending Appeal, ¶ 5; Declaration of Jay Coghlan in Support of Appellants' Emergency Motion for Injunction Pending Appeal, ¶ 5.

Because appellants have established their likelihood of success on the merits in their Appellants' Opening Brief, and are non-profit organizations and concerned citizens with extremely modest economic resources, a burdensome security requirement should not be imposed. Appellants respectfully request that bond be set at a nominal amount in accordance with *The Wilderness Society v. Tyrrel*, *supra*, 701 F.Supp. at 492, and the authorities therein cited. This Motion is also based on the foregoing Circuit Rule 27-3 Certificate and the points and authorities presented in Appellants' Opening Brief filed on May 13, 2005, the accompanying Declaration of Robert R. Curry, Ph.D., in Support of Appellants' Emergency Motion for Injunction Pending Appeal, and the Declaration of Stephan C. Volker in Support of Appellants' Emergency Motion for Injunction Pending Appeal.

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A proposed form of interlocutory injunction pending appeal, for approval and issuance by the Court, is lodged concurrently herewith.

Dated: February 14, 2006

Respectfully submitted,

LAW OFFICES OF STEPHAN C.  
VOLKER

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STEPHAN C. VOLKER  
ALLETTA BELIN  
Attorneys for Appellants Tri-Valley  
CAREs, Nuclear Watch of New  
Mexico, et al.

## PROOF OF SERVICE

I am a citizen of the United States of America; I am over the age of 18 years and not a party to within entitled action; my business address is 436 14th Street, Suite 1300, Oakland, California 94612.

On February 14, 2006, I served a true copy of the foregoing document entitled

### **APPELLANTS' URGENT MOTION FOR STAY PENDING APPEAL UNDER CIRCUIT RULE 27-3(b) AND SUPPORTING MEMORANDUM**

in the above-captioned matter on each of the persons listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in the United States mail at Oakland, California addressed as follows:

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I certify under penalty of perjury that the foregoing is true and correct. Executed on February 14, 2006 at Oakland, California.

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Teddy Ann Fuss

