

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 APPELLANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF URGENT MOTION FOR STAY PENDING APPEAL UNDER CIRCUIT RULE 27-3(b) AND SUPPORTING MEMORANDUM <u>DECISION NEEDED BY MARCH 15, 2006</u>
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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. APPELLANTS SATISFY THE TWO-PRONG TEST FOR INTERLOCUTORY INJUNCTIVE RELIEF. 1

A. Appellants Have Demonstrated a Likelihood of Success on the Merits. 2

B. The Balance of Hardships Favors Appellants. ... 3

III. THE BOND AMOUNT SHOULD BE NOMINAL. .. 5

IV. CONCLUSION 6

Proof of Service 7

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Amoco Production Co. v. Village of Gambell</i> 480 U.S. 531 (1987)	5
<i>Baby Tam & Co. v. City of Las Vegas</i> 154 F.3d 1097 (9th Cir. 1998)	3
<i>Friends of the Earth v. Brinegar</i> 518 F.2d 322 (9th Cir. 1975)	6
<i>Idaho Sporting Cong. v. Thomas</i> 137 F.3d 1146 (9th Cir. 1998)	2
<i>Marsh v. Oregon Natural Resources Council</i> 490 U.S. 360 (1989)	4
<i>National Parks & Conservation Ass’n. v. Babbitt</i> 241 F.3d 722 (9th Cir. 2001)	3
<i>Ocean Advocates v. U.S. Army Corps of Engineers</i> 402 F.3d 846 (9th Cir. 2005)	2, 3
<i>People of the State of California ex rel. Van de Kamp v. Tahoe Regional Planning Agency</i> 766 F.2d 1319 (9th Cir. 1985)	6
<i>Rodeo Collection, Ltd. v. West Seventh</i> 812 F.2d 1215 (9th Cir. 1987)	1
<i>San Diego Comm. Against Registration and the Draft v. Governing Board of Grossmont Union High School Dist.</i> 790 F.2d 1471 (9th Cir. 1986)	1
<i>Sardi’s Restaurant Corp. v. Sardi</i> 755 F.2d 719 (9th Cir. 1985)	1
<i>The Wilderness Society v. Tyrrel</i> 701 F.Supp. 1473 (E.D. Cal. 1988)	6
<i>United States v. Odessa Union Warehouse Co-Op</i> 833 F.2d 172 (9th Cir. 1987)	2

OTHER AUTHORITIES

Ninth Circuit Court Rules § 27-3(b)	1
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I. INTRODUCTION

Appellants' Urgent Motion for Stay Pending Appeal, filed February 14, 2006, relied on this Circuit's Rule 27-3(b) as the primary legal authority on which appellants' motion is based. This rule sets out detailed criteria for emergency motions. Appellants wish to supplement this authority with citation to Ninth Circuit and Supreme Court rulings that further elucidate the legal standards that govern this Court's issuance of a stay pending appeal. As shown below, appellants satisfy these standards.

II. APPELLANTS SATISFY THE TWO-PRONG TEST FOR INTERLOCUTORY INJUNCTIVE RELIEF.

A stay pending appeal is a form of preliminary injunction, in which the Court grants interlocutory relief restraining conduct that otherwise might cause irreparable harm before the matter can be resolved on the merits. "To qualify for a preliminary injunction, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships tips sharply in the moving party's favor." *Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987), citing *Sardi's Restaurant Corp. v. Sardi*, 755 F.2d 719, 723 (9th Cir. 1985).

"These are not two distinct tests, but rather the opposite ends of a single 'continuum in which the required showing of harm varies inversely with the required showing of meritoriousness.'" *Id.*, quoting *San Diego Comm. Against Registration and the Draft v.*

Governing Board of Grossmont Union High School Dist., 790 F.2d 1471, 1473 n. 3 (9th Cir. 1986). The moving party ordinarily must show “a significant threat of irreparable injury,” although there is “a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases,” *United States v. Odessa Union Warehouse Co-Op*, 833 F.2d 172, 174, 175 (9th Cir. 1987), and vice versa.

A. Appellants Have Demonstrated a Likelihood of Success on the Merits.

Appellants have demonstrated a likelihood of success on the merits, satisfying the first prong of the two-prong test. “[A]n EIS *must* be prepared if ‘substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor.’” *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 864 (9th Cir. 2005) (quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998) (alterations and emphasis in original)).

Appellants established in their opening and reply briefs on appeal that they have a high probability of success on the merits, because to trigger the requirement for an EIS, they “need not show that significant effects [on the environment] *will in fact* occur.” *Id.* at 865 (quoting *Idaho Sporting*, 137 F.3d at 1150) (emphasis in original). Appellants’ Opening Brief (“AOB”) at 2-8, 36-63; Appellants’ Reply Brief (“ARB”) at 12-28.

Instead, appellants need only raise substantial questions regarding whether the appellees’ BSL-3 project *may* have a

significant effect. *Ocean Advocates, supra*, 402 F.3d at 864. As demonstrated in appellants' opening and reply briefs on appeal, as well as in their moving papers herein, the subject BSL-3 facility may cause significant harm to the environment in the event the deadly bioagents it will store and use are released to the external environment. Such a harmful release could occur during an earthquake, fire, terrorist attack, or other foreseeable occurrences. AOB at 2-8, 36-53; ARB at 12-28; Appellants' Urgent Motion for Stay Pending Appeal at 2-5; Declaration of Robert R. Curry, Ph.D. in Support of Appellants' Urgent Motion for Stay Pending Appeal, filed February 14, 2006 ("Curry Dec."), at ¶¶ 4-9. Therefore an EIS is required.

B. The Balance of Hardships Favors Appellants.

Appellants have likewise satisfied the second prong of the twin tests for a preliminary injunction: that serious questions regarding the merits exist and the balance of hardships tips sharply in the moving party's favor. *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998). "Where an EIS is required, allowing a potentially environmentally damaging project to proceed prior to its preparation runs contrary to the very purpose of the statutory requirement." *National Parks & Conservation Ass'n. v. Babbitt*, 241 F.3d 722, 737-38 (9th Cir. 2001).

Appellants have adduced highly qualified expert testimony demonstrating that appellees have not designed their proposed BSL-3 facility to withstand foreseeable earthquakes (and other potential disturbances), and that a release of bioagents from the facility could

cause serious death and injury to potentially thousands of residents of the City of Livermore and the Bay Area. AOB at 2-8, 36-53; ARB at 12-28; Appellants' Urgent Motion for Stay Pending Appeal at 3-5, citing testimony by Professor Robert R. Curry (3ER8) and by Dr. Matthew McKinzie (3ER10) in the District Court proceeding.

Appellees may contend in response that this Court must defer to the judgment of appellees' specialists, who assert that this BSL-3 facility will not fail as a result of earthquake, fire, or terrorist attack, and that the public is fully protected. 5ER41 (Madhu Kamath); 6ER45 (Robert Hull). But as the Supreme Court explained in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989), courts "should not automatically defer" to an agency "without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision." "A contrary approach would not simply render judicial review generally meaningless, but would be contrary to the demand that courts insure that agency decisions are founded on a reasoned evaluation of the relevant factors." *Id.* (inner quotations omitted).

Appellees' decision not to prepare an EIS is not "founded on a reasoned evaluation of the relevant factors." *Id.* As Professor Curry explained in his Declaration filed February 14, 2006, appellees' witnesses either ignored or misapplied the proper methodology for assessing and addressing this site's substantial earthquake risks. Curry Dec. at ¶¶ 4-9. Appellees also overlooked or misstated the severe flaws in their safety and security systems, and never

considered the possibility that a fire could cause a release of deadly bioagents. AOB at 2-8, 36-53; ARB at 12-28.

Thus, even providing appellees with the deference they are due, serious questions nonetheless remain regarding whether this BSL-3 facility may release deadly pathogens during foreseeable events such as earthquake, fire, or terrorist attack, as documented in Appellants' Opening Brief at 2-8, 36-53, Appellants' Reply Brief at 12-28, and Appellants' Urgent Motion for Stay Pending Appeal at 2-5. Since the harm from a release of bioagents to the environment would be irreparable, the balance of harm favors issuance of a stay pending this appeal. As the Supreme Court has explained,

Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.

Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 545 (1987). Accordingly, the balance of harm favors appellants, satisfying the second test for interlocutory injunctive relief.

III. THE BOND AMOUNT SHOULD BE NOMINAL.

As appellants pointed out in their Urgent Motion for Stay Pending Appeal, any bond required of appellants should be set at a nominal amount. *Id.* at 6-7. This Court has held that non-profit conservation organizations such as appellants, who seek to prevent environmental harm and enforce environmental laws, should not be required to post substantial bonds, lest the courthouse doors be effectively shut to their requests for lawful government

decisionmaking. *People of the State of California ex rel. Van de Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985); *Friends of the Earth v. Brinegar*, 518 F.2d 322, 323 (9th Cir. 1975); *The Wilderness Society v. Tyrrel*, 701 F.Supp. 1473, 1492 (E.D. Cal. 1988). Appellants are non-profit organizations and concerned citizens who lack the economic wherewithal to post a substantial bond. 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.

Accordingly, appellants should not be required to post a substantial bond in order to secure enforcement of appellees' duties under the National Environmental Policy Act.

IV. CONCLUSION

For the foregoing reasons, appellants have satisfied both prongs of the two-part test for this Court's issuance of a stay pending appeal. Accordingly, this Court should grant Appellants' Urgent Motion for Stay Pending Appeal. The amount of bond, if any, should be nominal.

Dated: February 15, 2006

Respectfully submitted,

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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 15, 2006, I served a true copy of the foregoing document entitled

APPELLANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF 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 electronic transmission via facsimile to the facsimile numbers listed below and 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.

Teddy Ann Fuss