

adapted quickly to her new job. But she said she hopes to continue learning throughout her career.

"I feel like I have to earn my seat

personal injury
For the plaintiff: Robert Gibson and Cynthia Craig, Gibson & Hughes, Santa Ana

Mendoza, Riverside County district attorney's office
For the defense: Jon Jorgenson, Highland

Bioweapon security questioned

By Fiona Smith
Daily Journal Staff Writer

A community group concerned over the operation of a bioweapon research facility at the Lawrence Livermore National Laboratory sought to convince the 9th U.S. Circuit Court of Appeals Wednesday that the high security facility has failed to adequately look at the risks posed by a terrorist attack.

Nonprofit Tri-Valley Cares is fighting the Energy Department, claiming it glossed over the threat of deadly pathogens such as anthrax and plague escaping from the lab in violation of the National Environmental Policy Act or NEPA.

The research facility, aimed at combating the threat of biological weapons, was first proposed in 2002 on the heels of the Sept. 11, 2001 terrorist attacks and the mailing of anthrax-laced letters which killed five people. The facility has operated since 2008, after the plaintiffs tried and failed to get a preliminary injunction blocking the facility from opening while the NEPA case played out, *Tri-Valley Cares v. U.S. Department of Energy*, 17636 (9th Cir., filed Nov. 18, 2010).

The so-called Biosafety Level 3 lab is located three miles from downtown Livermore and 40 miles east of San Francisco, and yet the Energy Department has not done enough to analyze the impacts of a potential terrorist attack on the building, including a deliberate plane crash or a terrorist or insider stealing a pathogen, according to Livermore-based Tri-Valley.

While the Energy Department acknowledged the possibility of scenarios with catastrophic outcomes, it wrongly determined that the likelihood of such attacks were so small that it didn't need to do an in-depth analysis of the potential environmental impacts, said Scott Yundt, an attorney for the nonprofit.

But Judge Milan Smith pointed to the government's assessment as sufficient. "The fact is, that's an analysis," he said.

"But it doesn't meet the procedural requirements of NEPA," Yundt said. "They say there are potential catastrophic impacts, but they don't go on to analyze the impacts."

The district court upheld the adequacy of the Energy Department's analysis in 2010, and Smith appeared sympathetic to the government's argument that its conclusions were reasonable and subject to substantial judicial deference.

"I'm struggling with the fact that in this case, the government did a whole lot of analysis," Smith said. "It didn't do all you wanted it to do. The question is, when is it enough ... will it ever be enough?"

Sitting on the panel with Smith were Senior Circuit Judge John Noonan Jr., who did not ask any questions, and New York District Court Judge Jed Rakoff, sitting in by designation. Rakoff pointed out to Energy Department attorney Barclay Samford that one of the terrorist attack scenarios being argued — an insider stealing a pathogen — actually occurred in the 2001 anthrax scare. When Samford said he was not familiar with the results of the government investigation into that incident, Rakoff laid out the details, in which the FBI planned to charge a government scientist with the crime. The scientist killed himself before he was charged.

Samford argued that the type of anthrax stolen in 2001 was weaponized, or ready for easy dispersal, unlike the type of anthrax used at the Livermore facility. But Rakoff took issue, saying the anthrax stolen in the 2001 attacks was not weaponized either and that he had served on a National Research Council panel that studied the anthrax attacks at great length.

Samford came back with a rebuttal, noting that the Energy Department has strong human reliability and other security measures in place to prevent such an incident. A scientist would have to steal a small sample of a pathogen to avoid detection and grow it off-site to weaponize it, he added.

"It's very hard in DOE's estimation

to have the technical capacity to pull that off," Samford said. "The DOE determined there's not a significant risk of this happening."

Tri-Valley Cares raised other concerns over security at the Lawrence Livermore National Laboratory and argued that the Energy Department did not adequately disclose and analyze two incidents — one where anthrax vials were improperly shipped, leading several workers to be exposed to the pathogen, and another where the Centers for Disease Control found lab scientists conducted unauthorized experiments to create an antibiotic resistant strain of the plague. The Energy Department has addressed the problems and neither incident affects the potential environmental impacts of a terrorist attack on the bioweapons lab, according to government court filings.

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