

# Inside Energy

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## Activists urge court to order new study of terrorist attack on DOE weapons lab

Apart from researching cutting-edge energy technologies and nuclear weapons, the Energy Department's Lawrence Livermore National Laboratory also studies how to defend against biological attacks — an area that has sparked controversy and lawsuits from the community around the Northern California lab.

That controversy heated up last week, with local activists taking DOE to court once again in an effort to force the agency to more thoroughly examine the potential harm that could come from a terrorist attack on the facility.

Tri-Valley CARES, a Livermore, California-based watchdog group, has been in a legal tangle with the lab since 2003 over the Biosafety Level-3 facility, which does research on a range of dangerous microorganisms, including those responsible for Anthrax and the plague.

"We are challenging this BSL-3 because the DOE failed to adequately analyze the catastrophic consequences it could have on lab workers and the surrounding communities," said Scott Yundt, a staff attorney in charge of the case for Tri-Valley CARES.

The group argued in an appeals hearing on Wednesday in the San Francisco-based 9th Circuit Court of Appeals that the environmental review that DOE conducted before building the facility did not fulfill requirements under the National Environmental Policy Act.

"They have to do environmental impact statements when they build a new courthouse; the idea they don't have to do it when

they build a biological-weapons-agent research laboratory is kind of extreme," Yundt said in an interview. "We are not asking for something huge, we are not asking they not build the lab, we are just asking they do a full examination."

Tri-Valley CARES first sued DOE in 2003 over the same issues, and after a 2006 appeal, the court ordered the department to prepare a new environmental review, but gave it wide latitude on what the review covered. That review concluded in 2008, as the original review did in 2002, that the environmental analysis did not have to analyze the potential impact of a terrorist attack or theft, because the possibility was so remote. Operations at the facility began the same day.

The current lawsuit stems from that decision, and Tri-Valley CARES claims that DOE, by not preparing an EIS or EA that more thoroughly addressed a potential terrorist attack, did not fulfill its obligations under the appeals' court order. Under federal law, a formal EIS is more detailed and involves more opportunities for public input.

But in brief filed with the court and in oral arguments before a three-judge panel on the 9th Circuit, lawyers for the Justice Department representing DOE maintained that a revised environmental assessment sufficiently addressed safety and security concerns, and that further review was unnecessary.

DOJ lawyers argued that the quantity of harmful "biological agents" was so small that they would likely be destroyed in the case of a terrorist attack, such as if terrorists crashed a plane into the facility. In addition, it would be unlikely in the extreme that they could be stolen and effectively deployed as a weapon, the lawyers said.

"The pathogens involved in this lab, as the record makes very clear, are used in small amounts, contained in a form that under the DOE's analysis would have to be removed and then grown elsewhere to make them a viable weapon," Barclay Sanford, a DOJ lawyer, said during the oral arguments.

"It is very hard in DOE's estimation, and the Army's estimation, for an individual to have the technical capacity to pull that off," he said.

Combining the limited likelihood of a theft by a malicious insider and the limited possibility of a terrorist attack or theft, DOE has determined there is not a significant threat, Sanford told the judges.

That fact, combined with the close controls on the less than 10 employees who work in the lab, makes a full environmental review that considers the potential impact of an attack and release of pathogens unnecessary, the government argued.

While the three-judge panel gave no indication how it might rule, at least one member is more informed on the background issues than most in the judicial branch. Judge Jed Saul Rakoff served on a three-year National Academy Sciences review that examined the FBI's investigation of a notorious 2001 case in which anthrax spores were mailed to congressional offices and members of the media.

A decision on the appeal is not expected for several months.

Livermore is one of three national laboratories run by DOE's National Nuclear Security Administration, and is involved in nuclear weapons research, among other things.

NNSA declined to comment on the case.

Livermore's location — private homes sit within several hundred yards of labs that contain dangerous biological organisms and weapons-grade plutonium — has made it a target for local groups. Not only do the research materials cause concern, but the security put in place to protect it do as well. In recent years, security guards have performed poorly in training exercises, and a powerful mobile machine gun meant to protect the lab from attack, and within range of a school, has had mechanical failures.

Lab spokeswoman Lynda Seaver, however, said that the training and equipment problems that led to the failed performance reviews have been fixed.

"Those issues have been pretty much resolved actually. It was some training issues that needed to be resolved, along with some equipment modifications, and so the laboratory has essentially modified that," she said. "That portion of the security has improved dramatically."

DOE's biological research stems from its investigations during the Cold War into the effects of radiation from nuclear blasts on humans, and at Livermore it evolved into an effort to deal with the threat of chemical and biological weapons. The current work at Livermore is largely funded through the Homeland Security Department, and is aimed at developing defenses against the use of biological warfare by terrorists.

That research has resulted in a number of innovations, including that Autonomous Pathogen Detection System, a small cabinet-sized apparatus able to detect dangerous microorganisms. The device has been used in Washington's underground subway stations.

— *Derek Sands*