

Permit



Office of Inspector General

After we finished reading sections of the documents that had been kept secret for up to 10 years, we prepared sections for people to read of a hotline report from the EPA's Office of Inspector General, titled "Region 6 Needs to Improve Oversight Practices" dated April 14, 2010, which we obviously received after this hearing had begun.

In anticipation that some of these pages would be read, I gave the court recorder a copy of the entire document, and also a copy to you, Your Honor, for your convenience as pages were read, because it had not yet been introduced into the record.

It turned out that citizens who came for public comment since then had prepared their own statements and thus these pages were not read into the record. So I highlighted in a copy of the full document those parts that we had intended to read, and I would like to submit this copy with the pertinent parts highlighted. We respectfully request that Your Honor take administrative notice of this serious report from the Office of Inspector General.

And in closing, I thank you, Judge Alarid, for your patient listening to citizens' comments during this long hearing. I pray that the Holy Spirit guide you as you review the mountain of documents and make your recommendations. Thank you for your service.

PENELOPE

McMullen

5-7-2010





U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

Catalyst for Improving the Environment

Hotline Report

Region 6 Needs to Improve Oversight Practices

Report No. 10-P-0100

April 14, 2010

Report Contributors:

Christine El-Zoghbi
Eric Lewis
Larry Dare
John Coll
Ed Baldinger

Abbreviations

CANM	Citizen Action New Mexico
EPA	U.S. Environmental Protection Agency
FOIA	Freedom of Information Act
MWL	Mixed Waste Landfill
NMED	New Mexico Environment Department
OIG	Office of Inspector General
RCRA	Resource Conservation and Recovery Act



At a Glance

Catalyst for Improving the Environment

Why We Did This Review

The Office of Inspector General received a hotline complaint from Citizen Action New Mexico (CANM) alleging that the New Mexico Environment Department (NMED) mismanaged the Sandia National Laboratory's Mixed Waste Landfill (MWL) monitoring wells. We sought to determine if the allegation had merit by reviewing U.S. Environmental Protection Agency (EPA) Region 6's oversight activities.

Background

The Resource Conservation and Recovery Act requires EPA Region 6 to provide oversight to delegated sites. EPA's Public Involvement Policy encourages EPA staff and managers to ensure that decision-making processes are open and accessible.

For further information, contact our Office of Congressional, Public Affairs and Management at (202) 566-2391.

To view the full report, click on the following link:
www.epa.gov/oig/reports/2010/20100414-10-P-0100.pdf

Region 6 Needs to Improve Oversight Practices

What We Found

Region 6's documentation of its oversight was not sufficient to determine whether CANM's allegations had merit or whether NMED's actions and decisions with regard to the MWL monitoring wells were technically sound. Specifically, Region 6 staff (1) took inappropriate steps to keep the details of the MWL monitoring wells assessment from the public, (2) decided not to provide documentation or sometimes not to document their concerns about the MWL monitoring wells, (3) provided a letter to CANM that did not note the specific details of the assessment, or (4) improperly placed a national security marking (Confidential) on the assessment. The Region's actions are a violation of EPA's Public Involvement Policy and EPA's Records Management Policy.

What We Recommend

We recommend that the Regional Administrator, Region 6, comply with EPA's national security, public involvement, and records management policies, including removing the national security marking from the December 2007 Oversight Review. As part of this recommendation, the Regional Administrator should ensure that the opinions of technical and nontechnical staff are documented to support EPA's oversight decisions, and develop or update oversight standard operating procedures to ensure compliance with these policies. We also recommend that the Regional Administrator evaluate the extent to which the Region has not recorded oversight information, or misclassified information, to determine the scope of administrative action or training necessary to remedy the situation.

Region 6 comments were not responsive. Region 6 disagreed with the report's conclusion and recommendations, stating that information was not withheld from the public. However, the Region also stated that the information was exempt from release under the Freedom of Information Act. Region 6 also denied violating national security, public involvement, and records management policies. Region 6 stated that marking documents "confidential" is a common practice "throughout the agency" for many (unclassified) documents. The recommendations are unresolved. Region 6 requested resolution be elevated in accordance with EPA's Audit Management Process.



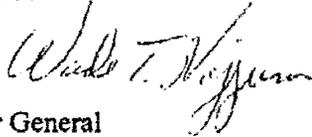
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
INSPECTOR GENERAL

April 14, 2010

MEMORANDUM

SUBJECT: Region 6 Needs to Improve Oversight Practices
Report No. 10-P-0100

FROM: Wade T. Najjum 
Assistant Inspector General
Office of Program Evaluation

TO: Robert Perciasepe
Deputy Administrator

The Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA) conducted this subject audit. This report contains findings that describe problems we identified and corrective actions we recommend. This report represents our opinion and does not necessarily represent the final EPA position. EPA managers will make final determinations on matters in this report in accordance with established audit resolution procedures. Region 6 did not agree with the conclusions and recommendations in the draft report and requested that the matter be elevated in accordance with EPA's Audit Management Process.

The estimated cost of this report -- calculated by multiplying the project's staff days by the applicable daily full cost billing rates in effect at the time -- is \$272,846.

Action Required

As part of the audit resolution process, we are requesting you provide a written response to this report within 90 calendar days. You should include a corrective actions plan for agreed-upon actions, including milestone dates. We have no objections to the further release of this report to the public. This report will be available at <http://www.epa.gov/oig>.

If you or your staff have any questions regarding this report, please contact me at 202-566-0827 or najjum.wade@epa.gov, or Eric Lewis at 202-566-2664 or lewis.eric@epa.gov.

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Purpose

In May 2007, the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA) received allegations from Citizen Action New Mexico (CANM) alleging that the New Mexico Environment Department (NMED) mismanaged the Sandia National Laboratory's Mixed Waste Landfill (MWL) monitoring wells. We sought to determine if EPA Region 6 carried out its oversight responsibilities regarding Sandia National Laboratory's MWL monitoring wells.

Background

The Sandia MWL is a Solid Waste Management Unit site; the monitoring wells are managed by NMED. EPA Region 6 provides oversight to NMED according to a memorandum of agreement with the State of New Mexico. The site is a fenced, 2.6-acre compound that includes several monitoring wells and a background well.

In March 2007, CANM requested that Region 6 review NMED decisions regarding the monitoring wells at Sandia MWL. The Project Engineer for Sandia stated that the Region became involved with the MWL monitoring wells only after the Region received a request from U.S. Senator Bingaman of New Mexico in April 2007. In response to the Senator's request, Region 6 replied that it was conducting an internal review of all well monitoring information, and that it would provide a response to CANM as soon as possible. Region 6 responded to the Senator and CANM in June and December 2007, respectively.

In December 2007, a team of three Region 6 technical staff and a project manager developed a detailed assessment of CANM's concerns. The team included two hydrologists and a geologist. The project manager was an engineer. The Region 6 team reviewed the overall MWL groundwater monitoring system in order to determine its efficacy in detecting contamination. The team reviewed well locations, depth of wells and well screens, purging and sampling methods, videos, and analytical results.

The Region 6 team's findings were summarized in a draft document titled "Sandia Mixed Waste Landfill Groundwater Monitoring Well System and Program Oversight Review" (Oversight Review). This document included comparisons of Region 6 findings and recommendations, NMED recommendations, and CANM issues of concern as stated in its letter of March 2007.

The EPA Public Involvement Policy, May 2003, supplements existing EPA regulations that prescribe specific public participation requirements. The policy applies to all EPA programs and activities. One of EPA's goals for this policy is to ensure that the public has timely, accessible, and accurate information about EPA programs. According to the policy, under the overall direction of the Administrator, Regional Administrators are responsible for ensuring that their managers and staff encourage and facilitate public involvement in programs and activities.

The EPA Records Management Policy, June 2009, established requirements for managing EPA's records. The policy promotes access to information by EPA staff, EPA partners, and the public, as appropriate.

The EPA National Security Information Handbook, December 2006, sets forth the official policies, standards, and procedures for EPA employees and nonfederal personnel who have access to classified national security information. Based on Executive Order 12958, the authority to classify original information at the Secret or Confidential level may be exercised only by the Administrator, EPA, and officials to whom such authority has been directly delegated by the Administrator, in writing. Information may not be classified unless its disclosure could reasonably be expected to cause damage to national security.

OMB Circular A-123, Management's Responsibility for Internal Control, December 21, 2004, states that management is responsible for establishing and maintaining internal control to achieve the objectives of effective and efficient operations, reliable financial reporting, and compliance with applicable laws and regulations. Management shall consistently apply the internal control standards to meet each of the internal control objectives and to assess internal control effectiveness. Internal control standards include control activities. Control activities include policies, procedures, and mechanisms in place to help ensure that agency objectives are met. These procedures include appropriate documentation and access to that documentation. The absence of effective control activities could lead to internal control deficiencies.

Scope and Methodology

We conducted field work from December 2008 to September 2009 in accordance with generally accepted government auditing standards. Those standards require that based on our objectives, we plan and perform the audit to obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions. We reviewed documents, regulations, the New Mexico/EPA memorandum of agreement governing NMED's Resource Conservation and Recovery Act (RCRA) program, and annual and semiannual reviews. We interviewed EPA Region 6 RCRA program managers and technical experts who work with New Mexico. We also interviewed members of CANM.

We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. EPA has granted the State of New Mexico primary responsibility for enforcing the RCRA program within its boundaries. We limited our review to EPA's oversight responsibilities as defined in applicable regulations and the memorandum of agreement with the State

Results of Review: Lack of Transparency Obscures Assessing Whether NMED Was Effectively Managing the MWL Monitoring Wells

Region 6's lack of documentation of its oversight prevented the OIG from determining whether CANM's allegations had merit. The Region's lack of documentation also prevented the OIG from assessing whether NMED's actions and decisions with regard to the MWL monitoring wells were technically sound. Specifically, the Region did not provide the OIG with documentation to support the Region 6 response to CANM that the Region found NMED's overall actions and decisions to be technically sound and consistent with requirements. We found that some Region 6 staff members intentionally did not document their oversight of the

Sandia MWL monitoring wells. The Chief of the Federal Facilities Section and Project Engineer for Sandia also limited public involvement by withholding information regarding the MWL monitoring wells and dismissing the Region's concerns about the site without documenting their decisions.

Region 6 Actions Limit Public Involvement

Region 6 withheld information from the public regarding the MWL monitoring wells through:

- discontinuation of record keeping,
- misleading communications, and
- inappropriate classification.

Discontinuation of Record Keeping. The Region 6 Project Engineer for Sandia stated that her section discontinued record keeping in favor of undocumented phone calls and conversations with NMED to prevent the production of documents. During an interview with the OIG, the Project Engineer for Sandia informed us that her section had discontinued record keeping of phone calls and discussions between the Region and NMED because of CANM's requests for documentation regarding the MWL, including extensive requests for information under the Freedom of Information Act. According to EPA's Records Management Policy, the Federal Records Act of 1950, as amended, requires all federal agencies to make and preserve records containing adequate and proper documentation of their organization, function, policies, decisions, procedures, and essential transactions. The policy requires EPA offices to create, receive, and maintain official records providing adequate and proper documentation and evidence of EPA's activities.

The Region 6 Chief of the Federal Facilities Section further noted that NMED "has become reluctant to engage in open discussions with Region 6 in order to avoid CA[NM]'s distortion of facts, repetitive Freedom of Information Act (FOIA) requests, and threats of lawsuits." Consequently, the Region does not have documentation of its oversight of NMED's management of the MWL monitoring wells. For example, EPA conveyed its Oversight Review concerns regarding the MWL monitoring wells to NMED orally, and NMED was not required to formally respond to the technical team's concerns regarding the MWL monitoring wells. Consequently, any resolution of the concerns is undocumented.

Misleading Communications. Region 6's communications with CANM did not adequately convey relevant and available information regarding CANM's stated concerns. Early drafts of a letter from Region 6 to CANM initially indicated that the Oversight Review would be provided to CANM. However, when a letter was sent from Region 6 to CANM, the document was not included, and the letter itself gave limited information regarding Region 6 findings and recommendations. The Chief of the Federal Facilities Section informed the OIG that she chose to simplify the Region's response to CANM because including overly technical information when corresponding with the public sometimes creates confusion. In an e-mail to the OIG, the Region explained, "We did not include a big 'report' analyzing all the things [CANM

all of
p. 3-7

representative] says NMED is doing wrong, as he had requested. [CANM representative] has already indicated he will be FOIAing all of our drafts, notes, etc. regarding the report, so we will see where that all turns out.”

EPA’s Public Involvement Policy instructs EPA managers and staff to “work to ensure that decision-making processes are open and accessible to all interested groups.” This policy also instructs EPA to approach all decision making with a bias in favor of significant and meaningful public involvement. The Region’s actions do not do that.

The Region’s response was misleading as it did not inform CANM that it found some of CANM’s concerns valid. The Chief of the Federal Facilities Section stated her response was not intended to mislead CANM.

Inappropriate Classification. The Project Engineer withheld the Oversight Review from the public by marking it Confidential, a security classification category. Regional counsel stated to the OIG that the marking was intended to show that the document was a deliberated draft. Classified information is not releasable to the public. On April 27, 2009, the regional counsel confirmed that the document contained no classified information. As such, the Regional Administrator should have the national security marking removed from this document.

Region 6 Accepted NMED’s Recommendations and Dismissed Its Own Concerns without Supporting Documentation

In 2007, the Region’s technical review team found several areas of disagreement with NMED decisions regarding the monitoring wells at the MWL. Despite disagreement between the Region and NMED on several recommendations, the EPA Region 6 Director of the Multimedia Planning and Permitting Division found that NMED’s overall action and decisions for administration of the authorized program were technically sound. However, the Region did not record evidence to support this finding.

The Region accepted NMED’s recommendations and dismissed its own concerns regarding NMED’s management of the MWL monitoring wells. The Region claimed to have no documentation to support these actions and provided none to the OIG. The Chief of the Federal Facilities Section stated that her organization must use experience and judgment in making oversight decisions. The Chief of the Federal Facilities Section also stated the Region adopted NMED’s position on the MWL monitoring wells as long as NMED meets “applicable technical and administrative requirements.” The OIG does not take issue over the use of experience and judgment in oversight roles or the acceptance of NMED’s positions, assuming those issues are within the limits of NMED’s discretion under the delegation of authority. However, the Project Engineer for Sandia intentionally did not document concerns with NMED’s management of the MWL monitoring wells specifically to withhold the information from the public. Therefore, the Chief of Federal Facilities Branch has no documentation to support the Region’s acceptance of the NMED’s recommendations.

The Chief of the Federal Facilities Branch's failure to document concerns with NMED's management of the MWL monitoring wells or the basis for the concerns resolution is an internal control deficiency that deprives management and the public of the ability to make informed decisions. The Project Engineer for Sandia and the Chief of the Federal Facilities Branch provided no documentation to support its judgment to accept NMED's position despite its concerns. In five cases, EPA rescinded its recommendations with regard to the MWL monitoring wells in favor of NMED's proposed plan. Although the Region told us the issues were resolved orally (meetings, conference calls, and individual phone calls), the Region was unable to provide any documentation to support or document the rationale for these compromises. We found that one Oversight Review team member felt the team was pushed to agree with NMED's position regarding the MWL monitoring wells.

The Chief of the Federal Facilities Section informed the OIG that most of the concerns detailed in the Oversight Review have been addressed by actions taken. One e-mail from the Project Engineer for Sandia to the OIG noted, "Yes, we have some differences of opinion, but NMED has delegated authority and the latitude to do what they deem is appropriate (as long as it protects the environment and meets our rules, of course)."

Deferring to NMED based on its delegated authority would be acceptable if EPA had the documentation to support the determination that NMED had acted within the scope of its authority. However, as stated previously, some Region staff members did not document concerns with NMED's management of the MWL monitoring wells or the basis for the resolution of these concerns.

Recommendations

We recommend that the Regional Administrator, Region 6:

1. Comply with EPA's national security, public involvement, and records management policies, including removing the national security marking from the December 2007 Oversight Review.
 - a. Ensure that the opinions of technical and nontechnical staff are documented to support EPA's oversight decisions.
 - b. Develop or update oversight standard operating procedures to ensure compliance with these policies.
2. Evaluate the extent to which the Region has not recorded oversight information, or misclassified information, to determine the scope of disciplinary action or training necessary to remedy the situation.

Agency Comments and OIG Evaluation

The OIG made changes to the report based on the Agency's comments where appropriate. Appendix A provides the full text of the Agency comments and the OIG response to those comments.

EPA does not agree with the recommendations in this report. The Region 6 Regional Administrator has requested that the matter be elevated in accordance with EPA's Audit Management Process. Region 6 believes it maintained information sufficient to respond to CANM's inquiry about the wells. The Region believes it complied with public involvement and records management policies to the extent they apply.

The report concluded that Region 6 oversight was not sufficiently documented because it did not show how the Agency concerns regarding the mixed waste landfill were resolved. The report states, "Specifically, the Region did not provide the OIG with documentation to support the Region 6 response to CANM that the Region found NMED's overall actions and decisions to be technically sound and consistent with requirements." EPA policy is that agency records must contain documentation that is "adequate and proper." That is, the documentation must show a clear picture of how the Agency conducts its business and makes its decisions.

The Region 6 response is that it prefers to initially discuss these matters informally to gather information without unnecessary confrontation. The Region believes that its informal approach provides clarification and resolves concerns. The Region says that the informality is not an attempt to defer to the State without documentation; rather, that is the nature of its "oversight." Region 6 did not explain why it believes its actions and information collected should not be documented as required by EPA policy. OIG cannot assess the adequacy of oversight based on undocumented informal conversations and information. In our opinion, oversight and transparency require documentation that shows a clear picture of how the Agency conducts its business and makes its decisions. The existing documentation does not show how Region 6 resolved its specific concerns to reach a conclusion that the overall actions and decisions for administration of the authorized program were technically sound and consistent with applicable RCRA requirements.

Region 6 denied its staff took inappropriate steps to withhold information from the public. The report addressed the Region staff's failure to document the discussions and resolutions with NMED of EPA's concerns. Region 6 comments focused on a single document (the oversight review inappropriately marked "confidential"). Those comments did not address evidence presented in the report that Region 6 staff intentionally stopped documenting discussions to avoid responding to the public's FOIA requests. It does not matter if a government agency collects information informally or otherwise; an agency is required to maintain documentation to clearly show how it does business.

Region 6 also stated that it was puzzled about the documentation issue, because it had no final action or permitting decision to make with regard to the wells. The region's role, according to Region 6, was to provide oversight of the State's implementation of the program and make appropriate responses to inquires from the public concerning the State's implementation. Later

Region 6 states that the Oversight Review was not released to the public because it was one of many draft versions, withheld under Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5). Apparently the resolution of concerns with NMED did not involve decisions requiring documentation of Region 6's actions, but did involve decisions that allowed the Region to exempt some documents from public disclosure.

Access to information is crucial for informed public involvement. EPA's policies say public involvement begins when individuals and organizations seek information from EPA about a topic or issue, or when they receive information from EPA because the Agency identifies them as a potentially affected party. EPA's outreach activities are supposed to serve and engage these individuals and organizations. As individuals and groups become more involved, they seek more detailed information, increased access to decision makers, and more influence on the ultimate decisions. The failure to maintain adequate and proper records also negatively impacts on public involvement.

Lastly, with regard to compliance with other EPA policies, Region 6's admission that it commonly marks non-classified information confidential puts it in violation of EPA security policies. The EPA National Security Handbook, February 1, 2005, sets forth the procedures for the proper handling of national security information. Paragraph 4-500 – 3 (Marking Prohibitions) specifically states, "The terms "Top Secret," "Secret," and "Confidential" should not be used to identify non-classified information." Using unique markings for classified information allows personnel to recognize it and ensure it is properly safeguarded.

In summary, the Region 6 Administrator's comments substantiate the necessity for both Recommendations 1 and 2. The Region's rationale for mismarking information is that other people do it. The Region's rationale for the lack of documentation is that regional oversight is informal and not confrontational, so it does not need to be documented. As a result transparency and public involvement are adversely affected.

Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS						POTENTIAL MONETARY BENEFITS (in \$000s)	
Rec. No.	Page No.	Subject	Status ¹	Action Official	Planned Completion Date	Claimed Amount	Agreed To Amount
1	5	Comply with EPA's national security, public involvement, and records management policies, including removing the national security marking from the December 2007 Oversight Review <ul style="list-style-type: none"> a. Ensure that the opinions of technical and nontechnical staff are documented to support EPA's oversight decisions. b. Develop or update oversight standard operating procedures to ensure compliance with these policies. 	U	Regional Administrator, Region 6			
2	5	Evaluate the extent to which the Region has not recorded oversight information, or misclassified information, to determine the scope of administrative action or training necessary to remedy the situation.	U	Regional Administrator, Region 6			

¹ O = recommendation is open with agreed-to corrective actions pending
 C = recommendation is closed with all agreed-to actions completed
 U = recommendation is undecided with resolution efforts in progress

Appendix A

Agency Response to Draft Report

March 3, 2010

MEMORANDUM

SUBJECT: Draft Hotline Report Project No. FY08-00025
Sandia Mixed Waste Landfill

FROM: Al Armendariz /s/
Regional Administrator
Region 6

TO: Bill A. Roderick
Acting Inspector General
Office of Inspector General

This memo is in response to the OIG's Draft Hotline Report entitled '*Region 6 Needs to Improve Management of Oversight at Sandia Landfill*' dated January 28, 2010. The draft OIG report charges that a Region 6 manager and project officer 'took inappropriate steps to keep details' of a draft technical evaluation from the public and violated EPA's national security, public involvement, and records management policies, including inappropriate use of national security markings. As explained in more detail in the attached summary, these charges are simply not true. Documents were not misclassified and details of EPA's evaluation were not withheld from the public. The draft, pre-decisional, technical review that the OIG auditors referenced was subject to review in the Regional Office and EPA headquarters under the Freedom of Information Act and was exempt from release under FOIA because it does not reflect the Agency's final position. Region 6 is therefore unable to concur on the recommendations included in this draft report and respectfully requests that the matter be elevated in accordance with EPA's Audit Management Process.

Should you have any questions regarding the attached response please contact Carl Edlund, Director of the Multimedia Planning and Permitting Division, at 214-665-7200, or Susan Spalding, Associate Director for RCRA, at 214-665-8022.

Attachments (see next page)

cc: See next page

Page 2
Memo to Bill Roderick
Draft OIG Report Sandia

Attachments

1. Region 6 Comments on Draft Report
2. EPA Region 6 RCRA State Hazardous Waste Program Oversight Process
3. EPA Region 6 letter to CANM dated December 13, 2007
4. EPA Region 6 letter to CANM dated February 8, 2008
5. FOIA Appeal Determination dated August 7, 2008
6. FOIA Appeal Determination dated November 12, 2009
7. OIG Hotline Closeout Letter dated June 20, 2007

cc: Wade Najjum, OIG
Eric Lewis, OIG
Pat Hirsch, OGC
Kevin Miller, OGC
Cynthia Anderson, OGC
Bob Frederick, OGC
Matt Hale, ORCR
Jim Berlow, ORCR

Corrected Attachment with Comments from OGC, [name of OGC personnel redacted here]

Attachment 1 – Region 6 Comments on Draft OIG Hotline Report – Sandia MWL

General Comments

1. A key concern in the draft Hotline Report (HR) is the national security marking on a document referred to as the Oversight Review. The word “confidential” was used on the document to indicate that the document was draft and pre-decisional.

OIG Response. It is a fact that the document was inappropriately labeled “confidential.” Confidential is a national security marking. The EPA National Security Handbook states that, “The terms “Top Secret,” “Secret,” and “Confidential” should not be used to identify non-classified information.” It appears Region 6 leadership is unfamiliar with EPA’s National Security Information Handbook.

As indicated in the HR, only the Administrator of EPA has the authority to classify information as “confidential” for national security purposes. There was no intention or authority on the part of Region 6 staff to classify the Oversight Review as confidential national security information. The term “confidential” is commonly used throughout the Agency for many documents, such as personnel-related documents and other internal correspondence. Further, markings on a document, such as “confidential” or “deliberative” have no impact on whether or not the document is released to the public.

OIG Response. OIG cannot verify the intent of Region 6 staff in marking the document “confidential.” A Region 6 staff member provided OIG with an email that the document was marked “confidential” to remind the writer and others not to file it with other RCRA paperwork since “it was a draft with some unanswered questions.” There was nothing in the document to justify marking the document “confidential” under agency information security policy. Other agency personnel handling the document would have to assume that the document was classified. Further, no document with a classified marking can or should be turned over to the public until the document is declassified and the marking is removed.

The Region 6 RCRA Program and Office of Regional Counsel worked closely with EPA’s Assistant General Counsel for Information Law to comply with EPA’s FOIA procedures and public involvement policies as they related to release of Sandia documents. Because of this coordination with EPA Headquarters, a copy of this response is provided to the OGC to ensure that any issues regarding the FOIA and public involvement processes are effectively communicated and resolved at the appropriate level within the Agency. OGC has also expressed an interest in your concerns related to the use of the term “confidential” on internal deliberative documents.

OIG Response. The findings in the report are based upon the actions of Region 6 personnel. Prior FOIA releases are not addressed in this report nor has OGC contacted OIG on this subject or national security classification markings.

2. The HR alleges that Region 6 oversight was not sufficient to determine whether Citizen Action New Mexico's (CANM) allegations had merit or whether the New Mexico Environment Department's (NMED) actions and decisions were technically sound. Region 6 oversight of the Sandia Mixed Waste Landfill (MWL) was extensive, particularly for an authorized program, and was documented in the EPA Region 6 RCRA State Hazardous Waste Program Oversight Process. In addition, several supporting documents including the response letters to CANM dated December 13, 2007, and February 8, 2008, demonstrate the degree to which Region 6 documented its oversight and communication with CANM. It is not clear what additional documentation the OIG believes Region 6 should have created to document oversight of the Sandia MWL. Documents referenced above are provided as attachments 2, 3 and 4.

OIG Response. Region 6 misstates the report. The issue in the report is documentation of the Region's oversight. Specifically that documentation was insufficient. Since the agency did not document how it resolved its concerns. OIG cannot determine if the Region's actions were adequate. The Region does not address the specific documentation issues in the report. The Region 6 Project Engineer stated that documentation of discussions with NMED concerning the monitoring wells at the MWL were no longer kept in an effort to prevent CANM from issuing FOIA requests. The Chief of the Federal Facilities Section added that NMED was reluctant to engage in open discussions with EPA because of frequent CANM FOIA requests. In contrast to the Region's actions, the EPA records management policy states at a minimum the Agency must, "Create, receive, and maintain official records providing adequate and proper documentation and evidence of EPA's activities."

3. As discussed on the February 17, 2010, call between Region 6 and the OIG, the Oversight Review document was subject to two FOIA appeals determinations made by EPA Assistant General Counsel for Informational Law. This appeals process and the resulting decisions are an important point that should be included in the draft Report. Copies of the appeal determinations are provided as attachments 5 and 6.

OIG Response. The OIG did not make any recommendations regarding the release of the Oversight Review.

4. The OIG Hotline closeout letter for the Sandia MWL dated June 20, 2007, (provided as attachment 7), refuses to examine CANM's complaint dated June 2006 because it was superseded by a pending lawsuit; two other ongoing investigations; and a notice of intent to sue EPA, NMED, and others; all filed by CANM concerning the same allegations. Those matters were pending in May 2007, when CANM's second OIG hotline complaint initiated this HR. However, the HR does not include any information regarding the outcomes of those matters, nor does it discuss their impact, if any, on OIG's investigation for the HR. We believe that the hotline complaint CANM filed in June 2006 was substantively similar to CANM's complaint filed in May 2007, which initiated the HR. Therefore, we believe the status and outcome of the

matters referenced above is relevant and should be discussed in the HR.

OIG Response. This report addresses internal regional practices that violated EPA policies and guidance for marking national security information, public involvement and records management. The outcome or status of other allegations are not material to these issues.

Sandia MWL Factual Background and Draft OIG Report Errors

The HR is erroneous and misleading because it does not provide any context for Regional oversight activities. It focuses on the Sandia MWL groundwater monitoring wells and, specifically, Region 6's 2007 review of the wells in response to complaints from CANM but fails to provide any technical details. Based on this single narrow aspect, the MWL monitoring wells, the report mistakenly concludes there are flaws in our overall oversight program relating to national security, public involvement, and record keeping.

OIG Response. That is incorrect. OIG did not conclude there were flaws in the oversight program. The purpose of the review was the Region's oversight of the MWL monitoring wells. OIG concluded that there was not sufficient documentation for OIG to make a determination regarding the Region's oversight. However, the Regional Administrator comments that not documenting "informal" communications is how Region 6 oversight is practiced and mislabeling of documents is an acceptable practice if it is widely done is an indication of poor oversight practices. OIG believes that if these practices were widespread they would constitute a serious material internal control weakness. Consequently, we recommended that the Regional Administrator, "Evaluate the extent to which the Region has kept information from the public, not recorded oversight information, or mislabeled information as classified, to determine the extent of administrative action or training necessary to remedy the situation." The Regional Administrator denied there was a need to do that.

The MWL is a 2.6 acre solid waste management unit (SWMU) located on the 8600 acre Sandia National Laboratories, New Mexico facility. Region 6's oversight of the New Mexico program involves a great deal more than just the Sandia facility, this small closed landfill, and its individual monitoring wells. Extensive information regarding the details of our oversight activity as well as specific actions related to the 2007 monitoring well review were previously provided to the OIG, verbally and in writing.

OIG Response. The specific allegations pertain to the Region's oversight of NMED's management of the MWL monitoring wells. As noted above we found insufficient documentation and noncompliance with EPA policies which we consider to be a material internal control weakness. If the weakness proves to be pervasive throughout the Region, then the effectiveness of all programs managed by the Region could be questioned. To that end, we recommended that the Regional Administrator determine whether those practices were widespread; however, he declined.

National Security Claim

The HR alleges that Region 6 violated national security policies and intentionally withheld information from the public by marking one document “confidential.” Because the document was a draft, and still pre-decisional, that allegation is overreaching and distorts the facts.

OIG Response. The Region avoids addressing the fact that Region 6 staff intentionally did not document discussions with NMED to avoid releasing them to the public under FOIA. Region 6 also mislabeled a document as “confidential” and, the national security marking should be removed. OIG does not know what the intent was, but Regional personnel equated the term confidential to deliberative draft and said the purpose of the marking was to keep the document from CANM. Regional personnel provided OIG with emails indicating that the document was originally prepared for release but later decided to withhold the document. Regional personnel stated that they did not present the document to CANM because they did not want to burden the public with overly technical information. Regional personnel added that the document was a deliberative draft.

The December 12, 2007, document marked “confidential” and described as the “oversight review” in the HR was the last draft summary of Region 6’s staff review of the old groundwater monitoring system at the MWL. This particular document was marked “confidential” and “draft” because it was an internal deliberative working draft, not because the authors intended to make a national security classification. Several members of our staff with geology, engineering, and groundwater monitoring experience reviewed available information for the MWL and provided their opinions and perspective, which were documented in various draft summary documents. In fact, the draft document has never been finalized. Accordingly, as the IG investigators are well aware, this document went through the Regional FOIA review process and was withheld as deliberative under Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5) by the Deputy Regional Administrator, Management Division. After the Freedom of Information Act (FOIA) requestor filed two administrative FOIA appeals, EPA’s Office of General Counsel upheld the Region’s application of Exemption 5 and denied both appeals. These facts do not appear in the HR, thus making the report misleading by omission. Moreover, a marking on the document does not control whether the document will be released under the FOIA. As happened here, the Region (or appropriate program office) will still review the record to determine whether it is exempt or releasable notwithstanding a designation.

OIG Response. We have previously addressed the markings on the document. We made no recommendation to release the oversight review to the public.

Public Involvement

Since New Mexico’s RCRA authorization, NMED has been the permitting authority for this site and Region 6’s role is oversight of the entire authorized RCRA program for New Mexico. The NMED regulatory permitting process includes appropriate public notice and comment opportunity. Historically, opportunities for public participation have been plentiful. The Final Order issued by the NMED Secretary of the Environment in 2005 for MWL remedy selection provides for additional, greater opportunity for public participation than required by the

regulations. The Department of Energy (DOE) commissioned a Citizen's Advisory Board (CAB), which met at least quarterly from the late 1990s until September 2000 to discuss issues at the MWL. This forum allowed the public, regulators, and local experts to openly discuss and debate technical issues and solutions for the MWL. EPA was an ex officio member and CANM, as a full CAB member, was an active participant in these discussions. The DOE has continued to

hold quarterly and semi-annual public meetings to discuss environmental issues at Sandia. At the MWL, Region 6 has participated in site activities far beyond that which is normally done in overseeing an authorized State's implementation of the RCRA program.

OIG Response. The above comments are not relevant to Region 6 internal management control weaknesses.

Region 6 has been actively involved with the MWL site for many years; therefore, the HR statement that the Region only became involved with the MWL after we received a request from Senator Bingaman is incorrect. CANM asked Region 6 to assess the monitoring wells in March 2007 and apparently contacted the Senator at nearly the same time, preempting our response to CANM. Further, Region 6 had already been in contact with CANM and provided them with more than 500 pages of documents under FOIA in February 2007. The extent of our prior involvement at the MWL is not reflected in the HR, probably because the OIG investigators only requested Region 6 records dating back to March 2007 (10/02/2008 email, names of OIG and Region personnel redacted here).

OIG Response. The report attributes the statement to the Region's Project Engineer for Sandia. The extent of her statement was that the Region became involved with the MWL monitoring wells after a request from Senator Bingaman. Although that should be discernable from the text, we will add "monitoring wells" after the MWL statement.

As stated above, the so called "oversight review" document was not provided to CANM because it was one of many draft versions, withheld under Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5). Our response regarding the well was provided to CANM in the December 13, 2007, letter, which informed CANM that NMED's overall actions and decisions for administration of the authorized program were consistent with applicable RCRA requirements. We found no evidence to indicate that the MWL posed an imminent or substantial danger to citizens or the groundwater supply. Because NMED had already directed the DOE and Sandia to install a vegetated cover and replace several wells, we believed these concerns were already being properly addressed by the State.

OIG Response. The conclusion provided to CANM was that overall actions and decisions for administration of the authorized program were consistent with applicable RCRA requirements. That conclusion left unanswered some specific concerns Region 6 expressed in the Oversight Review with NMED's management of the MWL monitoring wells. However, the Region has no documentation to show what steps taken, if any, to resolve their specific concerns or how the overall conclusion was reached in spite of their concerns.

While the Region believes it was important to respond to CANM's letter regarding the monitoring wells, it must be given proper significance as a State oversight matter and reflect to what extent this narrow issue should receive the Region's limited oversight resources. While the Public Involvement Policy encourages outreach and technical support to the public they also recognize that the Agency's limited resources should be spent on the highest priority issues.

OIG Response. Region resources had already been consumed to develop the Oversight Review. Despite its concerns expressed in the Oversight Review, Region 6 provided assurances to the public. The above comment implies that the concerns were left unresolved due to resource issues.

To further put this investigation and Regions 6's oversight activities into proper perspective, the HR focused on a single SWMU, the 2.6 acre MWL, which operated from 1959 to 1988. The MWL has a total of seven monitoring wells. There was no known release of contamination to the groundwater, the landfill contents were well-documented, the depth to the regional aquifer was nearly 500 feet, the distance to the nearest drinking water well was 4.6 miles, fate and transport modeling showed a low risk of contaminant release, there were no surface water features in the area, and there was little mechanism for contaminant transport due to the desert climate. Elevated levels of chromium and nickel, found in some older wells in the past few years, were investigated with down-hole video cameras but considered anomalous because the videos showed substantial corrosion of the well screens and there was no other known source for chromium or nickel in the landfill. This conclusion was supported by documentation of this problem at other sites and similar experience at Sandia where chromium and nickel exceedences stopped when wells with stainless steel screens were replaced with PVC. Conditions found at the MWL would normally dictate this SWMU be a low priority for oversight review, but nonetheless it has received direct review due to CANM's multiple requests. All of this information was available to the investigators but does not appear in the HR.

OIG Response. The above statement is not relevant to noncompliance with EPA record management and public involvement policies.

Records Management

The HR report raises concerns about our recordkeeping practices. The Region believes it maintained information sufficient to respond to CANM's inquiry about the wells. In 2007, when the Region was developing a reply to CANM concern regarding the monitoring wells, the project engineer retained all internal documents such as the staff notes and draft review summary documents generated throughout the time we were attempting to put together a response to CANM. These drafts were shared with supervisors and management, and many deliberative discussions occurred verbally and in writing. As the staff continued to research the issues, the drafts were updated and the format evolved. The decision to provide our conclusions to CANM in a letter was made by Region 6 management. The fact that the Region subsequently responded to CANM in a letter format does not alter the predecisional character of the draft documents or justify the HR claim that Region 6 intentionally misled or hid information from the public. Release of predecisional material would discourage open, frank discussions on matters of policy

between subordinates and superiors prematurely disclose proposed policies before they are finally adopted, and cause public confusion by disclosing reasons and rationales that were not in fact ultimately the grounds for EPA's action. Our December 13, 2007, letter to CANM indicated that NMED acted reasonably within its discretion as the permitting authority for the MWL. Further, the issues CANM raised either were previously settled or would become moot upon the imminent installation of new monitoring wells and the vegetated cover. Therefore, we saw no public benefit to rehashing past issues when there was no apparent environmental threat or harm. Instead, we chose to focus on data from the new wells when it became available in order to resolve any ambiguities.

OIG Response. The report criteria is the EPA records management policy. The Region's assertion that it maintained sufficient records does not demonstrate compliance with this policy. Intentionally not recording information to avoid FOIA is not recognized as an agency records management tool.

The HR claims that Region 6 intentionally discontinued recordkeeping are without merit. The claim that we did not document our decisions on the monitoring wells is also puzzling because we had no final action or permitting decision to make with regard to the wells. That decision was the responsibility of NMED because NMED now has the responsibility to issue RCRA permits within New Mexico. The Region's role was to provide oversight of the State's implementation of the program and to make appropriate responses to inquiries from the public concerning the State's implementation. The need for Region 6 to conduct ongoing documentation of this specific MWL was negligible because the corrective action plan was already in place and being implemented. Our mid and end of year program oversight reviews have demonstrated and documented that NMED has met the Region's oversight expectations for Sandia and its other RCRA facilities. All of this information, along with the technical review drafts, notes, and other documents, was provided to the investigators.

OIG Response. The Region ignores that its staff told OIG that they did not document communications with NMED to deliberately keep CANM from information through the FOIA process. The Records Management Policy requires the Region to document its oversight activities regarding the MWL monitoring wells, which it did not do.

The Region attempts to work with its States in a collaborative manner to address issues that might arise at a particular facility. We prefer to initially discuss these matters informally to gather information without unnecessary confrontation, as we did with the MWL wells. Often, that provides clarification and resolves the concerns. This is not an attempt to defer to the State without documentation, as the HR alleges, but rather that's the nature of "oversight." The interactions between EPA and NMED occur as a back and forth dialogue because, when doing environmental or groundwater monitoring, differences of opinion sometimes arise on the "best way" to proceed. We must use experience and judgment in our dealings with authorized States, and the Region believes it's appropriate to defer to the authorized entity as long as they act reasonably within their discretion and follow the appropriate administrative requirements. Once again, this was explained to the investigators, but it does not appear in the HR. It is unclear how the HR can conclude that we failed to generate adequate documentation for the OIG to make a determination if CANM's claims had merit but the OIG was able to determine that we deferred

to NMED on our disagreements. The OIG appears to misunderstand the difference between responding to a citizen inquiry and the oversight of a state's entire authorized RCRA program. The HR factually only discussed our response to CANM's inquiry about the wells, while its recommendation directs that we "develop or update our oversight," presumably for all the Regional state programs.

OIG Response. The Region ignores that its staff told OIG that they did not document communications with NMED to deliberately keep CANM from information through the FOIA process. Further, the Region did not have sufficient documentation to show that it determined deferring to NMED was an appropriate decision.

The fact that the HR focuses exclusively on our response to a citizen inquiry also does not correspond to what it stated in the Scope section of the HR on page 2. The HR states that "We [OIG] limited our review to EPA's oversight responsibilities as defined in applicable regulations and the memorandum of agreement (MOA) with the State;" however, there was no discussion in the HR concerning EPA's oversight responsibilities as defined in those applicable regulations and the MOA. In fact, the Region's mid year and end of the year oversight reviews are required by the MOA. This information concerning our oversight of the New Mexico program was shared with the investigators but was not discussed in the HR, and thus it is misleading by omission. We believe that this information was left out because it demonstrates that the Region does a very good job in overseeing the New Mexico program. Even the title of the HR demonstrates a lack of understanding of the nature of state oversight, i.e., "Region 6 needs to Improve Management of Oversight at Sandia Landfill." The State manages oversight of the Sandia Facility and, even more narrowly, this one particular Landfill. The Region oversees the State's program.

OIG Response. The Region is again incorrect. The purpose of the review as stated in the notification letter to Region 6 and the draft report was to ..."determine if EPA Region 6 carried out its oversight responsibilities regarding the Sandia National Laboratory's mixed waste landfill." The sentence from the Scope and Methodology section of the report is taken out of context. The full context says ..."We conducted audit work from December 2008 to September 2009 in accordance with generally accepted government auditing standards. Those standards require that based on our objectives, we plan and perform the audit to obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions. We reviewed documents, regulations, the New Mexico/EPA memorandum of agreement governing NMED's Resource Conservation and Recovery Act (RCRA) program, and annual and semiannual reviews. We interviewed EPA Region 6 RCRA program managers and technical experts who work with New Mexico. We also interviewed members of CANM."

"We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. EPA has granted the State of New Mexico primary responsibility for enforcing the RCRA program within its boundaries. We limited our review to EPA's oversight responsibilities as defined in applicable regulations and the memorandum of agreement with the State."

The HR states that we mislead CANM because one of our earlier, internal “draft letters” initially said we would send an Oversight Review report but then we did not include the Review in our final letter. How a draft letter we never sent to CANM could mislead them is not clear. Instead of finalizing this version of the draft review document, we chose to provide a response in a letter to CANM on December 13, 2007. We were not attempting to mislead CAMN but rather circumstances were such that the State had decided to order Sandia to put in new wells, which we believed made the report irrelevant and finalizing it a waste of resources.

OIG Response. The report says that we found the Region’s actions to be misleading, but not because the oversight review was not sent. As we state in the report, the Region’s actions were misleading when the EPA concerns were consistent with CAMN’s but that information was not disclosed nor was the basis for any resolution of those concerns documented.

Current Conditions at Sandia MWL

Four groundwater monitoring wells at the MWL have been plugged and abandoned. One new background well and three new downgradient monitoring wells were installed in 2008. New monitoring results for constituents of concern show no indication of contamination to groundwater from the MWL. There is also no indication of chromium or nickel beyond background levels, which supports the previous conclusion that elevated levels of chromium and nickel were due to stainless steel well screen corrosion. This information was provided to the investigators in June 2009 but is not discussed in the HR. Since then, the vegetated cover was completed in September 2009 and monitoring results continue to be below actionable levels, as expected.

OIG Response. The above statement is not relevant to the report issues.

Response to Recommendations

1. Comply with EPA’s national security, public involvement and records management policies, including removing the national security marking from the December 2007 Oversight Review.
 - a. Ensure that the opinions of technical staff and nontechnical staff are documented to support EPA’s oversight decisions.
 - b. Develop or update oversight standard operating procedures to ensure compliance with these policies.

Region 6 Response: Region 6 feels that we did comply with public involvement and records management policies to the extent they apply. As stated above, the term “confidential” was used on the Oversight Review document to indicate that the document was draft and pre-decisional.

OIG Response. Region 6 comments are nonresponsive to the recommendations. EPA policies regarding records management, public involvement, and national security information apply to all EPA Headquarters Programs, Regions, Laboratories and other Offices. Region 6 failed to document its fact gathering and resolution of the differences

between its technical opinions and that of NMED. Region 6 staff intentionally did not produce documentation of their official activities so that could not be obtained through FOIA. Region 6 continues to defend marking unclassified documents “confidential” despite EPA policy that prohibits it.

Region 6 believes that the technical, nontechnical, and management oversight documentation for the Sandia MWL was sufficient to support EPA’s oversight role, and we do not concur that additional measures are required. The Public Involvement Policy applies to EPA decisions. In this instance, our role was limited to oversight of NMED’s authorized program; therefore, we did not have the authority to make a permitting decision. In a similar vein, the OIG’s discussions about Regional actions (or inaction) “not to provide documentation” appear to be based on the OIG’s belief that EPA – in its oversight role – had a duty to create more, unspecified original documents or records. The OIG does not cite any policy or guidance to support its conclusion that the Region did not meet the required threshold for creating documentation in the performance of overseeing a program authorized to the state. Given the very extensive oversight and resources the Region has provided related to this singular landfill, the OIG’s hurdle seems excessively high and not sensitive to good stewardship of limited resources. The Region 6 State Hazardous Waste Program Oversight Process document completed at mid and end of year grant reviews as well as site specific documentation related to the Sandia MWL meet the requirements for this documentation (see attached EPA Region 6 RCRA State Hazardous Waste Program Oversight Process, Attachment 2).

OIG Response. Region 6 detailed comments stated that when issues arise the Region prefers to discuss them informally to gather information without unnecessary confrontation to provide clarification and resolve concerns. The Region states that is not an attempt to defer to the state without documentation, but rather that’s the nature of “oversight.” EPA Policy 2155.1 states that each office within EPA is required to establish and maintain a records management program with that will create, receive, and maintain official records providing adequate and proper documentation and evidence of EPA’s activities. Region 6’s preference to perform its official responsibilities informally does not relieve it of the requirement to document the activities it performs in accomplishing its duties. Proper documentation requires the creation and maintenance of records that document the persons, places, things, or matters dealt with by the agency; make possible a proper scrutiny by the Congress or other duly authorized agencies of the Government; and document the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically.

Because Region 6 complied with public involvement and records management policies, we do not concur with recommendation 1b. If the Agency determines that the use of the term “confidential” should no longer be used as a common practice, Region 6 will update standard operating procedures to make this decision clear to staff and management.

OIG Response. Agency policy is that “Confidential,” “Secret,” and “Top Secret” should only be used on classified documents. The violation of controls established to

safeguard classified information is not excused by past common practice and the comments document a Region-wide control failure. The Region's comments also indicate a serious deficiency in management control environment when management ignores agency controls in favor of ease of past common practice with the explanation that everyone does it.

2. Evaluate the extent to which the Region has not recorded oversight information, or misclassified information, to determine the extent of administrative action or training necessary to remedy the situation.

Region 6 Response: The scope of this recommendation extends far beyond the Sandia MWL and the RCRA program. However, Region 6 did comply with public involvement and records management policies in the Sandia MWL case and believe our Regional public involvement and oversight processes are effective and in compliance with applicable laws, regulation, and policy. We do not believe a new evaluation is needed and do not concur.

OIG Response. The report found that the Region had internal control deficiencies regarding public involvement, record keeping, and marking documents in the work performed. The Region's comments, particularly those regarding the widespread mislabeling of information as "confidential" and undocumented "informal" oversight demonstrate systemic material control weaknesses in these areas. The Region's comments, such as the refusal to address misuse of confidential markings with the explanation, in effect, that everyone does it, also indicates a deficient control environment.

The control environment is the organizational structure and culture created by management and employees to sustain organizational support for effective internal control. The organizational culture is also crucial within this standard. The culture should be defined by management's leadership in setting values of integrity and ethical behavior but is also affected by the relationship between the organization and central oversight agencies and Congress. Management's philosophy and operational style will set the tone within the organization. Management's commitment to establishing and maintaining effective internal control should cascade down and permeate the organization's control environment which will aid in the successful implementation of internal control system.

Appendix B

Attachments to Agency Response to Draft Report

For this appendix, go to the following:

www.epa.gov/oig/reports/2010/20100414-10-P-0100_appB.pdf

Appendix C

Distribution

Office of the Administrator
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Acting Inspector General

***Attachments to Agency Response to Draft Report,
“Region 6 Needs to Improve Oversight Practices”***

***Report No. 10-P-0100
April 14, 2010***

Scanned-in versions of the attachments are provided. If you have accessibility issues, contact our Office of Congressional, Public Affairs and Management at (202) 566-2391.

Note: We have redacted information in this appendix. Exemption (b)(6) of the Freedom of Information Act permits the government to withhold names of individuals when disclosure of such information “would constitute a clearly unwarranted invasion of personal privacy.” [5 U.S.C. § 552 (b)(6)]

**Environmental Protection Agency (EPA) Region 6
Resource Conservation and Recovery Act
State Hazardous Waste Program
Oversight Process**

**New Mexico Environment Department
FY 2008 Hazardous Waste Management Program**

**Prepared by the EPA Region 6
Multimedia Planning and Permitting Division**

End of Year 2008

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ATTACHMENT A: 6PD PROGRAM REVIEW CHECKLIST

INTRODUCTION

States that have been authorized under Section 3006 of the Solid Waste Disposal Act, as amended, administer most of the hazardous waste programs under the Resource Conservation and Recovery Act (RCRA) in Region 6. State programs are administered in Arkansas, Louisiana, New Mexico, Oklahoma, and Texas. The Environmental Protection Agency (EPA), however, retains significant responsibilities with Congress for ensuring that the States are administering programs that comply with the federal RCRA statutes and regulations. This document outlines the Region 6 process for conducting oversight of the State RCRA programs. This is a "living document" that will be continually improved and updated according to the national Annual Commitment System goals and measures.

Purpose

The purpose of this document is to provide clear goals and an outline of measures to use in State oversight of the Resource Conservation and Recovery Act program in Region 6. Overall, it provides a clarification of our current policy for state oversight and a venue for documenting our oversight activities.

Policy Statement

Our oversight policy is to work with the Region 6 states to achieve results toward our common goal of protection of human health and the environment. The Memorandum of Understanding (MOU) and the Memorandum of Agreement (MOA) that we have with each state clearly define the roles and responsibilities of the state and EPA. As each state has attained more authority for implementing the RCRA program, we feel it is our job to identify opportunities for enhancement and work with the states through partnerships to improve how we carry out our common mission of protecting human health and the environment.

OVERSIGHT ACTIVITIES

The RCRA Hazardous Waste Program is made up of a number of components: Permitting, Corrective Action, Compliance Assurance and Enforcement, Information Management, and Authorization. This document addresses permitting, corrective action, authorization, and information management through the Multimedia Planning and Permitting Division. The Compliance Assurance and Enforcement Division has an oversight process for their respective program, known as the State Review Framework. The RCRA Project Officers work closely with members of each program area to ensure effective implementation of the state-delegated program. The oversight and monitoring of state cooperative agreements (the type of assistance agreement used in our program) is an ongoing process that includes making sure that all programmatic terms and conditions in the award agreement are satisfied.

Our oversight activities are centered on four components – 1) the cooperative agreement process, 2) the authorization process, and 3) the technical assistance and permit review process, and 4) data management. An area that adds to the overall effectiveness of the RCRA program through forward-moving initiatives handed down from EPA headquarters is captured in the Progress of Voluntary Programs Section.

Section 1: Cooperative Agreement Process

- Review of the State's application for Section 3011 funding, including a thorough review of the costs associated with the activities to be accomplished;
- Negotiation of a work plan that reflects both State and EPA goals and responsibilities for the authorized RCRA program;
- Approval of a Quality Assurance Project Plan and Quality Management Plan before work begins;
- Communication with the State, through monthly conference calls if appropriate, to identify problems and successes as early as possible; and,
- Formal review of the State's performance at mid and end-of-the-program year, with at least one of these reviews being conducted on site and each followed by a report to the State.

Monitoring and Measuring Cooperative Agreement Commitments:

Monitoring commitments consists of tracking the State's progress with implementation of the RCRA program as well as conducting a joint analysis with each state. The joint analysis includes evaluating the project outputs, identifying success, identifying opportunities for enhancement, identifying appropriate solutions, and tracking progress of action items. Follow-up on these items is essential to monitoring progress.

The purposes for monitoring program progress are to:

- Identify project outputs, successes, and opportunities for enhancement;
- Provide recommendations and associated time frames for addressing opportunities for improvement;
- Identify action items and follow-up on previously identified action items;
- Follow-up and document the status of EPA recommendations; and,
- Provide a communication mechanism to management on the successes and opportunities for enhancement.

In the case of RCRA Tribal Grants, no Midyear Report is scheduled, but Quarterly Progress Reports are due to the Project Officer 30 days after the end of each quarter, and at the End-of-Year.

Thirty calendar days following the mid-point and the end-of-the-project period, the States submit progress reports containing a summary of activities conducted and issues faced during the project period. The evaluation reports contain an assessment of the State's progress to date, and the probability of reaching the end goals. If the State's objectives or goals have changed or if they foresee problems in meeting the end goals, the evaluation report must discuss the situation, and provide a plan of action with an associated time frame for addressing the problem. The final End-of-Year progress report should contain a self-evaluation of program activities, reflecting on the aspects of the program that were successful, and those that were unsuccessful. Each state must submit a final Financial Status Report no later than 90 calendar days after the end of the project period.

Section 2: Authorization Process

The workload for each Region 6 State's RCRA Program has increased steadily over time due to increased authorization of RCRA rules to the States. Over 302 rules have been promulgated under RCRA since the statute was signed into law in 1976. Consistent with the national policy that RCRA is designed to be implemented by the States, Region 6 States have sought and been authorized to implement most of the Federal program, including the RCRA "base program" (authorized in 1984). A summary of the major rules for which Region 6 States have sought and/or obtained authorization is presented in Table I.

TABLE I: KEY AUTHORIZATION RULE STATUS

State	RCRA Title VI	RCRA Title VIII	RCRA Title IX	RCRA Title X	RCRA Title XI	RCRA Title XII	RCRA Title XIII	RCRA Title XIV	RCRA Title XV	RCRA Title XVI	RCRA Title XVII	RCRA Title XVIII	RCRA Title XIX	RCRA Title XX	RCRA Title XXI	RCRA Title XXII	RCRA Title XXIII	RCRA Title XXIV	RCRA Title XXV	RCRA Title XXVI	RCRA Title XXVII	RCRA Title XXVIII	RCRA Title XXIX	RCRA Title XXX	
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Alaska																									
Arizona																									
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California																									
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Wisconsin																									
Wyoming																									

(X) denotes Region will authorize State for this rule in FY 2007;
(O) denotes State has adopted the rule, but authorization has not yet been granted;
(Y) Authorized.

Monitoring and Measuring Authorization Progress:

Region 6 uses the framework provided in the Capability Assessment guidance document issued by the Office of Solid Waste and Emergency Response, dated January 28, 1992, for the component of this oversight.

Section 3: Technical Assistance and Permit Review Process

Region 6 has historically provided technical assistance to states in a wide variety of program areas; including program and information management, regulatory interpretations, technical assistance in areas such as ground water modeling, and other corrective action areas such as characterization of contamination, risk characterization, and remedy selection/design. As part of our oversight role, EPA will monitor permit issuance, permit modifications, as well as review issued permits for technical and programmatic consistency.

The criteria for selecting permits/applications will consist of coordinating with each state on which applications will receive the most benefit of an oversight review, the types of permits and the availability of documentation. The Region will request all permit information required for the review from the state agency authorized to implement the RCRA program. If the state is not able to provide the needed information then the Region will coordinate with the State on contacting the facility directly to obtain the information.

The following table identifies the reviews to be conducted for each state:

State	AR	OK	LA	NM	TX
Annual Reviews	1	1	2	1	2

For Louisiana and Texas, two reviews are included to account for Hazardous Waste Combustors. This arrangement may be changed to address future permitting activities. The types of permits to be reviewed may be based on the priority of permitting activities with reference to issuance of permits for interim status or new facilities and permit renewals. This may include: post-closure permits, closure permits, hazardous solid waste amendment (HSWA Only) permits, or any other hazardous waste permitting mechanism deemed appropriate.

Monitoring and Measuring Permit Progress:

Our GPRA permitting goal for FY 2008 under Goal 3: Land Preservation and Restoration, Sub-objective 1.2 is to have approved controls in place at permitting baseline facilities in order to prevent releases from RCRA hazardous waste management units. Our second goal is to update controls by reaching our percent permit renewal goal. These goals will be one way by which a State's permitting program will be measured. Another way to monitor the State's permitting program is by reviewing issued permits for technical and programmatic consistency with the Federal requirements. The number of permits that will be reviewed in New Mexico is as follows:

New Mexico Environment Department (NMED) Permit Assistance and Review:

EPA will review one permit each year issued by NMED. The task will include review of a facility's permit application, the supporting documents, and the final permit.

Section 4: Data Management Process

The States must maintain the RCRAInfo database in order to provide a complete and accurate picture of program accomplishments and to support RCRA program goals developed for the Government Performance and Results Act (GPRA). The reporting of the nationally required RCRAInfo core elements is necessary to review and track RCRA program progress. A complete list of the nationally defined and required values for both Permit Event Codes and Corrective Action Event Codes can be found on the RCRAInfo website under the "Help" screens.

Monitoring and Measuring Data Management

Data management reviews are part of the midyear and end-of-year review process, as covered by the Cooperative Agreement.

Section 5: Progress of Voluntary Programs

EPA and the States work together to promote several national initiatives. Two prominent programs in Region 6 are the Ready for Reuse Program and the National Partnership for Environmental Priorities (NPEP). These programs are voluntary for the States and participating companies. EPA appreciates the States' participation, and all effort by the states will be viewed as enhancements to the overall RCRA program.

Monitoring and Measuring the progress of Voluntary Programs

Voluntary programs will be viewed as enhancements to the overall RCRA program.

ATTACHMENT A

6PD RCRA PROGRAM REVIEW CHECKLIST

Date of Evaluation: End of Year 2008

Program: RCRA Section 3011 Hazardous Waste Management Program

Delegated State: New Mexico

EPA Contacts:
Program Manager: Paul Sieminski
Grants/Project Officer: Lynn Prince
Technical Assistance Coordinator: Nick Stone

State Contacts:
Program Manager: James Bearzi
Grants/Project Officer: Brian Holton
Staff Contacts: John Kieling

Summary of Review:

PROGRAM REVIEW INDICATOR	EVALUATION ¹	COMMENTS
Section 1: Cooperative Agreement Process Review		
1a) Annual grant commitments have been met.	√	The state has completed 1 CA999 and 1 closure verification from its two-year work plan (08-09). In addition, of the annual goal of 77 hazardous waste inspections, a total of 101 were accomplished, exceeding the annual goal.
1b) On Track to Meet GPRA CA goals.		At the end of grant year 2008, the State had 86% Human Exposures controlled; 59% Groundwater controlled. The 08 goals are 95% and 80% respectively. NM has already exceeded the 08 goals for site-wide remedy selected and construction completed.
1c) On Track to Meet GPRA permitting goals	√ ²	At the end of grant year 2008, the State had 77% facilities permitted and 14% renewals completed. The 08 goals are 95% and 35% respectively. The 2008 renewal goal was 35% and the State had permitted 29% of the baseline facilities.
1d) Grant funds used appropriately.	☆	
1e) Alignment of State/EPA strategies and long-term planning tools	☆	
Section 2: Authorization Process Review		
2a) Timeliness and completeness of authorization packages	√	Revision application for RCRA Clusters XIII through XV is overdue. Recognize that John Kieling met with Alima Patterson while in the Regional Office on

¹ Key: ☆ = Meets Federal Requirements √ = Needs enhancement

² EPA continues to recognize the level of effort that the State of New Mexico faces with its work on federal facilities, especially at the Los Alamos National Laboratory.

PROGRAM REVIEW INDICATOR	EVALUATION ¹	COMMENTS
		2/6-7/08 to discuss the authorization package and RCRA Cluster XVI. The checklist for this cluster is now available on the Internet.
2b) Meets Authorization requirements	√	<p>EPA has been working with the State on authorization activities, especially adopting the used oil provisions.</p> <p>NM submitted an authorization application for Used Oil to EPA on February 22, 2008. This application was due to EPA on December 31, 2007 as provided for in the 3011 Work Plan.</p> <p>The authorization application for Clusters XIII through XVI is due to EPA in 2009 according to the 3011 Work Plan.</p>
2c) Maintenance of legal authority necessary to carry out delegated program.	√	
2d) Evaluation of State's resources to carry out the program	☆	
Section 3: Technical Assistance/Permit Review		
3a) Permits reviewed as part of our permit review process is (are) technically defensible.		Rinchem permit was reviewed in grant year 2008 and that permit is technically defensible.
3b) Permits reviewed as part of our permit review process is (are) consistent with federal requirements.	In progress	
3c) Performance standards have been established and implemented for permits/post-closure permits	In progress	R6 conducted a review of certain technical and regulatory aspects of Sandia's MWL and provided written response to Citizen action in December 2007. We found State's overall actions technically sound and consistent with the regulations.

PROGRAM REVIEW INDICATOR	EVALUATION ¹	COMMENTS
3d) Public participation requirements met/State agency records are comprehensive, organized, maintained and accessible to the public.	In progress	
3e) Corrective Action progress	In progress	R6 provided technical comments on Sparton's 2003 – 2006 Annual Reports which require joint EPA, NMED approval per the 2000 Consent Decree. The state has a plan to make progress in the area of Human Exposures. Large complex federal facilities make this more problematic than in other states.
Section 4: RCRA Data Management Review		
4a) Updates databases in a timely way		
4b) Conducts Staff Training	☆	
Section 5: Development of National Initiatives Review		
5a) Evaluation of voluntary programs advancing national initiatives	☆	National Partnership for Environmental Priorities (NPEP) The EPA's R6 Priority Chemical Reduction Team, in coordination with Michelle Vattano (NMED), will be conducting a joint (Green Zia and NPEP) outreach workshop in 2008.
5b) Progress for meeting new GPRA goals aligned with new initiatives.	☆	Land Revitalization In the first half of the fiscal year, NMED supported EPA Region 6's efforts to evaluate facilities with (site-wide) CA999 determinations for land reuse measures/indicators. In the second half of the year, EPA will be seeking NMED's assistance to evaluate the remaining 2008 GPRA facilities. In the second half of the year, Region 6 added Phillips

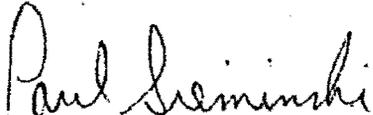
PROGRAM REVIEW INDICATOR	EVALUATION ¹	COMMENTS
		Semiconductors to the list of sites For Ready for Anticipated Use (RAU). In FY 09, EPA will be working closely with NMED to evaluate additional GPRA 2008 and RCRA 2020 sites for RAU, and collect the Universe (acres) for the remainder of the facilities on the RCRA 2020 baseline.

¹ Key: ☆ = Meets Federal Requirements

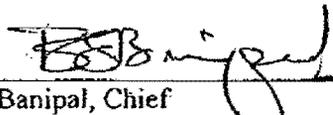
√ = Needs enhancement


Troy Hill
Associate Division Director for RCRA Programs
Multimedia Planning and Permitting Division

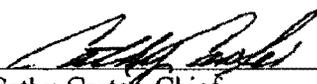
Date: 9/24/08


Paul Sieminski, Chief
State/Tribal Oversight Section
Multimedia Planning and Permitting Division

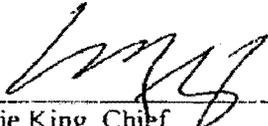
Date: 9/16/08


Ben Banipal, Chief
Corrective Action/Waste Minimization Section
Multimedia Planning and Permitting Division

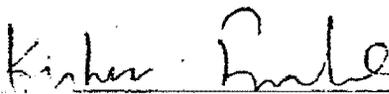
Date: 9/9/08


Cathy Carter, Chief
Strategic Planning/Information Management
Section
Multimedia Planning and Permitting Division

Date: 9/16/08


Laurie King, Chief
Federal Facilities Section
Multimedia Planning and Permitting Division

Date: 9-12-08


Kishor Fruitwala, Chief
Facility Assessment Section
Multimedia Planning and Permitting Division

Date: 9/4/08



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6

1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

DEC 13 2007

[REDACTED] Executive Director
Citizen Action New Mexico

Dear [REDACTED]:

This letter is the U.S. Environmental Protection Agency Region 6's (EPA) response to your various written, e-mail, and voicemail correspondence to our office, including: Letter of March 1, 2007; e-mail of September 18, 2007; and e-mail of November 16, 2007. The thoughts and concerns you have raised in your correspondence about the Sandia National Laboratories, New Mexico, (SNL) Mixed Waste Landfill (MWL) pertain primarily to public participation and ground water monitoring.

The New Mexico Environment Department (NMED), like all other State environmental agencies in Region 6 of the EPA, has been authorized to administer the Resource Conservation and Recovery Act (RCRA) program, and received that authority after having met the requirements for an authorized State program under RCRA. The EPA's role in these federally authorized States is programmatic oversight. In contrast, the authorized State program, which includes relevant State administrative and judicial processes, is in place to address the type of facility-specific concerns you have raised.

However, because of your high level of interest in the MWL, EPA has reviewed certain aspects of the regulatory activities involving the MWL and has addressed several of your comments below.

Regulatory Status of the MWL

You have frequently raised concerns about whether the MWL should be considered a Solid Waste Management Unit (SWMU) or a regulated unit for regulatory purposes. As a result of the appeal Citizen Action filed in October, 2006, the New Mexico State Court of Appeals is currently considering this matter. The EPA considers this an issue that must be allowed an opportunity for resolution through the State administrative and judicial processes and, therefore, declines to comment on this matter.

Public Participation

You have repeatedly expressed concerns about NMED's offering of opportunities for public participation in its regulatory activities related to the MWL. In general, EPA believes that NMED has provided adequate public notice and opportunity for participation in activities related to the MWL. More specifically, NMED has routinely placed MWL documents on its website and numerous opportunities have been provided for formal public comment on MWL proposals and plans. For example, the decision to place a cover over the MWL while maintaining long term monitoring was made after several years of public meetings, study, and discussion.

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Participants included a formal Citizen's Advisory Board (CAB), NMED, Department of Energy, SNL, various independent technical experts, as well as local interested citizens. The EPA was an ex officio participant in the CAB. Several possible scenarios were discussed before the cover and monitoring plan were selected. Please keep in mind that the purpose of placing a cover on the MWL is to decrease the impact of erosion, water infiltration, and animal intrusion in order to reduce the potential for ground water contamination.

Additionally, you have claimed that decisions regarding monitoring and well installation have been approved without the opportunity for public participation; however, the Long Term Monitoring and Maintenance Plan (LTMMP) for the MWL is currently open for public comment. Your concerns about this issue should be raised during the public comment period and addressed through the appropriate channels of NMED's federally authorized RCRA program. Therefore, we encourage you to utilize the proper State administrative and judicial processes to address any concerns you have regarding public participation and the LTMMP.

You have also made requests that EPA direct NMED to release the "Tech Law report." Because Citizen Action is a party to the lawsuit concerning NMED's release of that document, this matter is also currently being addressed through the New Mexico state court system. The EPA considers this an issue of State law and we are confident that this matter will be appropriately resolved through the State judicial process.

Ground Water Monitoring Network

In your letter dated March 1, 2007, you requested that we forward information regarding the MWL monitoring well network and sampling to the EPA National Risk Management Research Laboratory (NRMRL) for review. You also requested that NRMRL review the November, 2006, NMED report by Mr. William Moats, et al., entitled, "Evaluation of the Representativeness and Reliability of Ground Water Monitoring Well Data."

The EPA believes that ensuring the effectiveness of the fundamental aspects of the ground water monitoring well system is the most important element in detecting releases and protecting ground water resources. Therefore, EPA reviewed the overall MWL ground water monitoring system in order to determine its efficacy in detecting contamination. We reviewed well locations, depth of wells and well screens, purging and sampling methods, downhole videos, and analytical results. We also consulted with the NRML on various technical ground water issues. We did not conduct a rigorous technical review of the November, 2006, NMED report because NMED has already directed SNL to replace a number of MWL monitoring wells due to factors such as well screen corrosion and dropping water levels.

Based on our review, we have determined that NMED's overall actions and decisions for administration of the authorized program have been technically sound and consistent with applicable RCRA requirements. We have also found no evidence to indicate that the MWL poses an imminent or substantial danger to citizens or ground water supply.

As part of our oversight responsibility, EPA maintains an open dialogue with our States, routinely discussing program matters and raising any concerns we may have, and we have discussed these matters with NMED.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

FEB - 8 2008

[REDACTED] Director
Citizen Action New Mexico

[REDACTED]

[REDACTED]

Dear [REDACTED]:

This letter is in response to both your January 14 and January 18, 2008, letters to the U.S. Environmental Protection Agency Region 6 (EPA) regarding the Sandia National Laboratory (SNL), New Mexico, Mixed Waste Landfill (MWL). Your January 14, 2008, letter was in response to our December 13, 2007, letter to you regarding the MWL groundwater monitoring system. Your January 18, 2008, letter requested that we forward the November, 2006, New Mexico Environment Department (NMED) report entitled, "Evaluation of the Representativeness and Reliability of Ground Water Monitoring Well Data" (i.e., the "Moats Report") to the EPA National Risk Management Research Laboratory (NRMRL) for review.

The NMED, like all other State environmental agencies in EPA's Region 6, has been authorized to administer the Resource Conservation and Recovery Act (RCRA) program and received that authority after having met the requirements for an authorized State program under RCRA. The EPA's role in these federally authorized States is programmatic oversight. Because of this, EPA's review of the technical aspects of any particular site in an authorized State is discretionary.

As we stated in our December 13, 2007, letter, our review of the MWL groundwater monitoring system found no evidence to indicate that the MWL poses a current threat to citizens or the groundwater supply. Further, we believe long term monitoring, along with installation of a landfill cover to reduce erosion and animal intrusion, will provide both improved safeguards and early indication of any contamination. New monitoring wells, scheduled for installation this spring, will provide additional data.

Because NMED had already directed SNL to replace a number of MWL monitoring wells due to factors such as well screen corrosion and dropping water levels, we did not consider the "Moats Report" relevant and, therefore, did not conduct a technical review of that report. We requested that NRMRL review the Los Alamos National Laboratory (LANL) document entitled "Well Screen Analysis Report" and its subsequent revisions because of uncertainty in the groundwater geochemistry data. In that case, we recognized that a review by NRMRL was

appropriate and would provide technical assistance to both the State and LANL. In effect, we determined that a technical review of the "Moats Report" was not an appropriate use of our resources, however.

Our review of the MWL groundwater monitoring system found NMED's administration of its corrective action program to be adequate and appropriate. Further, we believe that the concerns you raised should be addressed within the context of NMED's authorized state hazardous waste program, which includes opportunities for public participation (such as public meetings, public comment periods, and public and administrative hearings) and opportunities for administrative appeals and judicial review. Because New Mexico implements the hazardous waste program in lieu of EPA, concerned citizens should avail themselves of these state-level opportunities. The EPA may review state-level decisions if they are adverse to or in conflict with the requirements for state program approval.

Thank you for your concern in this matter; we recognize that groundwater is a critical resource for New Mexico and the Albuquerque area. We again encourage you to work with NMED through the approved State program mechanisms to appropriately resolve your concerns regarding the MWL. If you have additional questions, please contact Ashley Phillips of our Office of Regional Counsel at (214) 665-7121.

Sincerely,



Carl E. Edlund, P.E.

Director

Multimedia Planning
and Permitting Division



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 7 2008

OFFICE OF
GENERAL COUNSEL

[REDACTED]
Executive Director
Citizen Action New Mexico
[REDACTED]

Re: Freedom of Information Act Appeal 06-RIN-00123-08-A

Dear [REDACTED]:

I am responding to your February 15, 2008, Freedom of Information Act ("FOIA") appeal. You appealed the January 24, 2008, decision of Lynda F. Carroll, Assistant Regional Administrator, Region 6 ("decision") of the U.S. Environmental Protection Agency ("EPA" or "Agency"), to deny in part the request you submitted to EPA on December 7, 2007. Your request sought documents pertaining to the Agency's internal review of ground water monitoring at the Sandia National Laboratory, New Mexico, Mixed Waste Landfill ("Landfill"). The decision stated that your request was denied in part because the withheld documents were exempt from disclosure under Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5).

I have carefully considered your request, EPA's decision, and your appeal. For the reasons set forth below, I have determined that your appeal should be, and is, denied in part and granted in part.

Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The documents or portions of documents that were withheld under Exemption 5 of the FOIA are exempt from disclosure because they contain information that is protected under the attorney-client privilege and because they are intra-agency or inter-agency memoranda generated by EPA or other federal employees protected by the deliberative process privilege.

Exemption 5 of the FOIA protects from disclosure a record, or portion of a record, that is subject to the attorney-client privilege. The attorney-client privilege protects confidential communications between an attorney and his/her client relating to a legal matter for which the client has sought professional advice. The privilege applies to facts divulged by a client to the

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attorney, to opinions given by the attorney to the client based upon those facts, and to communications between attorneys which reflect client-supplied information. Seventeen of the 21 internal draft summary documents also contain attached emails or portions of emails protected by the attorney-client privilege because they constitute communications between an attorney and her client. Release of this withheld material would allow scrutiny of sensitive, confidential communication between the attorney and the client. Therefore, I have determined that this withheld material is exempt from disclosure under Exemption 5 of the FOIA.

Exemption 5 of the FOIA also protects from disclosure a record, or portion of a record, that is subject to the deliberative process privilege. The deliberative process privilege protects documents that are both predecisional and deliberative. Region 6 withheld 21 internal draft documents, 17 emails attached to those 21 draft documents, approximately 93 pages of other internal emails or portions of emails, 68 pages of notes handwritten by Agency employees¹, and 9 pages of handwritten notes made by an EPA employee during two telephone conversations. All of this withheld information is protected by the deliberative process privilege because it reflects the internal discussions, advice, analysis, and recommendations that were being considered during EPA's decision-making process related to the Landfill. Release of this material would discourage open, frank discussions on matters of policy between subordinates and superiors, prematurely disclose proposed policies before they are finally adopted, and cause public confusion by disclosing reasons and rationales that were not in fact ultimately the grounds for EPA's action.² Therefore, I have determined that the withheld material is exempt from disclosure under Exemption 5 of the FOIA.

The decision also informed you that Region 6 would not provide you with copies of Landfill DVDs. You were told that Region 6 understood that you had also made a request to the Sandia National Laboratories and the U.S. Department of Energy for copies of these same DVDs and that those two entities would respond to your request. As shown in the attached July 25, 2008, email from the Department of Energy, that agency provided you with copies of the Landfill DVDs. Accordingly, I find that this portion of your request has been satisfied.

¹ The decision stated that approximately 68 pages of personal notes were withheld. These notes were mistakenly described as "personal". They should have been described as "handwritten" notes.

² The predecisional character of a document is not altered by the fact that an agency has subsequently made a final decision, see *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) (rejecting specious assertion that deliberative process privilege "expires" after deliberations have ended and relevant decision has been made), or even has decided to not make a final decision, see *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n. 18 (1975) (extending protection to records that are part of a decisionmaking process even where process does not produce actual decision by agency).

You were further informed in the decision that Region 6 would not provide you with full copies of information you requested that was already in the public domain, had been provided to you pursuant to earlier requests for information, or that you yourself or Citizen Action New Mexico had provided to EPA. Also included in this "general reference" information were personal documents belonging to an EPA employee and which were neither maintained by nor under the control of EPA. With the exception of the personally-owned reference materials, which are not Agency records, and any documents Region 6 provided earlier to you in response to your requests, I find that you are entitled to receive copies of other responsive general reference materials as well as copies of those documents you or Citizen Action New Mexico provided to the Agency. To make certain that you actually want this publicly available information and the documents you have provided to EPA, please contact Kathryn Thomas, Region 6, (214) 665-2229 to confirm and to preclude any unnecessary copying. If you do desire this material Ms. Thomas will ensure that copies are made and sent to you.

I have further determined that the withheld documents contain no reasonably segregable information that may be released.

You also argue that EPA's response is inadequate because it has not provided an index pursuant to Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied sub nom. Rosen v. Vaughn, 415 U.S. 977 (1974). I find this argument to be without merit. Vaughn held that in litigation, the Agency must provide information for each withheld document about the author, the date of the document, a description of the subject matter of the document, and an explanation as to why the document falls within the scope of the exemption that is claimed and the harm that would arise from its disclosure. EPA is not required to provide the same documentation in administrative responses as is necessary in the litigation context. See Crooker v. CIA, No. 83-1426, 1984 U.S. Dist. LEXIS 23177, at *3-*4 (D.D.C. Sept. 28, 1984). The court in Safecard Services, Inc. v. SEC, No. 84-3073, 1986 U.S. Dist. LEXIS 26467 at *5 (D.D.C. Apr. 21, 1986) states that "[n]o court has held that a requesting party may compel production of a Vaughn [sic] index before completing its administrative appeal"

The Agency is not required to provide a Vaughn index until ordered by the court in any judicial action you may bring after you have exhausted all available administrative remedies. See Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 11 (D.D.C. 1995), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996). By statute, the denial of an initial FOIA request must inform the requester of the reasons for the denial, the right to appeal, and the name and title of each person responsible for the denial. 5 U.S.C. §§ 552(a)(6)(A)(i) and 552(a)(6)(C)(i). See also 40 C.F.R. § 2.104(h) (EPA FOIA regulations also require an estimate of the volume of material denied).

This letter constitutes EPA's final determination on your appeal. In accordance with 5 U.S.C. § 552(a)(4)(B), you have the right to seek judicial review of this determination by instituting an action in the district court of the United States in the district in which you reside, or

FOIA Appeal 05-RIN-00123-08-A

Page 4

have your principal place of business, or in which the Agency records are situated, or in the District of Columbia.

Sincerely,

(S)

Kevin Miller
Assistant General Counsel
General Law Office

Attachment

cc: Larry Gottesman, HQ FOI Office
Lynda F. Carroll, Assistant Regional Administrator, Reg. 6
Kathryn Thomas, Reg. 6
Maryam Morales, Reg. 6



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 12 2009

OFFICE OF
GENERAL COUNSEL

[REDACTED]
Citizen Action New Mexico
[REDACTED]

Re: Freedom of Information Act Appeal 06-RIN-00396-09

Dear [REDACTED]:

I am responding to your Freedom of Information Act ("FOIA") appeal that was received on August 17, 2009. You appealed the July 20, 2009 decision of Lynda F. Carroll, Assistant Regional Administrator for Management Division ("decision"), of the U.S. Environmental Protection Agency ("EPA" or "Agency"). Your request again sought copies of "the review(s) or report(s) that were prepared by EPA Region 6 staff (Richard Mayer and others on his team) in response to a complaint that was filed with EPA Region 6 about the defective monitoring well network at Sandia National Laboratories' Mixed Waste Landfill." The decision stated that you had already requested these documents in your December 7, 2007 FOIA request; that Region 6 responded to your initial request on January 24, 2008; that you appealed Region 6's response on February 15, 2008; and that I upheld the portion of Region 6's response denying your appeal as to the withheld documents that were exempt from disclosure under Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), in my August 7, 2008 decision.

I have carefully considered your request, EPA's decision, and your appeal. The August 7, 2008 decision continues to apply to requests for information that you have previously requested. As explained in my August 7, 2008 decision, the documents you requested are exempt from disclosure under Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), and the program has decided not to exercise its discretion to release the information because there is a reasonable likelihood that the Agency would be harmed by release. Therefore, I have determined that your appeal should be, and is, denied.

This letter constitutes EPA's final determination on this matter. Pursuant to 5 U.S.C. 552(a)(4)(B), you may obtain judicial review of this determination by filing a complaint in the United States District Court for the district in which you reside or have your principal place of business, or the district in which the records are situated, or in the District of Columbia.

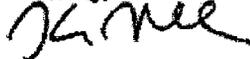
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FOIA Appeal 06-RIN-00396-09
Page 2

Should you have any questions regarding this matter, please call Dan Schulson at 202-564-3035.

Sincerely,



Kevin M. Miller
Assistant General Counsel
General Law Office

cc: HQ FOI Office



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 20 2007

OFFICE OF
INSPECTOR GENERAL



Dear [REDACTED]:

We have completed our review of issues raised in your e-mail dated June 8, 2006, to the Environmental Protection Agency Office of Inspector General Hotline regarding the Sandia National Laboratories, New Mexico, Mixed Waste Landfill (MWL). At our meeting in December 2006, you agreed that we should focus on answering three questions: (1) Did the New Mexico Environment Department properly permit the MWL and follow applicable Resource Conservation and Recovery Act (RCRA) closure requirements, (2) are monitoring wells for MWL deficient, and (3) are groundwater samples taken from the monitoring wells representative of contaminants at the MWL?

During the course of our work, we found that Citizen Action New Mexico (CANM) has requested that the New Mexico Court of Appeals determine whether the New Mexico Environment Department appropriately subjected the MWL to RCRA permitting and closure requirements. CANM also included this issue in its "Notice to Sue" EPA to comply with RCRA for the MWL. In addition to pursuing the first part of your complaint through the legal system, CANM requested that EPA Region 6's Criminal Investigation Division and the Department of Energy's Office of the Inspector General investigate issues regarding the inadequacy of the MWL monitoring wells and deficiencies in the samples collected from those wells. EPA's Region 6 Criminal Investigation Division, the Department of Energy's Office of Inspector General, and New Mexico courts are currently in the process of addressing CANM's remaining issues. Thus we have determined that additional work by our office is not warranted at this time, and we have closed your complaint. A copy of our findings is enclosed.

If you have any questions, please contact me at (617) 918-1471 or mckechnie.paul@epa.gov, or Larry Dare at (202) 566-2138 or dare.larry@epa.gov.

Sincerely,

A handwritten signature in black ink that reads "Paul D. McKechnie".

Paul D. McKechnie
Director of Public Liaison

Enclosure

**EPA Office of Inspector General
Public Liaison Report of Preliminary Research**

Background/Introduction

U.S. Department of Energy (DOE) owns the Sandia National Laboratories (SNL). The Sandia Corporation (Sandia), a wholly owned subsidiary of Lockheed Martin Corporation, and the DOE jointly operate SNL. SNL is located within the boundaries of Kirkland Air Force Base, south of Albuquerque, New Mexico, on the eastern margin of the Albuquerque Basin. Albuquerque metropolitan areas use the ground water from the Basin as their main water supply.

From 1959 through 1988, SNL's Mixed Waste Landfill (MWL) accepted 100,000 cubic feet of low-level radioactive and mixed wastes generated by its research facilities. MWL has two distinct disposal sections: a 6-acre classified section and a 2-acre unclassified section.

In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA). RCRA provided for the development and implementation of a comprehensive program for treatment, storage, and disposal at hazardous waste facilities to protect human health and the environment. EPA has authority to implement RCRA and can authorize eligible States to manage the program. In April 1985, EPA authorized the State of New Mexico to administer and enforce the State's hazardous waste program. New Mexico administers the program through its Hazardous Waste Act and implementing regulations.

Under RCRA, the groundwater protection requirements of 40 Code of Federal Regulations (CFR) 264, Subpart F, apply to surface impoundments, waste piles, land treatment units, and landfills (called regulated units) that received hazardous waste after July 28, 1982. There are three phases to the Subpart F groundwater protection requirements: detection monitoring, compliance monitoring, and corrective action. Subpart F corrective action applies to treatment, storage, and disposal-regulated units that have contaminated ground water.

In a 1986 rule change, EPA included the hazardous waste component of radioactive waste under RCRA. Until 1986, section 1004(27) of RCRA excluded special nuclear or byproduct material from its definition of solid waste sources. In addition, because hazardous waste is defined as a subset of solid waste, special nuclear and byproduct material were exempt from the definition of hazardous waste and, as a result, not regulated under RCRA Subtitle C. Therefore, EPA determined that authorized States' programs did not have the authority to manage the hazardous component of radioactive mixed wastes.

In 1986, EPA also allowed authorized States to apply for authority to manage the program. Facility owners or operators in an authorized State had to file an application for the hazardous component of mixed waste, called a RCRA Part A and Part B, within 12 months of the effective date of the State's authorization to regulate the hazardous component of the radioactive mixed waste, provided that the facility was either operating or under construction. New Mexico received authority to manage mixed waste in July 1990.

Since November 1980, DOE and SNL have managed RCRA regulated wastes under 40 CFR Parts 260-270. In August 1990, SNL submitted a Part A and B application¹ to the New Mexico Environment Department (NMED) for the storage and treatment of hazardous wastes at various units at SNL. Two years later, on August 6, 1992, NMED approved SNL's permit. The SNL permit did not include the MWL.

In January 2004, SNL asked NMED to modify its hazardous waste permit to select a remedy for the MWL. Later that year, NMED drafted a proposed permit for a remedy for SNL and held hearings regarding the selected remedy. The Secretary for NMED issued a final order in May 2005, approving SNL's request. In October 2006, Citizen Action New Mexico (CANM) asked the Court of Appeals of New Mexico to overturn the Secretary's decision.

The Complaint

On June 6, 2006, ██████████ contacted the U.S. Environmental Protection Agency (EPA) Office of Inspector General (OIG) alleging deficiencies in MWL monitoring well construction and inaccurate sampling data from its monitoring wells. On December 4, 2006, we met with ██████████ and CANM's Executive Director, ██████████ regarding their specific issues. We agreed to do preliminary research to answer three questions: (1) did NMED properly permit the MWL and follow applicable RCRA closure requirements, (2) are monitoring wells for MWL deficient, and (3) are groundwater samples taken from the monitoring wells representative of contaminants at the MWL?

Preliminary Research Objectives

We based our preliminary research objectives on the December 4, 2006, meeting with ██████████ and ██████████ of CANM.

Scope and Methodology

To draw our conclusions about the merits of the complaint, we interviewed staff and collected information from EPA Region 6, NMED, ██████████, and CANM. To the best of our knowledge, neither the EPA OIG nor the Government Accountability Office has previously conducted work regarding the issues presented by ██████████ and CANM. The work we did constitutes an audit according to the Government Auditing Standards; however, we limited our review of internal controls to issues in the complaint.

¹ Part A of a RCRA permit application qualifies owners and operators of existing hazardous waste facilities for "interim status" under RCRA. Interim status allows owners and operators to be treated as having been issued a permit until EPA or a State makes a final determination on their permit application. Part B of a RCRA permit application allows owners and operators to receive a permit for the storage, treatment, or disposal of hazardous waste.

Results of Review

Issue No. 1. Is the MWL Subject to Permitting and Closure Requirements of RCRA?

We recommend that our office not examine this issue because a legal action filed with the State of New Mexico's Court of Appeals has requested a ruling on the appropriateness of the use of RCRA Corrective Action provisions. The ruling, by the Court of Appeals, has not been issued.

██████████ and CANM alleged that NMED did not require Sandia and DOE to file a RCRA Part A and Part B RCRA application for the MWL. They also alleged the State allowed DOE and SNL to use RCRA Corrective Action provisions instead of the more stringent closure requirements of 40CFR Part 264, subpart G and 40 CFR 270.1(c).

NMED disagrees. In October 2006, CANM filed a legal action with the Court of Appeals for the State of New Mexico regarding this issue. Two months later, in December 2006, NMED filed a court response to CANM's lawsuit. In addition to the lawsuit, on January 23, 2007, CANM requested that the EPA Region 6 Criminal Investigation Division (EPA-CID) investigate this issue as a criminal matter.

CANM's court appeal argues that the MWL accepted RCRA-regulated hazardous waste after July 26, 1982, and is therefore subject to the RCRA closure and post-closure requirements rather than the less restrictive corrective action requirements. In addition, CANM contends that that SNL did not, but should have, filed a valid RCRA Part A and B application.

NMED contends that SNL was not required to file a Part A and B application for the MWL. NMED argues that a 1988 Federal regulation² required facilities such as SNL, in States like New Mexico, with base programs in place as of July 3, 1986, to submit a revised Part A application reflecting their radioactive mixed waste activity within 6 months of the State's receipt of authorization for mixed waste. In August 1990, SNL submitted a Part A and B application for storage of hazardous waste. Two years later, NMED approved the permit but the MWL was not part of SNL's application because the MWL closed in 1988, prior to the date that New Mexico received authorization to manage mixed waste.

NMED also believes that the MWL is subject to corrective action because the MWL is a solid waste management unit (SWMU) under the RCRA regulations and, as a result, MWL is subject to corrective action. In 1986, EPA recognized it could regulate units with mixed waste that did not fall within the State's mixed waste authority but could nonetheless be regulated as a SWMU subject to corrective action.³ In 1993, EPA designated the MWL as a SWMU because NMED had not received its authority to manage the corrective action program.

In 1998, the NMED Office of General Counsel reviewed the regulatory status of the MWL. Its review included whether SNL should close the landfill under a post-closure permit or if it was appropriate for SNL to take corrective action as a SWMU under the Hazardous and Solid Waste Amendments (HSWA).

² September 23, 1988 Federal Register, Volume 53, No. 185, pages 37045-48, Modification of Interim Status Qualification Requirements for the Hazardous Components of Radioactive Mixed Waste.

³ July 3, 1988 Federal Register, Volume 51, No. 128, pages 24505-06, State Authorization to Regulate Hazardous Components of Radioactive Mixed Wastes under the Resource Conservation and Recovery Act.

NMED's Office of General Counsel determined that SNL disposed of mixed waste into MWL after July 26, 1982, and was therefore required to obtain a post-closure permit under 40 CFR 270.1(c). However, it also determined that NMED had the option of closing MWL under a post-closure permit or under HSWA. NMED, in consultation with DOE and SNL, decided to close MWL as SWMU under HSWA, provided DOE and SNL complied with the technical requirements imposed by NMED. Treating the MWL as a SWMU under HSWA requires that DOE and SNL demonstrate that its remedy is equivalent to post-closure care permit requirements.

Issue No. 2. Is MWL's Monitoring Well Network Deficient?

We recommend that our office not examine this issue because CANM has previously requested that two investigative organizations pursue this issue and has notified EPA and DOE of its intent to sue.

██████████ and CANM alleged that the monitoring wells for MWL are deficient because only one monitoring well is currently installed in the unsaturated or vadose zone to detect contamination from the MWL and that no monitoring wells have been installed in the unsaturated or vadose zone at the point of compliance at the western boundary of the MWL. CANM made similar allegations to the DOE OIG and EPA-CID as well as in its Notice Intent to Sue EPA, DOE, and SNL over failure to comply with RCRA for the MWL.

DOE OIG acted on CANM's request to determine if the monitoring wells are deficient because of the wells' locations. On June 21, 2006, DOE OIG issued a Management Referral Memorandum, "Possible Deficiencies in Monitoring Wells at Sandia Mixed Waste Landfill [MWL]" [File No. I06RS055] questioning whether the monitoring wells were installed in the proper location. In September 2006, DOE and SNL responded to DOE OIG stating that they disagreed with DOE OIG's allegations that the wells are not located in the area of the highest level of contamination. DOE and SNL agreed with CANM's allegation that they did not install monitoring wells in the vadose zone but do not believe corrective action is required at this time. They noted their plans to monitor the vadose zone in the future, once the Long-Term Monitoring and Maintenance Plan has been developed and approved. On October 12, 2006, CANM filed a Notice of Intent to Sue with EPA, DOE, NMED, and SNL that included this same issue. In addition, on January 23, 2007, CANM requested that the EPA-CID investigate this issue as an environmental crime.

Issue No. 3. Are Well Samples from MWL Representative?

Because CANM had previously initiated a similar allegation with EPA CID and DOE OIG, we recommend that our office not pursue this issue.

██████████ and CANM allege that the samples from the monitoring well are not representative because the monitoring well drilling method used for some wells included an additive, bentonite clay, that masks the detection of contaminants at MWL.

As stated in Issue No. 2, CANM requested that DOE OIG and EPA-CID investigate activities at the MWL. Their requests included an allegation that the samples drawn from MWL's monitoring wells were not representative of the contamination coming from the landfill. DOE OIG acted on CANM's allegation and asked that DOE and SNL respond to CANM's allegation. DOE and SNL disagreed that

the samples are not representative. Similarly, CANM requested that the EPA-CID investigate SNL for various environmental crimes, including this issue.