

***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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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 1: KEY AUTHORIZATION RULE STATUS

KEY RULE (CHECKLIST#)	State AR	State LA	State NM	State OK	State TX			
CORR ACTION	171	Y	Y	Y	Y	Y		
POST CLOSURE	174	Y	Y	Y	Y	X		
HWIR-MEDIA	175	Y	Y	Y	Y	Y		
LDR S+D	34	Y	Y	Y	Y	Y		
LDR PHASE II	137	Y	Y	Y	Y	Y		
LDR PHASE IV	167	Y	Y	Y	Y	Y		
BIF	85	Y	Y	Y	Y	Y		

(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
<i>Section 1: Cooperative Agreement Process Review</i>		
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	☆	
<i>Section 2: Authorization Process Review</i>		
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.

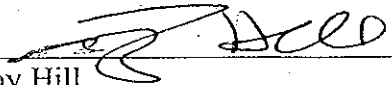
PROGRAM REVIEW INDICATOR	EVALUATION ¹	COMMENTS
		2/6-7/08 to discuss the authorization package and RCRA Cluster XVI. The checklist for this cluster is now available on the Internet.
2b) Meets Authorization requirements	√	<p>EPA has been working with the State on authorization activities, especially adopting 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

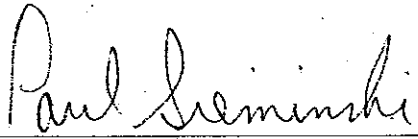
PROGRAM REVIEW INDICATOR	EVALUATION ¹	COMMENTS
		Semiconductors to the list of sites For Ready for Anticipated Use (RAU). In FY 09, EPA will be working closely with NMED to evaluate additional GPRA 2008 and RCRA 2020 sites for RAU, and collect the Universe (acres) for the remainder of the facilities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

¹ Key: ☆ = Meets Federal Requirements

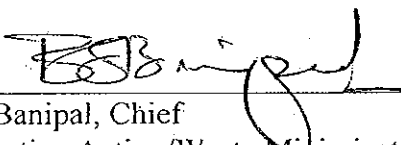
√ = Needs enhancement


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

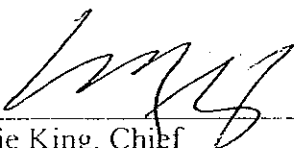
Date: 9/16/08


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

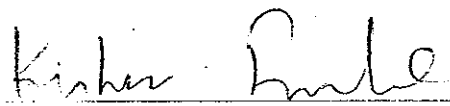
Date: 9/9/08


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


Kisher 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.

copy

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.

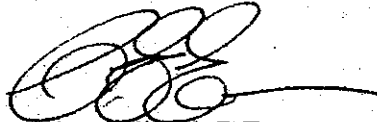
Because NMED had already directed SNL to replace a number of MWL monitoring wells due to factors such as well screen corrosion and dropping water levels, we did not consider the "Moats Report" relevant and, therefore, did not conduct a technical review of that report. We requested that NRMRL review the 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

OFFICE OF
GENERAL COUNSEL

AUG 7 2008

[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

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.

¹The 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.

²The 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 06-RIN-00123-08-A

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

Sincerely,



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
Maryann 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.

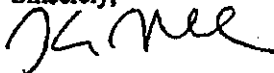
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Should you have any questions regarding this matter, please call Dan Schulson at 202-564-3035.

Sincerely,



Kevin M. Miller
Assistant General Counsel
General Law Office

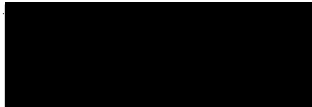
cc: HQ FOI Office



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 dark 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, [REDACTED] 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 [REDACTED] and CANM's Executive Director, [REDACTED], 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 [REDACTED] and [REDACTED] 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, [REDACTED], 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 [REDACTED] 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.