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DEFENSE NUCLEAR FACILITIES SAFETY BOARD

625 Indiana Avenue, NW, Suite 700, Washington, D.C. 20004-2901
(202) 694-7000



July 14, 2010

The Honorable Thomas P. D'Agostino
Administrator
National Nuclear Security Administration
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585-0701

Dear Mr. D'Agostino:

The Defense Nuclear Facilities Safety Board (Board) received the enclosed March 3, 2010, presentation and April 14, 2010, Environmental Protection Agency (EPA) Hotline Report from Mr. David McCoy, Executive Director, Citizen Action New Mexico, regarding concerns at Sandia National Laboratories (SNL). You were copied on the Board's preliminary response to Mr. McCoy.

We are forwarding copies of Mr. McCoy's written presentation along with the EPA report to you for your consideration and disposition, where appropriate, pending review by the Board's staff of issues raised by Mr. McCoy that are jurisdictional to the Board.

Please let us know if you have any questions.

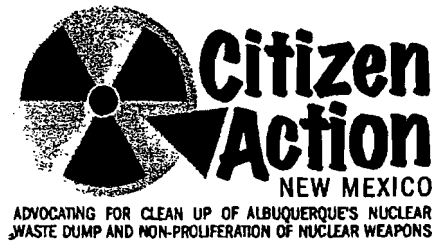
Sincerely,

A handwritten signature in black ink, appearing to read "Timothy J. Dwyer".

for Timothy J. Dwyer
Technical Director

Enclosure 1 Enclosure 2

c: Mr. David McCoy, Executive Director
Citizen Action New Mexico
Mrs. Mari-Jo Campagnone ✓



**Before the Defense Nuclear Facility Safety Board
Citizen Action New Mexico Presentation
March 03, 2010**

1. Citizen Action questions and objects to certification for the Sandia National Laboratories' operation of the Annular Core Research Reactor (ACRR) and the Auxiliary Hot Cell Facility (AHCF). The ACRR and AHCF were used for defense programs involving nuclear weapons. These radiological facilities cannot withstand the design basis earthquake, including ground rupture, which can occur at their location at Technical Area V in the southwest portion of Sandia. In September 2004 the DNFSB found inadequately examined dangers existed for these nuclear facilities for fire hazards, an airplane crash and equipment operations. One need only think of the powerful earthquakes in Haiti and Chile, the intentional airplane attack on the World Trade Center and the small airplane attack on the Internal Revenue Service to realize that acts of nature and terrorists are real dangers that cost lives and wreak devastation.

According to documents obtained by Citizen Action through Freedom of Information requests, the Sandia Pulse Reactor (SPR), the ACRR and the AHCF were all cited by the DNFSB Staff Report of September 27, 2004 as not having adequate Documented Safety Analyses (DSA). The Gamma Irradiation Facility and the Monzano Nuclear Facility were cited for other reasons such of improper inventory controls.

The Independent Evaluation of Field Element Performance (December 10, 2004), a report of the Independent Evaluation Team, found that the DSAs for the ACRR, the SPR and the AHCF all needed to be redone. The SPR has been decommissioned by Sandia. The independent team report found that (pp. 6-7) the SSO corrective action plan had a limited scope assessment; lacked sufficient detail for disposition of all the issues; had incorrect information about nearby residents; was not based on a root cause determination and a comprehensive problem statement.

A revised DSA for the AHCF is currently under review by the DNFSB. (T. Spatz, August 24, 2009 DNFSB Response to Citizen Action New Mexico Letter of July 3, 2009).

The DNFSB should be wary of the SSO's self analyses for corrective action and the upgrade of the AHCF to Hazard Category 3 nuclear facility. *The Path Ahead to Improve the Nuclear Safety Basis Process at Sandia National Laboratories* (January

24, 2005, p. 7) identifies in its Root Cause Analysis that "Sandia has failed to manage the nuclear safety basis program in a formal, systematic manner based on recognized management system standards." The first of nine contributing causes is that "Nuclear safety basis activities have been a low priority for Sandia senior management."

Surrounding the area as receptors for a nuclear accident are Pueblo of Isleta, Albuquerque International Sunport, Mesa del Sol (35,000 planned residential community), Wherry Elementary, the Child Development Center- East, the Coronado Club, Sandia Base Elementary, KAFB housing, Shandiin Daycare Center, the National Atomic Museum, housing along Gibson, Wyoming, and Louisiana Blvds., thousands of commuters including the I-25 and I-40 corridors, workers and military personnel.

Citizen Action does not agree that the February 15, 2005 Corrective Action Plan or subsequent documents furnished to Citizen Action by Sandia have resolved the problems for the lack of earthquake safety, airplane crash scenarios and/or ventilation system problems identified for the AHCF and ACRR.

The Sandia Site Office (SSO) was identified by the Corrective Action Plan (p.19) as "The root cause of many SSO problems" for not providing quality safety basis documentation. The SSO may prefer to continue operations at what are probably unnecessary facilities for Sandia's mission in the face of earthquake dangers and other hazards that still remain inadequately examined for protection of the public and environment.

The interrelationship between the co-location of the ACRR and AHCF building(s) and the safety systems and design basis have not been adequately described or considered. As is identified from the documents cited below, the building(s) that house the ACRR and AHCF are not safe for the size of earthquake that can occur at the TA-V site. The design basis earthquake and a thorough analysis of site geology related to the TA-V facilities is not described by Sandia.

Kirtland AFB and Sandia are in the regional geologic setting of the Rio Grande Rift. This site is riddled with regional fault systems: the Sandia, West Sandia, Manzano, Tijeras, Coyote and Hubbell Springs faults. An earthquake in the Albuquerque area has the potential for human injury and building damage throughout the region. Sandia buildings and structures vary in their capabilities to withstand earthquake forces. Facilities in TA-I could release chemical materials in a plume with exposure of as many as 5,300 persons at 3,800 feet. TA-V would be the predominant source of release of radioactive materials. (1999 Sandia Site-Wide Environmental Impact Statement). Sandia's Site-Wide Environmental Impact Statement is ten years out of date. Human exposures would now be higher after 10 years of rapid population growth in Albuquerque.

Probable future earthquake potential has been estimated to have large magnitude with surface-rupturing potential. (See e.g. *Paleoearthquakes and Eolian-Dominated Fault*

Sedimentation along the Hubbell Spring Fault Zone near Albuquerque , New Mexico, Bulletin of the Seismological Society of America, June 2003; v. 93; no. 3; p. 1355-1369). The earthquake potential from these various fault systems is not adequately described in the documents presented by Sandia to the DNFSB. DOE/NNSA/SSO have failed to provide resolution to the unresolved safety question for earthquakes. DOE Orders and standards are not being met.

The Annular Core Research Reactor (ACRR) in Building Bldg. 6588 and the Auxiliary Hot Cell Facility (AHCF) Bldg. 6580, are in Technical Area V and are in the same building. While the two facilities are in proximity to one another, the actual distance and interrelatedness of safety systems for the two facilities has not been adequately set forth in Sandia documents during DNFSB reviews.

1) The Highbay building (Bldg. 6588) housing the nuclear reactor (ACRR), the Auxiliary Hot Cell Facility and 2) its ventilation system cannot be upgraded for the necessary earthquake safety. The Highbay is a decades old structure which does not meet Safety Class seismic criteria.

The ACRR does not have “the inherent-safe design features similar to the advanced reactors.” (Independent report Assessment Form 1, p. 2). The postulated accidents for the ACRR of an earthquake, aircraft crash or complete loss of reactor pool water would be substantial for release of radiation. The ACRR has no containment and can have a criticality accident. A radioactivity release largely from Plutonium following an accident cannot be isolated for more than 10 minutes according to the Documented Safety Analysis (DSA) reviewed in 2004 by the DNSFB. An accident at the ACRR from a too rapid or uncontrolled regulating rod withdrawal would be severe and neither the water in the reactor pool nor the ventilation system would hold back the release of the radioactive inventory. The reactor explosion possible for the ACRR is described as being of the same type and could be more severe than the Idaho SL-1 reactor that killed three workers with unconfined release of radiation.

What is the scenario examined for cascading type of accident events, such as a powerful earthquake or an airplane crash ((accidental or intentional) simultaneously affecting the nuclear facilities at TA-V given their co-location?

Sandia National Laboratory is the only National Nuclear Security Administration (NNSA) facility operating on a U.S. military installation, i.e., Kirtland Air Force Base. That creates reciprocal dangers not present at other military bases and not present for other national laboratories.

Albuquerque’s population has little if any knowledge of the danger of the operation of the reactor and the hot cell facility. What co-ordinated emergency notification and emergency preparation for the public outside the TA-V site boundary and *outside* the confines of Kirtland AFB has taken place for a major radioactive or chemical accident at Sandia? Unlike the SL-1 accident occurring 40 miles away from Idaho Falls, an ACRR criticality accident would take place in the middle of Kirtland AFB,

near a commercial airport and within the heavily populated urban area of Albuquerque.

It is unknown how many fatalities or persons could be injured or made ill along with ensuing panic and destruction of property values. Dense housing tracts are encroaching along the boundaries of Kirtland AFB. Whether reactor operations are proceeding at present despite failure to resolve the unresolved Highbay building and other safety questions is unknown to Citizen Action.

That a major nuclear accident could occur in proximity to the storage location at Kirtland AFB for nearly 2000 thermonuclear weapons is less than appealing. The scenario may not have been analyzed as to potential consequences, emergency procedures and potential for co-existing terrorist attacks or theft of nuclear materials.

By allowing the reactor and hot cell operations in a building that cannot be made safe for earthquakes, Sandia is not ensuring a process for maintaining hazard controls to provide the necessary level of safety for the workers, public and environment. (10 Code of Federal Regulations Section 830.204).

The DNFSB Staff Report (August 12, 2004) describes the AHCF as processing plutonium and as being part of the existing facility that also houses the ACRR:

“The AHCF was built to facilitate the sorting, categorization and repackaging of legacy material that SNL has categorized as having no ‘defined use.’ These materials include radioactive and transuranic and fissile isotopes, and may also include mixed waste. Physically, the AHCF is a relatively small collection of structures that are completely contained within the highbay of an existing facility.”

According to DNFSB Staff concerns, no safety class systems to protect the public were in place to prevent a radioactive plume from escaping from Sandia’s Auxiliary Hot Cell Facility. It is noted that the NNSA approved a safety analysis for the facility despite 111 pending safety concerns of DNFSB. The August 12, 2004 DNFSB Staff report identifies that (p.4):

“The hot cell structure and ventilation system perform a safety-significant confinement function. However, the hot cell itself is built only to PC-2 requirements, which do not provide for survivable confinement after a seismic event. The ventilation system is not built to PC-2 requirement. Thus, it does not provide confinement of material released during a fire inside the hot cell that is initiated by a seismic event. The DSA [Design Safety Analysis] did not identify or address this deficiency.”

The seismic problems and inadequate documented safety analyses identified with the AHCF linked to the ACRR were first identified by the DNFSB in 2004. A January 24, 2005 Sandia document “*The Path Ahead to Improve the Nuclear Safety Basis Process at SNL*” states (at p. 12):

“The preliminary review concluded that it would be feasible to transition the reactor protection system safety function to Safety Class status. However, the preliminary review concluded it would not be feasible to modify the highbay building structure and highbay ventilation system to act as a Safety Class confinement system, given that the highbay is a decades old structure which does not meet Safety Class seismic criteria. The major difficulty in transitioning the reactor protection system to Safety Class status deals with meeting natural phenomena and external event design standards. The reactor protection system does comply with several of the applicable design criteria identified in the preliminary review. This includes single failure criterion (redundancy), quality standards, and human factors engineering.” (Emphasis supplied).

Regarding the DNFSB comments on the AHCF Safety Basis it is stated (at p. 13):
“A new facility seismic mitigation evaluation was completed on 11/23/04. The results were not adequately conclusive. Further evaluations are underway.”

Sandia’s specific comments on the lack of AHCF earthquake safety in Attachment E to the March 3, 2005 letter of Linton Brooks to John T. Conway of DNFSB state:

“5. DNFSB Staff Issue: The hot cell structure and ventilation system perform a safety-significant confinement function; however, they would not provide confinement after seismic event.

- Hot cell facility is built to PC-2 requirements and contains integral HEPA filter
- Feasibility and cost to upgrade seismic capability of ventilation system being evaluated.
- “Accidents and consequences will be adequately addressed in the DSA [Design Safety Analysis].
- Risks will be clearly communicated.”

Citizen Action has requested, but not received and is unaware of, the issuance of a DSA for the hot cell facility that shows an upgrade to seismic capability. The August 24, 2009 Response of the DNFSB to Citizen Action states that “The Auxiliary Hot Cell facility is in the process of upgrading from a less-than hazard category 3 radiological facility to a hazard category 3 (HC-3) nuclear facility.” But what is the relationship between the systems of the ACRR and the AHCF for seismic safety functions? The Highbay contains the AHCF, but it is the Highbay that cannot survive an earthquake. An August 31, 2009 Letter, cited below, from Thomas D’Agostino demonstrates that DOE does not plan to upgrade the ACRR to seismic capability for the ventilation systems.

According to the conclusions of a January 7, 2005 Sandia White Paper Analysis written by the Nuclear Reactor Facilities Department (Attachment D to the March 3, 2005 letter of Linton Brooks to John T. Conway of DNFSB) an upgrade for the Highbay Reactor Room and components has not been accomplished and would require major redesign and reconstruction (p.2):

“Another conclusion of this assessment was that the Active Confinement System safety function (which would be accomplished by [systems and safety components] SSCs associated with the ACRR Highbay (Bldg. 6588, Room 10) and the Highbay Ventilation System could not be transitioned to Safety Class. One major issue is the seismic qualification of the Highbay itself. In order to provide active confinement, it is necessary that the Highbay survive a design basis earthquake (DBE). The DSA currently states that the structure would not likely survive such an event. In addition, the Highbay Ventilation System (HBVS) ductwork, filters, and fan must also continue operating following a DBE. Thus, transitioning to Safety Class status would involve major redesign and reconstruction of the Highbay and the HBVS.”

Nothing in documents reviewed by Citizen Action indicate that major redesign and reconstruction were/are accomplished for the ACRR.

Citizen Action recommends that the DNFSB review should not certify the reactor and hot cell facility operations because it cannot be shown that the Highbay structure has been replaced with a redesigned and reconstructed facility. An August 24, 2009 DNFSB Response to Citizen Action New Mexico letter of July 9, 2009 states that a planned review by DNFSB staff will be made for the Auxiliary Hot Cell Facility. The latest indication from a letter dated August 31, 2009 from DOE Administrator Thomas P. D’Agostino to John E. Mansfield DNFSB Vice Chairman indicates this is not accomplished. The letter states in pertinent part:

“This letter and its enclosures comprise Deliverables 8.6.3 and 8.6.5 for Annular Core Research Reactor (ACRR) at Sandia National Laboratories (SNL), Albuquerque, NM.

“The evaluation concludes that the ACRR ventilation systems were neither designed nor required to prevent exceeding the evaluation guideline (EG) for the analyzed accidents. Though the systems are typically operated in support of ACRR operations, they are not credited in the ACRR accident analysis to function during normal, abnormal, or anticipated accident conditions to prevent or mitigate exposures. While the ventilation systems would have an impact on normal, abnormal or anticipated accident conditions, major facility modification or construction of a new facility would be required to be able to take credit for the function in the Safety Analysis. Therefore, the costs associated with modifying/upgrading the ventilation systems to meet the criteria for creditable active confinement ventilation systems would be difficult to justify.” (Emphasis supplied).

In the Attachment D (1/25/07) Summary and Conclusions is stated (at p.2-3):

“The transition work essentially amounts to a design basis reconstitution (see DOE Standard 1073-2003) of the PPS and its supporting equipment. Issues include the seismic qualification of the PPS, control/safety elements, the reactor core grid structure, and the control room and Highbay building structures, quality assurance pedigree for older components, fire protection studies, human factors

studies, and impacts of failures in co-located non-Safety Class equipment. It is anticipated that these studies would result in the need for some modifications to the PPS and/or its supporting equipment. Not only must these studies and potential modifications be completed, but the resulting documentation must be incorporated into an integrated design configuration management and system engineering program to ensure the continued maintenance and reliability of these SSCs. Lastly, this information must be appropriately incorporated into the safety basis (DSA and TSR) of the facility to be approved by DOE.

“It is vital that this transition work occur prior to “declaring” the SSCs as Safety Class. Otherwise, the ACRR facility would become immediately vulnerable to significant audit findings from the DOE Office of Assessment and/or the Defense Nuclear Facility Safety Board, while the transition work is underway.

“Another conclusion of this assessment was that the Active Confinement System safety function (which would be accomplished by SSCs associated with the ACRR Highbay (Bldg. 6588, Room 10) and the Highbay Ventilation System) could not be transitioned to Safety Class. **One major issue is the seismic qualification of the Highbay itself. In order to provide active confinement, it is necessary that the Highbay survive a design basis earthquake (DBE). The DSA currently states that the structure would not likely survive such an event.** In addition, the Highbay Ventilation System (HBVS) ductwork, filters, and fan must also continue operating following a DBE. Thus, transitioning to Safety Class status would involve major redesign and reconstruction of the Highbay and the HBVS. (Emphasis supplied).”

If the Highbay structure does not survive a design basis earthquake or an airplane crash, what are the implications and consequences for the AHCF to not survive and for combined releases of radioactivity from both structures? This disastrous scenario is clearly a possibility. The DNFSB Staff Report (2004) states (p.5):

“Aircraft crashes were not thoroughly analyzed, even though the facility is located within the take-off and landing pattern approximately 5 miles from the jointly operated Kirtland Air Force Base and Albuquerque airport. Given their proximity to each other, multiple TA-V nuclear facilities could be affected by a single aircraft crash. TA-V is also located on a direct vector associated with one of the runways.”

From the perspective of the lack of any defined mission, the public health and environmental dangers posed by the operation of the ACRR and AHCF in a highly urbanized area are not justifiable. It is not clear from the out of date 1999 Sandia Site Environment Impact Statement (EIS) just what mission the ACRR and AHCF are supposed to serve and whether the facilities are even any longer necessary (other than contractor enrichment). The EIS states a mission for the facilities for production of medical isotopes. Those activities are not being carried out. Unknown short-term tests at the ACRR in support of certification of weapons components are stated, but the EIS then states the possibility of conducting this at other DOE sites.

The DNFSB should require that Sandia address the issue of the “Yardholes” at the AHCF, ACRR and SPR locations.

Citizen Action obtained information from a Freedom of Information Act Request (FOIA) request that the waste from numerous experiments with the reactor fuels had been disposed of in various areas known as “Yardholes” at SNL.

<http://www.radfreeem.org/pages/nr/041504.html> The yardholes were over 30 primitive holes dug in the ground; some were lined and some were unlined. One of the yardholes was a water filled hole under the Hot Cell Facility monorail at SNL and contained a spent fuel element from the Savannah River Site. SNL has kept secret from the public the types and amounts of the contents of the various yardholes. The yardholes contain nuclear materials and/or hazardous wastes that should be disposed of or regulated under the Resources Conservation and Recovery Act (RCRA), the Atomic Energy Act, Nuclear Regulatory Commission (NRC) regulations, or Department of Energy (DOE) Orders.

A “SNL Site Team Report on Spent Fuel,” October 1993 (“Yardholes report”), assessed vulnerabilities of the DOE storage of irradiated reactor fuel and other irradiated nuclear materials (RINM). The 1993 Yardholes report stated: “The vulnerability identified was the lack of approved Safety Analysis Reports.” The report identified the existence of the Yardholes at the location of the Sandia Pulse Reactors (19 yardholes) and the Hot Cell Facility (13 yardholes under the HCF Monorail) associated with the Annular Core Research Reactor (ACCR).

The Yardholes report, Appendix 1 C. Sandia Pulsed Reactor Facility states:

p.1 – **“None of the reactor irradiated materials discussed below are classified.”** (Emphasis supplied).

p. 3 – “... [A] status book is kept updated with the most current information including the date the storage activity took place, the name of the experiment, the dose rate along with the survey date and the hole involved.

p. 4 - Contamination: It is assumed that small amounts of contamination are present inside some of the holes due to the process of irradiation with the ACRR central cavity. Every experiment package removed from a storage hole is treated as potentially contaminated upon removal until surveyed and released by the Health Physics Technician.”

p. 4 – “One item of concern is the issue of classifying the Yardholes and the NOVA [North Vault] as nuclear facilities.”

p. 7 - “The other concern is the ultimate recovery and disposition of these nuclear materials, All of the materials are currently stored on site since there is no approved method of disposal.....There are various concerns associated with the long term storage of any radioactive material, specifically leachability of material, decay rates and potential corrosion of the containment packages due to environmental conditions.”

The Yardholes report, Appendix 1 D. Hot Cell Facility, p. 2, identifies “hazardous materials such as cadmium, silver, lead, metallic sodium, etc.” These materials may constitute hazardous or mixed hazardous waste under RCRA.

The Yardholes report, Appendix 5 Tiger Team Findings, identified additional concerns:

“1. A/CF-04: Need for an air monitoring program to meet 40 CFR 61, Subpart H. Hot Cell Facility and ACRR are mentioned.”

“2. RAD/CF-01: Need for a program to monitor continuous and batch discharges of liquid and radiological effluents. Tech Area V is mentioned.”

“3. AX.02-01: Monitoring and disposal of hazardous and radioactive effluents. Hot Cell stack monitor is mentioned. Hot Cell, ACRR and SPR are mentioned.”

Other Tiger Team concerns involved: storage of fissile material, safety analyses for fissile material storage, posting of fissile material storage limits, emergency response procedures, criticality alarms, need for a review process responsive to safety needs and need for effective procedures for radiation protection.

SNL has not presented:

- what types of wastes are present in over 30 yardholes;
- the volume of those wastes;
- the containers for the wastes;
- the pathways for disposition of the wastes;
- how much of the wastes remain;
- whether the wastes are being added on an ongoing basis to the yardholes;
- whether new yardholes are being created;
- what releases of yardhole wastes there may have been to the environment.

Sandia’s continued secrecy about the yardholes’ wastes only serves Sandia to prevent public action for protection of the public health and safety interest and the environment. Sandia is required to furnish the information about the nature of the mixed wastes in the yardholes both to public organizations such as Citizen Action and the New Mexico Environment Department (NMED) for protection of the public health and environment from the dangerous nature of the wastes, the lack of monitoring for releases from the wastes, the potential for catastrophic criticality releases of fission materials, the leakage of the wastes to the groundwater, soil and air. The Tiger Team assessment found no air monitoring program or liquid effluent monitoring for the wastes at the HCF, ACRR and SPR.

DNFSB should not certify any operations for the AHCF or the ACRR until the yardhole wastes have been identified and cleaned up at the SPR, ACRR and the AHCF sites.

2. Citizen Action New Mexico has new information regarding the Sandia National Laboratories’ Mixed Waste Landfill and requests DNFSB take action to protect the public from legacy wastes from nuclear weapons production.

Implications of a 2006 TechLaw, Inc. document and the need to send the NMED Moats Evaluation to the EPA Kerr Laboratory at Ada, Oklahoma for review. The Moats Evaluation is at the following URL:

[http://www.nmenv.state.nm.us/hwb/SNL/MWL/Eval_Rep_Reliability_GW_Mon_Well_Data_MWL_\(11-2006\).pdf](http://www.nmenv.state.nm.us/hwb/SNL/MWL/Eval_Rep_Reliability_GW_Mon_Well_Data_MWL_(11-2006).pdf)

The Final Order of the NMED for the Sandia National Laboratories' Mixed Waste Landfill (MWL) required (page 3-4):

“a comprehensive fate and transport model that studies and predicts future movement of contaminants in the landfill and whether they will eventually move further down the vadose zone and/or to groundwater;”

[http://www.nmenv.state.nm.us/HWB/SNL/MWL/Final_Decision/Hearing_Off_Rprt_Fin_dings_Fact_Conclusion_Law_\(05-20-2005\).pdf](http://www.nmenv.state.nm.us/HWB/SNL/MWL/Final_Decision/Hearing_Off_Rprt_Fin_dings_Fact_Conclusion_Law_(05-20-2005).pdf)

In 2005 Sandia prepared a fate and transport computer model for the MWL.

[http://www.nmenv.state.nm.us/hwb/SNL/MWL/Fate_and_Transport_\(Probabilistic_Performance-Assessment_Modeling_of_the_MWL;%2011-2005\).pdf](http://www.nmenv.state.nm.us/hwb/SNL/MWL/Fate_and_Transport_(Probabilistic_Performance-Assessment_Modeling_of_the_MWL;%2011-2005).pdf)

A January 2006 TechLaw, Inc. report criticizes the 2005 Sandia National Laboratories computer model as a “Black Box” stating that the model should not be relied on by the NMED. Citizen Action asked for the TechLaw, Inc. report in February 2006, but NMED refused to provide the report and brought a lawsuit against Citizen Action.

The three year NMED lawsuit against Citizen Action asked for a declaratory judgment to keep the 2006 TechLaw, Inc. report secret on the basis of executive privilege. NMED lost the lawsuit because the 1st District Court held the TechLaw report is a public record. The NM Attorney General's office intervened in the lawsuit in support of the TechLaw, Inc. report being a public record. Citizen Action did not obtain the 2006 TechLaw, Inc. report until November 2009.

As a further result of the lawsuit, NMED released some 13,000 pages of TechLaw, Inc. and AQS documents concealed for up to a decade and that cost the taxpayers millions of dollars. The technical documents are relevant to widespread toxic contamination and/or permitting actions throughout New Mexico at Sandia Labs, Los Alamos National Laboratories, Triassic Park, Safety-Kleen Systems, military bases at Kirtland AFB, Fort Wingate, Holloman AFB, Ft. Bliss, White Sands Test Facility and oil company refineries Western Refining SW (Gallup), Bloomfield Refinery (Farmington), Navajo Refining Co. (Artesia).

The 2006 TechLaw, Inc. report and other just released TechLaw reports regarding risk assessment for Sandia's MWL expose a cover up by the NMED of its flawed decision making to leave 720,000 cubic feet of radioactive and hazardous waste under a dirt cover at the Mixed Waste Landfill. The MWL lies near Mesa del Sol's 35,000 home planned residential community. The MWL is above Albuquerque's drinking water aquifer. By withholding the 2006 TechLaw, Inc. report and thousands of pages of other records, NMED has protected Sandia from cleaning up the environment in accordance with federal Resource Conservation and Recovery Act (RCRA) regulations.

In addition to the flawed computer model, the 2006 TechLaw, Inc. report points out that the MWL cover design is not appropriate and does not meet long term maintenance requirements for the necessary 1000 year period. TechLaw criticizes the neutron tube moisture detection as not providing early warning that water has breached the cover and is moving down through the buried waste. The neutron tubes are placed beneath the buried wastes.

The 2006 TechLaw, Inc. report criticized “The use of data trends for trigger evaluations” as not being the appropriate legal mechanism “to determining the statistical significance of each exceedance” in collected sampling data. TechLaw states, “The transition from [detection monitoring to compliance monitoring] can be based on a single exceedance, according to regulations and federal EPA guidance.” TechLaw recommended measuring moisture directly beneath the soil cover and the use of “geosynthetic drains to carry any moisture within the cover system out and away from the soil cover and the underlying waste zone.”

The deficiencies for the MWL computer model and the dirt cover addressed by TechLaw continue to the present. The TechLaw recommendations were not revealed to the public or followed by NMED for the MWL. The question arises as to why NMED allows the public to pay millions upon millions of dollars for technical expertise that was concealed and then disregarded.

The 2005 Sandia computer model (Fate and Transport Model) used defective data from the monitoring well network at the MWL. The MWL monitoring wells were known for a decade to be in improper locations given the direction of the flow of groundwater. The monitoring well screens were corroded. Bentonite drilling muds were used. These factors meant that the monitoring wells provided unreliable data. A NMED 1998 Notice of Deficiency (NOD) identified these problems, but the problems were not subsequently corrected.

In May 2006, a public meeting was held by NMED for the Sandia Fate and Transport Model that had been required by the Final Order approving the dirt cover remedy for the MWL. NMED did not reveal the 2006 TechLaw document to Citizen Action or the public with the criticisms contained therein about the Sandia computer model. NMED also did not reveal the unresolved MWL monitoring network problems identified by the 1998 NOD.

After the May 2006 meeting, the public submitted comments to the NMED challenging both the MWL Fate and Transport Model and the groundwater monitoring network.

In November 2006 NMED furnished written responses to public concerns. [http://www.nmenv.state.nm.us/hwb/SNL/MWL/Interested_Citizen_Letter - Response_Comments_\(11-21-2006\).pdf](http://www.nmenv.state.nm.us/hwb/SNL/MWL/Interested_Citizen_Letter_Response_Comments_(11-21-2006).pdf) The Responses ignored the 2006 TechLaw, Inc. report and fallaciously wiped away public concerns for the Fate and Transport Model and the groundwater monitoring program at the MWL.

The NMED Responses relied heavily on a November 2006 report written by William Moats, a NMED geologist. The Moats Evaluation used concocted data to make the false claim that the monitoring wells were providing reliable water quality data. Moats relied on the 2005 Sandia computer model although he knew at the time that the Sandia model was rejected earlier in January 2006 by TechLaw, Inc. By keeping the 2006 TechLaw, Inc. report secret, NMED presented an incomplete and false technical assessment of the fate and transport model to the public. The Moats evaluation also did not consider the problems identified by NMED in its 1998 NOD of improper location, corroded well screens and changed water chemistry from Bentonite drilling muds.

The 2005 Sandia computer model for fate and transport, which Moats relied on both in his report and in NMED's written Responses to Public Comments, is called a "Black Box" by TechLaw that NMED should not rely upon without a full understanding. The Moats Evaluation was used by NMED to reject comments by Citizen Action, Registered Geologist Robert Gilkeson and the public. The NMED Responses to comments were part of the RCRA process for the Mixed Waste Landfill. The Responses provided incorrect information slanted to achieve the outcome that a dirt cover would be protective of the 720,000 cubic feet of the radioactive and hazardous wastes left in unlined pits and trenches of the MWL. RCRA provides for modification, revocation or termination of a permit where there is not full disclosure of all relevant facts, misrepresentation of any relevant facts at any time and when there is new information that was not available. (40 CFR 270.41-43).

The NMED Response to public comments cites the Moats Evaluation many times. The 2005 Sandia Fate and Transport Model is also repeatedly used by NMED to reject public comments. Neither the Moats Evaluation nor the Sandia computer model received peer review. Moats claimed he based his analysis on similar reports, called Well Screen Analysis Reports (WSAR) written for Los Alamos National Laboratory. However, those Well Screen Analysis Reports were rejected by both the EPA Kerr Laboratory (2005, February 10 and 16, 2006, and March 30, 2009) and the National Academy of Sciences (2007). The March 2009 EPA Kerr Laboratory was a rejection of the NMED approved version of the WSAR.

An additional issue regarding the Moats report is that it used concocted data that cannot be relied upon to make the conclusion of a reliable network of monitoring wells. Two statisticians and Gilkeson agree that the Moats Evaluation used imaginary data for cadmium levels to arrive at his conclusions.

Two statistical analyses by Billy Brown, Ph.D. Mathematics and William Payne, Ph.D., along with a geochemical analysis by Registered Geologist Robert Gilkeson conclude that Moats' conclusions are not supported by the imaginary data that his Evaluation used, especially for Cadmium. In fact, the correct analysis of Cadmium data shows that a Cadmium release is contaminating the ground water below the MWL.

Citizen Action seeks the DNFSB assistance to gain scientific review by the EPA Kerr Laboratory in Ada, Oklahoma of the Moats Evaluation. This review was sought previously to the 2009 release of the TechLaw, Inc. report, by Citizen Action, Mr. Gilkeson and the City of Albuquerque Groundwater Protection Advisory Board. Given the factors of the 2006 TechLaw, Inc. report and the information that NMED and Moats ignored the report, along with the false information used in the Moats Evaluation, a competent scientific review of the Moats Evaluation and its conclusions for the MWL dump is long overdue.

David B. McCoy, Executive Director
Citizen Action New Mexico
POB 4276
Albuquerque, NM 87196-4276
505 262-1862
dave@radfreenm.org



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



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
Office of Program Evaluation

A handwritten signature in black ink, appearing to read "Wade T. Najjum", is written over the typed name and title.

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

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 inquiries 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

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