

October 21, 2010
FOIA Officer (2822T)
USEPA
Ariel Rios Bldg.
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

SENT BY FAX 202 566-2147 and e-mail to hq.foia@epa.gov

Re: Appeal of Freedom of Information Act (FOIA) Denial for No. 06-FOI-00375-10 and for Reconsideration of 06-RIN-00123-08 (Tracking Number R6 07-000-3818) Based on New Information Contained in the EPA Office of Inspector General Hotline Report No. 10-P-0100 (April 14, 2010) (“Hotline Report”)
<http://www.epa.gov/oigearth/reports/2010/20100414-10-P-0100.pdf> (INCORPORATED HEREIN IN ITS ENTIRETY BY REFERENCE THERETO).

BACKGROUND FOR THE FOIA REQUESTS

In March 2007 Citizen Action and Registered Geologist Robert Gilkeson requested that EPA Region 6 perform an analysis of the well monitoring network at the Sandia National Laboratories’ (Sandia) Mixed Waste Landfill (MWL). The request asked for analysis by the US EPA National Risk Management Research Laboratory (Kerr Lab) to analyze the monitoring network and review the credibility of a New Mexico Environment Department report written by William Moats, et al (November 2006). In the March 2007 request, Citizen Action and Mr. Gilkeson provided substantial technical information that a Resource Conservation and Recovery Act (RCRA) groundwater monitoring network was not installed at the MWL and the system did not provide reliable and representative water samples for making a decision to install a dirt cover over the wastes.

An EPA Region 6 staff person represented to Citizen Action and Mr. Gilkeson that a technical report for the groundwater monitoring issues had been produced and sent to EPA Legal Office. EPA Region 6 counsel Ashley Phillips represented to Citizen Action on 11/26/2007 and again on 12/20/2007 that no such technical report existed. In December 2007, Region 6 issued a 3-page letter to Citizen Action that contained no technical report to support the statements in the letter. Upon information and belief, EPA Region 6 Kathy Thomas physically presented a copy of the technical report to the NMED, but no record was made of the presentation. Citizen Action was not informed of

the title and existence of the EPA Region 6 technical report entitled “*Sandia Mixed Waste Landfill Groundwater Monitoring Well System and Program Oversight Review*” (Oversight Review) until issuance of the April 14, 2010 EPA OIG Hotline Report.

After Citizen Action learned of the existence and misclassification of the Region 6 Oversight Report, Citizen Action filed a FOIA request on June 3, 2010 specifically for that document by title. (See Attachment A below). On October 8, 2010 Region 6 issued a letter of denial stating:

“Said documentation regarding this site has already been addressed in our January 24, 2008 and July 20, 2009, responses to your FOIA requests.”

Neither the EPA Region 6 response letters of January 2008 and July 2009, nor the General Counsel August 7, 2008 and November 12, 2009 responses address the Oversight Report.

ISSUES

EPA Region 6 has done everything within its power to prevent Citizen Action’s receiving the Oversight Review containing information about groundwater monitoring issues that can affect the quality and safety of Albuquerque’s drinking water aquifer. Albuquerque’s drinking water aquifer lies beneath 1,500,000 cu ft of radioactive and hazardous wastes dumped in unlined pits and trenches in the Sandia National Laboratories’ Mixed Waste Landfill dump (MWL).

The decision of the New Mexico Environment Department (NMED) to place a dirt cover over these dangerous cancer and disease causing wastes was based on flawed data derived from a worthless groundwater monitoring network at the MWL. EPA Region 6 knew that the MWL groundwater monitoring network is worthless from an earlier Notice of Deficiency filed in 1994 and from the Region 6 investigation conducted after Citizen Action requested review of the groundwater monitoring network in March 2007.

EPA Region 6 has denied Citizen Action FOIA requests for technical documents in order to cover up EPA Region 6’s failure to 1). conduct oversight of the NMED; 2). protect the

public as required by the Resource Conservation and Recovery Act (RCRA), and; 3). to prevent Citizen Action's public involvement with decision making under RCRA.

The EPA Office of Inspector General April 14, 2010 Hotline Report entitled "*EPA Region 6 Needs to Improve Oversight,*" found (p.3)

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.

The Oct. 8, 2010 denial response of EPA Region 6 claims that the "*Sandia Mixed Waste Landfill Groundwater Monitoring Well System and Program Oversight Review*" (Oversight Review) document was withheld based on Exemption (b)(5), internal draft deliberative nature. The actual title of the Oversight Review was not identified or provided to Citizen Action at any time for any FOIA request filed by Citizen Action. The Oversight Review and other documents were not provided in redacted form that would have allowed the review of technical information that would not be of a deliberative nature.

EPA Region 6's October 8, 2010 Response to No. 06-FOI-00375-10 maintains that it "does not receive generate, or maintain classified or controlled unclassified information for the subject Sandia Mixed Waste Landfill." Contrary to Region 6's assertion, the OIG Hotline Report (p.4) stated that the Oversight Review was stamped "Confidential" that constitutes an improper national security marking on the assessment [Oversight Review]. "Classified information is not releasable to the public." (Hotline Report, p.4).

The EPA responses to Citizen Action FOIA requests did not identify the actual title of the Oversight Review or the reasons for the (b)(5) exemption in relation to the Oversight Review. EPA legal counsel also issued FOIA denial responses of August 7, 2008 and

November 12, 2009 to Citizen Actions appeals without referring to the Oversight Review-- the existence of which was known by EPA Region 6 since 2007. Citizen Action was denied Due Process for any reasonable opportunity to seek through a FOIA requests or by appeals to obtain the Oversight Review or other unnamed documents withheld by Region 6. Citizen Action was misinformed by Ashley Phillips, EPA Region 6 counsel, that no technical report existed. Citizen Action was not subsequently informed of the existence of the Oversight Review, the title, or any of the pertinent facts or reasons for withholding the technical facts contained therein by either the Region 6 or EPA General Counsel responses.

The EPA OIG Hotline Report (April 14, 2010)

The EPA OIG spent \$275,000 of taxpayer money in its investigation of EPA Region 6's faulty oversight, failure to document its decisions and providing misleading responses to Citizen Action and that EPA Region 6 "found some of CANM's concerns valid." During the course of the investigation, OIG investigators discovered the EPA Region 6 Oversight Review, a technical document that identifies concerns for groundwater monitoring at Sandia National Laboratories Mixed Waste Landfill. Citizen Action first learned of the identity and references to the technical substance of the Oversight Review from the EPA OIG April 14, 2010 Hotline Report. The EPA OIG identified that (p.4):

"In 2007, the Region's technical review team found several areas of disagreement with NMED decisions regarding the monitoring wells at the Mixed Waste Landfill [MWL]."

The Oversight Review, according to the OIG Hotline Report (p.4), agrees with Citizen Action on some issues regarding problems with the monitoring network. EPA OIG reviewed the EPA Region 6 Oversight Review technical report in order to make the conclusions contained in the OIG report. Thus, the Oversight Report is a document used for a formal decision in EPA OIG Hotline Report and must be made available on that basis as well.

The Grounds for the Appeal and Reconsideration

The grounds for appeal and reconsideration are based on much of the new information contained in the EPA OIG Hotline Report. Citizen Action's grounds for appeal are for this instant appeal for both FOIA No. 06-FOI-00375-10 and reconsideration of 06-RIN-00123-08 (See APPENDIX B attached below):

1. Much or most of the material contained and withheld in the above referenced documents is related to 1) a review of the well monitoring network at the Sandia National Laboratories' Mixed Waste Landfill (MWL) and 2) materials related to whether public participation is being provided relevant to the MWL.
2. The materials withheld include factual, investigative, and evaluative portions of documents related to agency oversight performance and whether the EPA's policies are being carried out by the New Mexico Environment Department.
3. Citizen Action asserts that the EPA has not made any "decision" much less provided a technical review with issues decided by setting forth technical evidence. Certainly no Federal Register notice has been provided by EPA Region 6 that a "decision" was being rendered that was subject to judicial review under the Administrative Procedures Act. The EPA purported to perform a technical "review" of documents which was supposedly based upon the type of material stated to Senator Bingaman by Richard A. Greene. Rather than provide a technical report, EPA sent out a conclusory letter on December 13, 2007 that provided no substantive decision. Thus, the factual materials that were referred to and constituted the review for "all well monitoring information, well logs, site geology, and groundwater sampling results" should be made available. All of the above withheld documents must be provided (except those that are available as public records). Alternatively, factual materials contained in the above withheld documents must be provided.
4. The documents that are being withheld must be, but were not, specifically identified. The broad generic categories, without any detailed explanation in support of exemption for each document, are insufficient and effectively preclude Citizen Action from contesting the decision to withhold the information and shifts the burden of segregating out non-exempt information to the courts. See Vaughn v. Rosen 484 F.2d at 825-28. The categories and stated reason for Exemption 5 are mere "barren assertions" that the documents are exempt.
5. The EPA 12/3/07 letter to Citizen Action neither expresses opinions on legal or policy matters to be decided by the EPA and thus no predecisional process has been established by the EPA as a basis to withhold the documents. EPA has provided no decision subject to judicial review nor has it proposed to do so. EPA provided a December 13, 2007 letter to Citizen Action in which it stated that "EPA reviewed the overall MWL groundwater monitoring system in order to determine its efficacy in detecting contamination. We reviewed well locations, depths of wells and well screens, purging and sampling methods, downhole videos, and analytical results. We also consulted with the NRML on various technical ground water issues." Under the FOIA, EPA must furnish these many factual documents that were part of its "review." Mere review of documents and e-mails back and forth or conclusions stated without factual basis do not make a "decision."

6. To qualify for Exemption 5, EPA must show that the withheld document(s) is/are both predecisional and deliberative. Access Reports v. Dept. of Justice, 147 F.2d 1192 (D.C. Cir. 1991). EPA has not shown that any of the documents withheld above were directly related to any “decision,” let alone part of a predecisional process and that each document was also deliberative. The December 13, 2007 letter incorporates underlying documents and memoranda which EPA has in its possession that must be disclosed because the documents are neither predecisional nor deliberative. EPA has not shown that the information is of the type that would not flow freely within the agency unless protected from public disclosure. Parke, Davis & Co. v. Califano, 623 F.2d 1, 6 (6th Cir. 1980) (rejecting conclusory affidavits submitted in support of a claim of the deliberative process privilege).
7. The documents withheld under Exemption b5, rather than being part of a predecisional, deliberative decision making process, will reveal the opposite. The documents will show that instead of providing a technical review and substantively addressing those technical issues, EPA management engaged in a strategy to prevent knowledge of contamination of groundwater, the inefficacies of the groundwater monitoring system and serious violations for well monitoring practices that persisted since at least the early 1990s at Sandia Laboratories’ (SNL) Mixed Waste Landfill (MWL).
8. Exemption b5 is used by EPA to conceal facts that would have described the historical inaction and failure of the New Mexico Environment Department (NMED) to correct long standing well monitoring violations of the Resource Conservation and Recovery Act (RCRA) at the MWL. EPA thereby seeks to conceal its own lack of oversight for the NMED’s conduct of the RCRA program for hazardous waste management in New Mexico at SNL.
9. Upon information and belief, EPA staff informed the NMED that at least three of the monitoring wells at the MWL needed to be replaced based on information provided by Citizen Action and Registered Geologist Robert Gilkeson. The information, much of it gathered from the administrative record for the MWL by McCoy and Mr. Gilkeson, indicated monitoring wells and well screens were in the wrong locations, that the background well BW1 never was properly located and had also gone dry along with MW3, improper well construction with bentonite clay and organic drilling fluids that hide knowledge of contamination, improper sampling techniques, corrosion of well screens and evidence of contamination of groundwater at the MWL by high levels of nickel and chromium exceeding state and federal drinking water standards. These serious long standing deficiencies showed that historical data provided by the well monitoring network at the MWL was not reliable. EPA did not address the specific technical issues before it, but took informal action behind the scenes and did not reflect the basis for those actions in its December 13, 2007 letter. EPA thereby avoided identifying the inefficacies of the MWL well monitoring network for detecting contamination in the groundwater.
10. EPA refused to send the November 2006 report entitled “*Evaluation of the Representativeness and Reliability of Groundwater Monitoring Well Data, Mixed Waste Landfill, Sandia National Laboratories*,” by Will Moats, NMED for evaluation by the Kerr Laboratory. Upon information and belief, EPA knew the document was

without scientific merit and refused to evaluate the report to avoid embarrassment both to EPA Region 6 and the NMED.

11. EPA refused to review the 2006 TechLaw Report furnished to NMED that evaluates the possible contamination of the groundwater beneath the MWL. The New Mexico Attorney General twice stated that the document was a public record. EPA refused to obtain a copy of the TechLaw report, although it could have easily done so given its RCRA oversight authority. Upon information and belief, EPA refused to obtain and examine the report to continue its pre-arranged conclusion that no contamination exists for groundwater at the MWL. Upon information and belief, if EPA did obtain the TechLaw report, it suppressed acknowledgement of a TechLaw conclusion supporting contamination of the groundwater beneath the MWL.
12. Exemption 5 can never apply to final opinions or dispositions. 421 U.S. at 155-159. Even if a document were predecisional, “the privilege applies only to the ‘opinion’ or ‘recommendatory’ portion of [a document], not to factual information which is contained in the document.” *Coastal States Gas Corp. v. DOE*, 617 F.2d at 867. Again, it is questionable that any opinion, disposition, or decision has been rendered by the EPA Region 6 in this matter that could invoke the predecisional and deliberative rationales for withholding the documents.
13. Generally, facts in a predecisional document must be segregated and disclosed unless they are inextricably intertwined with exempt portions. *Ryan v. DOJ*, 617 F.2d 781, 790-91 (D.C. Cir. 1980). But where an agency adopts the recommendations of an otherwise predecisional document, the “chilling effect” of disclosure on agency decision-making is no longer a concern. On the contrary, disclosure serves the public interest. None of the information withheld by the EPA may properly be withheld under Exemption 5 because it is clear that the information is neither predecisional nor deliberative. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 160 (1975).
14. We seek the factual and other non-decisional materials withheld by EPA Region 6. The EPA did not provide the above records that would be responsive to the request. The EPA letters of denial are without justification, explanation, or reasonable description of the materials being redacted wholesale from the records provided. The withholding of documents made under Exemption 5 are not explained in the determination letters. The withholding of the numerous documents is not justified by identification of what decision exists, what predecisional/deliberative process existed and why the factual and other materials cannot be provided.

Additional Grounds for Appeal

The Oversight Review and supporting documents are not predecisional to any policy making function but constitute factual material examining the groundwater monitoring network at the MWL and the RCRA oversight function of EPA Region.

The deliberative process privilege only applies to the opinion or recommendatory portions of a document and not to the factual information which is contained in the document. (See, *Coastal States Gas Corp. v. DOE*, 617 F.2d at 867; ITT World

Communications, Inc. v. FCC, 699 F.2d at 1236; *Playboy Enterprises, Inc. v. DOJ*, 677 F.2d at 935. To the extent that the documents sought by Citizen Action contain such factual information they must be provided.

The OIG and EPA Region 6 documents are a retrospective evaluation of agency performance and also fall outside the (b)(5) exemption for inter and intra-agency documents. Several courts have required disclosure of the “factual, investigative and evaluative portions” of documents that “reveal whether the agencies’ policies are being carried out.” (*See e.g., Vaughn v. Rosen (II)*, 383 F. Supp. 1049 (D.C. Cir. 1975); *Sterling Drug, Inc. v. Harris*, 488 F. Supp. 1019, 1028-29 (S.D.N.Y. 1980); *Union of concerned Scientists v. NRC*, 2 Med. L. Rpt. 1458 (D.D.C. 1977; *Soucie v. David*, 448 F. 2d at 1067, 1078 (D.C. Cir. 1971). The documents Citizen Action seeks are relevant to whether agency policies for oversight and groundwater protection are being carried out.

The documents sought by Citizen Action are not documents that would be used for assisting formulation of policy. The documents were related to the investigation of EPA Region 6 development of technical information regarding the monitoring wells, the performance of oversight duties and whether there was adherence to policies already formulated for compliance with RCRA by NMED and EPA Region 6.

The Region 6 FOIA denials fail to: 1) provide documents that are factual and technical in nature, 2) segregate any opinion from the factual material and 3) to state any cognizable exemption for withholding the factual material from each of those documents or portions thereof in full. The EPA has failed to provide any list of documents that it is withholding.

The EPA OIG has made no showing of any reasonable likelihood that the Agency would be harmed by release of the requested documents or that production of the documents would be injurious to the “consultative functions of government.” (*See, EPA v. Mink*, 410 U.S. 73, 87 (1973)). The motivation for refusal to provide the documents sought by Citizen Action is that EPA Region is conducting a bureaucratic

cover up for the inadequacies of its oversight of the NMED and the NMED mismanagement of the MWL monitoring wells in violation of RCRA. Region 6's embarrassment, malfeasance and violation of federal RCRA regulations are not grounds for withholding the Oversight Review and other documents sought.

A presumption of disclosure exists for the FOIA under President Obama's White House policy that agencies should take affirmative steps to make information public and thus encourage accountability through transparency thereby opening a new era of open government. The new FOIA policy of President Obama's administration state in part:

“Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

“All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.”

Region 6 and General Counsel have not considered nor applied the presumption of disclosure in favor of Citizen Action. Moreover, that presumption for disclosure must be clearly rebutted with stated reasons and that has not been accomplished by EPA Region 6 or General Counsel.

Disclosure of the requested information would enhance public knowledge of government operations of the EPA Region 6. EPA Region 6's denial of the Oversight Review offers nothing to overcome the presumption of disclosure. The EPA Region 6 is not harmed by the release of investigative information relevant to whether EPA Region 6 is properly exercising oversight to protect the Albuquerque, New Mexico public from a dangerous nuclear waste dump lying above Albuquerque's drinking water aquifer. The public is harmed by the EPA Region 6's secrecy, obstinacy and lack of transparency and allowing a dangerous radioactive and hazardous waste dump to remain above Albuquerque's drinking water aquifer without an adequate groundwater monitoring network.

The OIG Hotline Report emphasizes access to EPA information as being “crucial” to the public for involvement and access to the decision making process (p.7):

“Access to information is crucial for informed public involvement. EPA’s policies say public involvement begins when individuals and organizations seek information about a toxic 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.”

Citizen Action has been systematically denied public involvement in the decision making process through the calculated pattern and practice of the denial of technical information required to be furnished under the FOIA.

CONCLUSION

EPA Region 6 must provide the Oversight Review and all pertinent technical documents that were sought by Citizen Action.

Respectfully submitted,

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ATTACHMENT A

The June 3, 2010 FOIA request

Under the Freedom of Information Act, 5 U.S.C. § 522, Citizen Action New Mexico is requesting access to a full and complete copies of documents in any form, whether from correspondence, memoranda, tape recordings, electronic or handwritten communications, notes or handout documents. This would include all documents and communications written by and/or from and/or between the Environmental Protection Agency (“EPA”), Sandia National Laboratories, the Department of Energy (“DOE”), the New Mexico Environment Department (“NMED”) and/or any of their contractors. This would include all attachments, maps, graphs, figures, tables and references to those documents.

The USEPA Office of Inspector General issued an April 14, 2010 Hotline Report <http://www.epa.gov/oigearth/reports/2010/20100414-10-P-0100.pdf> that identified that EPA Region 6 engaged in a widespread mislabeling of information that also included a Region 6 report entitled “Sandia Mixed Waste Landfill Groundwater Monitoring Well System and Program Oversight Review” (pp.1 and 21):

“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.”

1. Provide the identity of all records that have been requested by Citizen Action in its Freedom of Information Act requests during the period from 2006 to the present day that were withheld from Citizen Action on the basis of containing Classified National Security Information or other mislabeling. This should also include “Sandia Mixed Waste Landfill Groundwater Monitoring Well System and Program Oversight Review”
2. Provide all records requested by Citizen Action in its Freedom of Information Act requests during the period from 2006 to the present day that were withheld from Citizen Action on the basis of containing Classified National Security Information but which did not contain national security information.
3. For each document withheld on the basis of containing Classified National Security Information, provide a concise reason for classification, i.e., identify any reason used to withhold the record such as:
 - (a) military plans, weapons systems, or operations;
 - (b) foreign government information;
 - (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;

- (d) foreign relations or foreign activities of the United States, including confidential sources;
 - (e) scientific, technological, or economic matters relating to the national security;
 - (f) United States Government programs for safeguarding nuclear materials or facilities;
 - (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or
 - (h) the development, production, or use of weapons of mass destruction.
4. Provide the identity of each record that was withheld from Citizen Action on any basis of containing Classified National Security Information, but for which the withholding did not identify Exemption 1 for National Security Information. Identify any exemption that was instead stated as the reason for withholding the record(s), e.g., Exemption 5.
 5. For each of the record(s) above classified for national security information, provide the identity, by name and position, or by personal identifier, of the original classification authority; any letter(s) of delegation of authority to the person or persons to make the decision to withhold or identify the record(s) for containing National Security Information
 6. Identify and provide any records that were withheld from Citizen Action on the basis of Controlled Unclassified Information that did not contain controlled unclassified information.
 7. For each of the record(s) above classified for Controlled Unclassified Information, provide the identity, by name and position, or by personal identifier, of the original classification authority; any letter(s) of delegation of authority to the person or persons to make the decision to withhold or identify the record(s) for containing National Security Information

ATTACHMENT B

FOIA 06-RIN-000123-08 (Tracking Number R6 07-000-3818)

December 7, 2007
Freedom of Information Officer (6MD-OO)
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

Sent by Fax to Region 6 at (214) 665-2146, Attention: FOIA Officer.

**Re: Freedom of Information Act Request -- Well Monitoring Network Analysis
Tracking Number R6 07-000-3818**

Dear FOIA Officer:

A June 21, 2007 letter from EPA Administrator Richard E. Greene to Senator Jeff Bingaman stated in pertinent part:

“In our oversight capacity, the EPA is currently conducting an internal review of all well monitoring information, including well logs, site geology, and groundwater sampling results. The data for this site extends back more than two decades so there is a considerable amount of information to analyze. We intend to contact the EPA Risk Management Research Program Groundwater and Ecosystem Restoration Research Laboratory in Ada, OK, if necessary, to provide additional technical assistance.”

Under the Freedom of Information Act, 5 U.S.C. § 522, Citizen Action New Mexico is requesting access to a full and complete copies of the report prepared for the above tracking number including all documents in any form, whether from correspondence, memoranda, tape recordings, electronic or handwritten communications, notes or handout documents used to prepare the report. This would include all documents and communications within, from and or between the Environmental Protection Agency (“EPA”), the EPA Risk Management Research Program Groundwater and Ecosystem Restoration Research Laboratory in Ada, OK Sandia National Laboratories, the Department of Energy (“DOE”), the New Mexico Environment Department (“NMED”) and/or any of their contractors and any documents furnished by or notes made of conversations with Citizen Action New Mexico. This would include all video tapes of wells, attachments, maps, graphs, figures, tables and references to those documents. **The original technical report as it was issued prior to review and any modifications made to the report by the EPA legal department is hereby requested.**