

February 15, 2008
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) Request 06-RIN-00123-08

Dear Sir/Madame,

Citizen Action New Mexico appeals the January 24, 2008 denial letter by Lynda F. Carroll, Assistant Regional Administrator for Management, EPA Region 6, 1445 Ross Ave., Suite 1200, Dallas, TX 75202-2733.

Citizen Action is requesting all documents withheld by the EPA to include:

- Twenty-one internal draft summary documents
- Approximately 93 pages of internal e-mails
- Approximately 68 pages of personal notes
- Handwritten notes from two telephone conversations (nine pages).
- Copies of MWL well DVDs.
- Copies of general reference documents [Note: cover pages for all may not have been provided to identify which documents were reviewed].

Background

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.”

The grounds for the appeal are:

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 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 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 is 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 January 24, 2008 letter of denial is 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 letter. 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.
 15. The fact that another agency may have the down well videos is irrelevant and EPA is required to produce the video records if they are at EPA Region 6. The FOIA request asked for records associated with the videos that may also be uniquely in the possession of the EPA Region 6. The FOIA request stated “This would include all video tapes of wells, attachments, maps, graphs, figures, tables and references to those documents.” This is factual material that EPA Region 6 is required to produce under the FOIA.
 16. The denial letter from Region 6 did not include the telephone number, the FAX number or e-mail address for filing an appeal in this matter.
 17. A fee waiver was previously granted for this FOIA request. The suggestion that Citizen Action “may receive a bill” is inappropriate and incorrect.

CONCLUSION

Citizen Action asserts that no decision was made to form a basis for the use of Exemption b5. However, the EPA FOIA Office should require at a minimum that EPA Region 6 must examine the record, identify the specific documents withheld, provide the reason for withholding each document and why each document is predecisional and deliberative,

segregate factual material from opinion by redaction and provide the materials that have been improperly withheld.

Respectfully submitted,

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