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Special Council Reports



U.S. OFFICE OF SPECIAL COUNSEL
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129879CU
James Fall
MP

The Special Counsel

September 8, 1995

The Honorable Abner Mikva
Counsel to the President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-93-1119

Dear Mr. Mikva:

Pursuant to 5 U.S.C. § 1213(e)(3), I am transmitting the enclosed letter and report to The President. If I may provide more information concerning this matter, please let me know.

Sincerely,

A handwritten signature in cursive script that reads "Kathleen Day Koch".

Kathleen Day Koch

Enclosure



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

September 8, 1995

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

In accordance with 5 U.S.C. § 1213(e)(3), I am transmitting a report from the Secretary of Agriculture sent to me pursuant to 5 U.S.C. §§ 1213(e) and (d). The report sets forth the findings and conclusions of the Secretary's review of allegations of violations of law and regulation, gross mismanagement, and a substantial and specific danger to public health by officials of the Food Safety and Inspection Service (FSIS). I have reviewed the Secretary's report, and the comments on the report by the individual who made the allegations.

Pursuant to 5 U.S.C. § 1213(e)(2), I have determined that the findings appear reasonable and the report contains the information required. It was noted that the clearer guidelines which the agency implemented for the inspection work force, will no longer allow suggestive carcasses, regardless of whether the bacteriological culturing is positive or negative for tuberculosis organisms, to be released, in accordance with 9 C.F.R. § 311.2.

The allegations of the individual who made the disclosures, in part, were substantiated. The agency released at least two "suggestive beef carcasses unrestricted" into commerce in 1989. No disciplinary action was taken as the agency considered the problems to arise from misinterpretation of laboratory findings rather than misconduct by agency employees.

With respect,


Kathleen Day Koch

Enclosures



United States
Department of
Agriculture

Food Safety
and Inspection
Service

Washington, D.C.
20250

SEP 9 1994

94 SEP 16 PM 2:05

Ms. Joyce Carnell
Office of Special Counsel
Suite 300
1730 M Street, NW
Washington, DC 20036-4505

Dear Ms. Carnell:

This in response to your telephonic request to me on Monday, August 22, regarding OSC File Number DI-93-1119, a complaint initiated by Dr. Wilfredo Rosario. You stated that the report to the Office of Special Counsel, from Secretary of Agriculture Mike Espy, dated November 18, 1993, appeared to not contain, to a sufficient degree, the information required by 5 USC 1213(d). I have reviewed the Secretary's report in light of your request, and offer the following information on this matter.

The Secretary's report addresses the actions and findings of the Food Safety and Inspection Service (FSIS), USDA, as a result of allegations by Dr. Rosario of violations of regulations, gross mismanagement, and a substantial and specific danger to public health, as they relate to the detection and disposition of cattle carcasses with tuberculosis (TB), or TB-like lesions. Specifically, Dr. Rosario alleges that:

- an earlier statement by then Secretary of Agriculture Edward Madigan concerning the retention of carcasses pending laboratory results is incorrect, in that the practice is to not retain the carcasses.
- FSIS officials did not meet an affirmative burden of proving carcasses were free of TB, before those carcasses were released into commerce; and
- FSIS officials falsely stated that local officials made improper TB testing and disposition decisions, when they were implementing the instruction from the national office.

No formal investigation was conducted as a result of your April 16, 1993 request, since an extensive inquiry, after the original complaints, had produced most of the necessary information upon which to base a response. Ms. Jeanne Axtell, then Executive Director, Inspection Management Program, Inspection Operations, was tasked with researching and drafting a response to the allegations contained in the April 16 request. Ms. Axtell reviewed the existing documentation, and developed more specific information on the disposition of the subject carcasses.

Ms. Joyce Carnell

2

Since our previous submissions to the Office of Special Counsel on this matter, our Agency received information from the Animal and Plant Health Inspection Service (APHIS) regarding the reliability of the laboratory tests used to confirm the presence of TB organisms. The results of the interagency taskforce were also available to her. Thus, after this review of both existing materials, and newly developed or available information, the November 18, 1993 report was prepared. Of course, input was received, and the draft report was reviewed by both subject matter experts and senior management officials.

The pertinent regulation on the subject of TB and inspected carcasses is 9 CFR 311, and that regulation remains unchanged. An interagency task force looked at Agency guidance and practices on the issue of TB in carcasses. Based on the task force recommendations, FSIS has issued written instructions to our Veterinary Medical Officers on the use of laboratory test results as an aid in arriving at diagnoses.

The inquiry into the complainant's allegations found that misinterpretation of laboratory findings resulted in at least two suggestive carcasses being released unrestricted into commerce in 1989. Subsequent laboratory findings on bacteriological culturing were negative for tuberculosis organisms. Under today's guidelines, these two carcasses would be considered positive for tuberculosis and disposed of in accordance of 9 CFR 311.2 by either "passed for cooking" or "condemnation". Clearer guidelines have been communicated to the inspection workforce to preclude a recurrence. No identifiable misconduct was found on the part of any FSIS employee, and therefore no disciplinary actions were warranted.

Hopefully, the Secretary's November 18 report, and this supplemental information adequately address the allegations, and clearly explain the Agency's actions and corrective measures taken. If I may be of further assistance, please feel free to contact me on (202) 720-4425.

Sincerely,



William J. Hudnall
Deputy Administrator
Administrative Management



DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

November 18 1993

RECEIVED
NOV 18 1993
OFFICE OF THE SECRETARY
DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C.

Honorable Kathleen Day Koch
Office of Special Counsel
Suite 300
1730 M Street, NW.
Washington, DC 20036-4505

Dear Ms. Koch:

This is in response to your request of April 16, 1993, concerning OSC File No. DI-93-1119, alleging a violation of regulations, gross mismanagement, and a substantial and specific danger to public health by officials of the Food Safety and Inspection Service (FSIS). Your request is based on information contained in a letter from attorneys for Dr. Wilfredo B. Rosario. Our response conforms to each of the three allegations as stated in your request. Prior to addressing each of the allegations, the policy and regulatory actions of the FSIS with respect to the disposition of cattle carcasses having tuberculosis (TB) or TB-like lesions is stated for the record.

POLICY AND REGULATORY ACTIONS: USDA permits only cattle carcasses which have been diagnosed as negative for tuberculosis and are otherwise not adulterated to be released unrestricted into commerce. Carcasses diagnosed as positive for tuberculosis must either be condemned or their use restricted to cooking. The diagnosis and subsequent disposition of the carcass is made as required by law and regulation only by an authorized USDA veterinary medical officer (VMO). A VMO is expected to make a diagnosis of the disease and a determination as to whether the extent of the disease process or condition renders the carcass as unfit and unwholesome for human food. When, in the professional opinion and judgment of the VMO, tuberculosis is diagnosed, the disposition of the carcass must be made in accordance with 9 CFR 311.2. These regulations, published in 1972 and 1973, provide that a carcass must be condemned if, in the VMO's professional opinion and judgment, any one of the generalized disease conditions spelled out in 9 CFR 311.2 (a) are found on post-mortem examination.

When a veterinary medical officer diagnoses tuberculosis, but the extent of disease is localized and does not meet one of the conditions identified in 9 CFR 311.2, then the VMO condemns the affected part(s) having the localized lesion or lesions and passes the remainder of the carcass for cooking. The decision to make a disposition of "passed for cooking" is based on the evidence of disease in the carcass and is not based on whether the plant has cooking facilities. Only those carcasses wholly without evidence of tuberculosis are passed for human food in an unrestricted manner.

"Passed for cooking" is a restricted condition of use for product so designated. It must be cooked under USDA supervision to a "temperature of not lower than 170 degrees for a period of not less than 30 minutes" (9 CFR 315.2). This time and temperature

combination kills any TB bacilli present in the tissue and renders the product safe for human consumption.

If the plant does not have proper cooking facilities on the premises or chooses not to use those cooking facilities, then the plant may sell and transport that restricted product to another plant with proper cooking facilities. Restricted product does not move freely in food distribution channels. It must be moved under USDA seal which can only be applied and removed by an authorized USDA inspector. Another alternative is for the plant itself to condemn the product. A distinction is made between product condemnations made by USDA--based on the unfitness or unwholesomeness of that product for use as human food--and product condemnations made by the plant--based on the plant's inability to secure proper cooking facilities for that product. Even in this latter case, when a plant condemns product, the process of denaturing that product and assuring it does not reenter human food channels remains with the USDA. Inspectors-in-charge, such as Dr. Rosario, are expected to oversee proper movement of restricted product, either through the cooking process or through the denaturing and condemnation process. This is the official USDA policy and regulatory action regarding the diagnosis and disposition of bovine tuberculosis.

This policy of reliance on the professional opinion and judgment of a veterinary medical officer as to whether the evidence of disease renders the carcass unfit and unwholesome for human food has been in effect since 1972 and has not changed. What has been at issue is the role that laboratory findings play in confirming the VMO's initial or presumptive diagnosis of tuberculosis, prior to rendering a disposition of the carcass and its parts.

A VMO may send lesion samples to an Animal and Plant Health Inspection Service (APHIS) Veterinary Services laboratory to aid in the FSIS VMO's diagnosis, prior to determining the disposition of the carcass under 9 CFR 311.2. Submission of samples for testing is not required of the VMO but may be elected at the VMO's discretion, so that the results may be used as an aid in diagnosis. In every case, the diagnosis by the VMO is the legal basis for the disposition, not the test results. Thus, there has been no written policy with respect to disposition based on APHIS laboratory test results, because dispositions are not made on the basis of those test results. This was true in the situation identified by Dr. Rosario and remains true today. Dispositions are not to be made on the basis of laboratory findings, but on the basis of the overall professional judgment of the VMO.

Results from two different types of laboratory tests have been available to FSIS veterinary medical officers to aid in their diagnosis of tuberculosis. The first test is a histopathology test. Sample results have been classified in a variety of ways since 1961 when the laboratory support service from APHIS National Veterinary Services Laboratory (NVSL) began. At the time of the 1989 incident, which forms the basis of Dr. Rosario's allegation, three classifications were being used: (1) no significant finding, meaning no evidence of TB; (2) compatible, meaning positive evidence of TB; and (3) suggestive, meaning the histopathology is suggestive of TB, but no acid-fast organism is evident.

Generally, NVSL performs a second test on tissue samples that test either compatible or suggestive on the histopathology test. The second test is a bacteriological culturing to determine if TB organisms are present in the tissue sample. Results are not available for 6 to 12 weeks.

Until recently, FSIS accepted the culture test as confirmatory of the initial results on the histopathology test. Sample results are reported as either positive or negative for tuberculosis. Based on the results of this investigation, FSIS will no longer accept the culture test as confirmatory of the initial results on the histopathology test and is providing written instructions to its veterinary medical officers on the use of laboratory test results as an aid in arriving at diagnoses. A full explanation of how this decision was reached is discussed in response to each of the allegations below.

ALLEGATION 1: In practice, cattle carcasses are not retained pending the results of the bacteriological culturing for at least two crucial reasons: (a) the quality of the product would be severely diminished since it would need to be frozen for 6 to 12 weeks for the test results to become available. Therefore, regardless of the results, the meat would have to be cooked (most plants in the Southern California area do not have cooking facilities); (b) the culture test itself is unlikely to succeed in either confirming or eliminating the presence of TB as the source of TB-like lesions identified in a "suggestive" finding.

RESPONSE: (a) It is true that the length of time involved in securing test results of the bacteriological culturing is of such duration that the quality of the product is diminished. Some plant owners wish to wait for the test results, since a negative finding on the culture test would permit release of the wholesome portions of the carcass meat. In such instances, the carcass is generally boned and frozen, with the parts having localized lesions condemned and the wholesome portions placed under USDA retention pending the results of the bacteriological culturing. The disposition of the carcass is made after the results of that second test. If, at that point, the disposition is made to pass for cooking, then the unaffected carcass parts may be cooked in accordance with 9 CFR Part 315. If the plant does not have the facilities for cooking on its premises, then the plant may sell the product to another USDA-inspected plant that does have the appropriate cooking facilities. Transportation of the product between the plants is done under USDA seal.

(b) As a result of this investigation, we have looked into the reliability of the bacteriological culturing test as confirmatory of the initial histopathology test results. Our investigation has found that false negative results can occur roughly one-third of the time. A false negative result produces no finding of TB bacilli when in fact the tissue sample may contain such bacilli. This occurs with sufficient frequency that FSIS will no longer permit its VMO's to use results from the bacteriological culturing to aid in their diagnosis of tuberculosis. Veterinary medical officers will make their diagnosis after considering their findings during the post-mortem examination, and, at their discretion, the results of the histopathology test. If the laboratory results are compatible or suggestive, the diagnosis is positive for tuberculosis. Dispositions will continue to be made under 9 CFR 311.2.

ALLEGATION 2: FSIS officials failed to obey regulations prohibiting USDA approval of beef carcasses without first meeting the affirmative burden to prove the meat has been "found free" of tuberculosis lesions. Confirmed TB carcasses that, by law, can be passed only for cooking were released into commerce from meat industry plants in Southern California that do not have cooking facilities. There are no records that the carcasses were transported elsewhere and cooked.

RESPONSE: As stated above, the diagnosis of disease and the disposition of cattle carcasses is made based on the judgment and professional opinion of a VMO as to whether the extent of the disease process or condition renders the carcass as unfit and unwholesome for human food. A diagnosis of tuberculosis, if the condition is generalized as outlined in 9 CFR 311.2, renders the carcass unfit and unwholesome and requires its condemnation. A diagnosis of tuberculosis with only localized lesions requires that the affected part(s) be condemned and permits the unaffected part(s) of the carcass to be passed for cooking. This determination is not a matter of "proof", but is a matter of expert judgment by a trained veterinary medical officer.

Cattle tuberculosis is caused by the organism, *Mycobacterium bovis* (*M. bovis*). Scientific literature identifies transmission of *M. bovis* from cattle to man through two routes--the inhalation of aerosolized particles containing the bacilli or the ingestion of raw, unpasteurized milk containing the bacilli. There are no reports of transmission from cattle to man by ingesting the meat from carcasses of cattle infected with *M. bovis*. The public health risk of infection to man from ingesting meat from cattle with tuberculosis is negligible. The regulations are written to eliminate even the most remote public health risk by requiring condemnation of carcasses or parts of carcasses from tuberculous cattle and requiring the cooking of non-affected parts.

In 1989, in Southern California there was a question concerning the interpretation and utilization of laboratory results as an aid in diagnosis of tuberculosis. A suggestive finding means that the lesion is characteristic of tuberculosis, but no TB bacilli can be stained and identified histologically. The absence of TB bacilli on histology does not eliminate tuberculosis as the cause of the lesion. This may not have been clearly conveyed or was misunderstood in conversations between a local Southern California supervisor and a Washington headquarters official to mean that suggestive findings were negative for tuberculosis.

APHIS records confirm that in 1989 ten carcasses in Southern California had laboratory findings of suggestive on the initial histopathology test. Of these ten, four had positive findings from the bacteriological culturing test. Of these four, agency records on carcass disposition (post-mortem disposition certificates, logbook entries of post-mortem disposition certificates, and post-mortem disposition summaries) show that two were condemned by the USDA veterinary medical officer, and one was "passed for cooking" but subsequently condemned by the plant. The final disposition on the fourth carcass cannot be determined because the plant (Est. 344, Beefco) is no longer in business and none of the

records are available.

Six carcasses had suggestive findings on histopathology test and were negative for TB on the bacteriological culturing test. The carcasses were disposed of as follows: one was released as stated by Dr. Rosario; a second was presumed released because no records could be found for disposition by either pass for cooking or condemnation; one was passed for cooking and subsequently condemned by the plant; and the disposition on the remaining three carcasses cannot be determined because the same plant (Est. 344, Beefco) is no longer in business.

In summary, the misinterpretation of laboratory findings resulted in at least two suggestive carcasses being released unrestricted into commerce in 1989. Subsequent laboratory findings on bacteriological culturing were negative for tuberculosis organisms. Under today's guidelines, these two carcasses would be considered positive for tuberculosis and disposed of under 9 CFR 311.2 by either "passed for cooking" or "condemnation".

ALLEGATION 3: FSIS officials falsely stated that improper TB testing and disposition practices were the decisions of local officials, who in reality were implementing instructions from the national office.

RESPONSE: FSIS officials believe that the misinterpretation of laboratory findings and their use in diagnosis and disposition resulted from miscommunication between the local supervisor in Southern California (Dr. Teresita Rucio) and a Washington headquarters official. The local supervisor in Southern California was unfamiliar with the terminology used in reporting the laboratory results. She properly contacted the regional office and was referred to the Washington headquarters office for guidance. She implemented what she understood that guidance to be. It is not possible for FSIS officials today to be certain of the context of telephone conversations that took place in 1989. Both parties are sure of their understanding which clearly indicates a miscommunication. Further evidence of this miscommunication is the regulatory action taken by VMO's in other parts of the country. Outside of the Southern California area, VMO's routinely either accepted suggestive results as enough evidence to confirm their diagnosis of tuberculosis and to make their disposition according to 9 CFR 311.2, or they continued to retain the carcass until bacteriological culturing results were received.

FSIS does not question the credibility or integrity of any of the veterinary medical officers involved with the situation in Southern California. The Agency believes that both Dr. Rosario and Dr. Rucio were correct to continue to challenge guidance on interpreting laboratory findings that could result in the unrestricted release of suggestive carcasses into commerce. However, FSIS absolutely refutes the allegation of a secret illegal policy to permit TB carcasses to move unrestricted in commerce.

FSIS recognized that the interpretation of the laboratory results from APHIS should be readdressed by an interagency task force with APHIS officials. The task force has since

Honorable Kathleen Day Koch

6

convened and concluded its deliberations. During their meetings, the task force concluded that suggestive laboratory findings are to be considered as positive evidence of tuberculosis.

The task force based this conclusion on two factors: (1) histopathological findings that the lesion is consistent with tuberculosis, even though the causative bacilli cannot be identified, and (2) the possibility of false negatives on bacteriological culturing making that test unreliable for regulatory purposes. These two factors together suggest that public health interests will be better served by treating suggestive results as positive for tuberculosis.

FSIS policy and regulatory actions on tuberculosis will remain unchanged as stated in 9 CFR 311.2. During 1992, FSIS officials began to disseminate the new instructions on interpreting laboratory results to inplant veterinary medical officers in correlation and training sessions at the field level (one of these sessions was held in September 1992 in Southern California). Written notification to inplant veterinary medical officers on using laboratory results are drafted and are enclosed with this letter. Providing specific information in face-to-face sessions with inplant veterinary medical officers, in addition to providing written instructions, will assure proper diagnosis and disposition of cattle carcasses with tuberculosis.

We hope that this information addresses the concerns that Dr. Wilfredo B. Rosario has raised concerning the handling of cattle carcasses diagnosed with tuberculosis. We appreciate his patience and persistence in seeking clarification on this matter on behalf of himself and his colleagues.

Sincerely,



MIKE ESPY
Secretary

Enclosures

FSIS Notice 56-93, "Use of Laboratory Results In Mycobacterium Bovis Disposition"
Draft FSIS Directive 6240.1, "Bovine Mycobacteriosis (M.bovis) Disposition Guideline"

UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION SERVICE
WASHINGTON, D. C.

FSIS NOTICE

56-93

10-5-93

USE OF LABORATORY RESULTS IN MYCOBACTERIUM BOVIS DISPOSITION

I. PURPOSE

The purpose of this notice is to:

A. restate for FSIS Veterinary Medical Officers (VMOs) the purpose of certain sample and specimen collections,

B. clarify the Agency's policy on the use of laboratory results in making Mycobacterium bovis dispositions, and

C. serve as a precursor to more complete instructions that will be issued in the form of an FSIS Directive, titled Bovine Mycobacteriosis (M. bovis) Disposition Guideline, which will be completed and distributed in the near future.

II. GENERAL POLICY FOR DISPOSITIONS

The disposition of cattle, sheep, swine, goats, horses, mules, and other equines is determined by ante-mortem inspection and a subsequent post-mortem inspection of the carcasses and parts thereof. VMOs will make carcass dispositions after careful and complete examination of the carcass followed by professional interpretation of all clinical findings and gross pathological lesions. VMOs will exercise professional judgment in determining whether the stage of the disease process or condition renders the carcass unwholesome for human food, as outlined in the MPI Regulations, Section 311.1.

III. POST-MORTEM EXAMINATION AND DISPOSITION FOR MYCOBACTERIUM BOVIS

A. The VMO will use professional judgment in making the appropriate presumptive diagnosis, based on all gross pathology, stage of the disease, and the overall condition of the carcass. The carcass shall be disposed of in accordance with the MPI Regulations, Section 311.2.

DISTRIBUTION: Inspection
Offices, T/A Inspectors
Plant Mgt., T/A Plant Mgt.
TRA, ABB, PRD, AID

OPI: IO/SOS

B. All cattle having mycobacteriosis-like lesions, including granulomas involving the thoracic viscera (lungs, thoracic lymph node, pleura) and all tuberculin reactors will be subject to the expanded post-mortem procedure detailed in MPI Guideline No. 4, "Inspection of Tuberculin Reactors."

C. When the VMO suspects a carcass may be affected by Mycobacterium bovis and believes laboratory analysis will aid in making the diagnosis, he/she will submit tissue samples to the National Veterinary Services Laboratory (NVSL) and will retain the carcass until histopathology results are received. Histopathology results from NVSL indicating that the lesions from such carcasses are "compatible" with or "suggestive" of Mycobacteriosis will be considered positive for Mycobacterium bovis. The carcasses shall be disposed of in accordance with MPI Regulations, Section 311.2.

Any questions concerning this notice, please use the usual supervisory chain of command.



Deputy Administrator
Inspection Operations

DRAFT

FSIS DIRECTIVE 6240.1

BOVINE MYCOBACTERIOSIS (M.bovis) DISPOSITION GUIDELINE

I. PURPOSE

This directive provides appropriate procedures for ante-mortem and post-mortem inspection and disposition guideline for bovine mycobacteriosis (M.bovis).

II. CANCELLATION

This directive cancels sections 9.17(a)8; 11.5(i)(11)(i)(ii); 21.4(d)(1)(2)(3); 21.6(a)(1)6 of the Meat and Poultry Inspection Manual.

III. (RESERVED)

IV. REFERENCES

Code of Federal Regulations, Section 311.2 (9 CFR 311.2) and FSIS Directive 6200.1.

V. ABBREVIATION

FSIS Food Safety and Inspection Service
APHIS Animal and Plant Health Inspection Service
NVSL National Veterinary Services Laboratory
VS Veterinary Services
VMO Veterinary Medical Officer
CFR Code of Federal Regulations

VI. PROCEDURES

A. ANTE-MORTEM INSPECTION

1. All "tuberculin reactor" animals must be identified by establishment personnel as "reactors" before ante-mortem inspection is performed by a FSIS veterinary medical officer.

(i) The VMO will complete a physical examination, which will include taking the animals's temperature and recording the examination results on FSIS Form 6150-1 (Identification Tag-Ante-mortem).

- (ii) Livestock bearing official "USDA Reactor" eartags shall not be identified with a "U.S. Suspect" tag, but the reactor tag number shall be recorded on the FSIS Form 6150-1.
 - (iii) Animals that were dead on arrival (DOA), died in the pens or were inspected and condemned by a VMO, shall be given a complete post-mortem examination by a VMO in an area designated for inedible product or in an area within the premises of the establishment acceptable to the VMO, and the examination will include the expanded post-mortem procedure detailed in MPI Guideline No. 4, "Inspection of Tuberculin Reactors."
- 2. All tuberculosis-suspect or -exposed animals designated by VS Form 1-27 must be identified as tuberculosis-suspect or -exposed by establishment personnel before a regular ante-mortem inspection is performed by the VMO.
 - 3. A lot identification system shall be established by the plant management acceptable to the VMO, so that when M-branded cattle (steers imported from Mexico) are observed upon ante-mortem inspection, and the blue metal eartags shall be collected by establishment personnel from all cattle in the M-branded lot.

B. POST-MORTEM INSPECTION

- 1. **Tuberculin reactor animal.**
 - (i) During post-mortem inspection, the VMO shall:
 - a. Perform the expanded post-mortem inspection procedures detailed in MPI Guideline No. 4, "Inspection of Tuberculin Reactors."
 - b. Record observations of all granulomatous lesions on FSIS Form 6200-14 (Daily Disposition Record).
 - (ii) The VMO will use professional judgement in making the appropriate presumptive diagnosis, based on all gross pathology, stage of the disease, and the overall condition of the carcass. The carcass shall be disposed of in accordance with the MPI Regulations, Section 311.2.
- 2. **Tuberculosis-suspect or tuberculosis-exposed animal.**

- (i) If on regular post-mortem examination tuberculous-like lesions are detected, the VMO shall:
 - a. Perform the expanded post-mortem inspection procedure detailed in MPI Guideline No. 4, "Inspection of Tuberculin Reactors."
 - b. Record all granulomas found from the carcass on FSIS Form 6200-14 (Daily Disposition Record).
 - c. When the VMO suspects a carcass may be affected by Mycobacterium bovis and believes laboratory analysis will aid in making the diagnosis, he/she will submit tissues to the National Veterinary Services Laboratory (NVSL) and will retain the carcass until histopathology results are received.
 - d. Include a VS Form 10-4 and all available identification with the tissue specimen(s) being submitted to NVSL.
 - (ii) The VMO will use professional judgement in making the appropriate presumptive diagnosis, based on all gross pathology, stage of the disease, and the overall condition of the carcass. The carcass shall be disposed in accordance with the MPI Regulations, Section 311.2.
 - (iii) Histopathology results from NVSL indicating that the lesions from a retained carcass are "compatible" with or "suggestive" of mycobacteriosis shall be considered positive for Mycobacterium bovis. The carcass shall be disposed of in accordance with the MPI Regulations, Section 311.2.
3. **Animal that is not a reactor, nor tuberculosis - suspect or -exposed, but has been found during regular slaughter inspection to have thoracic granuloma(s) or any other lesion(s) suspected to be tuberculous.**
- (i) If on regular post-mortem examination tuberculous-like lesions are detected, the VMO shall:
 - a. Perform the expanded post-mortem inspection procedures detailed in MPI Guideline No. 4, "Inspection of Tuberculin

Reactors."

- b. When the VMO suspects a carcass may be affected by Mycobacterium bovis and believes laboratory analysis will aid in making the diagnosis, he/she will submit tissues to the National Veterinary Services Laboratory (NVSL) and will retain the carcass until histopathology results are received.
- c. Include a VS Form 6-35 and all available identification with the tissue specimen(s) being submitted to NVSL.
 - (ii) The VMO will use professional judgement in making the appropriate presumptive diagnosis based on all gross pathology, stage of the disease, and the overall condition of the carcass. The carcass shall be disposed of in accordance with the MPI Regulations, Section 311.2.
 - (iii) Histopathology results from NVSL indicating that lesions from a retained carcass are "compatible" with or "suggestive" of mycobacteriosis shall be considered positive for Mycobacterium bovis. The carcass shall be disposed of in accordance with the MPI Regulations, Section 311.2.

C. COLLECTING ID DEVICES

1. Identification devices collected at slaughter from all cattle shall be matched with the affected carcasses to which the devices correspond.
2. If ID devices collected at slaughter from mature cattle (cows and bulls) cannot be correctly matched with the affected carcasses to which the devices correspond, a "house tag" shall be placed in the same plastic bag as the brucellosis blood sample and other manmade identification devices. An alternative carcass identification method may be used provided that an accurate matching of IDs with affected carcasses is achieved.
3. When M-branded cattle (steers imported from Mexico) have been identified, plant employees will collect the blue metal ear tags from such cattle and place these tags in the plastic bags containing "house tags."

VII PREPARATION OF TISSUES AND REPORTING FORMS

- A. Remove excess fat and prevent contamination.
- B. Divide lesions as follows:
 1. For histopathology, include normal tissue and cut into block(s) approximately 1/2" and place in formalin at a 1:10 tissue to preservative ratio.
 2. For bacteriologic examination, cut a block approximately 1 to 2 inches thick and place in sodium borate solution (SBS) at 1:1 tissue to preservative ratio. Once a lesion is suspected as tuberculous it should not be further incised. Incisions create more surface area and sodium borate acts as a bactericide.
- C. If not enough tissue is available to be divided for both histopathological and microbiological analysis, send all the tissue for histopathological examination.
- D. Use an indelible pen to write the specimen identification number and the "U.S. Retained" tag number on the labels of the specimen bottles.
- E. Tighten caps and seal with masking tape to prevent loosening.
- F. SBS is a supersaturated solution. It is normal to see crystals in the bottles containing the solution.
- G. VS Form 6-35, Report of Tuberculous Lesions or Thoracic Granulomas in Regular Kill Animals. This form should be completed only for tissues submitted from regular kill animals; not for reactors, suspects or for exposed animals moving to slaughter on VS Form 1-27, Permit for Movement of Animals. Two copies go with the specimen and the third is retained by the VMO. Complete lines 1-20 of VS Form 6-35. Include all available information for traceback purposes. Be sure to include a telephone number in item 17, if the carcass is being retained pending laboratory results. Place completed VS Form 6-35 in the black and yellow striped mailer along with the polystyrene box containing the specimens.
- H. VS Form 10-4, Laboratory Request. This form should be used when tissues are submitted from Mycobacterium bovis reactors, suspects, and exposed. Do not submit lesions from reactors unless specifically requested by VS.
- I. VS Form 10-23. This is an orange Retained sticker that is attached to the outside of the tissue shipping container to indicate that the carcass is being retained pending laboratory results.

- J. Regardless of the reporting form used, each specimen container label should have some means of identifying the specimen to the accompanying report. For example, specimen bottle labels of 6-35 cases should have the retain tag number, eartag number, or any other identification number that ties the specimen to the correct report. Despite great care at the receiving point, the possibility of sample mixup exists anytime labels are not positively identified to the accompanying report.
- K. Only one report (6-35 or 10-4) should be used for tissues from any single animal to avoid the possibility of more than one accession number being assigned to a single animal.
- L. Send the tissue samples in formalin and sodium borate solution bottles, using the special black and yellow striped mailer box to NVSL, 1800 Dayton Road, P.O. Box 844, Ames, IA 50010.
- M. Histopathology results are reported via FAX to the respective FSIS Area Office within 24 hours upon receipt of the sample.
- O. FSIS Form 6000-13, Certificate of Ante-mortem or Post-Mortem Disposition of Tagged Animals. This accountable form is issued by the VMO upon the request of plant management after making the final disposition for Mycobacterium bovis. It is illegal to indicate under the column for disposition that the carcass was condemned if the VMO's final disposition was "passed for cooking". The improper reporting of the final disposition for Mycobacterium bovis will affect adversely the VS Bovine Mycobacteriosis Slaughter Surveillance Program.

If plant management elects to condemn the carcass for absence of cooking facilities or decides not to ship to other official establishments under restriction, the VMO shall indicate in the narrative section of **FSIS FORM 6200-14, Daily Disposition Record**, that "the carcass was condemned by plant management." This statement is in addition to the VMO's diagnosis of the disease or condition with detailed description of the location and extent of lesions and the appropriate disposition. In lieu of word descriptions, entries for Mycobacterium bovis disposition may be coded using the key at the top of **FSIS Form 6200-14**, to describe the location and extent of lesions. Mark the appropriate disposition block, and enter the code number for the condition and the code number for the class of animal. For information on the preparation and submission of FSIS Form 6200 Series, refer to FSIS DIRECTIVE 6200.1.

Kenneth S. Morrison
ATTORNEY & COUNSELOR AT LAW

CENTRAL OFFICE
WASH. D.C.
U.S. OFFICE OF
SPECIAL COUNSEL

P. O. Box 15562 • Beverly Hills, California 90209-1562 • (310) 205-0855

95 MAY -5 PM 3: 30

May 1, 1995

VIA TELECOPIER & U.S. MAIL

Ms. Joyce Carnell
Disclosure Unit Coordinator
U.S. Office of Special Counsel
1730 M Street, N.W.
Suite 300
Washington, DC 20036-4505

Re: OSC File No. DI-93-1119

Dear Ms. Carnell:

This is in response to the September 9, 1994, letter to you from William J. Hudnall, Deputy Administrator for Administrative Management of the U.S. Department of Agriculture (USDA) Food Safety and Inspection Service, a copy of which you forwarded to us on February 13, 1995. His letter was submitted in response to your conclusion that the Secretary of Agriculture's November 18, 1993, report of investigation appeared not to meet the minimum statutory requirements under 5 U.S.C. § 1213(d).

Nothing contained in Mr. Hudnall's letter has in any way altered the position of our client, Dr. Wilfredo Rosario. His position is described in detail in the September 3, 1994, and January 17, 1994, letters (and supporting exhibits) submitted to the Office of Special Counsel (OSC) on his behalf. We will not reiterate the details contained in those letters; however, we *urge* the Special Counsel to carefully review and consider our September 3 and January 17 letters prior to coming to any final conclusions in this matter.

Upon review of the relevant material in this case file, it is our strong belief that the Special Counsel will agree that the USDA's response does not appear reasonable and that the agency is now incapable of responding adequately to the serious issues raised by Dr. Rosario. In closing its files in this case, we urge the Special Counsel to condemn, in the strongest possible terms, the recalcitrant failure by the USDA and its successive Secretaries to take seriously Special Counsel orders to investigate the serious allegations of illegal conduct and substantial public health threats raised by Dr. Rosario.

The most significant element of Mr. Hudnall's letter is the admission that "no formal

Ms. Joyce Carnell
May 1, 1995
Page 2

investigation was conducted as a result of your [the Special Counsel's] April 16, 1993, request." Only after the OSC agreed with Dr. Rosario that the Secretary of Agriculture's "investigative report" appeared to be inadequate did the USDA inform the OSC that it had failed to take seriously the requirements of 5 U.S.C. § 1213(d) by not investigating.

According to Mr. Hudnall, the USDA's explanation for failing to formally investigate pursuant to the Special Counsel's 5 U.S.C. § 1213 referral is that "an extensive inquiry, after the original [1990] complaints, had produced most of the necessary information upon which to base a response." That "extensive inquiry" was in response to a separate whistleblower disclosure made by Dr. Rosario in 1990, was fundamentally flawed and inadequate, and did not even include an interview of the complainant himself, Dr. Rosario.

The USDA has now *twice* refused to take seriously Special Counsel orders to investigate. As far as we know, no witnesses were *ever* interviewed -- even in connection with the Secretary's 1990 report, which the USDA has referred to as a "memo." To this day, five years after Dr. Rosario first made his whistleblower disclosures through the OSC, the USDA has not interviewed him to discuss, detail, or evaluate any of the issues he has raised.

Furthermore, with regard to the "extensive inquiry" conducted in 1990, it had long been Dr. Rosario's contention that then-Secretary of Agriculture Clayton Yeutter's 1990 report was inaccurate to the extreme. After years of persistent challenges on the part of Dr. Rosario and his legal team, Secretary of Agriculture Edward Madigan finally admitted in 1993 that the Secretary's 1990 report to the Special Counsel contained fundamentally "inaccurate statements" and that Dr. Rosario was correct all along that beef carcasses with evidence of tuberculosis had been improperly released for human consumption. Therefore, the "extensive inquiry" referred to by Mr. Hudnall was, at best, less than adequate.

In fact, it was the inadequacy of the USDA's 1990 response, in conjunction with new information provided by Dr. Rosario, that led the Special Counsel in 1993 to make a *new* referral under § 1213(c) and (d). The Special Counsel handled Dr. Rosario's 1993 complaint as a fresh whistleblower disclosure under 5 U.S.C. § 1213(c) and, accordingly, made a new referral to the Secretary of Agriculture to investigate and report on the evidence of illegal conduct disclosed by Dr. Rosario.

BY REFUSING TO FORMALLY INVESTIGATE, THE USDA APPEARS TO BE CHALLENGING THE SPECIAL COUNSEL'S AUTHORITY TO ORDER § 1213 INVESTIGATIONS. EVIDENTLY, THE USDA BELIEVES IT POSSESSES SOLE DISCRETION TO DETERMINE WHEN SUCH INVESTIGATIONS ARE WARRANTED.

Ms. Joyce Carnell
May 1, 1995
Page 3

As detailed in our September 3, 1994, and January 17, 1994, letters (and attached exhibits), the Secretary's November 18, 1993, report clearly fails to "appear reasonable," as required by 5 U.S.C. § 1213(e)(2)(A), for the following main reasons:

1. First and foremost, the report is not even an investigative report as required by 5 U.S.C. § 1213(d). The agency is unable to provide the requisite "description of the conduct of the investigation," as required by 5 U.S.C. § 1213 because, by the agency's own admission, there was never a investigation conducted to describe. For example, a list of witnesses interviewed could not be supplied because, apparently, no witnesses were ever interviewed. That explains, *inter alia*, why Freedom of Information Act requests for copies of interviewer notes produced no documents.

2. The report fails to provide a full and complete accounting of how many TB-suggestive beef carcasses, in what parts of the country, have been illegally released for human consumption between 1988 and October 1993, when the USDA formally called a halt to the practice.

3. The report fails to provide a reasonable response to the specific evidence provided regarding the identities and roles of high-level Washington officials involved in the development, approval, and implementation of TB-disposition policies violative of federal law and regulation.

4. The report ignores unanimous recommendations by the USDA's own scientific experts who recommended the deletion of statements in the report that, in the experts' view, could not be endorsed by the scientific community. The objectional statements involved down-playing the public health risks associated with the human ingestion of meat from TB-infected cattle.

It is ironic that, in describing the preparation of the Secretary's 1993 report, Mr. Hudnall states in his letter, "Of course, input was received, and the draft report was reviewed by both subject matter experts and senior management officials." What he fails to mention is how the agency flatly rejected unanimous recommendations by its own scientific experts in order to mislead the Special Counsel and the public on the matter of health risks associated with TB meat.

The USDA has repeatedly failed to meet federal statutory requirements in connection with Dr. Rosario's disclosures and has demonstrated a repeated pattern of unresponsiveness and in providing misleading information that has now been extended into the tenure of four successive Secretaries of Agriculture.

Ms. Joyce Carnell
May 1, 1995
Page 4

It is our reluctant, yet firm, conclusion that the USDA is *incapable* of adequately investigating and providing a reasonable resolution to the issues raised by Dr. Rosario. Therefore, we are no longer seeking assistance from the Special Counsel in forcing the USDA to respond reasonably to the issues raised in this case.

In closing its files in this case, we urge the Special Counsel to condemn, in the strongest possible terms, the recalcitrant failure by the USDA and its successive Secretaries to take seriously Special Counsel orders to investigate the serious allegations of illegal conduct and substantial public health threats raised by Dr. Rosario.

If the USDA is not held accountable for its intentional deceptions and failures to reasonably respond to the issues raised in this aging case (now more than five years old), it simply sends a message to the public, potential members of the whistleblower community, and the heads of other federal agencies that Special Counsel orders need not be taken seriously and can be circumvented through avoidance, doublespeak, delays, and inaction.

As always, please do not hesitate to contact me if I can provide any additional assistance.

Sincerely,



Kenneth S. Morrison

KSM:fs

cc: Mr. Thomas Devine
Government Accountability Project



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

129880CU

The Special Counsel

September 7, 1995

The Honorable Abner Mikva
Counsel to the President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-93-0582

Dear Mr. Mikva:

Pursuant to 5 U.S.C. § 1213(e)(3), I am transmitting the enclosed letter and report to The President. If I may provide more information concerning this matter, please let me know.

Sincerely,

A handwritten signature in cursive script, reading "Kathleen Day Koch".

Kathleen Day Koch

Enclosure



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

September 7, 1995

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

In accordance with 5 U.S.C. § 1213(e)(3), I am transmitting a report from the Director of the Federal Emergency Management Agency (FEMA) sent to me pursuant to 5 U.S.C. §§ 1213(c) and (d). The report sets forth the findings and conclusions of the Director's review of disclosures of information allegedly evidencing violations of law and regulation, gross mismanagement, gross waste of funds and abuse of authority by officials of Region IX of FEMA, San Francisco, California.

The discloser provided comments to the agency report to this office pursuant to 5 U.S.C. § 1213(e)(1), which I am also transmitting. Since the discloser has requested that the comments remain confidential, any reference to his identity has been redacted.

I have determined that the report is a reasonable response to the disclosures and meets the requirements of 5 U.S.C. § 1213(d). The major disclosure alleged that Mr. Medigovich, former Regional Director of Region IX, FEMA, improperly or illegally approved the \$7.4 million hazard mitigation grant to the City of Oakland (California) after the Loma Prieta Earthquake. The investigation revealed that Mr. Medigovich had the authority to approve the grant. However, neither Mr. Medigovich nor his former Deputy Director, Ms. Lori Jean, followed standard hazard mitigation grant procedures in that negotiation. The Director assures us that corrective action has been taken to ensure that future decisions on hazard mitigation grants will not be made on a discretionary basis by agency officials.

With respect,

A handwritten signature in cursive script that reads "Kathleen Day Koch".

Kathleen Day Koch

Enclosures



Federal Emergency Management Agency

Washington, D.C. 20472

NOV 8 1993

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COMMUNICATIONS SECTION
FEDERAL EMERGENCY MANAGEMENT AGENCY
WASHINGTON, D.C.

Kathleen Day Koch
U.S. Office of Special Counsel
1730 M Street, N.W.
Suite 300
Washington, D.C. 20036-4505

Re: OSC File No. DI-93-0582

Dear Ms. Koch:

I am writing in further response to your letter of January 29, 1993, concerning the above-reference case. This letter supplements my June 22, 1993, letter to you, which provided an interim report on the matter. In my earlier letter I indicated that most of the allegations transmitted in your January 29 letter concerning actions taken by Mr. William Medigovich, the Regional Director of the Federal Emergency Management Agency's ("FEMA") regional office in San Francisco, were not supported with information or evidence available to us.

I indicated in my June 22 letter that some aspects of the allegation against Mr. Medigovich relating to a hazard mitigation grant to the City of Oakland (the "City") could have some basis in fact. On June 22 I asked the Regional Director to give me his views on the hazard mitigation grant which he approved for the City. See June 22, 1993 Memorandum from me to Mr. Medigovich (enclosed). The Regional Director responded to my memorandum on July 20. See July 20, 1993 letter from Mr. Medigovich (enclosed).

The purpose of this continued inquiry from the Agency's perspective was to determine (1) whether the actions taken by the Regional Director were proper, (2) whether the additional grant monies committed by the Regional Director were appropriately provided to the City of Oakland, and (3) what additional steps should be undertaken by the Agency in light of this matter.

1. Were the Actions Taken By the Regional Director Proper?

I believe the record is clear that the Regional Director relied on his authority under 44 CFR 206.226(c) ("Subsection (c)") to provide additional grant monies to the City for hazard mitigation purposes. Subsection (c) provides in pertinent part:

In approving grant assistance for restoration of facilities, the Regional Director may require cost effective hazard mitigation measures not required by applicable standards.

It also appears from both the Regional Director's explanation and a review of the record, however, that no adequate cost effectiveness analysis was undertaken by the Regional Director when approving the grant.

The Regional Director indicated in his letter to me that it was his view that he was not provided with adequate guidance for approving discretionary hazard mitigation grants. This is an issue that was identified by the General Accounting Office (the "GAO") in its July 1992 report on the Agency's response to the Loma Prieta Earthquake. See p. 16 of the enclosed GAO Report. In addition, the enclosed May 18, 1993, Report of Investigation (the "Report") which was prepared by FEMA's Office of Inspector General also identified this as an issue which requires refined guidance by the Agency. See recommendation no. 1 of the Report.

On the other hand, there is no indication from the Regional Director that he sought guidance concerning the appropriate factors to apply when considering whether the hazard mitigation grant which he approved was cost effective. Further, no specific hazard mitigation measures were identified by the Regional Director to support a grant on that basis. The Regional Director explained that hazard mitigation measures were not identified because those details should more appropriately reside with State and local governments, rather than the Agency. He also noted that he did not believe the regulations required the identification of specific hazard mitigation measures before a grant could be approved under Subsection (c).

The Regional Director instead relied on a number of extraneous factors, many of which were not an appropriate basis for providing the hazard mitigation grant. For example, in approving the hazard mitigation grant relating to Oakland's City Hall, the Regional Director noted in his letter to me that he was avoiding adverse publicity and possible litigation with the City over the issue. I do not believe it is appropriate for FEMA officials to take official actions simply in order to avoid potential adverse publicity. In addition, Regional Directors are required to consult with FEMA's Office of the General Counsel regarding potential litigation. Regional Directors should not approve discretionary hazard mitigation grants based upon a desire to prevent possible litigation without consulting with the Agency's Office of General Counsel.

In defending his actions, the Regional Director also took the position that the leadership of FEMA under the former Administration was "unlikely to stand on this issue if serious external political pressure were applied." See discussion at the top of page 6 of Mr. Medigovich's July 20 letter. In my opinion

this is also not a proper basis upon which FEMA Regional Directors should exercise their discretion to approve hazard mitigation grants.

It appears that the Regional Director's decision to provide the hazard mitigation grant was based upon the fact that the Oakland City Hall is an historic facility. City officials argued that FEMA's regulations authorize additional funding for the repair of historic facilities which are damaged by major disasters. See discussion below. Because there has been some dispute within the Agency regarding the existence of such an exception, the scope of such an exception, and whether such an exception should apply to projects similar to the Oakland City Hall, the Regional Director apparently decided not to rely specifically on this exception to support his decision to provide the supplemental grant, but to rely instead upon a hazard mitigation grant.

The pertinent regulation, which appears at 44 CFR 206.226(d) ("Subsection (d)"), indicates that it is FEMA's policy to impose a cap on disaster assistance for buildings which are so severely damaged by major disasters that it would cost less to replace the buildings with functional equivalents than it would cost to repair the buildings to their pre-disaster condition. FEMA's regulations state that in restoring damaged facilities, "eligible costs shall be limited to the less expensive of repairs or replacement." See 44 CFR 206.226(d)(2). However, Subsection (d)(3) states that there is an exception to this limitation when a damaged facility is on or is eligible for placement on the National Register of Historic Properties ("the National Register"). I understand that the Oakland City Hall is listed on the National Register.

On the other hand, when FEMA published its final regulations implementing the pertinent provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§5121 et seq., on January 23, 1990 (see 55 F.R. pp. 2297-2319, a copy of which is enclosed), the Supplementary Information discussion relating to this issue stated that it was FEMA's intent not to except historic properties from the general rule which appears at 44 CFR 206.226(d)(2). See the discussion relating to comment no. 6 at 55 F.R. at page 2301.

This apparent inconsistency between the discussion of FEMA's final rule and the language which appears at Subsection (d)(3) has been the subject of much discussion - both within FEMA and outside of the Agency. For example, the enclosed GAO Report recommended that FEMA clarify its standards for restoring historic buildings which are damaged by major disasters. See pages 4-5 and 24 of the GAO Report. In addition, the Report of FEMA's Office of Inspector General recommends that FEMA should clarify its regulations relating to the repair of historic buildings which are damaged by major disasters. See recommendation no. 2 on page 7 of the Report.

I agree that there seems to be an inconsistency between FEMA's implementing regulation at 44 CFR 206.226(d)(3) and the discussion of that regulation which appears at 55 F.R. page 2301. I also agree that it would be prudent for FEMA to issue guidance clarifying our position on the restoration of historic structures which are damaged by major disasters and on the approval of discretionary hazard mitigation grants by FEMA's Regional Directors. I intend to take steps to clarify FEMA's position on these matters in the near future.

It appears that if the Regional Director believed he had clear authority to apply the Subsection (d)(3) historic facility exception, he would have relied on that authority and not on the hazard mitigation authority set forth in Subsection (c) in approving additional funding for the repair of Oakland's City Hall. Under the original cost estimates, it was estimated that repair of the Oakland City Hall would involve a cost of approximately \$57 million, in contrast to the estimated \$45.8 million replacement cost of the building. The Regional Director apparently concluded that by agreeing to provide a discretionary hazard mitigation grant to the City, FEMA would be able to resolve the matter for less than the estimated repair cost of \$57 million.

2. Were the Additional Grant Monies Committed by the Regional Director Appropriately Provided to the City of Oakland?

FEMA has historically taken the position that the scope of any exception created by Subsection (d)(3) is very limited. However, there appears to be a colorable argument that FEMA may provide funding above the replacement cost of a building where an historic structure is involved.

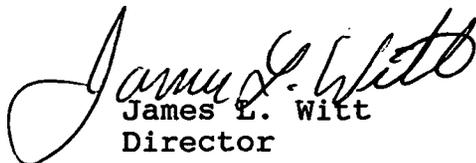
As noted, the Agency will need to reexamine this regulation, the Supplementary Information discussion which accompanied FEMA's publication of the final version of the regulation, and the Stafford Act to clarify the regulation. Nevertheless, in light of the regulations as currently drafted, and given the specific reliance by the City of Oakland in reaching a good faith settlement with FEMA regarding this matter, I conclude that the Agency should not upset this agreement and should honor its terms.

3. What additional steps should be undertaken by the Agency in light of this matter?

The Inspector General has made several recommendations designed to prevent the kinds of problems that have been identified in this investigation. See page 7 of the Report of FEMA's Office of Inspector General. Some of these recommendations are already being implemented, and I intend to review these recommendations further and take whatever additional steps are appropriate to resolve the problems that have been identified as a result of this investigation.

I hope that this letter adequately responds to your request for my views on the hazard mitigation grant which the Regional Director approved for the Oakland City Hall. If I can provide you with any additional assistance, please do not hesitate to contact me.

Sincerely,


James L. Witt
Director

Enclosures



Federal Emergency Management Agency

Washington, D.C. 20472

MAY 18 1993

MEMORANDUM FOR: James L. Witt
Director

FROM:

R. F. Miller
Russell F. Miller
Inspector General

SUBJECT: Office of Special Counsel File No. DI-93-0582

In response to Mr. Tidball's memorandum of April 12, 1993, the Office of Inspector General has completed the attached investigation report. We would be happy to brief you on its contents at your convenience.

Attachment

Report of Investigation
Office of Special Counsel File No. DI-93-0582

Summary of Information Provided

This report was prepared in response to the U.S. Office of Special Counsel letter dated January 29, 1993, concerning allegations by a FEMA employee of violations of law and regulation, gross mismanagement, gross waste of funds and abuse of authority by William Medigovich, Director, FEMA Region IX and Lorri Jean, the former Deputy Regional Director. The allegations include entering into a secret agreement with a subgrantee, the City of Oakland to provide \$7.4 million for unspecified hazard mitigation measures for Oakland City Hall without the participation of the grantee, the State of California, or the advice and assistance of regional program staff. The employee also alleges that these funds were inappropriate because the original \$45.8 million awarded by FEMA for Oakland City Hall was based upon the cost of a replacement structure built to current building codes and standards including all pertinent hazard mitigation requirements. Other allegations included offering a similar hazard mitigation grant to Stanford University, lobbying to give the City of San Francisco \$100 million to rebuild its City Hall, and seeking a means to provide \$22 million for relocation of Watsonville Hospital. It is further alleged that these actions were taken in an attempt to seek political favor to retain Mr. Medigovich in his position as Regional Director.

Conduct of Investigation

This investigation was conducted using a combination of direct and telephone interviews with FEMA personnel at Headquarters and the Region IX office. City of Oakland and State of California personnel were also interviewed. In addition, pertinent documents and correspondence were reviewed at FEMA Headquarters, Region IX, and the City of Oakland Deputy City Manager's Office. A complete list of the names and titles of individuals interviewed as well as the dates of each interview is attached to this report.

Summary of Evidence Obtained

Both Mr. Medigovich and Ms. Jean agreed that they entered into the November 6, 1992, agreement with the City of Oakland to provide \$7.4 million for hazard mitigation measures in accordance with 44 CFR 206.226 (b) of the regulations. This section reads, "In approving grant assistance for restoration of facilities, the Regional Director may authorize or require cost effective hazard mitigation measures not required by applicable standards. The cost

of any requirements for hazard mitigation placed on restoration projects by FEMA will be an eligible cost for FEMA assistance." In return, the City was required to agree it would withdraw its appeal and keeping the agreement confidential. Ms. Jean said it was her opinion that the agreement was within the Regional Director's authority and that the agreement would limit the financial participation of FEMA in the eligible costs for Oakland City Hall as a result of the Loma Prieta earthquake. She said there were fears in the Region and at FEMA Headquarters that costs would skyrocket if the appeal was granted at the Headquarters level or if Oakland were to sue FEMA over the project. There is no statutory or regulatory limit on funding that may be approved under this section, aside from the requirement that measures be cost-effective.

Ms. Jean said that the Regional Director, Mr. Medigovich, had asked her to review the many controversial public assistance projects from the Loma Prieta earthquake to determine if she could find a way to resolve them and, at the same time, reduce the level of acrimony that had developed between FEMA Region IX on one side and the State of California and its subgrantees on the other. One of these projects was Oakland City Hall.

Ms. Jean said that she initially negotiated via telephone directly with the City on a possible settlement of the situation because relationships with State officials had become so difficult. However, the day that the agreement was signed, two representatives of the California Office of Emergency Services (OES) attended the meeting between FEMA Region IX and City of Oakland officials. According to Mr. Richard Andrews, Director, California OES, their representatives were Mr. Eric Koch and Mr. Jeff Crawford. Mr. Andrews said that although he would prefer that all contacts between FEMA and local governments that are disaster applicants go through his office, he had no objections to the City's and FEMA's reaching the settlement agreement and knew that the paperwork would have to go through his office for processing. Mr. Andrews said that the possible use of hazard mitigation authority was discussed with State officials prior to the negotiations with Oakland as a potential vehicle to reach settlement and was viewed by him and other State officials as a positive way to break the logjam on contentious projects. He said the fact that the State had agreed to pay the 25% non-Federal share for the hazard mitigation measures should be considered as proof that the State of California had no objection to the agreement between FEMA and the City of Oakland. He said that California OES representatives previously had criticized FEMA Regional staff for several years for its reluctance to use this authority, since they understood that other FEMA regions used it more frequently.

Ms. Jean said that it is true that she did not consult regional Public Assistance staff in any but a very general way on the use of hazard mitigation measures for the Oakland City Hall project. Ms.

Jean said that her experience as Deputy Regional Director beginning June 18, 1989, had indicated that the Public Assistance staff consistently took an ultra-conservative approach to funding disaster work, even legitimately eligible projects. She felt that their advice was often not useful because they regarded avoiding the expenditure of FEMA funds as a victory. She assumed they would be opposed to any suggestion that involved spending money, even though it might save money in the long run. Ms. Jean said that she did have telephone conversations with staff at Headquarters in the Office of Disaster Assistance Programs and in the Office of General Counsel to ascertain whether there was a maximum amount that could be awarded for hazard mitigation and other generally related issues.

Ms. Jean said that she also had several telephone conversations with then Director Wallace Stickney on this issue. Because he had had previous experience as a member of the National Historic Review Board, he was particularly interested in the fact that much of the controversy concerning Oakland City Hall was because of the historic nature of the property. FEMA regulations at 44 CFR Part 206 Paragraph 226 (d) (1), (2), and (3) published January 23, 1990, are pertinent and are quoted here in full.

(d) Repair vs. replacement. (1) A facility is considered repairable when disaster damages do not exceed 50 percent of the cost of replacing a facility to its predisaster condition, and it is feasible to repair the facility so that it can perform the function for which it was being used as well as it did immediately prior to the disaster

(2) If a damaged facility is not repairable in accordance with paragraph (d)(1) of this section, approved restorative work may include replacement of the facility. The applicant may elect to perform repairs to the facility, in lieu of replacement, if such work is in conformity with applicable standards. However, eligible costs shall be limited to the less expensive or replacement.

(3) An exception to the limitation in paragraph (d)(2) of this section may be allowed for facilities eligible for or on the National Register of Historic Properties. If an applicable standard requires repair in a certain manner, costs associated with that standard will be eligible.

Because the cost to repair Oakland City Hall was greater than the cost to build a replacement facility, FEMA originally approved a Damage Survey Report (DSR) for \$45.8 million, the estimate for replacement. Officials of the City of Oakland were of the opinion that paragraph (d)(3) above should apply, thereby allowing an

exception because the building is on the National Register of Historic Properties and they wanted to repair it. The City originally estimated that the cost to repair the facility to current code would be \$55.9 million. The City now estimates that the total cost of repairs will be \$76.8 million.

With regard to the exception for historic properties in paragraph (d) (3), FEMA has interpreted this paragraph to mean that the exception can only be granted if there is a written standard in place requiring the property to be repaired. Program officials said that, although they have never seen a written standard prohibiting replacement of a historic local structure, regardless of the degree of damage or the cost to repair, they believe that such a narrow interpretation is justified and appropriate. City of Oakland officials argue that providing for the exception in Paragraph 206.226 (d)(3) that FEMA program officials acknowledge may never be used is misleading and creates opportunities for controversy.

It may be significant to note that in the supplementary information published with the regulations in the Federal Register, Vol. 55, No. 15 on January 23, 1990, there is a discussion on page 2301 of historic properties. The discussion notes that one comment made to interim regulations suggested that an exception be added to the regulations for historic properties. FEMA's response was that an exception for historic facilities would be contrary to the legislative intent. Yet, the exception was included in the final regulations. This gives the impression that at the time of publication of final regulations there may have been confusion or disagreement as to the inclusion or interpretation of this rule.

Ms. Jean said that during her conversations with then Director Stickney she developed the opinion that he wavered between supporting the City's request for exception and wanting to limit funding to replacement costs. She said that she had doubts that FEMA's interpretation of its own regulations would hold up if it were challenged in court. It is noted that Ms. Jean is an attorney and prior to being selected as Deputy Regional Director was an Assistant General Counsel at FEMA.

Mr. Daryl Wait, Regional Public Assistance staff member who prepared the paperwork for the hazard mitigation grant has said that he advised Ms. Jean that the historic property exception was the appropriate vehicle for approving increased costs for Oakland City Hall, indicating that he did not agree with the interpretation being made. Ms. Jean agreed that Mr. Wait had recommended the use of the historic property exception, but because of her extensive conversations with FEMA Headquarters program officials, she knew that they were unalterably opposed to a more liberal interpretation of the exception. Therefore, she felt that the only possible resolution to the impasse short of a formal appeal and potential lawsuit was a hazard mitigation grant. She acknowledged that no

specific hazard mitigation measures were envisioned in the approval of the grant and that no cost effectiveness analysis was done as required by FEMA regulations. She said that she felt that she could have demonstrated the cost effectiveness of her approach but did not realize that it needed to be documented. She acknowledged that she did not ask to see any pertinent guidance that might have existed on the subject or examples of other hazard mitigation measures that might have been approved in the past. Mr. Medigovich said that he assumed that staff preparing the paperwork would ensure that any requirements for documentation would be met. Ms. Jean said the requirement that the City keep the agreement confidential was a "feeble" effort to avoid having other applicants use the agreement with the City of Oakland as a basis for negotiating with FEMA on their projects. She agreed that FEMA Region IX was not intended to be bound by the confidentiality requirement and, in fact, shared the agreement with the State Office of Emergency Services during the meeting at which it was signed.

Both Ms. Jean and Mr. Medigovich said they were unaware of a FEMA Document entitled "Hazard Mitigation Grant Program: Interim Guidance" dated June 1992. Program staff at the Region and Headquarters acknowledged that they had never brought this document to the attention of Ms. Jean or Mr. Medigovich. While the document primarily deals with the Hazard Mitigation Grant Program authorized under Section 404 of the Stafford Act, pages 2-4 and 2-5 discuss hazard mitigation measures related to damaged public facilities under 44 CFR 206.226. The document quotes the applicable section of the regulations and further states, "Design changes or improvements are eligible expenses when it can be demonstrated that these measures will have a cost-effective mitigation benefit in terms of the life of a structure." It also gives an example involving modifications of a levee system to provide greater storage area to reduce the damage caused by levee breaks due to repetitive flooding. In the guidance, the issue of cost-effectiveness is not discussed in detail with respect to hazard mitigation measures approved as part of public facility restoration but only in the context of the hazard mitigation program under Section 404. Specific requirements for documentation for hazard mitigation measures approved as part of public assistance projects also are not detailed in this guidance document.

Mr. Medigovich and Ms. Jean agreed that she had earlier attempted the same approach with Stanford University in an attempt to break the impasse on projects there and agreed that it did not go through only because attorneys for Stanford University declined. They both said that they had looked at a variety of options with regard to San Francisco City Hall and Watsonville Hospital. The San Francisco City Hall project is currently at FEMA Headquarters for consideration of a second appeal, the first appeal to the Regional Director having been denied. The Watsonville Hospital project has not been appealed at the Regional level at this time. We found no

documentation supporting the allegation that the Regional Director or former Deputy Regional Director "lobbied" to give the City of San Francisco \$100 million to rebuild its City Hall or sought a means to fund the purchase of land for an alternate site for Watsonville Hospital.

We found no evidence that any of these actions were related to an attempt by Mr. Medigovich to seek political favor to remain the Regional Director. Mr. Medigovich said that he is interested in remaining the Regional Director but had initiated the effort to resolve the Oakland City Hall and other issues long before there was any speculation that President Bush might not be re-elected. We were unable to find documentation to support the date of the initiation of these discussions, although some staff indicated they began soon after Mr. Medigovich joined FEMA in March 1990.

Conclusions

Guidance on approving hazard mitigation measures under 44 CFR Subpart H 206.226 (b) is limited, non-specific, and buried in an interim guidance document designed to address the hazard mitigation program authorized under 44 CFR Subpart N.

Regulations at 44 CFR Subpart H 206.226 (d)(3) concerning an exception to the repair/replacement limitation for historic properties are subject to varying interpretations.

The California Office of Emergency Services, as the grantee, was inappropriately excluded from initial negotiations between FEMA Region IX and the City of Oakland representatives, contrary to the intent of FEMA regulations.

The negotiation of an agreement between FEMA Region IX and the City of Oakland requiring that the City keep the provisions confidential, while violating no law or regulation according to the FEMA Office of General Counsel, may give the appearance of impropriety in this situation.

The lack of consultation between FEMA Region IX and the State of California and between some Region IX employees and the Regional Director and Deputy Director appear to have been caused by severely strained working relationships. These continue to be so strained as to make effective accomplishment of their programmatic responsibilities questionable.

The FEMA Office of General Counsel indicated that it may be premature to determine whether the Regional Director exceeded his authority to approve hazard mitigation measures under 44 CFR Part H Paragraph 206.226 (b) simply because the specific measures and their cost-effectiveness were not documented, and recommended that the Regional Director be offered the opportunity to provide such documentation for ratification after the fact.

Recommendations

1. The FEMA Headquarters Office of Disaster Assistance Programs should issue specific guidance to the Regional Offices addressing the approval of hazard mitigation measures under 44 CFR Subpart H Paragraph 206.226 (b). The guidance should, at a minimum, discuss the types of measures considered appropriate, documentation required, and suggested methods for determining and documenting cost-effectiveness.
2. The FEMA Headquarters Office of Disaster Assistance Programs should revise regulations at 44 CFR Subpart H Paragraph 206.226 (d) (3) to clarify the interpretation of the historic property exception to the repair/replacement limitation.
3. The FEMA Director should investigate the usefulness of naming a dispute resolution officer for FEMA as a supplement to formal appeal procedures to assist in resolving differences between FEMA and individuals, organizations and governmental entities doing business with the Agency.
4. The FEMA Director should investigate the current working relationship between FEMA Region IX and the State of California and within FEMA Region IX to determine whether formal intervention to improve these relationships may be beneficial.
5. The FEMA Director should consider the OGC recommendation to permit the Regional Director to document the specific hazard mitigation measures approved for Oakland City Hall and their cost-effectiveness.

Attachment

Record of Interviews

1. April 15, 1993 Sandra Lee (Telephone)
Emergency Management Specialist
Public Assistance
FEMA Region IX
2. April 19, 1993 William Medigovich
Regional Director
FEMA Region IX
3. April 20, 1993 Roy Gorup, Lamoyne Darnall,
Jack Lagerbom
Public Assistance
FEMA Region IX
4. April 20, 1993 Frank Kishton
Deputy Division Chief
Disaster Assistance Programs
FEMA Region IX
5. April 20, 1993 Ezra Rapport
Deputy City Manager
City of Oakland, California
6. April 20, 1993 Bruce Moen
Construction Manager
Oakland City Hall Repair
7. April 26, 1993 Chuck Stuart
Public Assistance
FEMA Headquarters
8. April 28, 1993 Mr. Richard Andrews (Telephone)
Director, California Office
of Emergency Services
9. April 28, 1993 Mr. Paul Jacks (Telephone)
California Office of Emergency
Services
10. April 29, 1993 Ms. Lorri Jean (Telephone)
former Deputy Regional Director
FEMA Region IX
11. May 4, 1993 Mr. Daryl Wait (Telephone)
Public Assistance
FEMA Region IX



Federal Emergency Management Agency

Washington, D.C. 20472

April 12, 1993

MEMORANDUM FOR: Russell F. Miller
Inspector General

FROM: *William C. Tidball*
William C. Tidball
Chief of Staff

SUBJECT: Office of Special Counsel File No. DI-93-0582

This memorandum is to request an investigation by your Office of the allegations made in the subject case file referred to FEMA by the Office of Special Counsel (OSC).

Attached herewith is the letter from the Special Counsel forwarding the redacted copy of the information received by OSC from a FEMA employee. Also attached is a report by Richard W. Krimm, Acting Associate Director, State and Local Programs and Support Directorate, providing information of the headquarters program office knowledge, or lack thereof, concerning the alleged matters.

I have, on this date, requested a 60-day extension of the deadline for filing FEMA's report with the Special Counsel as required by 5 U.S.C. 1213(d). Therefore, I would appreciate it if you would provide me with a report of your findings, including any violations and recommended corrective actions, no later than May 23, 1993.

Your cooperation with this matter is appreciated.

Attachments



Federal Emergency Management Agency

Washington, D.C. 20472

APR - 5 1993

MEMORANDUM FOR: William C. Tidball
Acting Director

FROM: Richard W. Krimm
Acting Associate Director
State and Local Programs and Support

SUBJECT: U.S. Office of Special Counsel Letter Dated
January 29, 1993, OSC File No. DI-93-0582

The following is based upon information provided by Larry Zensinger, Chief of the Public Assistance Division, Office of Disaster Assistance Programs.

The Office of Special Counsel has summarized and provided a redacted copy of charges brought by a Region IX employee against William Medigovich, Region IX Director. These charges concern administration of the Public Assistance program in Region IX and focus particularly on a grant made to the City of Oakland.

The purpose of this memorandum is to relate to you what we know about these allegations from the headquarters perspective and to suggest a course of action.

Oakland City Hall

Following the Loma Prieta earthquake, FEMA inspectors determined that the cost of repairs required to Oakland City Hall exceeded 50% of the estimated replacement cost of the building. In situations such as these, the applicant has the option of either repairing the building or replacing it with a new building. Under the replacement option, the applicant is eligible to receive reimbursement for the full cost of constructing a new building of equivalent floor area and function in accordance with applicable codes and standards. Under the repair option, the applicant is eligible only for the cost of repairs. Eligible repair costs are capped at the replacement cost of the building. FEMA estimated the replacement cost of the building to be \$45.8 million.

The City of Oakland opted to repair City Hall rather than tear it down and replace it with a new building. Due to the extensive seismic retro-fitting required by city ordinance, and the cost of restoring and protecting historically significant features of the building, the City projected that repair costs would be in the range of \$57 million, significantly higher than the replacement cost of the building.

In accordance with FEMA regulations, Region IX approved a Damage Survey Report (DSR) for \$45.8 million, the estimated replacement cost of the building. This determination was immediately contested by the City, which argued that the State Historic Building Code imposed costly repair requirements that should be eligible for FEMA reimbursement. The City wrote several letters directly to FEMA headquarters attempting to make a case for their position. The Public Assistance Division, in concert with the Office of General Counsel and Region IX staff consistently supported the original Region IX position.

The Public Assistance Division expected that this project would be appealed to the extent possible under FEMA regulations.

In November, 1992, Gregg Chappell, former Assistant Associate Director for the Office of Disaster Assistance Programs, received a copy of the executed agreement negotiated between FEMA Region IX and the City of Oakland. Neither Gregg nor any members of the Public Assistance Division staff in headquarters had any knowledge of this agreement during its development and negotiation.

The agreement itself is highly unusual in a number of respects. First, it was negotiated between FEMA and the City of Oakland. The State of California is not a party to the agreement and we are not aware whether they were aware of its development. This is unusual since the State of California is the grantee for all Public Assistance funds and the State has assumed responsibility for the 25% non-federal cost share of the program. While the State may have been sympathetic to the City's original claim for higher funding from FEMA and may welcome this agreement and willingly provide the non-federal share of the additional hazard mitigation funding approved by the Regional Director, they also may feel that they are not obligated by this agreement to do so. If that is the case, there may be some question as to whether appropriate cost sharing is occurring for this grant. In addition, the agreement contains a provision that requires the City of Oakland to keep the agreement and the hazard mitigation grant confidential. I cannot comment on the legality of such a provision, but can assure you that there should never be any reason for secrecy surrounding any official grant-making activity of the disaster assistance program except for matters which are covered by the Privacy Act. Finally, no one in the Office of General Counsel was aware of this agreement having been approved by that office, as is the case with most agreements and legal obligations into which the agency enters.

This agreement provides \$7.4 million to carry out unspecified hazard mitigation measures. The Regional Director has the authority, under FEMA regulations, to reimburse an applicant for hazard mitigation measures that the Regional Director has required as a condition of approving a grant. Such measures must be shown to be cost-effective by FEMA before they can be funded.

There are at least four reasons why this grant award could be considered to be unusual, and possibly irregular:

1. We are aware of no hazard mitigation measures specified by the Regional Director as contemplated in the regulations and the legislation as a basis for the reimbursement. That is, the grant cannot be traced to any specific scope of work that was required to be accomplished for which the reimbursement could be made;

2. We are aware of no cost-effectiveness analysis performed to determine whether the funds provided for hazard mitigation meet the cost-effectiveness criteria as provided for in 44 CFR 206.226 (c). Of course, without knowing what mitigation measures the funds were to be used for, it would be impossible to perform a cost-effectiveness analysis. The agreement discusses at some length that Congress contemplated that hazard mitigation grants would average 11% of repair costs and that this grant was being made for 16% of repair costs. The Congressional record has been greatly misrepresented in this discussion. The factor of 11% was offered as an average in response to concerns about the impact that this provision might have on the program budget when this particular amendment was under consideration. The 11% factor was never intended as any kind of guideline for use by the agency in implementing the program. The criteria used is cost-effectiveness. Projects which add much less than 11% to the cost of repair of a structure can be found not to be cost-effective and projects which add more than 11% can be found to be cost-effective. Program regulations, policies and guidance provide no basis for using percentage of project cost as a means of justifying hazard mitigation measures. Finally, applying an additional 16% to the authorized cost for hazard mitigation measures when the base cost itself already includes all costs of hazard mitigation measures cannot be supported (see #4 below).

3. Section 206.226 (c) (2) provides that in any situation in which the applicant chooses to repair a building that is eligible for replacement, the amount of reimbursement for which they are eligible is "limited to the less expensive of repairs or replacement." In this case, the less expensive alternative is full replacement, that is, the \$45.8 million dollar estimate. It appears that the guise of "hazard mitigation" funding authorized under Section 206.226 (c) may have been used to circumvent the limitation contained in 206.226 (c) (2). Indeed, the City of Oakland will be receiving, under this agreement, reimbursement which exceeds by \$7.4 million the estimated cost of building a completely new building meeting all the pre-disaster space requirements.

4. The estimated replacement cost of the building, which this hazard mitigation grant is in addition to, includes full seismic design in accordance with current standards. To authorize additional funding for hazard mitigation on a grant which already

has factored into it all necessary hazard mitigation costs could be considered to be duplicative and an unwarranted expansion of allowable federal assistance.

We have no specific information concerning the allegations with respect to Stanford University, the City of San Francisco (regarding the City Hall) and the Watsonville Community Hospital Association. Obviously, it would be possible to verify one of these allegations with attorneys for Stanford University. As for the allegations regarding the intent of the Regional Director, we have no evidence to support or refute these allegations.

There are obviously a number of serious issues related to the Oakland City Hall situation which could be pursued further from a programmatic, legal and ethical viewpoint. Many of these issues are beyond the capability of the program staff to investigate.

With respect to the Office of Special Counsel inquiry, however, we have been asked to indicate what actions we have taken or intend to take. I believe that first a determination must be made as to whether or not the Regional Director exceeded his authority, exercised bad judgement or made a valid grant decision. Based upon this determination, it is then necessary to determine what action, if any, is appropriate with respect to the \$7.4 million grant made to the City of Oakland. Any determination which leads to the requirement to somehow recoup the funding already approved would obviously have harmful repercussions to the agency.

It is the belief of my staff that at a minimum the Regional Director exercised poor judgement, failed to consult with his technical staff and used erroneous reasoning in approving this grant. This does not in and of itself invalidate the grant, but provides grounds for further investigation by qualified investigators.

I will await your guidance regarding any actions to be taken on this issue and will proceed with drafting a response to the Office of Special Counsel at that time. Additionally, I would welcome the opportunity to discuss this further and weigh whatever other options may be available.

If I can provide any additional information for you in this matter, please do not hesitate to contact me.

cc: Zensinger
Kwiatkowski

SL-DA-PA/Zensinger:paw/x4240/March 11, 1993/"OSC"

CONCUR: ZENSINGER

KWIATKOWSKI

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3/12/93

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PK
3/12

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3/12/93

Ms. Elicia L. Marsh
U.S. Office of Special Counsel
1730 M Street, N.W. Suite 300
Washington, D.C. 20036-4505

RE: OSC File No: D1-93-0582

Dear Ms. Marsh

I have reviewed the report submitted to you by the Director of FEMA, James Lee Witt and make the following comments and recommendations:

Background

My first impression after reading the report is that the agency did not comply with the requirements of 5 USC.1213(d) in neither conducting the investigation nor in the preparation of the report submitted to you. I was particularly distressed by the laissez-faire tenor of the response. There were no findings, even though the Headquarters official responsible for implementing agency policy for the Public Assistance program points out in his report, of April 5, 1993, four reasons why the \$7.4M mitigation grant made by the FEMA RIX Director to the City of Oakland was irregular. Mr. Krim points out that in making this grant, William Medigovich, the Regional Director:

- 1) Failed to specify the hazard mitigation measures that would justify the award of the grant;
- 2) Did not perform a cost effectiveness analysis as required by 44 CFR 206.226 (c);
- 3) Exceeded the cap on eligible funding, 44 CFR 206.226 (d) (2); and
- 4) Authorized additional funding for Hazard Mitigation (HM) on a grant which had already included into it all necessary HM costs.

I consider the investigation performed by the FEMA, Office of the Inspector General to be inadequate and inconclusive. It seems to be strongly prejudicial rather than impartial, thus advocating the political interest rather than the interest of law. Mr. Witt's report to you states as one of his purposes, "determine 1) whether the actions taken by the Regional Director were proper..." Mr. Medigovich justifies his actions by stating, in part, that:

- 1) He was not provided with adequate guidance for approving discretionary HM grants;

- 2) He did not identify the hazard mitigation measures to be taken because the state and local governments are responsible for such details;
- 3) He was avoiding adverse publicity and possible litigation;
- 4) The leadership of the previous administration, of which he was part, were not likely to stand behind an adverse decision on this issue if serious political pressure were applied.
- 5) His decision to award the HM grant was based on the fact that the Oakland City Hall was an historic structure.

Mr. Witt comments on Mr. Medigovich's submittal allowed that he failed to seek proper guidance or obtain the HM measures to be applied. Mr. Witt further added that the Regional Director applied many inappropriate extraneous justifications in awarding the grant. Crucially, however, Mr. Witt makes no determination as to whether Mr. Medigovich's actions were proper. Given the absence of a determination, no corrective measures were recommended or taken. Mr. Witt's concludes by suggesting that honoring the agreement is the least embarrassing way to proceed.

Analysis

Subsequent to receiving the report, ~~_____DELETE_____~~
~~_____DELETE_____~~ relevant materials which are listed below and included in my response to you:

Tab A: The Damage Survey Report (DSR) was completed on April 1, 1991 in accordance with 44 CFR 206.226 (d). The following excerpts are relevant to this inquiry:

(d) *Repair vs. replacement.* (1) A facility is considered repairable when disaster damages do not exceed 50 percent of the cost of replacing a facility to its predisaster condition, and it is feasible to repair the facility so that it can perform the function for which it was being used as well as it did immediately prior to the disaster.

(2) If a damaged facility is not repairable in accordance with paragraph (d)(1) of this section, approved restorative work may include replacement of the facility. The applicant may elect to perform repairs to the facility, in lieu of replacement, if such work is in conformity with applicable standards. However, eligible costs shall be limited to the less expensive of repairs or replacement.

(3) An exception to the limitation in paragraph (d)(2) of this section may be allowed for facilities eligible for or on the National Register of Historic Properties. If an applicable standard requires repair in a certain manner, costs associated with that standard will be eligible.

Region IX's estimate to replace the building to include current codes and standards was \$42,386,000. FEMA Headquarters, after review, increased that amount to \$45,799,000

(45.8M), which equates to \$245/ft².

As noted in the comment section of the DSR, this project received improved project status in accordance with 44 CFR 206-203 (d) (1) as follows:

(d) *Funding options* (1) If a subgrantee desires to make improvements, but still restore the predisaster function of a damaged facility, the Grantee's approval must be obtained. Federal funding for such improved projects shall be limited to the Federal share of the approved estimate of eligible costs.

As such the Federal share of the project was capped at 75% of \$45.8M or approximately \$34.35M. Thus, no additional federal funds could be awarded to the project.

Tab B: The applicant appeal. The appeal was transmitted by the City of Oakland to the state on October 11, 1991. It was never officially forwarded by the state to FEMA Region IX. The proposed appeal challenges FEMA's repair v. replacement policy, quoted above. Had the appeal been forwarded, the Region IX Public Assistance staff would have been compelled to deny it because it ran contrary to existing regulations. The City did appeal directly to Headquarters. That appeal was answered by Robert G. Chappell (see Tab C), who stated most clearly what FEMA's past practice had been.

Tab C: Letter from Mr. Robert G. Chappell (FEMA Headquarters) to Mr. Ezra Rapport (City of Oakland), dated May 7, 1990. Mr. Chappell explains to the City of Oakland the FEMA's long standing policy has been to replace damaged structures with a new one of the same capacity, but not necessarily the same historical significance.

Tab D: Memorandum from H.W. Lagerbom (FEMA contractor on the project) to L. Darnell (FEMA Public Assistance staff), dated December 13, 1993. This memorandum and the attached spreadsheets are self explanatory, however, the following additional points should be noted:

- The \$7.4M HM grant matched exactly the shortfall in the City's project budget.
- A review of the budget items reveals that no funds have been committed to hazard mitigation.

Tab E: Spreadsheet - Estimate of Final Costs for Oakland City Hall. The spreadsheet shows an upward spiral of project management costs, from 19.8% in the original Construction Manager's (CM) budget to 27.7% in the CM forecast for October and November of 1993. The original estimate of 19.8% is considered high as these ratios go: project management costs normally run 4-8%. In this project, the project management costs have escalated from \$12,288,000 to \$15,812,000, a difference of \$3,524,000. This amount, together with the over-funding identified in Tab D of \$10,971,000, brings the total over-funding to approximately \$14,451,528. The FEMA project monitor estimates that upon

completion, project eligible costs will come in under the original DSR replacement estimate of \$45.8M.

During the IG investigation, Mr. Medigovich stated that he was not provided with adequate guidance for approving HM grants. 44 CFR 2.71 (f) establishes the following policy for the authority delegated to Regional Directors:

(f) In exercising any authority delegated to them, the Regional Directors shall coordinate (to the maximum extent practicable) technical matters and routine actions with appropriate program officials on the staffs of the various Administrators, Associate Directors, General Counsel, Inspector General or Office Directors who shall render policy guidance and program direction.

A review of the above facts reveals the following:

1. The Regional Director and his Deputy took actions contrary to established FEMA policies in making a grant of \$7.4M for unspecified hazard mitigation measures. That policy is clearly stated below in 44 CFR 206-226 (c):

(c) *Hazard Mitigation.* In approving grant assistance for restoration of facilities, the Regional Director may require cost effective hazard mitigation measures not required by applicable standards. The cost of any requirements for hazard mitigation placed on restoration projects by FEMA will be an eligible cost for FEMA assistance.

2. Mr. Medigovich, in his capacity as Regional Director, failed to coordinate his actions in this regard, as directed in 44 CFR 2.71 (f) quoted above.

3. The Regional Director violated 44 CFR 206.203 (d) and 206.226 (d) by adding additional federal funding to a project that was already capped by both rules. He also ignored the policy stated by Mr. Chappell in his letter (Tab C) to the City of Oakland and the advise of the Regional Public Assistance staff.

4. Mr. Medigovich HM grant award of \$7.4M was unwarranted in light of the current funding status of this project (\$14.5 in cost savings of normal eligible costs from Oakland's project budget). However, these federal funds as well as the state's \$7.9M contribution may not be recovered since the project has been designated an improved project as defined in 44 CFR 206.203 (d)

Recommendation

I recommend that the OSC engage competent and independent agents to audit and investigate this transaction for possible criminal intent on the part of Mr. Medigovich.

~~DELETE~~

Sincerely,

~~DELETE~~

Enclosures