

National Aeronautics and Space Administration

Appeal under the Freedom of Information Act
to NASA Response Dated February 11, 2010 and
received via email February 16, 2010

FOIA 10-HQ-F-00285

Filed: December 14, 2009

Jed Margolin

NASA Appendix NA

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Jed Margolin

From: "McConnell, Stephen (HQ-NB040)" <stephen.mcconnell-1@nasa.gov>
To: "Jed Margolin" <jm@jmargolin.com>
Cc: "Young, Denise (HQ-NB040)" <denise.young-1@nasa.gov>
Sent: Tuesday, February 16, 2010 1:30 PM
Attach: 10-00285 (final) v2.docx; 10-00285 (docs).pdf
Subject: 10-00285

Our initial release determination is provided below.

February 11, 2010

10-HQ-F-00285

Mr. Jed Margolin
1981 Empire Road
Reno, NV 89521-7430

Dear Mr. Margolin:

This is our final initial release determination to your Freedom of Information Act request, dated December 15, 2009, subject: *FOIA Request – Take 2*.

We have conducted a search of the office specifically responsible for ‘patent infringements’; which is our Office of General Counsel. Even though you posed your request for agency records as questions, under the FOIA, federal agencies are provided guidance “that they are not required to answer questions posed as FOIA requests.”ⁱ

However, in an affirmative action towards seeking the records to your request we conducted a search which could answer those questions.ⁱⁱ

- Question #1: can be answered by providing you a copy of the log the Office of General Counsel maintains.
- Questions # 2-8 and 10: found ‘no records’, which would specifically provide you with a responsive answer to your questions.
- Question # 9: is seeking records not kept or maintained by this agency. However, you may wish to contact the General Accounting Office, which could have records relating to that specific question. The following is a link to their agency’s FOIA office.
<http://www.gao.gov/foia.html>
- Question #11: Procurement Information Circular 08-12 The Federal Acquisition Regulations has internal standards of conduct, which is responsive to your request.

<http://www.hq.nasa.gov/office/procurement/regs/pic08-12.html>

You may appeal this initial determination to the NASA Administrator. Your appeal must be addressed to: Administrator, National Aeronautics and Space Administration, Mail Stop: 9Q42, 300 E Street, SW, Washington, DC 20546, and be identified clearly on the envelope and in the letter as an “Appeal under the Freedom of Information Act (FOIA). Also, include a copy of the request for the agency record, and a copy of the adverse initial determination and state, to the extent possible, the reasons why you believe the initial determination should be reversed. This must be sent to the Administrator with thirty (30) calendar days of the date of the receipt of this initial determination.

I trust this will be of assistance to you.

Appendix NA5

Sincerely,

Original Signed

Denise Young
Headquarters, Freedom of Information Act Officer

ⁱ Department of Justice, Office of Information Policy's *Guide to the Freedom of Information Act*. See e.g. Zemansky v. EPA, 767 F.2d 569, 574 (9th Cir. 1985); DiViao v. Kelley, 571 F.2d 538, 542-43 (10th Cir. 1978); Barber v. Office of Info. & Privacy, No. 02-1748, slip op. At 4 (D.D.C. Sept. 4, 2003)(holding that the agency "had no duty to conduct research or to answer questions"...; Higgins, 620 F. Suppl. At 21("[The] FOIA creates only a right of access to records, not a right to personal services.")

ⁱⁱ Department of Justice *FOIA Update*, Vol. V, No. 1 at 5 (advising that "while agencies do not have to create or compile new records in response to FOIA requests (whether formulated in question form or not), they should make good faith efforts to assist requesters in honing any requests for readily accessible records which are 'inartfully presented in the form of questions' (quoting Ferri, 645 F.2d at 1220)).

INFRINGING PATENT CLAIMS

2001

#	DATE	CLAIMANT/COMPANY	DATE	GP#	STATUS	DATE
	REC'D.		LTR SENT			CLOSED
221	7/10	Barry Herbert	7/10	02-37037	Acknowledgement Letter Sent	

<u>I#</u>	<u>DATE REC'D.</u>	<u>CLAIMANT/COMPANY</u>	<u>DATE LTR SENT</u>	<u>GP#</u>	<u>STATUS</u>	<u>DATE CLOSED</u>
219	2/5	Douglas E. Pittman/U.S. Controls and Services			Acknowledgement Letter Sent	
220	8/16	Ramsey M. Al-Salam/Perkins Co				

INFRINGE PATENT CLAIMS

2000

#	DATE	CLAIMANT/COMPANY	DATE	GP#	STATUS	DATE
	REC'D.		LTR SENT			CLOSED
216	1/19	Lemelson Foundation Partnership	1/27	00-37007	Acknowledgement Letter Sent	
			1/27	00-37008	Letter Sent to T.Byrnes (DOJ) for review and advice	
217	5/22	W. Calvert	5/23	00-37052	Letter Sent to EF for his signature	
218	8/4	Po Kee Wong			Ordered Two Patents on 8/9	

INFRINGE PATENT CLAIMS

1999

#	DATE	CLAIMANT/COMPANY	DATE	GP#	STATUS	DATE
	REC'D.		LTR SENT			CLOSED
214	2/11	S. Chapman of Clemson U	4/14	99-37025	Acknowledgement Letter Sent	
			4/14		Patent Ordered from PTO	
			4/26		Patent Received from PTO	
			6/24	99-37045	Investigation Memo sent to Guy; Respond by 08/20/99	
215	10/14	Louis Birbas/Ulysses Corporation	2/7	00-37005	Investigation Completed Letter sent to Birbas	

Jed Margolin

From: "Jed Margolin" <jm@jmargolin.com>
To: <denise.young-1@nasa.gov>
Sent: Monday, December 14, 2009 6:40 PM
Attach: V16_gao.pdf
Subject: FOIA Request

This request is made pursuant to the Freedom of Information Act.

I would like all documents that answer the following questions:

1. How many claims for patent infringement have been filed with NASA since January 1, 1999? This includes requests which NASA chose to handle as claims even if the person who submitted it had not intended it to be an official claim.
2. How many of the claims for patent infringement in paragraph 1 were affirmed by NASA?
3. How many of the claims for patent infringement in paragraph 1 were made by what NASA considers Independent Inventors?
4. What does NASA consider an Independent Inventor?
5. How many of the claims for patent infringement that NASA affirmed in paragraph 2 were filed by Independent Inventors?
6. How many of the claims for patent infringement in paragraph 1 were denied by NASA?
7. How many of the claims for patent infringement that were denied by NASA in paragraph 6 resulted in a Court action against NASA?
8. How many of the claims for patent infringement that were denied by NASA that resulted in a Court action against NASA in paragraph 7 were filed by Independent Inventors?

The following requests pertain to the attached file:

9. Page 03719, paragraph 2: Please send me document(s) referred to by GAO as "NASA's procedures for administratively reviewing a claim of patent infringement ..."
10. Page 03721, last paragraph: What is the name of the Director of the Infringement Division?

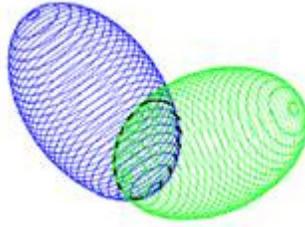
Other:

11. Please send me documents relating to a standard of ethics or conduct for NASA contractors.

Costs:

I claim the journalist exemption. The answers to these questions are material to the article/blog I am writing called "How NASA Treats Independent Inventors" at www.jmargolin.com/nasa/nasa.htm

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 775-847-7845



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[Redacted]

From: Borda, Gary G. (HQ-MC000)
Sent: Friday, January 23, 2009 11:44 AM
To: Rotella, Robert F. (HQ-MA000); McNutt, Jan (HQ-MC000)
Cc: Graham, Courtney B. (HQ-MA000)
Subject: 2000 GAO Report on NASA's Administrative Review of Patent Infringement Claims
Attachments: NASA's Administrative Review of Patent Infringement Claims_GAO Report_Aug 2000.pdf; DFAR 227_70 Patent Infringement Claims.pdf

FYI – found all this in a Google search. The attached 2000 GAO report on NASA’s Administrative Review of Patent Infringement Claims wasn’t widely disseminated here since I didn’t know about it (guess they thought since I didn’t work these claims I didn’t need to know – not a very good policy decision from past IP leadership).

The GAO report mentions that “NASA’s procedures for administratively reviewing a claim of patent infringement against the agency are set out in an attachment to a September 29, 1987, letter to all NASA installations by the Associate General Counsel for Intellectual Property.” I have also never seen the referenced letter. We should find a copy and make sure we are following the procedures.

The GAO report goes on to state that the NASA procedures are modeled after the DOD procedures. I’m not sure what those procedures might be, but There are procedures for administrative claims for patent infringement in the DFAR (Subpart 227.70 – attached).

DOE also has regs on Claims for Patent and Copyright Infringement at 10 CFR Part 782
<http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=ae9d0477eef326f1d13d73becade33d&rgn=div5&view=text&node=10:4.0.2.5.19&idno=10>

Gary

Gary G. Borda
Agency Counsel for Intellectual Property
Office of the General Counsel
NASA Headquarters

[Redacted]

b(6)

Cell: [Redacted]
Fax: [Redacted]

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G A O

Accountability • Integrity • Reliability

United States General Accounting Office
Washington, DC 20548

Resources, Community, and
Economic Development Division

B-285211

August 8, 2000

The Honorable Robert F. Bennett
United States Senate

Subject: NASA's Administrative Review of a Patent Infringement Claim

Dear Senator Bennett:

On February 7, 2000, the National Aeronautics and Space Administration (NASA) responded to an inventor's complaint that the agency had used his patented technology without approval, compensation, or acknowledgment. NASA told the inventor that it had conducted an administrative review of the matter and concluded that there was no infringement. The inventor contacted you about this matter, and you asked us to review NASA's administrative action on his complaint.

As agreed with your office, this report addresses (1) whether NASA adhered to established procedures in conducting its administrative review of the inventor's infringement claim and (2) what criteria NASA used in reaching its decision. As also agreed, we take no position as to whether NASA infringed the inventor's patent.

Results in Brief

NASA reviewed the inventor's complaint in accordance with its procedures governing administrative reviews of patent infringement claims. Even though the inventor never filed an official claim, NASA treated his complaint as an infringement claim because it had no other mechanism for investigating allegations of infringement and wanted to remove any doubt that it had infringed the patent in question. Also, NASA and the inventor agree that the agency's decision to treat his allegation as an infringement claim probably will work to his advantage if he chooses to bring an infringement suit. The inventor was correct that NASA used the same attorney to conduct the administrative review that earlier had been involved in licensing negotiations on his patent. While this does not violate NASA's procedures, it is inconsistent with federal internal control standards, and NASA said it would separate the duties if such a case arose in the future.

NASA applied federal patent law to reach its decision. NASA interpreted the law as providing that only the patent "claims"—those specific elements set out in the patent

that make the invention novel—can be infringed. After surveying the operations of its field units, NASA concluded that none of its systems—including the Mars Pathfinder landing system and the TransHab Design Concept cited by the inventor—infringed the claims in the inventor's patent. NASA's decision completes its administrative review process. If the inventor wishes to pursue his complaint, his recourse is to file a claim with the U. S. Court of Federal Claims.

Background

A patent is a grant made by the government to an inventor, conveying and securing to him or her the exclusive right to an invention for a term of years. The Patent and Trademark Office (PTO) grants patents in the United States. By its terms, a patent gives an inventor the right to exclude others from making, using, or selling the invention for a specified period, in this instance 17 years. A person infringes another's patent when he or she makes, uses, or sells the subject invention without permission during the patent term.

On June 19, 1990, PTO granted U.S. Patent No. 4,934,631 to the inventor. The patent describes the invention as a "lighter-than-air type vehicle comprising a framework and a series of inflatable lift bags secured to said framework." The lift bags were designed to contain heating elements and a gas, such as hydrogen or helium, in contact with these heating elements.

Believing his technology could be adapted successfully for a broad range of military and civilian projects, the inventor had attempted since 1989 to market his invention to the government. He said that certain agencies, including NASA, expressed interest but declined his offers to license the invention or enter into a contract with him to develop and use his technology.

In 1997, the inventor saw drawings of the Mars Pathfinder landing system developed by NASA and noted that the system used inflatable bags that he believed were similar to those described in his patent. He concluded that NASA had adapted and was using his invention without approval, compensation, or acknowledgment. After further research, he concluded that NASA also was using bags similar to his own in its TransHab Design Concept, which features inflatable structures that can be used to house personnel and equipment in space.

On February 26, 1997, the inventor contacted the NASA Administrator and complained that NASA had used his invention without his approval. The complaint was referred to the Director of the Infringement Division in the Office of the Associate General Counsel for Intellectual Property. After obtaining the inventor's approval, NASA docketed the matter as a "license to proffer" on March 7, 1997, giving NASA permission to send the patent to its various units to determine whether they had an interest in obtaining a license to use the technology. On July 30, 1997, the Director of the Infringement Division sent a letter to the inventor informing him that the agency had no interest in obtaining a license.

On March 31, 1998, the inventor asked the NASA Inspector General to conduct an investigation into NASA's use of his patented technology. The Inspector General conducted a preliminary investigation and concluded the complaint constituted a claim of infringement. On October 14, 1999, the Inspector General referred the case to the Associate General Counsel for Intellectual Property, and on November 3, 1999, the Director of the Infringement Division notified the inventor that it was treating his complaint as a patent infringement claim and was initiating a formal administrative review.

On February 7, 2000, the Director of the Infringement Division notified the inventor by letter that he had completed the administrative review of the infringement claim and found no evidence of infringement by NASA. Accordingly, he said that NASA was denying the inventor's claim and that, if the inventor was not satisfied with this result, his recourse was to file a lawsuit for patent infringement. The Director also pointed out that the statute of limitations—which by law had been suspended, or “tolled,” during the administrative review—again would begin to run.¹

The inventor is not satisfied with NASA's response. From a procedural standpoint, he says he does not understand why NASA chose to treat his complaint as a request for a claim of patent infringement when he had not made a formal request for an administrative review. He also is concerned that the Director of the Infringement Division, who prepared NASA's response, was the same attorney to whom he had spoken over the years about NASA's possibly licensing his invention.

The inventor also disagrees with the criteria NASA used in reaching its decision. He believes that NASA is interpreting the case law on patent infringement too narrowly because, under NASA's interpretation, one could easily “invent around” almost any patent. He said that, in addition to considering the patent claims, NASA should consider such factors as the description and specifications set out in the patent. Moreover, the inventor disagrees with NASA's (1) characterizing his invention as a “dirigible” or a “blimp” and (2) comparing it with single-walled inflatable structures covered by earlier patents. He says NASA did not address his basic complaint that the agency developed an interest in using double-walled inflatable airbags—a primary feature of his invention—only after he brought the potential uses to the agency's attention.

NASA Followed Its Procedures in Conducting the Administrative Review of the Infringement Claim

NASA followed its established procedures in reviewing the inventor's complaint. While NASA was not required to treat the complaint as an infringement claim, it had the authority to do so, and its use of the formal administrative review process was

¹In its response to the inventor, NASA also noted that the patent had expired. The patent expired on June 19, 1999, because the inventor did not pay the required maintenance fees. Subsequently, however, he filed a petition for reinstatement, paid the fees, and on May 22, 2000, was informed by PTO that his patent was reinstated.

reasonable under the circumstances. The inventor made a written request for an investigation, accusing NASA of infringing his patent and, according to NASA officials, the administrative review is NASA's only mechanism for handling such a complaint. Moreover, while NASA found no infringement on its part, the decision to conduct a formal review may be to the inventor's benefit, as it provides him with additional time and the agency's position on the record if he decides to pursue the matter in the courts.

NASA's Administrative Review, While Not Required, Was Conducted in Accordance With Its Procedures

NASA's procedures for administratively reviewing a claim of patent infringement against the agency are set out in an attachment to a September 29, 1987, letter to all NASA installations by the Associate General Counsel for Intellectual Property. According to the Director of the Infringement Division, these requirements were modeled after those established by the Department of Defense (DOD). He said that, like the DOD regulations, NASA's procedures are intended to provide both the claimant and the agency with an alternative to litigation, although the administrative process is not a prerequisite for litigation. The procedures provide for no administrative appeal; if NASA finds no infringement, the claimant's recourse is to sue in federal court.

NASA's procedures set out specific elements for initiating an administrative review. There must be a claim in writing that makes an allegation of infringement, requests compensation, cites the patent that is believed to have been infringed, and designates the item or process that is alleged to have infringed. The claimant also is encouraged to provide information such as identification of procurements that involve the infringing items, detailed descriptions of the infringing items, a list of persons to whom notices of infringement have been sent, and a listing of all government contracts under which the claimant has performed work. When NASA has determined that it will review a claim, its procedures instruct the Office of the Associate General Counsel for Intellectual Property to docket the case and to inform the claimant of this action. The Associate General Counsel then contacts those NASA installations that are primarily concerned with the subject matter of the alleged infringement and instructs them to determine whether an infringement occurred. Ultimately, the Associate General Counsel responds to the claim in writing, setting out specific reasons if the claim is denied. NASA followed these procedures in this case.

The inventor said that, although he asked NASA for an investigation, he never presented an infringement claim to NASA that would have initiated a formal administrative review. Part of his reason for asking for the investigation was that he did not know or have access to much of the information necessary to determine whether an infringement had occurred. He noted, for example, that he had hoped to obtain details on the technology being used in the Mars Pathfinder and TransHab projects.

The Director of the Infringement Division agreed that, although NASA was not required to initiate a formal administrative review, its decision to do so was proper under the circumstances. He noted that the inventor had requested in writing that NASA conduct

an investigation of his complaint. He said that NASA had decided to treat the request for an investigation as an infringement claim because it had no other mechanism to investigate a complaint and wanted to be positive that it had not, even inadvertently, infringed the inventor's patent. The Director said that NASA wanted to give the inventor every benefit of the doubt and that treating the request for an investigation as an infringement claim ensured that the inventor's concerns received a complete review.

Director Had Authority to Conduct the Administrative Review

A related concern raised by the inventor was that the Director of the Infringement Division—who conducted the administrative review of the infringement claim—was the same attorney with whom the inventor had talked on earlier occasions about a possible contract or licensing arrangement with NASA. Thus, he questioned the Director's impartiality in conducting the administrative review.

The Director of the Infringement Division agreed that he had previous contact with the inventor about his patent. However, he said that this was the result of his having two roles within the division. One role is to act as an intermediary for persons who bring patents to NASA seeking licensing arrangements. The other is to conduct administrative reviews on claims brought by persons who believe NASA may have infringed their patents. He noted that the two roles are complementary and have the same objective—to ensure that NASA avoids even the appearance of infringing another's invention. The Director also noted that he is the only attorney assigned to the Infringement Division, which receives no more than two to three patent infringement claims per year.

In his role as intermediary for persons seeking licensing arrangements, the Director noted that he did not make the decision himself on whether to seek a license but rather sought assistance from the NASA units that might use or be interested in the particular technology. When these units expressed no such interest, the Director was the person who relayed this information to the inventor.

The Director said that in his second role, he conducted the administrative review on the inventor's claim. He said that it did not occur to him that someone might question his impartiality, since he is always the attorney who conducts the administrative reviews. He said that there is no special NASA policy or procedure covering a situation in which the Director had previous involvement with a claimant. The Director also noted that his supervisor, the Associate General Counsel for Intellectual Property, reviewed and approved his decision and the written response before it was sent to the inventor.

We pointed out to the Director of the Infringement Division that, even though he appears to have followed established procedures, his dual role involving the inventor's patent does not appear to be in accordance with the guidelines on the separation of duties set out in the *Comptroller General's Standards for Internal Control in the Federal Government*, which provides as follows:

“Key duties and responsibilities need to be divided or segregated among different people to reduce the risk of error or fraud. This should include separating the responsibilities for authorizing transactions, processing and recording them, reviewing the transactions, and handling any related assets. No one individual should control all aspects of a transaction or event.”

Both the Director and the Associate General Counsel for Intellectual Property said that the separation of duties issue had not occurred to them at the time. They noted that this was the first case in their experience in which the Director had handled a potential licensing arrangement and an infringement claim on the same patent. The Associate General Counsel said that, if such a case occurs again, he will assume responsibility for the administrative review.

Administrative Review Appears to Benefit the Inventor

The Director of the Infringement Division said that NASA’s decision to treat the request for an investigation as an infringement claim probably worked to the inventor’s advantage. Under 35 U.S.C. 286, there is a 6-year statute of limitations on patent infringement by the federal government. However, the statute is suspended, or “tolled,” during the administrative review of an infringement claim. Thus, the time taken by NASA to review the inventor’s complaint allows him a longer period in which to file a lawsuit and for which to claim damages. Also, NASA’s procedures require the agency to inform a claimant in writing of the basis for denying a claim. By issuing a formal response, NASA provided the inventor with its position, which he could then use in preparing a lawsuit.

We discussed with the inventor the Director’s position on the need for and potential benefits of the administrative review. The inventor said that while he did not agree with the need for an administrative review, the way the review was conducted, or the review’s finding, the process probably works to his advantage in that he has more time to file a lawsuit and has NASA’s position on the record.

NASA Used Established Criteria in Reaching Its Decision

In deciding whether it infringed the inventor’s patent, NASA applied federal patent law that only the “claims” in a patent can be infringed. After identifying the relevant elements in each of the inventor’s two claims, NASA asked its various operating units to determine whether any of the agency’s systems—including the Mars Pathfinder landing system and the TransHab—had used technology similar to that protected by the subject patent. On the basis of the feedback from these units, NASA determined that there was no infringement.

NASA Examined the Claims in the Inventor’s Patent

Under the provisions of 35 U.S.C. section 112, a specification as part of the application for a patent “shall conclude with one or more claims particularly pointing out and

distinctly claiming the subject matter which the applicant regards as his invention.” Thus, a patentee must “claim” his invention by stating his claims in his application.

Typically, each claim in a patent application consists of several elements. Those claims PTO approves become a part of the patent that is issued. In turn, infringement of a patent is established by showing that an accused, or allegedly infringing, device or process matches or infringes a claim. For this purpose, each element of a claim is deemed to be necessary to the patentee’s statement of his or her claim, and each element or its equivalent must exist in the accused device or process for infringement to be proved.²

NASA applied these rules in conducting its administrative review. According to the Director of the Infringement Division, his first step in determining whether an infringement occurred was to identify the precise elements actually “claimed” in the patent. He noted that the inventor’s patent included only two claims, the first of which is stated as follows:

“An inflatable air bag for lighter-than-air type vehicles, having a flame resistant liner, said air bag being provided with an interior heating element and a lighter-than-air gas in intimate contact with said heating element, said air bag also including sealed tubular portions communicating with the exterior and passing through opposite ends of said air bag for receiving external structural mounting support thereat.”

The inventor’s second claim is for a “combination” and is stated as follows:

“An elongate vehicle including, in combination: a framework provided a door and a forwardly facing window; a series of inflatable lift bags secured to and about said framework, said lift bags containing a lighter-than-air gas and being individually provided with respective interior heating element means for variably heating and thereby variably expanding said gas within each of said lift bags; means for heating said heating elements coupled thereto; propulsion structure coupled to and disposed outside of said framework; and means mounted to and within said framework for supplying power to said propulsion structure, and wherein said air bags are each provided with integral tubes communicating with the exterior at opposite ends of said air bags, said air bags being mounted to said framework by portions of said framework passing through said tubes.”

The Director said that these two claims provide few exclusive rights to the inventor, as they give him rights only against inventions that include those specific combinations of elements identified in the claims. For example, the fact that the inventor identifies items such as inflatable air bags or flame-resistant liners – items covered by earlier patents or in the public domain – does not mean that his patent protects inflatable air bags or

² *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17 (1997).

flame-resistant liners. The patent only protects the completely described structures claimed, of which inflatable air bags with flame resistant liners are but components.

To more fully understand the nature of the inventor's complaint, the Director also obtained PTO's examination, or "prosecution," history for the patent. He found that, originally, the patent application had included 14 claims. However, PTO questioned the patentability of all but two of these because they were not unique or would be obvious to someone skilled in the particular field of technology. The inventor then amended his application, leaving only the two claims that eventually were approved by PTO and appear in the issued patent.

NASA Found No Evidence of Infringement

After determining the specific elements covered by the claims in the inventor's patent, the Director of the Infringement Division, by memorandum dated November 3, 1999, contacted all NASA operating units that might be aware of any NASA technologies that were similar to the inventor's two claims. He asked them to conduct an investigation to determine "whether or not you believe that his alleged claim for patent infringement is valid...." He also asked them specifically to analyze whether any of the technologies so identified were involved in either the Mars Pathfinder landing system or the TransHab project. He advised them that the inventor had earlier submitted the patent to NASA and offered to license it to the agency.

The Director said that none of the NASA units identified any technologies or uses consistent with the claims in the inventor's patent. He concluded that, because there were no devices that matched the claims, there was no infringement. He discussed his reasoning in NASA's response to the inventor and, in addition, set out the specific differences between the claims in the inventor's patent and the technology used in the Mars Pathfinder landing system and the TransHab project. The Director said that his February 7, 2000, response to the inventor ended NASA's administrative review of the inventor's complaint. He said that if the inventor is still not satisfied, his only remaining avenue for relief is through the federal courts.

As stated, we do not take a position on whether NASA's conclusion is correct. Under 28 U.S.C. section 1498, the inventor's recourse is to file a claim with the U. S. Court of Federal Claims if he is not satisfied with the agency's decision.

Agency Comments

We provided a draft of this report to NASA for its review and comment. NASA concurred with the report's findings. NASA reiterated that, in the future, the Associate General Counsel for Intellectual Property would have responsibility for administrative reviews of patent infringement claims in those cases where the Director of the Infringement Division was involved in licensing discussions on the same patent. (See enc. I for NASA's comments.)

Scope and Methodology

To meet our objectives, we met with and examined records provided by the inventor, the Director of NASA's Infringement Division, and NASA's Associate General Counsel for Intellectual Property. We also obtained data from PTO's patent records. In addition, we reviewed NASA's procedures and relevant federal statutes, regulations, and case law related to patent examination and patent infringement.

We conducted our work from April through July 2000 in accordance with generally accepted government auditing standards.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 7 days after the date of this letter. At that time, we will provide copies to the appropriate congressional committees; interested Members of Congress; the Honorable Daniel S. Goldin, Administrator, National Aeronautics and Space Administration; and the Honorable Jacob J. Lew, Director, Office of Management and Budget. We will also provide copies to others upon request.

If you have any questions about this report, please contact Derek Stewart, Acting Associate Director, or me at (202) 512-3841. Other key contributors to this report were Frankie Fulton, John Hunt, Bert Japikse, and Deborah Ortega.

Sincerely yours,



Jim Wells
Director, Energy, Resources,
and Science Issues

Enclosure

Enclosure

Comments From the National Aeronautics and Space Administration

National Aeronautics and
Space Administration
Office of the Administrator
Washington, DC 20546-0001



Mr. Derek B. Stewart
Acting Associate Director, Energy,
Resources, and Science Issues
Resources, Community, and
Economic Development Division
United States General Accounting Office
Washington, DC 20548

AUG 3 2000

Dear Mr. Stewart:

NASA appreciates the opportunity to comment on your draft report entitled "NASA's Administrative Review of a Patent Infringement Claim (GAO/RCED-00-240R)" that was prepared for Senator Robert F. Bennett.

NASA would like to thank the General Accounting Office for the professional manner in which this investigation was conducted by your staff. The only clarifying comment that NASA would like to make is that while the same attorney conducted evaluations of both the license proffer and the administrative claim, the administrative claim was reviewed by and concurred by the attorney's supervisor, the Associate General Counsel (Intellectual Property). While the supervisor did not sign the claim evaluation letter after his concurrence, his signature was not required by then current procedures. In the future, the Associate General Counsel (Intellectual Property) will assume responsibility and sign similar evaluation letters sent to claimants after his review and concurrence.

NASA has no other issues with the report. Thank you for your assistance in bringing this matter to our attention.

Sincerely,

A handwritten signature in cursive script that reads "Daniel R. Mulville".

Daniel R. Mulville
Associate Deputy Administrator

(141436)

Orders by Internet

For information on how to access GAO reports on the Internet, send an e-mail message with "info" in the body to

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Web site: <http://www.gao.gov/fraudnet/fraudnet.htm>

E-mail: fraudnet@gao.gov

Automated answering system: 1-800-424-5454

Defense Federal Acquisition Regulation Supplement

Part 227—Patents, Data, and Copyrights

SUBPART 227.70—INFRINGEMENT CLAIMS, LICENSES, AND ASSIGNMENTS

(Revised September 21, 1999)

227.7000 Scope.

This subpart prescribes policy, procedures, and instructions for use of clauses with respect to processing licenses, assignments, and infringement claims.

227.7001 Policy.

Whenever a claim of infringement of privately owned rights in patented inventions or copyrighted works is asserted against any Department or Agency of the Department of Defense, all necessary steps shall be taken to investigate, and to settle administratively, deny, or otherwise dispose of such claim prior to suit against the United States. This subpart 227.70 does not apply to licenses or assignments acquired by the Department of Defense under the Patent Rights clauses.

227.7002 Statutes pertaining to administrative claims of infringement.

Statutes pertaining to administrative claims of infringement in the Department of Defense include the following: the Foreign Assistance Act of 1961, 22 U.S.C. 2356 (formerly the Mutual Security Acts of 1951 and 1954); the Invention Secrecy Act, 35 U.S.C. 181-188; 10 U.S.C. 2386; 28 U.S.C. 1498; and 35 U.S.C. 286.

227.7003 Claims for copyright infringement.

The procedures set forth herein will be followed, where applicable, in copyright infringement claims.

227.7004 Requirements for filing an administrative claim for patent infringement.

(a) A patent infringement claim for compensation, asserted against the United States under any of the applicable statutes cited in 227.7002, must be actually communicated to and received by a Department, agency, organization, office, or field establishment within the Department of Defense. Claims must be in writing and should include the following:

- (1) An allegation of infringement;
 - (2) A request for compensation, either expressed or implied;
 - (3) A citation of the patent or patents alleged to be infringed;
 - (4) A sufficient designation of the alleged infringing item or process to permit identification, giving the military or commercial designation, if known, to the claimant;
 - (5) A designation of at least one claim of each patent alleged to be infringed;
- or
- (6) As an alternative to (a)(4) and (5) of this section, a declaration that the claimant has made a bona fide attempt to determine the item or process which is

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alleged to infringe, but was unable to do so, giving reasons, and stating a reasonable basis for his belief that his patent or patents are being infringed.

(b) In addition to the information listed in (a) above, the following material and information is generally necessary in the course of processing a claim of patent infringement. Claimants are encouraged to furnish this information at the time of filing a claim to permit the most expeditious processing and settlement of the claim.

(1) A copy of the asserted patent(s) and identification of all claims of the patent alleged to be infringed.

(2) Identification of all procurements known to claimant which involve the alleged infringing item or process, including the identity of the vendor or contractor and the Government procuring activity.

(3) A detailed identification of the accused article or process, particularly where the article or process relates to a component or subcomponent of the item procured, an element by element comparison of the representative claims with the accused article or process. If available, this identification should include documentation and drawings to illustrate the accused article or process in suitable detail to enable verification of the infringement comparison.

(4) Names and addresses of all past and present licenses under the patent(s), and copies of all license agreements and releases involving the patent(s).

(5) A brief description of all litigation in which the patent(s) has been or is now involved, and the present status thereof.

(6) A list of all persons to whom notices of infringement have been sent, including all departments and agencies of the Government, and a statement of the ultimate disposition of each.

(7) A description of Government employment or military service, if any, by the inventor and/or patent owner.

(8) A list of all Government contracts under which the inventor, patent owner, or anyone in privity with him performed work relating to the patented subject matter.

(9) Evidence of title to the patent(s) alleged to be infringed or other right to make the claim.

(10) A copy of the Patent Office file of each patent if available to claimant.

(11) Pertinent prior art known to claimant, not contained in the Patent Office file, particularly publications and foreign art.

In addition in the foregoing, if claimant can provide a statement that the investigation may be limited to the specifically identified accused articles or processes, or to a specific procurement, it may materially expedite determination of the claim.

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Part 227—Patents, Data, and Copyrights

(c) Any Department receiving an allegation of patent infringement which meets the requirements of this paragraph shall acknowledge the same and supply the other Departments which may have an interest therein with a copy of such communication and the acknowledgement thereof.

(1) For the Department of the Army--Chief, Patents, Copyrights, and Trademarks Division, U.S. Army Legal Services Agency;

(2) For the Department of the Navy--The Patent Counsel for Navy, Office of Naval Research;

(3) For the Department of the Air Force--Chief, Patents Division, Office of The Judge Advocate General;

(4) For the Defense Logistics Agency--The Office of Counsel; for the National Security Agency, the General Counsel;

(5) For the Defense Information Systems Agency--The Counsel;

(6) For the Defense Threat Reduction Agency--The General Counsel; and

(7) For the National Imagery and Mapping Agency--The Counsel.

(d) If a communication alleging patent infringement is received which does not meet the requirements set forth in paragraph (c) of this section, the sender shall be advised in writing—

(1) That his claim for infringement has not been satisfactorily presented, and

(2) Of the elements considered necessary to establish a claim.

(e) A communication making a proffer of a license in which no infringement is alleged shall not be considered as a claim for infringement.

227.7005 Indirect notice of patent infringement claims.

(a) A communication by a patent owner to a Department of Defense contractor alleging that the contractor has committed acts of infringement in performance of a Government contract shall not be considered a claim within the meaning of 227.7004 until it meets the requirements specified therein.

(b) Any Department receiving an allegation of patent infringement which meets the requirements of 227.7004 shall acknowledge the same and supply the other Departments (see 227.7004(c)) which may have an interest therein with a copy of such communication and the acknowledgement thereof.

(c) If a communication covering an infringement claim or notice which does not meet the requirements of 227.7004(a) is received from a contractor, the patent owner shall be advised in writing as covered by the instructions of 227.7004(d).

227.7006 Investigation and administrative disposition of claims.

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Part 227—Patents, Data, and Copyrights

An investigation and administrative determination (denial or settlement) of each claim shall be made in accordance with instructions and procedures established by each Department, subject to the following:

(a) When the procurement responsibility for the alleged infringing item or process is assigned to a single Department or only one Department is the purchaser of the alleged infringing item or process, and the funds of that Department only are to be charged in the settlement of the claim, that Department shall have the sole responsibility for the investigation and administrative determination of the claim and for the execution of any agreement in settlement of the claim. Where, however, funds of another Department are to be charged, in whole or in part, the approval of such Department shall be obtained as required by 208.7002. Any agreement in settlement of the claim, approved pursuant to 208.7002 shall be executed by each of the Departments concerned.

(b) When two or more Departments are the respective purchasers of alleged infringing items or processes and the funds of those Departments are to be charged in the settlement of the claim, the investigation and administrative determination shall be the responsibility of the Department having the predominant financial interest in the claim or of the Department or Departments as jointly agreed upon by the Departments concerned. The Department responsible for negotiation shall, throughout the negotiation, coordinate with the other Departments concerned and keep them advised of the status of the negotiation. Any agreement in the settlement of the claim shall be executed by each Department concerned.

227.7007 Notification and disclosure to claimants.

When a claim is denied, the Department responsible for the administrative determination of the claim shall so notify the claimant or his authorized representative and provide the claimant a reasonable rationale of the basis for denying the claim. Disclosure of information or the rationale referred to above shall be subject to applicable statutes, regulations, and directives pertaining to security, access to official records, and the rights of others.

227.7008 Settlement of indemnified claims.

Settlement of claims involving payment for past infringement shall not be made without the consent of, and equitable contribution by, each indemnifying contractor involved, unless such settlement is determined to be in the best interests of the Government and is coordinated with the Department of Justice with a view to preserving any rights of the Government against the contractors involved. If consent of and equitable contribution by the contractors are obtained, the settlement need not be coordinated with the Department of Justice.

227.7009 Patent releases, license agreements, and assignments.

This section contains clauses for use in patent release and settlement agreements, license agreements, and assignments, executed by the Government, under which the Government acquires rights. Minor modifications of language (e.g., pluralization of "Secretary" or "Contracting Officer") in multidepartmental agreements may be made if necessary.

227.7009-1 Required clauses.

(a) **Covenant Against Contingent Fees.** Insert the clause at FAR 52.203-5.

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Part 227—Patents, Data, and Copyrights

- (b) Gratuities. Insert the clause at FAR 52.203-3.
- (c) Assignment of Claims. Insert the clause at FAR 52.232-23.
- (d) Disputes. Pursuant to FAR Subpart 33.2, insert the clause at FAR 52.233-1.
- (e) Non-Estoppel. Insert the clause at 252.227-7000.

227.7009-2 Clauses to be used when applicable.

(a) *Release of past infringement.* The clause at 252.227-7001, Release of Past Infringement, is an example which may be modified or omitted as appropriate for particular circumstances, but only upon the advice of cognizant patent or legal counsel. (See footnotes at end of clause.)

(b) *Readjustment of payments.* The clause at 252.227-7002, Readjustment of Payments, shall be inserted in contracts providing for payment of a running royalty.

(c) *Termination.* The clause at 252.227-7003, Termination, is an example for use in contracts providing for the payment of a running royalty. This clause may be modified or omitted as appropriate for particular circumstances, but only upon the advice of cognizant patent or legal counsel (see 227.7004(c)).

227.7009-3 Additional clauses—contracts except running royalty contracts. The following clauses are examples for use in patent release and settlement agreements, and license agreements not providing for payment by the Government of a running royalty.

(a) License Grant. Insert the clause at 252.227-7004.

(b) License Term. Insert one of the clauses at 252.227-7005 Alternate I or Alternate II, as appropriate.

227.7009-4 Additional clauses—contracts providing for payment of a running royalty.

The clauses set forth below are examples which may be used in patent release and settlement agreements, and license agreements, when it is desired to cover the subject matter thereof and the contract provides for payment of a running royalty.

(a) *License grant--running royalty.* No Department shall be obligated to pay royalties unless the contract is signed on behalf of such Department. Accordingly, the License Grant clause at 252.227-7006 should be limited to the practice of the invention by or for the signatory Department or Departments.

(b) *License term—running royalty.* The clause at 252.227-7007 is a sample form for expressing the license term.

(c) *Computation of royalties.* The clause at 252.227-7008 providing for the computation of royalties, may be of varying scope depending upon the nature of the royalty bearing article, the volume of procurement, and the type of contract pursuant to which the procurement is to be accomplished.

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Part 227—Patents, Data, and Copyrights

(d) *Reporting and payment of royalties.*

(1) The contract should contain a provision specifying the office designated within the specific Department involved to make any necessary reports to the contractor of the extent of use of the licensed subject matter by the entire Department, and such office shall be charged with the responsibility of obtaining from all procuring offices of that Department the information necessary to make the required reports and corresponding vouchers necessary to make the required payments. The clause at 252.227-7009 is a sample for expressing reporting and payment of royalties requirements.

(2) Where more than one Department or Government Agency is licensed and there is a ceiling on the royalties payable in any reporting period, the licensing Departments or Agencies shall coordinate with respect to the pro rata share of royalties to be paid by each.

(e) *License to other government agencies.* When it is intended that a license on the same terms and conditions be available to other departments and agencies of the Government, the clause at 252.227-7010 is an example which may be used.

227.7010 Assignments.

(a) The clause at 252.227-7011 is an example which may be used in contracts of assignment of patent rights to the Government.

(b) To facilitate proof of contracts of assignments, the acknowledgement of the contractor should be executed before a notary public or other officer authorized to administer oaths (35 U.S.C. 261).

227.7011 Procurement of rights in inventions, patents, and copyrights. Even though no infringement has occurred or been alleged, it is the policy of the Department of Defense to procure rights under patents, patent applications, and copyrights whenever it is in the Government's interest to do so and the desired rights can be obtained at a fair price. The required and suggested clauses at 252.227-7004 and 252.227-7010 shall be required and suggested clauses, respectively, for license agreements and assignments made under this paragraph. The instructions at 227.7009-3 and 227.7010 concerning the applicability and use of those clauses shall be followed insofar as they are pertinent.

227.7012 Contract format.

The format at 252.227-7012 appropriately modified where necessary, may be used for contracts of release, license, or assignment.

227.7013 Recordation.

Executive Order No. 9424 of 18 February 1944 requires all executive Departments and agencies of the Government to forward through appropriate channels to the Commissioner of Patents and Trademarks, for recording, all Government interests in patents or applications for patents.

Jed Margolin

From: "Jed Margolin" <jm@jmargolin.com>
To: <hq-foia@nasa.gov>
Sent: Tuesday, December 15, 2009 8:39 AM
Attach: V16_gao.pdf
Subject: FOIA Request

This request is made pursuant to the Freedom of Information Act.

I would like all documents that answer the following questions:

1. How many claims for patent infringement have been filed with NASA since January 1, 1999? This includes requests which NASA chose to handle as claims even if the person who submitted it had not intended it to be an official claim.
2. How many of the claims for patent infringement in paragraph 1 were affirmed by NASA?
3. How many of the claims for patent infringement in paragraph 1 were made by what NASA considers Independent Inventors?
4. What does NASA consider an Independent Inventor?
5. How many of the claims for patent infringement that NASA affirmed in paragraph 2 were filed by Independent Inventors?
6. How many of the claims for patent infringement in paragraph 1 were denied by NASA?
7. How many of the claims for patent infringement that were denied by NASA in paragraph 6 resulted in a Court action against NASA?
8. How many of the claims for patent infringement that were denied by NASA that resulted in a Court action against NASA in paragraph 7 were filed by Independent Inventors?

The following requests pertain to the attached file:

9. Page 03719, paragraph 2: Please send me document(s) referred to by GAO as "NASA's procedures for administratively reviewing a claim of patent infringement ..."
10. Page 03721, last paragraph: What is the name of the Director of the Infringement Division?

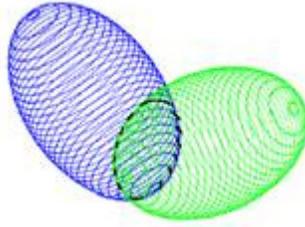
Other:

11. Please send me documents relating to a standard of ethics or conduct for NASA contractors.

Costs:

I claim the journalist exemption. The answers to these questions are material to the article/blog I am writing called "How NASA Treats Independent Inventors" at www.jmargolin.com/nasa/nasa.htm

Jed Margolin
 1981 Empire Rd.
 Reno, NV 89521-7430
 775-847-7845



www.jmargolin.com

Jed Margolin

From: "Jed Margolin" <jm@jmargolin.com>
To: <hq-foia@nasa.gov>; <denise.young-1@nasa.gov>
Sent: Tuesday, December 15, 2009 9:47 PM
Subject: FOIA Request- Take 2

This request is made pursuant to the Freedom of Information Act.

I would like all documents that answer the following questions:

1. How many claims for patent infringement have been filed with NASA since January 1, 1999? This includes requests which NASA chose to handle as claims even if the person who submitted it had not intended it to be an official claim.
2. How many of the claims for patent infringement in paragraph 1 were affirmed by NASA?
3. How many of the claims for patent infringement in paragraph 1 were made by what NASA considers Independent Inventors?
4. What does NASA consider an Independent Inventor?
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10. What is the name of the Director of the Infringement Division?

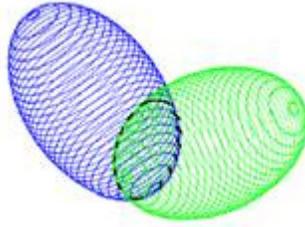
Other:

11. Please send me documents relating to a standard of ethics or conduct for NASA contractors.

Costs:

I claim the journalist exemption. The answers to these questions are material to the article/blog I am writing called "How NASA Treats Independent Inventors" at www.jmargolin.com/nasa/nasa.htm

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 1981 Empire Rd.
 Reno, NV 89521-7430
 775-847-7845



www.jmargolin.com

Jed Margolin

From: "Jed Margolin" <jm@jmargolin.com>
To: <lori.garver@nasa.gov>; <hq-foia@nasa.gov>; <denise.young-1@nasa.gov>; <stella.luna-1@nasa.gov>; <LARC-DL-foia@mail.nasa.gov>; <foiaoig@hq.nasa.gov>
Cc: <hq-foia@nasa.gov>; <denise.young-1@nasa.gov>; <stella.luna-1@nasa.gov>; <LARC-DL-foia@mail.nasa.gov>; <foiaoig@hq.nasa.gov>
Sent: Wednesday, December 16, 2009 8:58 AM
Subject: FOIA Request- Take 3

Dear Ms. Garver.

Your FOIA people (Kellie Robinson and Denise Young) have ignored the following request.

----- Original Message -----

From: [Jed Margolin](#)
To: hq-foia@nasa.gov ; denise.young-1@nasa.gov
Sent: Tuesday, December 15, 2009 9:47 PM
Subject: FOIA Request- Take 2

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I would like all documents that answer the following questions:

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2. How many of the claims for patent infringement in paragraph 1 were affirmed by NASA?
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5. How many of the claims for patent infringement that NASA affirmed in paragraph 2 were filed by Independent Inventors?
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9. Please send me document(s) referred to by GAO as "NASA's procedures for administratively reviewing a claim of patent infringement ..."
10. What is the name of the Director of the Infringement Division?

Other:

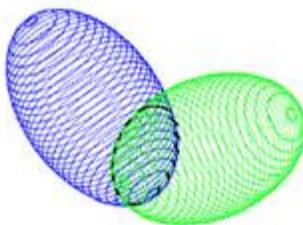
11. Please send me documents relating to a standard of ethics or conduct for NASA contractors.

Costs:

Appendix NA40

I claim the journalist exemption. The answers to these questions are material to the article/blog I am writing called "How NASA Treats Independent Inventors" at www.jmargolin.com/nasa/nasa.htm

Jed Margolin
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www.jmargolin.com

Jed Margolin

From: "Garver, Lori B. (HQ-AB000)" <lori.garver@nasa.gov>
To: "Jed Margolin" <jm@jmargolin.com>
Sent: Wednesday, December 16, 2009 8:58 AM
Attach: ATT00043.txt
Subject: Read: FOIA Request- Take 3

Your message was read on Wednesday, December 16, 2009 10:58:20 AM (GMT-06:00) Central Time (US & Canada).

Jed Margolin

From: "Von Ofenheim, Bill (LARC-B703)" <bill.von.ofenheim@nasa.gov>
To: "Jed Margolin" <jm@jmargolin.com>
Sent: Wednesday, December 16, 2009 8:57 AM
Attach: ATT00022.txt
Subject: Read: FOIA Request- Take 3

Your message was read on Wednesday, December 16, 2009 10:57:55 AM (GMT-06:00) Central Time (US & Canada).

Jed Margolin

From: "Wheeler, Carissa Smith (LARC-H1)" <carissa.s.wheeler@nasa.gov>
To: "Jed Margolin" <jm@jmargolin.com>
Sent: Wednesday, December 16, 2009 8:58 AM
Attach: ATT00031.txt
Subject: Read: FOIA Request- Take 3

Your message was read on Wednesday, December 16, 2009 10:58:04 AM (GMT-06:00) Central Time (US & Canada).

Jed Margolin

From: "Fleming, Laraunce A. (LARC-H1)[TESSADA & ASSOC INC]" <laraunce.a.fleming@nasa.gov>
To: "Jed Margolin" <jm@jmargolin.com>
Sent: Wednesday, December 16, 2009 8:59 AM
Attach: ATT00052.txt
Subject: Not read: FOIA Request- Take 3

Your message was deleted without being read on Wednesday, December 16, 2009 10:59:16 AM (GMT-06:00) Central Time (US & Canada).

Jed Margolin

From: "Luna, Stella (JSC-AD911)" <stella.luna-1@nasa.gov>
To: "Jed Margolin" <jm@jmargolin.com>
Sent: Wednesday, December 16, 2009 9:01 AM
Attach: ATT00061.txt
Subject: Read: FOIA Request- Take 3

Your message was read on Wednesday, December 16, 2009 11:01:38 AM (GMT-06:00) Central Time (US & Canada).

Jed Margolin

From: "Young, Denise (HQ-NB040)" <denise.young-1@nasa.gov>
To: "Jed Margolin" <jm@jmargolin.com>
Sent: Wednesday, December 16, 2009 9:29 AM
Attach: ATT00070.txt
Subject: Read: FOIA Request- Take 3

Your message was read on Wednesday, December 16, 2009 11:29:01 AM (GMT-06:00) Central Time (US & Canada).

Jed Margolin

From: "HQ-FOIA" <hq-foia@nasa.gov>
To: "Jed Margolin" <jm@jmargolin.com>
Sent: Wednesday, December 16, 2009 9:33 AM
Attach: ATT00079.txt
Subject: Read: FOIA Request

Your message was read on Wednesday, December 16, 2009 11:33:44 AM (GMT-06:00) Central Time (US & Canada).

Jed Margolin

From: "HQ-FOIA" <hq-foia@nasa.gov>
To: "Jed Margolin" <jm@jmargolin.com>
Sent: Wednesday, December 16, 2009 9:38 AM
Attach: ATT00088.txt
Subject: Read: FOIA Request- Take 2

Your message was read on Wednesday, December 16, 2009 11:38:33 AM (GMT-06:00) Central Time (US & Canada).

Jed Margolin

From: "HQ-FOIA" <hq-foia@nasa.gov>
To: "Jed Margolin" <jm@jmargolin.com>
Sent: Wednesday, December 16, 2009 9:38 AM
Attach: ATT00097.txt
Subject: Read: FOIA Request- Take 3

Your message was read on Wednesday, December 16, 2009 11:38:51 AM (GMT-06:00) Central Time (US & Canada).

Jed Margolin

From: "Young, Denise (HQ-NB040)" <denise.young-1@nasa.gov>
To: "Jed Margolin" <jm@jmargolin.com>
Sent: Wednesday, December 16, 2009 9:51 AM
Attach: ATT00106.txt
Subject: Read: FOIA Request

Your message was read on Wednesday, December 16, 2009 11:51:55 AM (GMT-06:00) Central Time (US & Canada).

Jed Margolin

From: "Jed Margolin" <jm@jmargolin.com>
To: <lori.garver@nasa.gov>; <hq-foia@nasa.gov>; <foiaoig@hq.nasa.gov>; <Paul.K.Martin@nasa.gov>; <denise.young-1@nasa.gov>; <stella.luna-1@nasa.gov>; <LARC-DL-foia@mail.nasa.gov>
Sent: Thursday, February 04, 2010 12:58 PM
Attach: jm_nasa_foia2.pdf
Subject: You have ignored my FOIA Request

Dear NASA,

I filed a Freedom of Information Act Request on December 14, 2009. See the attached file.

As of this date:

I have not received any documents.

I have not received a request for an extension.

I have not received a FOIA case number.

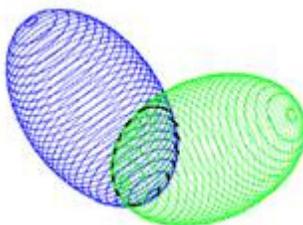
Under the Freedom of Information Act 5 U.S.C. §552 (a)(6)(A) you had 20 days (excepting Saturdays, Sundays, and legal public holidays) to respond.

Today is day 35, not including weekends or legal public holidays.

Kindly do me the courtesy of confirming that you have no intention of complying with the Freedom of Information Act and that I have exhausted all of the administrative remedies that NASA has to offer.

If I do not receive a response to this email by the end of business tomorrow (Friday February 5) I will assume the answer is yes.

Sincerely yours,
Jed Margolin
1981 Empire Rd.
Reno, NV 89521-7430
775-847-7845
=====



www.jmargolin.com

Jed Margolin

From: "Young, Denise (HQ-NB040)" <denise.young-1@nasa.gov>
To: "Jed Margolin" <jm@jmargolin.com>; "Garver, Lori B. (HQ-AB000)" <lori.garver@nasa.gov>; "HQ-FOIA" <hq-foia@nasa.gov>; <foiaog@hq.nasa.gov>; "MARTIN, PAUL K. (HQ-WAH10)" <paul.k.martin@nasa.gov>; "Luna, Stella (JSC-AD911)" <stella.luna-1@nasa.gov>; "LARC-DL-foia" <LARC-DL-foia@mail.nasa.gov>
Cc: "McConnell, Stephen (HQ-NB040)" <stephen.mcconnell-1@nasa.gov>
Sent: Thursday, February 04, 2010 1:26 PM
Subject: RE: You have ignored my FOIA Request

Mr. Margolin-

This action is currently is currently being reviewed for legal concurrence; this action should be completed within the next couple days. We apology for the delay in this process; but we must adhere to our agency's processing procedures.

If we can of any additional assistance to you, please contact Steve McConnell, Chief FOIA Public Liaison Office, at 202.358.0068 or 877.627.3642; nasafoia@nasa.gov .

Denise Young

Headquarters, FOIA Public Liaison Officer
 National Aeronautics and Space Administration (NASA)
 300 E Street, S.W., Suite 5L27
 Washington, DC 20546-0001
 Phone: (202) 358-0701
 Fax: (202) 358-4345

From: Jed Margolin [mailto:jm@jmargolin.com]
Sent: Thursday, February 04, 2010 3:58 PM
To: Garver, Lori B. (HQ-AB000); HQ-FOIA; foiaog@hq.nasa.gov; MARTIN, PAUL K. (HQ-WAH10); Young, Denise (HQ-NB040); Luna, Stella (JSC-AD911); LARC-DL-foia
Subject: You have ignored my FOIA Request

Dear NASA,

I filed a Freedom of Information Act Request on December 14, 2009. See the attached file.

As of this date:

I have not received any documents.

I have not received a request for an extension.

I have not received a FOIA case number.

Under the Freedom of Information Act 5 U.S.C. §552 (a)(6)(A) you had 20 days (excepting Saturdays, Sundays, and legal public holidays) to respond.

Today is day 35, not including weekends or legal public holidays.

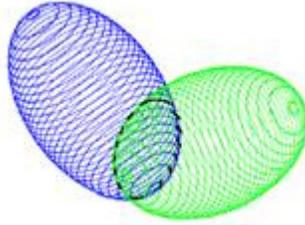
Kindly do me the courtesy of confirming that you have no intention of complying with the Freedom of Information Act and

Appendix NA53

that I have exhausted all of the administrative remedies that NASA has to offer.

If I do not receive a response to this email by the end of business tomorrow (Friday February 5) I will assume the answer is yes.

Sincerely yours,
Jed Margolin
1981 Empire Rd.
Reno, NV 89521-7430
775-847-7845
=====



www.jmargolin.com

Jed Margolin

From: "Jed Margolin" <jm@jmargolin.com>
To: <nasafoia@nasa.gov>; <Stephen.L.McConnell@nasa.gov>
Sent: Monday, February 08, 2010 10:29 AM
Subject: Stephen L. McConnell

Dear Mr. McConnell,

What is the case number for this FOIA request?

Regards,

Jed Margolin

=====

----- Original Message -----

From: [Young, Denise \(HQ-NB040\)](#)
To: [Jed Margolin](#) ; [Garver, Lori B. \(HQ-AB000\)](#) ; [HQ-FOIA](#) ; foiaoig@hq.nasa.gov ; [MARTIN, PAUL K. \(HQ-WAH10\)](#) ; [Luna, Stella \(JSC-AD911\)](#) ; [LARC-DL-foia](#)
Cc: [Mcconnell, Stephen \(HQ-NB040\)](#)
Sent: Thursday, February 04, 2010 1:26 PM
Subject: RE: You have ignored my FOIA Request

Mr. Margolin-

This action is currently is currently being reviewed for legal concurrence; this action should be completed within the next couple days. We apology for the delay in this process; but we must adhere to our agency's processing procedures.

If we can of any additional assistance to you, please contact Steve McConnell, Chief FOIA Public Liaison Office, at 202.358.0068 or 877.627.3642; nasafoia@nasa.gov .

Denise Young

Headquarters, FOIA Public Liaison Officer
 National Aeronautics and Space Administration (NASA)
 300 E Street, S.W., Suite 5L27
 Washington, DC 20546-0001
 Phone: (202) 358-0701
 Fax: (202) 358-4345

From: Jed Margolin [mailto:jm@jmargolin.com]
Sent: Thursday, February 04, 2010 3:58 PM
To: Garver, Lori B. (HQ-AB000); HQ-FOIA; foiaoig@hq.nasa.gov; MARTIN, PAUL K. (HQ-WAH10); Young, Denise (HQ-NB040); Luna, Stella (JSC-AD911); LARC-DL-foia
Subject: You have ignored my FOIA Request

Dear NASA,

I filed a Freedom of Information Act Request on December 14, 2009. See the attached file.

Appendix NA55

As of this date:

I have not received any documents.

I have not received a request for an extension.

I have not received a FOIA case number.

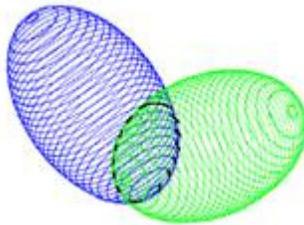
Under the Freedom of Information Act 5 U.S.C. §552 (a)(6)(A) you had 20 days (excepting Saturdays, Sundays, and legal public holidays) to respond.

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Kindly do me the courtesy of confirming that you have no intention of complying with the Freedom of Information Act and that I have exhausted all of the administrative remedies that NASA has to offer.

If I do not receive a response to this email by the end of business tomorrow (Friday February 5) I will assume the answer is yes.

Sincerely yours,
Jed Margolin
1981 Empire Rd.
Reno, NV 89521-7430
775-847-7845
=====



www.jmargolin.com

Jed Margolin

From: "McConnell, Stephen (HQ-NB040)" <stephen.mcconnell-1@nasa.gov>
To: "Jed Margolin" <jm@jmargolin.com>
Sent: Monday, February 08, 2010 4:28 PM
Subject: RE: Stephen L. McConnell

10-HQ-F-00285

Thanks, Steve

From: Jed Margolin [mailto:jm@jmargolin.com]
Sent: Monday, February 08, 2010 1:30 PM
To: NASA-DL-FOIA; McConnell, Stephen L. (KSC-NEF30)
Subject: Stephen L. McConnell

Dear Mr. McConnell,

What is the case number for this FOIA request?

Regards,

Jed Margolin

=====

----- Original Message -----

From: [Young, Denise \(HQ-NB040\)](#)
To: [Jed Margolin](#) ; [Garver, Lori B. \(HQ-AB000\)](#) ; [HQ-FOIA](#) ; foiaoig@hq.nasa.gov ; [MARTIN, PAUL K. \(HQ-WAH10\)](#) ; [Luna, Stella \(JSC-AD911\)](#) ; [LARC-DL-foia](#)
Cc: [McConnell, Stephen \(HQ-NB040\)](#)
Sent: Thursday, February 04, 2010 1:26 PM
Subject: RE: You have ignored my FOIA Request

Mr. Margolin-

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If we can of any additional assistance to you, please contact Steve McConnell, Chief FOIA Public Liaison Office, at 202.358.0068 or 877.627.3642; nasafoia@nasa.gov .

Denise Young

Headquarters, FOIA Public Liaison Officer
National Aeronautics and Space Administration (NASA)
300 E Street, S.W., Suite 5L27
Washington, DC 20546-0001
Phone: (202) 358-0701
Fax: (202) 358-4345

Appendix NA57

From: Jed Margolin [mailto:jm@jmargolin.com]
Sent: Thursday, February 04, 2010 3:58 PM
To: Garver, Lori B. (HQ-AB000); HQ-FOIA; foiaog@hq.nasa.gov; MARTIN, PAUL K. (HQ-WAH10); Young, Denise (HQ-NB040); Luna, Stella (JSC-AD911); LARC-DL-foia
Subject: You have ignored my FOIA Request

Dear NASA,

I filed a Freedom of Information Act Request on December 14, 2009. See the attached file.

As of this date:

I have not received any documents.

I have not received a request for an extension.

I have not received a FOIA case number.

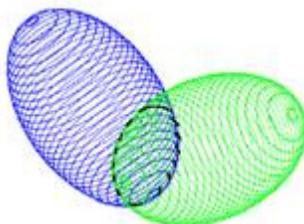
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Today is day 35, not including weekends or legal public holidays.

Kindly do me the courtesy of confirming that you have no intention of complying with the Freedom of Information Act and that I have exhausted all of the administrative remedies that NASA has to offer.

If I do not receive a response to this email by the end of business tomorrow (Friday February 5) I will assume the answer is yes.

Sincerely yours,
Jed Margolin
1981 Empire Rd.
Reno, NV 89521-7430
775-847-7845
=====



www.jmargolin.com

Administration of Barack H. Obama, 2009

Memorandum on the Freedom of Information Act

January 21, 2009

Memorandum for the Heads of Executive Departments and Agencies

Subject: Freedom of Information Act

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

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

The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.

I direct the Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the *Federal Register*. In doing so, the Attorney General should review FOIA reports produced by the agencies under Executive Order 13392 of December 14, 2005. I also direct the Director of the Office of Management and Budget to update guidance to the agencies to increase and improve information dissemination to the public, including through the use of new technologies, and to publish such guidance in the *Federal Register*.

This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of the Office of Management and Budget is hereby authorized and directed to publish this memorandum in the *Federal Register*.

BARACK OBAMA

[Filed with the Office of the Federal Register, 11:15 a.m., January 23, 2009]

NOTE: This memorandum was released by the Office of the Press Secretary on January 22, and it was published in the *Federal Register* on January 26.

Categories: Communications to Federal Agencies : Freedom of Information Act, memorandum.

Subjects: Freedom of Information Act.

DCPD Number: DCPD200900009.



Office of the Attorney General

Washington, D.C. 20530

March 19, 2009

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM:  THE ATTORNEY GENERAL

SUBJECT: The Freedom of Information Act (FOIA)

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, reflects our nation's fundamental commitment to open government. This memorandum is meant to underscore that commitment and to ensure that it is realized in practice.

A Presumption of Openness

As President Obama instructed in his January 21 FOIA Memorandum, "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails." This presumption has two important implications.

First, an agency should not withhold information simply because it may do so legally. I strongly encourage agencies to make discretionary disclosures of information. An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.

Second, whenever an agency determines that it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure. Agencies should always be mindful that the FOIA requires them to take reasonable steps to segregate and release nonexempt information. Even if some parts of a record must be withheld, other parts either may not be covered by a statutory exemption, or may be covered only in a technical sense unrelated to the actual impact of disclosure.

At the same time, the disclosure obligation under the FOIA is not absolute. The Act provides exemptions to protect, for example, national security, personal privacy, privileged records, and law enforcement interests. But as the President stated in his memorandum, "The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Pursuant to the President's directive that I issue new FOIA guidelines, I hereby rescind the Attorney General's FOIA Memorandum of October 12, 2001, which stated that the Department of Justice would defend decisions to withhold records "unless they lack a sound

legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.”

Instead, the Department of Justice will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law. With regard to litigation pending on the date of the issuance of this memorandum, this guidance should be taken into account and applied if practicable when, in the judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information.

FOIA Is Everyone's Responsibility

Application of the proper disclosure standard is only one part of ensuring transparency. Open government requires not just a presumption of disclosure but also an effective system for responding to FOIA requests. Each agency must be fully accountable for its administration of the FOIA.

I would like to emphasize that responsibility for effective FOIA administration belongs to all of us—it is not merely a task assigned to an agency's FOIA staff. We all must do our part to ensure open government. In recent reports to the Attorney General, agencies have noted that competing agency priorities and insufficient technological support have hindered their ability to implement fully the FOIA Improvement Plans that they prepared pursuant to Executive Order 13392 of December 14, 2005. To improve FOIA performance, agencies must address the key roles played by a broad spectrum of agency personnel who work with agency FOIA professionals in responding to requests.

Improving FOIA performance requires the active participation of agency Chief FOIA Officers. Each agency is required by law to designate a senior official at the Assistant Secretary level or its equivalent who has direct responsibility for ensuring that the agency efficiently and appropriately complies with the FOIA. That official must recommend adjustments to agency practices, personnel, and funding as may be necessary.

Equally important, of course, are the FOIA professionals in the agency who directly interact with FOIA requesters and are responsible for the day-to-day implementation of the Act. I ask that you transmit this memorandum to all such personnel. Those professionals deserve the full support of the agency's Chief FOIA Officer to ensure that they have the tools they need to respond promptly and efficiently to FOIA requests. FOIA professionals should be mindful of their obligation to work “in a spirit of cooperation” with FOIA requesters, as President Obama has directed. Unnecessary bureaucratic hurdles have no place in the “new era of open Government” that the President has proclaimed.

Working Proactively and Promptly

Open government requires agencies to work proactively and respond to requests promptly. The President's memorandum instructs agencies to "use modern technology to inform citizens what is known and done by their Government." Accordingly, agencies should readily and systematically post information online in advance of any public request. Providing more information online reduces the need for individualized requests and may help reduce existing backlogs. When information not previously disclosed is requested, agencies should make it a priority to respond in a timely manner. Timely disclosure of information is an essential component of transparency. Long delays should not be viewed as an inevitable and insurmountable consequence of high demand.

In that regard, I would like to remind you of a new requirement that went into effect on December 31, 2008, pursuant to Section 7 of the OPEN Government Act of 2007, Pub. L. No. 110-175. For all requests filed on or after that date, agencies must assign an individualized tracking number to requests that will take longer than ten days to process, and provide that tracking number to the requester. In addition, agencies must establish a telephone line or Internet service that requesters can use to inquire about the status of their requests using the request's assigned tracking number, including the date on which the agency received the request and an estimated date on which the agency will complete action on the request. Further information on these requirements is available on the Department of Justice's website at www.usdoj.gov/oip/foiapost/2008foiapost30.htm.

Agency Chief FOIA Officers should review all aspects of their agencies' FOIA administration, with particular focus on the concerns highlighted in this memorandum, and report to the Department of Justice each year on the steps that have been taken to improve FOIA operations and facilitate information disclosure at their agencies. The Department of Justice's Office of Information Policy (OIP) will offer specific guidance on the content and timing of such reports.

I encourage agencies to take advantage of Department of Justice FOIA resources. OIP will provide training and additional guidance on implementing these guidelines. In addition, agencies should feel free to consult with OIP when making difficult FOIA decisions. With regard to specific FOIA litigation, agencies should consult with the relevant Civil Division, Tax Division, or U.S. Attorney's Office lawyer assigned to the case.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees, agents, or any other person.

[REDACTED]

From: Rotella, Robert F. (HQ-MC000)
Sent: Tuesday, May 05, 2009 2:14 PM
To: Graham, Courtney B. (HQ-MC000)
Subject: CIPLG Practice Group

1) Node 3 module of ISS online naming contest: Drafted set of rules and entry conditions for participants; the most significant was that the agency was not bound to accept the results of the online voting which avoided having to name Node 3 after Stephen Colbert, who encouraged viewers to nominate him.

2) Administrative Claims for Patent Infringement:

- a) Delta Engineers' allegation of infringement of its U.S. patent covering a "High Performance Cold Plate." Claim was denied in a final agency decision following extensive review;
- b) Margolin/Optima allegation of patent infringement by X-38 Project, based on patent covering "Synthetic Vision." Claim was denied in a final agency decision following extensive review and coordination with Center patent staffs.

3) NASA trademarks: agency will pursue formal trademark registration in US and European Community for NASA brands, including: meatball, NASA seal, NASA acronym, "National Aeronautics and Space Administration.

Robert F. Rotella
Senior Patent Attorney
Office of the General Counsel

[REDACTED] b(6)

This document, including any attachments, contains information that is confidential, protected by the attorney-client or other applicable privileges, or constitutes non-public information. It is intended only for the designated recipient(s). If you are not an intended recipient of this information, please take appropriate steps to destroy this document in its entirety and notify the sender of its destruction. Use, dissemination, distribution, or reproduction of this information by unintended recipients is not authorized and may be unlawful.

NASA's Continuing Lack of Accounting Controls

Jed Margolin

1. In 2002 GAO assessed NASA's financial management system as inadequate, but NASA was working on a new financial management system (its third attempt) and expected it to be fully functional in 2008. It hasn't happened even though, for a time, NASA's administrator was an accountant (Sean O'Keefe - December 2001 to February 2005).

Reference 1 - GAO Testimony Before the Committee on Science, Subcommittee on Space and Aeronautics, House of Representatives, NASA MANAGEMENT CHALLENGES, Human Capital and Other Critical Areas Need to be Addressed, Statement of David M. Walker, Comptroller General of the United States, July 18, 2002.

<http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA404576&Location=U2&doc=GetTRDoc.pdf>

{[Click here for Local Copy](#)}

From page 23 - page 24 (I have underlined what I think is important):

The inadequacy of NASA's financial management system has further impact. Without a more effective financial management system, NASA will likely continue to have difficulty providing relevant, reliable, timely financial data -including cost information- that can be used on a real-time basis by program managers to monitor costs, schedule, and performance. In March 2002, we testified⁹ that NASA was unable to provide us with detailed support for amounts obligated against cost limits established by the fiscal year 2000 NASA Authorization Act. This was due, in large part, to NASA's lack of a modern, integrated financial management system.

To its credit, NASA is working toward implementing an integrated financial management system that it expects to be fully operational in fiscal year 2008 at an estimated cost of \$691 million. This is NASA's third attempt toward implementing a new integrated financial management system. The first two efforts were abandoned after 12 years and after spending a reported \$180 million. NASA's current approach focuses on learning from other organizations' successes in implementing similar projects, as opposed to revisiting its own failures. NASA has also abandoned the single product approach that the two prior attempts had as their basic architecture. Instead, the project will be broken down into implementable modules on the basis of the availability of proven software products.

2. In January 2004, the independent auditor -PricewaterhouseCoopers- conducting NASA's audit pursuant to the Chief Financial Officers Act and under the direction of the Office of Inspector General, determined that it could not render an opinion on NASA's financial statements for FY 2003. The disclaimer resulted from NASA's inability to provide the auditor with sufficient evidence to support the financial statements and complete the audit within time frames the Office of Management and Budget established. The disclaimer on the FY 2003 financial statements followed an unqualified¹ FY 2002 audit opinion and a disclaimed audit opinion in FY 2001.

Reference 2 - Testimony of NASA Inspector General, May 19, 2004

<http://oig.nasa.gov/congressional/Testimony051904.pdf> {[Click here for Local Copy](#)}

Before the Government Reform Subcommittee on Government Efficiency and Financial Management U.S. House of Representatives, May 19, 2004, NASA Financial Management Statement of The Honorable Robert W. Cobb, Inspector General National Aeronautics and Space Administration.

From page 2:

OVERALL SUMMARY

In January 2004, the independent auditor—PricewaterhouseCoopers—conducting NASA’s audit pursuant to the Chief Financial Officers Act and under the direction of the Office of Inspector General, determined that it could not render an opinion on NASA’s financial statements for FY 2003. The disclaimer resulted from NASA’s inability to provide the auditor with sufficient evidence to support the financial statements and complete the audit within time frames the Office of Management and Budget established.

The disclaimer on the FY 2003 financial statements followed an unqualified¹ FY 2002 audit opinion and a disclaimed audit opinion in FY 2001. The FY 2002 unqualified opinion was the consequence of a so-called “heroic” effort of the independent auditor PricewaterhouseCoopers. A heroic audit effort occurs where assurance on the financial statements is established through substantially expanded transaction testing rather than the auditor placing reliance on systems of internal control. Such a heroic effort was not possible in FY 2003 because of dependency on a new automated financial management system.

The reports that the independent auditor submitted identified instances of non-compliance with generally accepted accounting practices, material weaknesses in internal controls, and non-compliance with the Federal Financial Management Improvement Act. Many of the weaknesses the audit disclosed resulted from a lack of effective internal control procedures and problems with NASA’s conversion during FY 2003 from 10 separate systems to a new single integrated financial management program (IFMP).

Mr. Cobb’s testimony was in 2004.

An article in the Orlando Sentinel on November 20, 2006 by Michael Cabbage, Sentinel Space Editor, sheds some light on NASA’s accounting problems.

Investigators from the Department of Housing and Urban Development were called in to conduct an inquiry into complaints made by career employees in Cobb’s own office. (I wonder why HUD conducted the investigation and not DOJ.)

From the Orlando Sentinel article:

According to the probe, the number of audit reports issued by Cobb's office plummeted from 62 in 2000 to seven during the first half of the 2006 fiscal year. An audit safety team was abolished. Investigations were derailed, witnesses said, including some related to safety and national security.

Investigators found that Cobb lunched, drank, played golf and traveled with former NASA Administrator Sean O’Keefe, another White House appointee. E-mails from Cobb showed he

frequently consulted with top NASA officials on investigations, raising questions about his independence.

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Nicknamed "Moose," Cobb came to NASA in April 2002 after 15 months as an ethics lawyer in the Bush White House responsible for vetting financial-disclosure and conflict-of-interest issues for administration nominees who required Senate confirmation. He replaced Roberta Gross, a Clinton appointee, who had been in the job since 1995 and had earned a reputation on Capitol Hill as a competent, independent investigator.

The HUD report discusses Gross' departure from NASA.

Gross had contracted with the accounting firm Price Waterhouse Coopers to do NASA's chief financial audit, investigators wrote. After the White House tapped O'Keefe to succeed longtime NASA Administrator Dan Goldin in December 2001, O'Keefe told Gross he was unhappy with the audit. "Gross subsequently [was] asked to resign," the report said.

Cobb replaced Gross four months after O'Keefe's arrival and canceled the contract with Price Waterhouse Coopers.

HUD investigators heard testimony from other witnesses that suggested O'Keefe's and Cobb's association went beyond the traditional arm's-length relationship between agency heads and inspectors general. E-mail traffic between Cobb, O'Keefe and former NASA General Counsel Paul Pastorek indicated Cobb consulted with them on audits and investigations.

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In one case, Cobb was accused of squelching part of an audit related to the international space station program after conferring with Pastorek. The report notes that investigators found an e-mail where Pastorek wanted to discuss the audit and questioned its analysis and conclusions. Investigators wrote that auditors were told to remove all of the findings from one section, reducing four pages of findings in the draft report to one paragraph in the final version.

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According to witnesses in the HUD report, Cobb told his staff, as well as an outside group, that he had to do some "diving saves" to keep his auditors from embarrassing NASA.

See <http://www.orlandosentinel.com/news/space/orl-nasa-inspector-files7,0,3895863,full.story>
{*Click here for Local Copy*}

Mr. Cobb protested his innocence.

Despite calls by Senator Jay Rockefeller (D-WV) and Senator Bill Nelson (D-FL) for Cobb to resign, he refused to do so until April 2009.

http://commerce.senate.gov/public/index.cfm?p=PressRoom&ContentType_id=77eb43da-aa94-497d-a73f-5c951ff72372&Group_id=505cc3fa-a767-40f4-8ac2-4b8326b44e94&MonthDisplay=4&YearDisplay=2009

COMMERCE CHAIRMAN ROCKEFELLER'S STATEMENT ON RESIGNATION OF NASA
INSPECTOR GENERAL ROBERT COBB

Jena Longo - Democratic Deputy Communications Director 202.224.7824
Apr 02 2009

COMMERCE CHAIRMAN ROCKEFELLER'S STATEMENT ON RESIGNATION OF NASA
INSPECTOR GENERAL ROBERT COBB

WASHINGTON, D.C. – Senator John D (Jay) Rockefeller IV (D-WV), Chairman of the U.S. Committee on Commerce, Science and Transportation, issued the following statement regarding the resignation of NASA Inspector General Robert Cobb:

“Only a few short weeks ago, Senator McCaskill and I expressed deep concerns to President Obama that the NASA Inspector General, Robert Cobb, had been repeatedly accused of stifling investigations, retaliating against whistleblowers and prioritizing social relationships with top NASA officials over proper federal oversight. I respectfully asked that the President take immediate action to put an end to IG Cobb’s conflict of interest and cronyism and remove him from the system.

“News of Robert Cobb’s resignation is certainly welcome and this is an important step forward. I applaud the White House for taking a zero tolerance approach to lax enforcement and oversight. President Obama is setting the tone from the top and holding all employees who serve the American people accountable for improper conduct and just plain not doing their jobs. The time has come to close the door on this troubling chapter for NASA and a fresh start awaits.”

(SEE ATTACHED LETTER)

###

If you want to know what it was like to work for Cobb see the Oral Statement made to the Oversight Review of the Investigation of the NASA Inspector General Mr. Robert W. Cobb by Lance G. Carrington, Former Assistant Inspector General for Investigations, NASA Office of Inspector General:

<http://legislative.nasa.gov/hearings/2007%20hearings/6-7-07%20carrington.pdf> {Click here for Local Copy}

The reason for including this material here is because the problems Cobb reported in his testimony to Congress in 2004 were problems that he himself created or was complicit in creating.

3. In 2008 NASA was unable to account for capital assets with an acquisition cost of about \$32 Billion (with a net value of about \$18.6 Billion). It was worse than that.

As part of its FY 2007 report on NASA’s financial statement, E&Y, in its “Report on Internal Control,” dated November 13, 2007, identified significant deficiencies that it considered to be material weaknesses

under standards established by the American Institute of Certified Public Accountants. E&Y identified material weaknesses in NASA's controls for financial systems, financial analyses, oversight used to prepare the financial statements, and processes for assuring that PP&E and materials are presented fairly in the financial statements. In addition, E&Y stated that NASA's financial management systems are not substantially compliant with the Federal Financial Management Improvement Act (FFMIA) of 1996² noting that certain subsidiary systems, including all property systems, are not integrated with NASA's Systems Applications and Products (SAP) Core Financial module. Core Financial—customized off-the-shelf software that serves as the backbone to the IEMP—is used to record accounting transactions including commitments, obligations, and expenditures and to produce NASA's annual financial statements.

Reference 3 - Report No. IG-08-032 - <http://oig.nasa.gov/audits/reports/FY08/IG-08-032.pdf> {[Click here for Local Copy](#)}

September 25, 2008

TO: Chief Financial Officer
Chief Information Officer
Deputy to Chief Information Officer
Director, Marshall Space Flight Center

FROM: Assistant Inspector General for Auditing

SUBJECT: Final Memorandum on NASA's Development of the Integrated Asset Management – Property, Plant, and Equipment Module to Provide Identified Benefits (Report No. IG-08-032; Assignment No. A-08-001-00)

From page 1:

The Office of Inspector General conducted an audit of NASA's Integrated Asset Management – Property, Plant, and Equipment (IAM/PP&E) module. A component of NASA's Integrated Enterprise Management Program (IEMP), the IAM/PP&E module is an automated asset-management system that performs two main functions: equipment management (logistics) and asset accounting (finance) and was designed to integrate logistics and financial processes to account for and facilitate management of NASA personal property.

From page 2:

Executive Summary

We found that NASA adequately defined the IAM/PP&E module project requirements to ensure the six benefits are achieved and that the achievement would be measurable. To determine that the project requirements were adequately defined, we verified that the requirements were crosswalked to each anticipated benefit; we verified that project personnel had reviewed the Federal financial system requirements and could trace the project requirements to the Federal requirements; and we reviewed the project's Performance Measurement Plan to verify that a performance measure could be tied to each of the six identified benefits. We determined that the IAM/PP&E module, as designed, and the corresponding changes in NASA's business processes and controls should help mitigate deficiencies

reported as material weaknesses by Ernst and Young (E&Y), the independent public accounting firm that conducted the audit of NASA's financial statements for the past 4 years.

However, also from page 2:

We note, however, that the system's contribution to improved financial reporting may be limited by inaccurate data. NASA did not validate approximately 6,300 records of capital assets that have an acquisition value of \$32 billion (and a net value of approximately \$18.6 billion) prior to transferring the data into IAM/PP&E. In addition, NASA has not resolved an operating policy issue involving identifying purchases of controlled equipment, which could bear on the successful operations of the system. However, we did not conduct audit work to address the impact of these issues because E&Y plans to perform tests of the IAM/PP&E module and NASA's corresponding manual controls as part of the fiscal year (FY) 2008 financial statement audit. Accordingly, we made no recommendations for management action. We issued a draft of this memorandum on September 17, 2008, and provided NASA management an opportunity to comment on the draft, but comments were not required and no formal comments were received.

And, from page 2 - page 3

Background

As part of its FY 2007 report on NASA's financial statement, E&Y, in its "Report on Internal Control," dated November 13, 2007, identified significant deficiencies that it considered to be material weaknesses under standards established by the American Institute of Certified Public Accountants. E&Y identified material weaknesses in NASA's controls for financial systems, financial analyses, oversight used to prepare the financial statements, and processes for assuring that PP&E and materials are presented fairly in the financial statements. In addition, E&Y stated that NASA's financial management systems are not substantially compliant with the Federal Financial Management Improvement Act (FFMIA) of 1996,² noting that certain subsidiary systems, including all property systems, are not integrated with NASA's Systems Applications and Products (SAP) Core Financial module. Core Financial—customized off-the-shelf software that serves as the backbone to the IEMP—is used to record accounting transactions including commitments, obligations, and expenditures and to produce NASA's annual financial statements.

Therefore, NASA's response to the criticism that it is not following the accounting procedures established by the American Institute of Certified Public Accountants was to **cook the books**.

4. FY 2009 was not much better. From Acting Inspector General Thomas J. Howard:

"Although much progress has been made in developing policies, procedures, and controls to improve NASA's financial processes and systems, challenges remain. Specifically, during FY 2009, NASA management and Ernst & Young LLP (E&Y) continued to identify deficiencies in the Agency's system of internal control, which impair NASA's ability to timely report accurate financial information. The most severe deficiency involves NASA's internal control over legacy property, plant, and equipment (PP&E). As shown in the following table, this deficiency has been reported as a material weakness for several years."

Reference 4 - NASA 2009 Management Challenges

<http://oig.nasa.gov/NASA2009ManagementChallenges.pdf> *{Click here for Local Copy}*

Cover Letter:

November 13, 2009

TO: Administrator

FROM: Acting Inspector General

SUBJECT: NASA's Most Serious Management and Performance Challenges

As required by the Reports Consolidation Act of 2000, this memorandum provides our views of the most serious management and performance challenges facing NASA and is to be included in the Agency's Performance and Accountability Report for fiscal year 2009.

In determining whether to report an issue as a challenge, we consider the significance of the issue in relation to the Agency's mission; its susceptibility to fraud, waste, and abuse; whether the underlying problems are systemic; and the Agency's progress in addressing the issue. We provided a draft copy of our views to Agency officials and considered all comments received.

Through various Agency initiatives and by implementing recommendations made by the Office of Inspector General (OIG) and other evaluative bodies, such as the Government Accountability Office, NASA is working to improve Agency programs and operations. However, challenges remain in the following areas:

- Transitioning from the Space Shuttle to the Next Generation of Space Vehicles
- Managing Risk to People, Equipment, and Mission
- Financial Management
- Acquisition and Contracting Processes
- Information Technology Security

During FY 2010, the OIG will continue to conduct work that focuses on NASA's efforts to meet these challenges as part of our overall mission to promote the economy and efficiency of the Agency and to root out fraud, waste, abuse, and mismanagement.

We hope that you find our views helpful. Please contact me if you have questions.

signed

Thomas J. Howard

From page 5 - page 6:

Financial Management

Over the past year, NASA continued to make progress in improving its internal control over financial reporting by executing its Continuous Monitoring Program (CMP). The CMP assesses and evaluates internal controls, compliance with generally accepted accounting principles, and evidence used to support that balances and activity reported in NASA's financial statements are accurate and complete by requiring Centers to perform a set of control activities. Throughout FY 2009, the CMP has operated as designed. NASA has identified exceptions through the execution of the control activities and has generally tracked and resolved those exceptions in a timely manner.

Although much progress has been made in developing policies, procedures, and controls to improve NASA's financial processes and systems, challenges remain. Specifically, during FY 2009, NASA management and Ernst & Young LLP (E&Y) continued to identify deficiencies in the Agency's system of internal control, which impair NASA's ability to timely report accurate financial information. The most severe deficiency involves NASA's internal control over legacy property, plant, and equipment (PP&E). As shown in the following table, this deficiency has been reported as a material weakness for several years.

Internal Control Deficiencies						
Fiscal Year	2009	2008	2007	2006	2005	
Independent Public Accountant	E&Y	E&Y	E&Y	E&Y	E&Y	
Audit Opinion	Disclaimer	Disclaimer	Disclaimer	Disclaimer	Disclaimer	
Internal Control Deficiencies	Property, Plant, and Equipment	material weakness	material weakness	material weakness	material weakness	
	Financial Statement Preparation Process and Oversight	—	material weakness	material weakness	material weakness	
	Environmental Liability Estimation ^a	significant deficiency	—	—	—	reportable condition
	Federal Financial Management Improvement Act ^b	significant deficiency	—	—	—	—
	Fund Balance with Treasury	—	—	—	—	material weakness
^a The deficiency cited for Environmental Liability Estimation was included in the Financial Statement Preparation Process and Oversight weakness for FYs 2006–2008. ^b The deficiency cited for Federal Financial Management Improvement Act was included in the Financial Statement Preparation Process and Oversight weakness for FYs 2005–2008.						

The following is especially important. From page 11:

Standards of Ethical Conduct Compliance. There is a great deal of interaction between NASA and the private sector, including both industry and academia. Again, given that approximately 90 percent of NASA's budget is dedicated to contracts and grants, there is great incentive for private sector interests to influence NASA employees. There is also substantial interaction between NASA's scientists and researchers and those working for non-governmental entities, and incentives abound for such acts as sharing information that is sensitive but unclassified. Many NASA employees often seek to pursue financial opportunities in the private sector beyond their Government employment. With the interchange of talented personnel between the public and private sectors, the advent of term appointments, the use of Intergovernmental Personnel Act appointments, and the use of contractors to meet personnel needs, management is challenged to ensure that ethics laws and regulations applicable to each category are identified and followed. It is imperative that NASA employees, as stewards of NASA's mission and budget, are aware of and comply with the applicable ethics laws and regulations.

However, Margolin filed a Freedom of Information Act Request on December 14, 2009. (See [Ref5 f2 01.pdf](#) and [Ref5 f2 01a.pdf](#)). One of his requests was

11. Please send me documents relating to a standard of ethics or conduct for NASA contractors.

NASA's tardy response to that item ([Ref6 jm nasa foia2 response.pdf](#)), received February 16, 2010 was:

Question #11: Procurement Information Circular 08-12 The Federal Acquisition Regulations has internal standards of conduct, which is responsive to your request.

<http://www.hq.nasa.gov/office/procurement/regs/pic08-12.html>

The link to Federal Acquisition Regulations produces an interesting document ([Ref7 08-12.pdf](#)):

December 22, 2008

CONTRACTOR ETHICS

PURPOSE: This Procurement Information Circular (PIC) is issued to call attention to the new contractor ethics requirements and to advise acquisition personnel of their roles and responsibilities in implementing the programs and processing reports of violations under the program.

BACKGROUND: Over the past year, two significant FAR rules related to contractor ethics have been issued. In November of 2007, the FAR was revised to require contractors to establish a written code of business ethics and conduct. Furthermore, on December 12, 2008, the Contractor Business Ethics Compliance Program and Disclosure Requirements went into effect, requiring contractors to report criminal violations and overpayments.

Under the fist{sic} rule, contractors are required to:

- Establish a written code of business ethics (FAR 52.203-13)
- Establish an internal control system that facilitates timely discovery of improper conduct in connection with Government contracts and ensures that corrective action is taken.
- Train their employees in business ethics; promote business ethics awareness

The second rule builds upon the first by additionally requiring contractors to:

- Timely disclose any violations of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or a violation of the civil False Claims Act (31 U.S.C. 3729-3733) to the Agency Office of the Inspector General, with a copy to the contracting officer.
- Timely disclose and remit any significant overpayments made by the Government.

Therefore:

1. Contractors have to agree to disclose any violations of specified Federal criminal laws that they commit.
2. Contractors have to come up with their own written code of business ethics.

If NASA requires (allows) Contractors to write their own business ethics code, and there is no standard for judging the adequacy of the Contractor's ethics code, then NASA does not have a business ethics code for its Contractors.

[Reference 4](#) (NASA 2009 Management Challenges) refers to a Standards of Ethical Conduct Compliance for NASA employees. However, NASA employees are working with Contractors who set their own code of ethics.

5. As of February 2010 NASA has still failed to get its financial house in order. NASA's auditor refused to sign-off on its latest audit.

Reference 8 - GAO United States Government Accountability Office Testimony Before the Subcommittee on Space and Aeronautics, Committee on Science and Technology, House of Representatives - **NASA Key Management and Program Challenges**, Statement of Cristina Chaplain, Director Acquisition and Sourcing Management, February 3, 2010 - <http://legislative.nasa.gov/hearings/2-3-10%20CHAPLAIN.pdf> {[Click here for Local Copy](#)}

From page 7:

NASA has continually struggled to put its financial house in order. GAO and others have reported for years on these efforts.⁷ In fact, GAO has made a number of recommendations to address NASA's financial management challenges. Moreover, the NASA Inspector General has identified financial management as one of NASA's most serious challenges. In a November 2008 report, the Inspector General found continuing weaknesses in NASA's financial management process and systems, including internal controls over property accounting. It noted that these deficiencies have resulted in disclaimed audits of NASA's financial statements since fiscal year 2003. The disclaimers were largely attributed to data integrity issues and poor internal controls. NASA has made progress in addressing some of these issues, but the recent disclaimer on the fiscal year 2009 audit shows that more work needs to be done.

Here is footnote 7:

⁷ GAO, Property Management: NASA's Goal of Increasing Equipment Reutilization May Fall Short without Further Efforts, GAO-09-187 (Washington, D.C.: Jan. 30, 2009); GAO; Business Modernization: NASA Must Consider Agencywide Needs to Reap the Full Benefits of Its Enterprise Management System Modernization Effort, GAO-07-691 (Washington, D.C.: July 20, 2007); and GAO, Financial Management Systems: Additional Efforts Needed to Address Key Causes of Modernization Failures, GAO-06-184 (Washington, D.C.: Mar. 15, 2006).

6. NASA Administrator Bolden found it necessary to issue a centerwide communication ordering all NASA personnel to cooperate with OIG investigations and audits.

Reference 9 - This is from SpaceRef: <http://www.spaceref.com/news/viewsr.rss.html?pid=33246>
Although the article gives a link to the NASA HQ web site General Bolden's announcement does not seem to be there.

Message from Administrator Charles F. Bolden, Jr. - January 14, 2010 Transparency, Communication and Cooperation

STATUS REPORT

Date Released: Thursday, January 14, 2010

Source: [NASA HQ](#)

Subject: Message from Administrator Charles F. Bolden, Jr. - January 14, 2010 Transparency, Communication and Cooperation

From: Centerwide Announcement

Date: Thursday, January 14, 2010

Message from Administrator Charles F. Bolden, Jr. - January 14, 2010 Transparency, Communication and Cooperation

President Obama has made it clear that he is committed to a more transparent and responsive Federal Government. I believe that NASA should be a leader in implementing that goal. Accordingly, whether we are referring to the Agency's treatment of requests under the Freedom of Information Act, answering questions from Congress or cooperating with our Inspector General in Agency audits or investigations, I expect that we will respond both promptly and thoroughly.

As I know you realize and I hope you appreciate, the NASA Office of Inspector General (OIG) performs a valuable function at the Agency with both its audits and its investigations. I fully support the OIG's efforts to eradicate fraud, waste and abuse, as well as its role in making the Agency more efficient and more effective. While cooperation with OIG audits and investigations is mandated by Federal laws and regulations, NASA employees should readily and fully cooperate whenever an OIG representative seeks access to personnel, facilities, records, reports, databases, or documents because it is the right thing to do. Leadership should also ensure that no unduly burdensome requirements are imposed on OIG auditors or investigators carrying out their important duties. We also need to understand that while OIG personnel generally will state the reason for their requests, they are under no obligation to do so and sometimes cannot do so.

The OIG also serves as the point of contact for NASA employees to report possible criminal activity, fraud, waste, abuse and mismanagement involving Agency funds or employees.

As we begin this new decade, let's renew our commitment to strengthening NASA's traditional values of openness, honesty and transparency.

With best regards for the New Year,

Charles F. Bolden, Jr.

Let's see if General Bolden and Deputy Administrator Garver can get NASA's house in order.

Jed Margolin
Virginia City Highlands, NV
March 7, 2010



08-12

Procurement Information Circular

December 22, 2008

CONTRACTOR ETHICS

PURPOSE: This Procurement Information Circular (PIC) is issued to call attention to the new contractor ethics requirements and to advise acquisition personnel of their roles and responsibilities in implementing the programs and processing reports of violations under the program.

BACKGROUND: Over the past year, two significant FAR rules related to contractor ethics have been issued. In November of 2007, the FAR was revised to require contractors to establish a written code of business ethics and conduct. Furthermore, on December 12, 2008, the Contractor Business Ethics Compliance Program and Disclosure Requirements went into effect, requiring contractors to report criminal violations and overpayments.

Under the first rule, contractors are required to:

- Establish a written code of business ethics (FAR 52.203-13)
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The second rule builds upon the first by additionally requiring contractors to:

- Timely disclose any violations of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or a violation of the civil False Claims Act (31 U.S.C. 3729-3733) to the Agency Office of the Inspector General, with a copy to the contracting officer.
- Timely disclose and remit any significant overpayments made by the Government.

GUIDANCE: Successful implementation of these rules will require the joint efforts of all those involved in the contracting process. The regulations require contractors to report criminal violations to the Agency Office of the Inspector General (OIG). Within NASA, the Acquisition Integrity Program (AIP) in the Office of General Counsel will work with the OIG, Procurement Office and DOJ to coordinate remedies and recommend actions. Contracting Officers (COs) and Contracting Officer Technical Representatives (COTRs) play an important role in relaying reports of violations that they may receive to the OIG and the AIP and in supporting the Agency investigations. COs and COTRs shall coordinate any contractor ethics issue or criminal violation with the designated AIP attorney at their Center. The NASA FAR Supplement will be amended (NFS 1803-104) to reference NASA's internal process for coordinating the investigations. The process to be followed is specified in NPD 2086.

It is important to note that the reporting procedures for overpayments differ from those for criminal violations. In the case of overpayment, the Contracting Officer is the primary point of contact and is responsible for determining the causes for overpayment and collecting the repayment. Overpayments may be the result of administrative errors or automated system glitches. They are not necessarily indicative of unethical behavior but COs should make a determination regarding the causes of overpayments, and if fraud is suspected, the matter should be coordinated with the AIP and the OIG.

The new rule also includes contractual remedies when contractors fail to comply. Failure by a principal to timely disclose violations of Federal laws of significant overpayments may be cause for suspension and debarment. Similarly, failure to disclose and the violations themselves should be considered when conducting past performance evaluations.

EFFECTIVE DATE: This PIC is effective as dated and shall remain in effect until canceled or superseded.

HEADQUARTERS CONTACTS: Leigh Pomponio, Office of Procurement, Contract Management Division, (202) 358-0592, e-mail: Leigh.Pomponio@nasa.gov.

James A. Balinskas
Director, Contract Management Division

DISTRIBUTION:
PIC List

Appendix NA77



November 13, 2009

TO: Administrator
FROM: Acting Inspector General
SUBJECT: NASA's Most Serious Management and Performance Challenges

As required by the Reports Consolidation Act of 2000, this memorandum provides our views of the most serious management and performance challenges facing NASA and is to be included in the Agency's Performance and Accountability Report for fiscal year 2009.

In determining whether to report an issue as a challenge, we consider the significance of the issue in relation to the Agency's mission; its susceptibility to fraud, waste, and abuse; whether the underlying problems are systemic; and the Agency's progress in addressing the issue. We provided a draft copy of our views to Agency officials and considered all comments received.

Through various Agency initiatives and by implementing recommendations made by the Office of Inspector General (OIG) and other evaluative bodies, such as the Government Accountability Office, NASA is working to improve Agency programs and operations. However, challenges remain in the following areas:

- Transitioning from the Space Shuttle to the Next Generation of Space Vehicles
- Managing Risk to People, Equipment, and Mission
- Financial Management
- Acquisition and Contracting Processes
- Information Technology Security

During FY 2010, the OIG will continue to conduct work that focuses on NASA's efforts to meet these challenges as part of our overall mission to promote the economy and efficiency of the Agency and to root out fraud, waste, abuse, and mismanagement.

We hope that you find our views helpful. Please contact me if you have questions.

signed
Thomas J. Howard

Enclosure:
NASA's Most Serious Management and Performance Challenges

NASA's Most Serious Management and Performance Challenges

Transitioning from the Space Shuttle to the Next Generation of Space Vehicles

NASA's greatest challenge continues to be maintaining the critical skills and capabilities required to safely and effectively fly the Space Shuttle until its retirement while transitioning to the next generation of space vehicles. In 2004, the "President's Vision for U.S. Space Exploration" caused a substantive reorganization of NASA's strategic priorities, established a timeline for the retirement of the Space Shuttle, established the completion date for the International Space Station (ISS), and set the goals of returning to the Moon and reaching Mars. However, fiscal realities and technical challenges have hampered NASA's efforts to effectively implement the Vision.

Space Shuttle Program. The primary mission focus of the Space Shuttle Program between now and retirement is to launch and assemble U.S. and international components for the ISS while sustaining logistics and science support to ISS crews. Successful completion of the Space Shuttle Program's planned manifest, currently scheduled for completion by the end of fiscal year (FY) 2010, is key to meeting NASA's strategic goals of supporting the safe operation of the Space Shuttle to complete assembly of the ISS by the Space Shuttle's planned retirement.

NASA continues to fund and plan for completion of the remaining Space Shuttle flight manifest, which is required to complete the ISS, by September 30, 2010. However, indications from historical flight rates, the presidentially directed Review of U.S. Human Space Flight Plans Committee (the Augustine Committee), internal NASA evaluations, and work by the NASA Office of Inspector General (OIG) show that this goal is not likely to be achieved by the end of FY 2010. If NASA is required to extend the Shuttle's flight schedule, the Agency will need to reevaluate the adequacy of funding and plans for the sustainability of the Shuttle's workforce and infrastructure while preserving the robust process for voicing safety and engineering concerns.

Constellation Program. NASA began the Constellation Program in 2005 to facilitate the President's Vision for return to the Moon and the human exploration of Mars. However, reviews of various components of the Program have concluded that allotted resources are not sufficient for stated requirements.

The largest expenditure of funds within the Constellation Program—\$10 billion—has been for the development of the Ares I crew launch vehicle and the Orion crew exploration vehicle. Yet, according to the Government Accountability Office (GAO), NASA cannot confidently determine total costs until technical challenges have been overcome. Engineers working on the Ares I Project continue their efforts to understand and mitigate the impact of rocket thrust oscillations that some critics contend could threaten the health of astronauts and survivability of the Orion vehicle. To improve cost and schedule confidence, NASA has modified Orion's baseline configuration for initial missions, reducing the number of astronauts the vehicle will transport

from six to four. To accommodate the resolution of these and other technical issues, project milestones have rightfully been delayed. NASA's meticulous application of a disciplined approach for each life-cycle phase review will help ensure that complete, timely, and essential information is provided for informed decision making.

Unity of effort is essential for executing a program as complex as Constellation within the fiscal resources provided while ensuring the safe, efficient, and effective implementation of its projects, such as Orion. Over the past year, the Constellation Program has been the subject of multiple studies and analyses. In addition to internal life-cycle reviews associated with standard program management, reviews conducted by the Agency for the President, OIG, GAO, and the Augustine Committee have all examined and reported on the progress of various components of the Constellation Program. Each review noted that allotted resources did not match stated requirements, which resulted in the modification of requirements and the delay of significant milestones.

Managing the Transition. NASA faces several transition challenges, among the greatest are the gap period between the last planned Shuttle flight in 2010 and the first planned Ares I and Orion flight in 2015, the sustainment of the ISS after the last Space Shuttle mission, and the effective management of civil service and contractor personnel assigned to the Space Shuttle Program and the Constellation Program.

Over the past year, at the request of Congress and the Administration, NASA has provided various options for extending Shuttle operations and closing the gap between the planned retirement of the Space Shuttle and the first piloted space flight of the Constellation Program's Orion crew exploration vehicle. While each option is technically feasible, each option results in a higher cumulative safety risk because each involves an increased number of Space Shuttle flights, and additional funding would be required to avoid negatively impacting implementation of the next generation of space vehicles.

Two plans that NASA developed—one for an extension of the Shuttle Program to 2012 and another for extension to 2015—would cost an estimated \$4.7 billion and \$14 billion, respectively. These costs would have to be taken out of other NASA programs unless they were provided as an addition to the baseline budget. Each plan would require close coordination with the Constellation Program to avoid negatively impacting the development and implementation of the Program. In addition, the Columbia Accident Investigation Board recommended in 2003 that, as part of a Service Life Extension Program, NASA should recertify the Shuttle at the material, component, system, and subsystem levels prior to operations beyond 2010. Additional challenges to any plan to extend the Shuttle Program include recertifying suppliers who have already begun retooling efforts and reversing recent contract workforce layoffs.

The Augustine Committee presented eight options to address the gap in U.S. space flight capability; six of the options included extending ISS operations from 2015 to 2020, potentially making ISS sustainment more challenging. Providing for the sustainment of ISS is crucial to realizing the scientific research potential of the ISS and protecting the extensive U.S. and foreign investments in the ISS. NASA plans to rely on international partners and commercial providers for logistics support and crew rotation necessary to sustain and operate the ISS during the gap

period of 2010 through 2015. However, while viewed by Agency officials as unlikely, there are various ISS components that can only be carried to orbit by the Space Shuttle should they have to be replaced. In addition, NASA plans to rely on the commercial sector to develop space vehicles for the bulk of cargo delivery required to maintain an ISS crew of six. However, a recent GAO report stated that although the commercial providers have made some progress in meeting established milestones, demonstration flights of their vehicles have been delayed due to engine development challenges. Significant delays in the availability of these commercial vehicles could threaten sustainment of the ISS.

Workforce issues during the gap period of 2010 through 2015 include maintaining the critical skills now present in the Shuttle workforce throughout the Shuttle's remaining flights while placing additional emphasis on defining and cultivating the skill sets needed by the Constellation Program, especially those that will be needed at Kennedy Space Center. Although other NASA Centers are engaged in development and production activities for the new vehicles, the primary focus of the Kennedy workforce is launch operations and ground processing—activities that will not be needed at levels similar to current capacity until the new crew exploration vehicles are ready for flight. Determining the appropriate balance to operate the Space Shuttle safely and sustain that program through retirement while incentivizing talented people to prepare for the future requirements of the Constellation Program demands the optimization of all human resource management assets.

Recognizing the significance of the transition being properly managed, various NASA councils (e.g. Program Management Council, Operation Management Council, and Strategic Management Council) routinely review the Space Shuttle retirement plan and progress, to include transition metrics, decisions, and impact on facilities. In addition, in July 2009, NASA published the third edition of the "NASA Workforce Transition Strategy," which detailed civil service and contractor Shuttle and Constellation workforce projections and requirements at NASA's individual Centers. As the Shuttle Program is retired and the Constellation Program enters the implementation phase of development, such efforts should entail greater detail and transparency to enable informed decision making.

Managing Risk to People, Equipment, and Mission

Ensuring the success of NASA's mission is the goal of effective risk management. Safety and mission assurance controls are key to supporting robust and reliable operations in the context of very challenging launch and mission schedules. NASA program managers are constantly confronted with risks introduced by fiscal realities, schedule demands, and ever-changing priorities. In addition, the NASA OIG has investigated instances involving damaged, counterfeit, or inferior parts purchased by NASA as a result of questionable or even criminal actions of suppliers. Technical challenges, competition for scarce resources, and U.S. economic constraints add risk to international and commercial partnerships. Close scrutiny by NASA management of adherence to the fundamentals of project and program management, risk identification and mitigation, and proven acquisition strategies is beneficial toward the accomplishment of Agency goals.

Technical Challenges. Although there is evidence of a continued, strong engineering and safety focus, technical issues continue to challenge the Shuttle Program and add risk to mission success. Specifically, NASA most recently has been troubleshooting hydrogen gas leaks and valve concerns and continued addressing the risk posed by the shedding of foam insulation from the external fuel tank. Undoubtedly, there will be unforeseen technical challenges that will need to be addressed as long as the Space Shuttle continues operations. The stress added to schedules and budgets in an effort to meet these technical challenges is compounded by stress generated in trying to maintain the Constellation Program's development and acquisition schedule.

Ongoing technical challenges and failures in the Science Mission Directorate portfolio add to Agency stress and increase the cost of NASA programs and projects. NASA's next high-profile mission to Mars, the Mars Science Lab, suffered a major setback resulting in a missed launch opportunity in 2009, a \$400 million cost increase, and a 2-year schedule delay due to technical challenges. These challenges threaten the viability of the project, and cost increases and schedule delays may significantly impact the entire Mars Exploration Program. In addition, the Orbiting Carbon Observatory, a satellite important to the monitoring and understanding of the Earth's changing climate, suffered an undetermined technical failure on launch, resulting in the loss of the \$209 million satellite and arguably creating a gap in NASA's execution of the recommendations and intent of the National Research Council's Earth Science Decadal Survey. NASA is also continuing to work on resolving technical issues that threaten to further delay implementation of the Stratospheric Observatory for Infrared Astronomy Program, which is now 10 years behind schedule with costs exceeding 200 percent of the initial cost estimate.

Sound program and project management principles, technical and safety risk identification, and sound mitigation strategies are paramount to successfully developing and operating programs and projects that push the envelope of technological advancement. In the past year, the OIG dedicated considerable resources to reviewing the Agency's risk management efforts at the program and project levels. Although the management of risk generally appeared sound, life-cycle reviews needed to remain focused on ensuring appropriate maturity of design and emphasis was needed on ensuring the adequacy of benefit-cost analyses to provide required information for informed decision making. Our focus will continue to include monitoring NASA's implementation of requirements detailed in the NASA Policy Directive 7120 series on program and project management as well as NASA's implementation of GAO best practices and OIG recommendations.

Budgetary Challenges. Aside from the tremendous schedule and technical challenges associated with the complex science, aeronautics, and space exploration projects undertaken by NASA, accomplishment of those missions is susceptible to budgetary revisions imposed through the appropriations process. The implications associated with this budgetary reality add ever-increasing risk to an organization responsible for leading the Nation in space and aeronautics research and development and whose programs are designed to operate over several decades.

Budget revisions and the emphasis on implementing the President's Vision, National Academy of Sciences recommendations, and other stakeholder priorities also influence operations within the NASA Directorates not directly involved in the Space Shuttle or Constellation Programs. While the major space exploration and operational program challenges continue to be a difficult

balancing act, other Mission Directorates within NASA, such as the Aeronautics Research Mission Directorate (ARMD) and the Science Mission Directorate, certainly feel the impact. Shifting priorities and inconsistent funding levels have delayed the development and implementation of the Landsat Data Continuity Mission and Global Precipitation Measurement projects. Decreasing budget allocations have influenced decisions throughout the ARMD portfolio, including research and development activities for the Next Generation Air Transportation System.

NASA is required to operate within the fiscal boundaries afforded and supported by the public interest. Although NASA's programs have advanced the Nation's knowledge in science and technology, the many issues facing the country have led to questions about the cost and benefits of space exploration. The debate will likely intensify as the Administration and Congress weigh the options presented by the Augustine Committee.

Key Partnerships. In light of NASA's budgetary realities, international and commercial partnerships are vital to not only implementing the President's Vision, but also improving the viability of future inter-planetary and deep-space exploration. Such partnerships involve risks that include changes in U.S. foreign relations policy and economic constraints.

The President's Vision directed NASA to pursue opportunities for international partnerships in support of the Nation's exploration goals. The Augustine Committee reaffirmed the benefits of engaging international partners in future space exploration endeavors, stating that many nations have aspirations for space exploration and U.S. leadership "could strengthen geopolitical relationships, leverage global resources, and enhance the exploration enterprise." In addition to NASA's traditional partners (Canada, France, Japan, etc.), other countries (e.g., China) that have not traditionally been considered as partners for various reasons are developing space programs, which could prove to be an asset in the future to NASA in attaining its goals.

The looming gap in U.S. human space flight capability makes engagement, cooperation, and consideration of alternatives a must for the viability of the ISS. NASA is facing significant challenges to its plan to honor its commitments to deliver cargo to the ISS. Delays in the Commercial Orbital Transportation Services Program and the likely unavailability of U.S.-made crew vehicles increase the likelihood that NASA will be forced to rely solely on international partners to transport cargo and crew to the ISS.

Financial Management

Over the past year, NASA continued to make progress in improving its internal control over financial reporting by executing its Continuous Monitoring Program (CMP). The CMP assesses and evaluates internal controls, compliance with generally accepted accounting principles, and evidence used to support that balances and activity reported in NASA's financial statements are accurate and complete by requiring Centers to perform a set of control activities. Throughout FY 2009, the CMP has operated as designed. NASA has identified exceptions through the execution of the control activities and has generally tracked and resolved those exceptions in a timely manner.

Although much progress has been made in developing policies, procedures, and controls to improve NASA's financial processes and systems, challenges remain. Specifically, during FY 2009, NASA management and Ernst & Young LLP (E&Y) continued to identify deficiencies in the Agency's system of internal control, which impair NASA's ability to timely report accurate financial information. The most severe deficiency involves NASA's internal control over legacy property, plant, and equipment (PP&E). As shown in the following table, this deficiency has been reported as a material weakness for several years.

Internal Control Deficiencies						
Fiscal Year		2009	2008	2007	2006	2005
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	Fund Balance with Treasury	—	—	—	—	material weakness
^a The deficiency cited for Environmental Liability Estimation was included in the Financial Statement Preparation Process and Oversight weakness for FYs 2006–2008. ^b The deficiency cited for Federal Financial Management Improvement Act was included in the Financial Statement Preparation Process and Oversight weakness for FYs 2005–2008.						

Property, Plant, and Equipment. To address the PP&E material weakness, NASA implemented a PP&E capitalization policy and procedures for assets procured on or after October 1, 2007. The policy and procedures are intended to ensure that the value and completeness of capitalized assets, whether Government-held or contractor-held, will be accurate. For contracts with effective dates on or after October 1, 2007, contractors are required to report the cost of each capitalized asset as a separate item on required contractor cost reports. NASA also designed a process to reconcile the monthly contractor cost reports and the capitalized PP&E amounts recorded in NASA's Contractor-Held Asset Tracking System (CHATS) and the Core Financial module. However, given that NASA had no new contracts that fell into this category during FY 2009, E&Y could not test the effectiveness of NASA's controls surrounding those reconciliations for contractor-held property.

Currently, the weakness in PP&E is focused primarily on controls over legacy assets that flow from contracts executed prior to October 1, 2007. The most significant of these legacy assets are the ISS and the Shuttle. For several years, audits of these legacy assets have identified serious

weaknesses in internal controls over the completeness and accuracy of the value of the assets. As a result, Agency management and E&Y have been unable to obtain sufficient evidentiary support for the amounts presented in the financial statements.

On October 14, 2009, the Federal Accounting Standards Advisory Board issued an accounting standard clarifying that reasonable estimates of historical cost may be used to value general PP&E. The standard clarifies that Federal entities should report their general PP&E based on historical cost in accordance with the asset recognition and measurement provisions of the earlier property accounting standards. However, the standard allows for reasonable estimates of historical cost to be used to value general PP&E assets. The proper and effective implementation of the new accounting standard will be important in remediating this deficiency regarding legacy capital assets.

In preparation for the issuance of the new accounting standard, NASA performed an analysis of costs that were capitalized for major components of the ISS and Shuttle. NASA undertook a similar effort when it changed its accounting policy for PP&E in FY 2007 and reclassified almost \$13 billion of costs previously categorized as general PP&E to research and development costs.

During its analysis in FY 2009, NASA changed its capitalization policy for Integration and Operations costs associated with the ISS after it was placed into service on September 30, 2001. NASA also changed its policy for capitalizing Shuttle launch service costs associated with the ISS. These policy changes resulted in the reclassification of approximately \$11 billion of ISS costs that were previously capitalized. Many of the adjustments affected prior periods and are recorded as a correction of an error in the financial statements.

Due to the volatility of the property balances and the increased risk of recording estimates for property, PP&E remains a significant management challenge. Ongoing efforts by NASA management to develop a robust and rigorous review process that both validates and challenges the adequacy of estimation techniques used and the sufficiency of documentation supporting those conclusions will serve NASA management well in preparing for the audit of these estimates in the future.

Environmental Liability Estimation. Over the past several years, NASA has taken proactive measures to improve its financial statement preparation processes and oversight. As a result, this issue is no longer reported as a material weakness for FY 2009; however, NASA has challenges estimating its unfunded environmental liability (UEL). These challenges include establishing an Agency-wide policy and ensuring consistent implementation of the policy across the Agency.

During FY 2009, NASA changed the timeframe it uses to estimate its environmental liability to clean-up contaminated sites. NASA now limits the length of the remediation period included in the UEL accrual estimates at 30 years as of the Balance Sheet date. According to NASA, beyond a 30-year horizon, UEL estimates have not proven to be reliable for presentation in the financial statements. While NASA's guidance regarding UEL estimates is under continued revision, NASA has articulated that reliable engineering estimates beyond the 30-year period

will be taken into consideration while developing the accrual. However, no amounts in the FY 2009 accrual relate to periods past the 30-year horizon.

NASA developed a policy in September 2009 to capture cleanup costs for removing, containing, and/or disposing of hazardous waste from property or material associated with the permanent or temporary shutdown of a program. The Federal accounting standard that requires agencies to capture this information when applicable property is placed into service has been in effect since FY 1998; however, in September 2009, NASA made its first attempt to estimate and disclose those costs in the financial statements. In addition, E&Y found that NASA does not apply mark-ups (i.e., percentage increases applied to environmental liability estimates to account for contingencies) consistently to remediation projects from year to year, thus creating large variances in the UEL estimate when no other factors had changed. Generally, contingencies should not be changed from year to year unless there is appropriate justification. All of these issues contributed to NASA not having a stable and auditable UEL estimate.

Acquisition and Contracting Processes

One of NASA's long-standing management challenges relates to systemic weaknesses identified in its acquisition and contracting processes. GAO first identified NASA's contract management as a high-risk area in 1990, citing NASA's undisciplined cost-estimating processes in project development, the project managers' inability to obtain information needed to assess contract progress, and persistent cost growth and schedule slippage in the majority of its major projects. GAO noted improvements to NASA's processes in its most recent update to the high-risk areas, "High Risk Series: An Update" (GAO-09-271, January 2009), that included the development of a plan to address systemic weaknesses while noting that "it will take several years to fully implement these initiatives and transform the agency into an organization that delivers the kind of analysis and forward-looking information needed to effectively manage its many complex programs." During 2009, the OIG also noted NASA's continued emphasis on monitoring this challenge and implementing disciplined acquisition management processes. However, both GAO and OIG audits and investigations continue to reveal systemic weaknesses in the areas of acquisition and procurement, to include awards as part of the Small Business Innovation Research (SBIR) Program.

Cost Estimates. In recent reviews of selected NASA programs, the OIG found that NASA still lacks the disciplined cost-estimating processes and financial and performance management systems needed to establish priorities, quantify risks, and manage program costs. Our review of the Stratospheric Observatory for Infrared Astronomy Program found that initial cost estimates were inaccurate and continuously increased as the Program progressed, and our review of the FY 2008 budget request for the Constellation Program found that cost estimates could have been better documented. Given that NASA programs and projects have historically experienced cost overruns, improvements in cost estimating with detailed, empirical data that explain the rationale for decisions could help minimize the risk of cost overruns by providing additional assurance that budget requests are adequate to achieve program and project goals.

GAO has also reported that NASA faces disparate challenges in estimating the cost to retire the Space Shuttle and transition to the Constellation Program. Although NASA continues to budget and manage the launch schedule to retire the Shuttle in 2010, it has yet to decide which facilities and equipment will transition to the Constellation Program and which will be sold, demolished, or preserved for historic value. Proper estimation of the cost to transition and dispose of its facilities and assets are critical to the long-term financial planning for the Constellation Program. According to GAO, NASA will need to determine the status of as many as 654 facilities, worth an estimated \$5.7 billion, and equipment estimated at \$12 billion. NASA continues to focus its efforts to address these challenges on providing improved estimates of transition costs.

Acquisition Process. GAO and OIG audits have continued to report systemic weaknesses involving NASA's acquisition process. This year there were bid protests involving significant NASA programs pertaining to missteps in the NASA acquisition process. The bid protests cost the Agency in many ways—through delaying the furtherance of the mission for which the contract was being let, through costs generated by the bid protest process itself, and through the costs associated with maintaining the operational status quo. Given that NASA spends approximately 90 percent of its budget on contracts and awards, these systemic weaknesses pose significant challenges to NASA's ability to make informed investment decisions. In response to this challenge, NASA revised its acquisition policy in 2007, which was a positive step in improving NASA's ability to complete its programs and projects within cost, schedule, and performance parameters. However, implementation of the revised policy has created its own challenges by fundamentally changing NASA's approach to acquisition.

In June 2007, the OIG initiated an audit of the Orion Project because it was one of the first space flight projects to implement the revised program and project management policy, which requires space flight projects to conduct life-cycle reviews during each phase of the project's life cycle. These reviews are considered essential elements of conducting, managing, evaluating, and approving space flight projects. However, during our audit of the Orion Project, we found that NASA conducted a life-cycle review with a vehicle configuration that was not at the proper maturity level to proceed to the next phase. As a result, a significant portion of the vehicle configuration that eventually did proceed to the next phase had not been completely evaluated for compliance with requirements, which increased the risk of costly rework and schedule delays.

More than 3 years ago, GAO testified that NASA's acquisition strategy of awarding a long-term contract for the design, development, production, and sustainment of Orion before developing a sound business case placed the project at risk of significant cost overruns, schedule delays, and performance shortfalls. Later, in October 2007, GAO noted that gaps in the Ares I Project included inadequate knowledge of requirements, costs, schedule, technology, design, and production feasibility. GAO also noted that, given the complexity and interdependence within the Constellation Program, these challenges were significant. In April 2008, GAO again testified that while NASA was working toward a preliminary design review for Ares I and Orion, there were considerable unknowns as to whether NASA's plans could be executed within schedule and cost parameters because NASA was still in the process of defining many performance requirements. Most recently, GAO stated that Constellation Program cost and schedule uncertainties persist because "NASA is still struggling to develop a solid business case—

including firm requirements, mature technologies, a knowledge-based acquisition strategy, a realistic cost estimate, and sufficient funding and time—needed to justify moving the Constellation program forward into the implementation phase.” The persistence of this identified systemic weakness in NASA’s most valuable program warrants scrutiny and immediate action to ensure the achievement of strategic goals.

Contract Management. With approximately 90 percent of NASA’s annual budget used for procuring material and services via contracts and grants, careful attention to the proper administration and monitoring of these vehicles is in the best interest of NASA and the taxpayer. Over the past year, the OIG focused considerable effort in this area and noted several weaknesses.

One of GAO’s criticisms of NASA’s contract management is the Agency’s inability to control cost. The NASA supplement to the Federal Acquisition Regulation (FAR) contains specific provisions to monitor contractor’s cost control performance. However, OIG found that NASA project managers deemphasized the importance of controlling costs, minimized the effectiveness of cost control, and gave the contractors minimal incentives to control costs. Specifically, NASA managers did not include cost control measures weighted at no less than 25 percent of the total weighted award evaluation factors. This resulted in the unsupported payment of award fees of \$16 million and 27 months of contract term extensions, valued at \$3.375 billion in one contract and \$233,600 on another, that were not in compliance with the regulation.

GAO has also questioned the effectiveness of award fee type contracts, which are intended to inspire better contractor performance but require significant oversight and documentation to justify the award. We found several instances in which a lack of oversight and documentation resulted in questionable awarding of these fees. Specifically, in one instance we found that performance evaluation factors used to assess a contractor’s performance were not sufficiently specific, did not provide the basis for a fair and objective assessment of the contractor’s performance, and provided little evidence that the approximately \$2.2 million in award fees were fully justified or an accurate reflection of the contractor’s performance. Similarly, in another instance, not only did we question the appropriateness of the award fee type contract but because the Agency’s performance evaluations were incomplete and did not comply with guidance, NASA’s overall assessment of the contractor performance may have been overstated.

As a result of GAO and OIG findings and recommendations, the Office of Procurement has made several changes to help improve the management of contracts. Specifically, the NASA supplement to the FAR has been revised to require documentation of a cost benefit analysis to support the use of award fees, the management of award fee contracts is being reviewed during the Procurement Management Reviews at each Center, and award fee ratings on selected programs and projects are reviewed during the monthly Baseline Performance Review. OIG will continue to monitor these efforts and evaluate their effectiveness in future work.

Small Business Innovation Research Program. OIG work has identified instances of fraud, waste, and abuse by Program participants that bring into question the effectiveness of the Program’s internal controls. Specifically, of the 46 SBIR investigations we closed since 2001, eight (17 percent) have resulted in criminal convictions, civil judgments, or administrative

corrective action. Our investigative and audit work has shown that some SBIR contractors received awards from multiple agencies for essentially the same work, submitted different proposals to multiple agencies but then provided all of them the same deliverable, or misrepresented information including the role of a principal investigator who was supposed to perform the research. In addition to initiating a comprehensive audit of NASA's management of the SBIR Program that will focus specifically on assessing the adequacy and implementation of the Program's internal controls, the OIG recommended that

- the Agency consider whether the SBIR program represents a weakness in internal controls that warrant monitoring as part of the Agency's implementation of OMB Circular A-123, "Management's Responsibility for Internal Control";
- the Director, Innovative Partnerships Program, take into consideration the OIG's past audit and investigative work concerning the SBIR Program when conducting the Statement of Assurance Process for 2009; and
- the Senior Assessment Team discuss NASA's SBIR Program and consider whether the Program's internal controls represent a vulnerability that should be monitored.

NASA is taking action to address these recommendations.

Standards of Ethical Conduct Compliance. There is a great deal of interaction between NASA and the private sector, including both industry and academia. Again, given that approximately 90 percent of NASA's budget is dedicated to contracts and grants, there is great incentive for private sector interests to influence NASA employees. There is also substantial interaction between NASA's scientists and researchers and those working for non-governmental entities, and incentives abound for such acts as sharing information that is sensitive but unclassified. Many NASA employees often seek to pursue financial opportunities in the private sector beyond their Government employment. With the interchange of talented personnel between the public and private sectors, the advent of term appointments, the use of Intergovernmental Personnel Act appointments, and the use of contractors to meet personnel needs, management is challenged to ensure that ethics laws and regulations applicable to each category are identified and followed. It is imperative that NASA employees, as stewards of NASA's mission and budget, are aware of and comply with the applicable ethics laws and regulations.

We believe that the Agency's commitment to ethics is crucial to maintaining the confidence of Congress and the taxpayer so that NASA can fulfill its mission to further science and technology and to explore the universe. NASA needs to meticulously scrutinize its processes for appointments to panels, boards, and committees that are charged with rendering independent evaluations of NASA programs and projects. The consequences of not having a strong commitment to ethics or of having a workforce that does not embrace a culture of ethical compliance not only undermines the public's trust in Government but inherently causes a further disruption in Agency programs, given the host of consequential activities such as bid protests, contract cancellations, and inquiries by the investigative arms of Congress and the OIG.

Following our April 2008 audit related to the establishment of the Orion Project's Standing Review Board (SRB), which found that 6 of the Orion SRB's 19 members were not fully independent of the Orion Project, we initiated a review of all Constellation Program SRBs to determine whether similar issues existed with their SRBs. Similarly, we found 21 SRB members—close to one-third of all non-Federal Constellation Program SRB members—with conflicts of interest and determined that each of the SRBs for Constellation Program included at least one non-Federal Government employee who was conflicted. Specifically, each SRB included at least one non-Federal Government employee who was an employee or consultant of a NASA contractor with an interest in or contract with either Constellation Program or one of its projects. This condition occurred because NASA's procedures for determining the independence of an SRB member were inadequate. Specifically, because the SRBs met the definition of Federal Advisory Committee Act (FACA)¹ committees but were not organized under FACA, they did not trigger the ethics review process associated with the establishment of FACA committees. Instead, NASA used a process that was lacking in both rigor and accuracy for determining independence of SRB members.

We do note the Office of the General Counsel's commitment to ethics compliance and awareness, as the Office expanded its resources in the past 3 years to focus on acquisition integrity. Nevertheless, ethics issues, for the Agency as a whole, still accounted for a significant number of cases and allegations examined by the OIG in recent fiscal years. Several of those investigations caused protracted procurements, some also led to criminal convictions of NASA employees. For example:

- A former Chief of Staff was convicted on Conflict of Interest and False Statement charges stemming from the steering of earmarked funds to a client of his private consulting company.
- An SBIR contractor submitted false financial reports and included family members on the company payroll.
- An Intergovernmental Personnel Act employee overcharged NASA for payroll and fringe benefit costs.
- A NASA scientist steered contracts to a company operated by his spouse.
- Source Evaluation Board information was leaked to a potential contractor during a bid protest.
- Employees were guilty of organizational conflicts of interest and unauthorized access to proprietary information.
- A former NASA employee used information gained from his position at NASA to give an unfair advantage to a prospective contractor.

¹ Title 5, United States Code Appendix, Sections 1–16, the Federal Advisory Committee Act (1972), as amended.

Although many of the examples are still under investigation, and may not be violations of applicable laws or regulations, they are emblematic of the types of allegations that arise with a technical workforce that works closely with the private sector to accomplish NASA's mission.

The OIG continues to work with Agency ethics officials to identify and address these issues through both training and enforcement; prudence would dictate that the Agency continue to examine the effectiveness of its ethics training and processes, given the continued number of ethics allegations and instances identified.

Information Technology (IT) Security

Although our focus is on NASA's need to strengthen its IT security program, we recognize that achieving this goal will occur through improvements in the Agency's overarching IT management practices. In the past, NASA has reported IT security as a material weakness in the Administrator's annual Statement of Assurance. Since then, NASA has implemented various solutions in an attempt to improve its IT security. These solutions have resulted in continued incremental improvements across NASA's IT infrastructure; however, challenges remain. Specifically, not all solutions have been fully implemented and ongoing breaches of NASA computer systems have resulted in the theft of sensitive data related to Agency programs, which adversely affected NASA's mission and resulted in millions of dollars in losses.

During FYs 2008 and 2009, the Agency reported taking steps to prevent future breaches of its computer systems by making progress on two key management initiatives related to IT security. First, NASA implemented the Cyber Threat Analysis Program to proactively detect and handle intrusions into NASA's cyber assets. The program includes threat analysis, identification, and reporting as well as advanced data forensics methods. Second, NASA initiated the Security Operations Center (SOC) project to consolidate Agency security operations and incident response capabilities. The SOC is expected to be fully operational in late FY 2010 and will provide the Agency with end-to-end visibility and real-time monitoring of its computer networks and systems. In addition, the Agency also reported making significant progress implementing corrective actions related to IT security weaknesses as well as meeting its annual requirements under the Federal Information Security Management Act (FISMA).

In 2008, the Office of the Chief Information Officer (OCIO) concluded that IT security no longer needed to be reported as a material weakness in the Administrator's annual Statement of Assurance, provided certain conditions were met. These conditions included substantiated progress implementing corrective actions related to IT security weaknesses, full implementation of the SOC, and favorable results from regular security compliance reviews. The OIG performed a limited review to independently assess NASA's actions. We found that NASA had closed 91 percent of the OIG recommendations to improve IT security in FYs 2005 through 2007, established the Cyber Threat Awareness Program, completed implementation planning for the SOC, and improved compliance with FISMA requirements for its systems to be certified and accredited. Based on our limited review, we agreed with the conclusion of the OCIO that IT security should no longer be reported as a material weakness. However, the threat to NASA's

computer networks and systems is tangible and evolving—both in scope and sophistication. As such, much work remains to be done in order for NASA to fully implement a sufficient and reliable IT security program.

For example, we identified an issue during our FY 2008 FISMA audit concerning the reporting of NASA's national security systems. Each year, OMB provides a FISMA reporting template for agencies to use in their annual FISMA reporting. The issue we identified related to information the Agency included in its responses to OMB regarding its national security systems. The subsequent OIG audit found that NASA did not comply with FISMA requirements for the reporting of national security systems for FYs 2007 and 2008 because NASA had not clearly assigned this responsibility to a specific NASA office. Further, NASA had not formally designated an entity with appropriate resources to complete the annual independent evaluations of its national security systems required by FISMA.

As part of our FY 2009 FISMA audit, we reviewed system certification and accreditation packages, security control tests, and contingency plan tests for 24 Agency and 5 external systems.² Our review sample included systems from all NASA Centers, NASA Headquarters, and the NASA Shared Services Center. We found that 89 percent of the 29 systems that we reviewed were certified and accredited. However, only 25 percent had security controls tested within the last year and only 50 percent met annual FISMA requirements for contingency plan testing. NASA also could not provide evidence of required contractor oversight for four of the five external systems in our sample. In addition, we found that only 2 percent of the plans of action and milestones (POA&Ms) related to the 29 systems reviewed addressed IT security weaknesses. Finally, results from a concurrent GAO audit of NASA's IT security program identified 129 weaknesses in controls that are intended to restrict access to NASA's data and systems.

The significance of the reported IT security weaknesses is brought into clearer focus when taken into account along with the burgeoning network-centric threats that NASA faces. NASA continues to undergo successful attacks as cyber attack technology, new phishing techniques, and spyware programs become more damaging with the advancement of technology. For example, in December 2008, three systems with regular access to a NASA Center's badging database were compromised. NASA was unable to determine whether the incidents resulted in the theft of personally identifiable information from the database because of a lack of data regarding the incident. However, the lack of adequate safeguards potentially exposed a significant number of employees of that Center to identity theft. In a separate incident at the same Center, intruders were able to steal large amounts of research data that included information protected under the International Traffic in Arms Regulations. The Center's lack of adequate access controls allowed the intruders access to a great deal of data across a number of programs. Although only one legitimate user's account had been compromised initially, poorly implemented access controls allowed the intruders to achieve much greater success than they would have realized in a

² NASA Standard Operating Procedure, ITS-SOP-0033, "External System Identification and IT Security Requirements," July 19, 2007, defines an external system as an IT system used by NASA to store or process "NASA information that is critical to the mission or operations of NASA. . . . External systems are generally owned by outside agencies, contractors, universities, or other organizations and provide services to other customers besides NASA."

more controlled network environment. NASA's efforts to improve its IT security and management should decrease the likelihood of similar incidents in the future.

Although the ongoing development and implementation of both the Cyber Threat Analysis Program and the SOC are representative of the Agency's progress, the Agency is still developing and implementing various other projects involving incident management. For example, the implementation of the SOC is still incomplete. Additional time will also be required to demonstrate the effectiveness of this program.