

**United States Department of Energy  
Office of Hearings and Appeals**

In the Matter of Nancy Milburn )  
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Filing Date: November 27, 2020 )  
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Case No.: FIA-21-0002

Issued: December 11, 2020

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**Decision and Order**

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On November 25, 2020, Nancy Milburn (Appellant), a partner in the firm Arnold & Porter Kaye Scholer, LLP (Arnold & Porter), appealed a Determination Letter issued to her from the Department of Energy’s (DOE) Office of Public Information (OPI) regarding Request No. HO-2019-01130-F. In that determination letter, OPI responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 522, as implemented by the DOE in 10 C.F.R. Part 1004. OPI released six documents in their entirety. The Appellant argues that, not only was the final determination letter conclusory in nature, but that the DOE failed to complete an adequate search for all responsive records.

**A. Background**

On July 11, 2019, the Appellant submitted a FOIA request, asking for the following:

- A. All records relating to hydrocarbon or other mineral exploration and production activities associated with the West Hackberry Strategic Petroleum Reserve or on or near the property owned by the federal government for purposes of operating the West Hackberry Strategic Petroleum Reserve;
- B. All records relating to brine operations conducted prior to the development of the West Hackberry Strategic Petroleum Reserve on or near the property now owned by the federal government for purposes of operating the West Hackberry Strategic Petroleum Reserve, including without limitation brine operations performed by Mathieson Alkali Works, Inc., Mathieson Chemical Corporation, Olin Mathieson Chemical Corporation, and/or Olin Corporation;
- C. All records relating to hydrocarbon storage operations conducted prior to the development of the West Hackberry Strategic Petroleum Reserve on or near the property now owned by the federal government for purposes of operating the West Hackberry Strategic Petroleum

Reserve, including without limitation hydrocarbon storage operations performed by Cities Service Refining Corporation, Cities Service Oil Company, and/or Cities Service Company;

- D. All records relating to releases of brine associated with the West Hackberry Strategic Petroleum Reserve;
- E. All records relating to spills or releases of chemicals or harmful or potentially harmful materials in connection with the West Hackberry Strategic Petroleum Reserve;
- F. All records relating to or reflecting environmental impacts associated with, or potentially associated with, the construction, use, maintenance, or other activities of the West Hackberry Strategic Petroleum Reserve, including but not limited to geological impacts, hydrogeological impacts, impacts to surface water, ecological impacts, land loss, or contamination;
- G. All records relating to monitoring, assessment, or observation of any potential environmental impacts associated with the West Hackberry Strategic Petroleum Reserve;
- H. All records relating to or reflecting subsidence associated with the West Hackberry Strategic Petroleum Reserve;
- I. All records relating to mitigation, restoration, or other restorative work performed or contemplated by the DOE or others to address environmental impacts potentially or actually caused by the West Hackberry Strategic Petroleum Reserve;
- J. All records relating to purchases of property, interests in property, or other rights obtained by the federal government or any of its agencies for purposes of constructing and/or operating the West Hackberry Strategic Petroleum Reserve; and
- K. All records relating to leases, licenses, or other permissions given to private companies, governmental bodies, or individuals to perform activities of any kind on federally-owned land in the West Hackberry Strategic Petroleum Reserve area, including but not limited to:
  - 1. U.S. Army Corps of Engineers;
  - 2. U.S. Environmental Protection Agency;
  - 3. U.S. Fish and Wildlife Service;
  - 4. U.S. Department of Agriculture;
  - 5. Louisiana Department of Natural Resources;
  - 6. Louisiana Department of Wildlife and Fisheries;
  - 7. Louisiana Department of Environmental Quality (including without limitation its predecessor, the Louisiana Stream Control Commission);
  - 8. Louisiana Department of Agriculture and Forestry;
  - 9. Louisiana Office of Conservation;
  - 10. Louisiana Coastal Protection and Restoration Authority;
  - 11. Louisiana Department of Transportation and Development;

12. Cameron Parish Police Jury;
13. Cameron Parish Coastal Zone Management Advisory Committee;
14. Cameron Parish School Board;
15. Cameron Parish Gravity Drainage Districts;
16. Cameron Parish Port, Harbor & Terminal District;
17. Amoco Production Company;
18. BP America Production Company;
19. Atlantic Richfield Company;
20. Shell Oil Company;
21. SWEPI LP; or
22. Shell Western E&P Inc.

FOIA Request from Nancy Milburn at 1-4.

Soon after, an OPI FOIA analyst (Analyst) contacted the Appellant via email on July 22, 2019, encouraging the Appellant to examine the DOE's Office of Science and Technical Information's website, OSTI.gov, for public information that is potentially responsive to the Appellant's request. Email from Nicholas Mantzaris to Nancy Milburn at 1 (July 22, 2019); Appellant's Exhibit 4 at 1. The email stated that "[t]he search term 'West Hackberry' came back with 35 hits dating from 1976 to 2019. *Id.* A July 29, 2019 response stated that an initial examination of the OSTI.gov website did not contain information responsive to requests B, C, J, and K. Email from Katie Campbell to Nicholas Mantzaris at 1 (July 29, 2019); Appellant's Exhibit 5 at 1.

On August 16, 2019, the Analyst emailed an associate of Arnold & Porter, Ms. Campbell, providing her with weblinks to publicly available information pertaining to requests B, C, and J. Email from Nicholas Mantzaris to Katie Campbell at 1-2 (August 16, 2019); Appellant's Exhibit 6 at 1-2. The Appellant submitted a revised FOIA request to OPI on September 25, 2019. Revised FOIA Request from Nancy Milburn to Nicholas Mantzaris at 4 (September 25, 2019); Appellant's Exhibit 8 at 1-4. In the Amended Request, the Appellant sought:

- A. Annual reports on the Strategic Petroleum Reserves which reference the West Hackberry Strategic Petroleum Reserve, including annual environmental reports and reports issued pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), for 1977-2018, *except* for reports relating exclusively to oceanographic and offshore activities, and *except* for the following reports, which are publicly available:
  1. 1989 Strategic Petroleum Reserve Environmental Site Report
  2. 1992 Strategic Petroleum Reserve Environmental Site Report
  3. Annual report to Congress for Fiscal year 1992 pursuant to CERCLA, as amended by the Superfund Amendments and Reauthorization Act Section 120(e)(5).
  4. 1994 Strategic Petroleum Reserve Annual Report
  5. 1995 Strategic Petroleum Reserve Environmental Site Report
  6. 1996 Strategic Petroleum Reserve Environmental Site Report
  7. 1997 Strategic Petroleum Reserve Environmental Site Report
  8. 1998 Strategic Petroleum Reserve Annual Report

- B. All records relating to brine operations conducted prior to the development of the West Hackberry Strategic Petroleum Reserve on or near the property now owned by the federal government for purposes of operating the West Hackberry Strategic Petroleum Reserve, including without limitation brine operations performed by Mathieson Alkali Works, Inc., Mathieson Chemical Corporation, Olin Mathieson Chemical Corporation, and/or Olin Corporation;
- C. All records relating to hydrocarbon storage operations conducted prior to the development of the West Hackberry Strategic Petroleum Reserve on or near the property now owned by the federal government for purposes of operating the West Hackberry Strategic Petroleum Reserve, including without limitation hydrocarbon storage operations performed by Cities Service Refining Corporation, Cities Service Oil Company, and/or Cities Service Company;
- D. All records relating to releases of brine in or around the West Hackberry Strategic Petroleum Reserve area, including in connection with the use of injection wells, pits, ditches or ponds for brine disposal (excluding documents relating exclusively to offshore brine releases);
- E. All records relating to spills or releases of chemicals or harmful or potentially harmful materials in or around the West Hackberry Strategic Petroleum Reserve area;
- F. All reports relating to environmental impacts associated with, the construction, use, maintenance, or other activities of the West Hackberry Strategic Petroleum Reserve, including but not limited to geological impacts, hydrogeological impacts, impacts to surface water, ecological impacts, land loss, or contamination, excluding documents relating exclusively to offshore or oceanographic impacts;
- G. All reports relating to monitoring, assessment, or observation of any potential environmental impacts associated with the West Hackberry Strategic Petroleum Reserve, excluding documents relating exclusively to offshore or oceanographic impacts;
- H. All records relating to remediation, restoration, or other restorative work performed or contemplated by the DOE or others to address environmental impacts potentially or actually caused by the West Hackberry Strategic Petroleum Reserve; and
- I. All records relating to leases granted by DOE or other federal entities for use of federally owned land in the West Hackberry Strategic Petroleum Reserve area.

*Id.*

In an October 31, 2019, email, OPI provided Ms. Campbell with additional website links where more responsive documents could be found. Email from Nicholas Mantzaris to Katie Campbell at 1-2 (October 31, 2019); Appellant's Exhibit 10 at 1-2. The communication also indicated that for requests B and C, the DOE would not have responsive documents for the period prior to the federal

development of the West Hackberry site. *Id.* Further, regarding requests H and I, the email simply stated that there were “[n]o responsive documents.” *Id.* After some subsequent communications between Ms. Campbell and OPI, Ms. Campbell clarified that she was still seeking “pre-1982, archived materials *in addition to* the post-1982 materials[,]” and that the September 25, 2019, amendment “still stand[s] as drafted.” Email from Katie Campbell to Traci McCoy at 1; Appellant’s Exhibit 13 at 1.

OPI’s final determination letter regarding the Appellant’s FOIA request was issued on August 28, 2020. Final Determination Letter from Alexander C. Morris to Nancy Milburn at 1-9 (August 28, 2020). The Determination Letter indicated that the DOE’s Office of Fossil Energy (FE) was tasked with conducting the search for documents, and having located six responsive documents, OPI was releasing the aforementioned documents in their entirety. Final Determination Letter at 4. The Appellant alleges that the final determination letter was conclusory and that an adequate search for documents had not been conducted. *Id.* at 9-12.

## B. Analysis

### Adequacy of Search

In responding to a request for information filed under the FOIA, it is well established that an agency must “conduct a search reasonably calculated to uncover all relevant documents.” *Truitt v. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard of reasonableness we apply “does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Dep’t of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord* *Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate, and whether the search conducted was reasonable depends on the facts of each case. *See, e.g., In the Matter of Ayyakkannu Manivannan*, Case No. FIA-17-0035 (2017); *Coffey v. Bureau of Land Mgmt.*, 249 F. Supp. 3d 488, 497 (D.C.C. 2017) (citing *Weisberg v. Dep’t of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)).

In the instant case, as part of standard procedure, OHA requested that OPI provide a copy of the search certificates for all searches performed pursuant to the FOIA request. Email from Noorassa Rahimzadeh to Iwetta Pyc at 1 (November 20, 2020). The OPI provided a search certificate indicating that on October 24, 2020, automated and manual searches were conducted for annual reports on the Petroleum Reserves Website, for annual reports kept in the file room, and for annual reports located in the “O drive.” Search Certification Form from December 10, 2020. As an initial matter, only request A of the Appellant’s amended FOIA request pertains to annual reports, and there is nothing in the search certificate that indicates FE searched for responsive documents outside of the annual reports that were sought after in request A. Although the record does contain emails from OPI to the Appellant indicating that documents responsive to requests B and C can be found through public sources and that they were unable to locate any documents responsive to requests H and I, we have no way to verify how searches were conducted for responsive documents pursuant to requests B through I of the Appellant’s amended FOIA Request and whether the searches were reasonably calculated to uncover responsive documents.

We therefore grant the Appeal and remand the case back to OPI so that the requested search can be conducted pursuant to the scope established by the Appellant's amended FOIA request.

### **Order**

It is hereby ordered that the Appeal filed November 25, 2020, by Ms. Nancy Milburn, Case file No. FIA-21-0002, is granted in accordance with the explanation provided above.

This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 522(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

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Poli A. Marmolejos  
Director  
Office of Hearings and Appeals