

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

In the Matter of Nancy Milburn)

Filing Date: August 24 , 2021)

Case No.: FIA-21-0015

Issued: September 20, 2021

Decision and Order

On August 24, 2021, Nancy Milburn (Appellant), a partner in the firm Arnold & Porter Kaye Scholer, LLP (Arnold & Porter), appealed a Partial Determination Letter and a Final Determination Letter issued to her by the Department of Energy’s (DOE) Office of Public Information (OPI) regarding Request No. HO-2020-01130-F. In those determinations, OPI responded to a request filed under the Freedom of Information Act (FOIA), 5. U.S.C. § 522, as implemented by DOE in 10 C.F.R. Part 1004. OPI reviewed Appellant’s revised FOIA Request a second time after Appellant’s appeal concerning the same revised FOIA request was remanded to OPI by DOE’s Office of Hearings and Appeals (OHA) on December 11, 2020. *See In the Matter of Nancy Milburn*, OHA Case No. FIA-21-0002 at 5 (2020) (*Milburn*).¹ In the Partial Determination Letter, OPI released 19 documents in their entirety, and in the Final Determination Letter, OPI released nine additional documents, some of which OPI partially withheld under FOIA Exemptions 5 and 6.² Appellant’s present appeal challenges the adequacy of the search. As explained below, we deny Appellant’s appeal.

I. Background

On July 11, 2019, the Appellant submitted a FOIA request seeking eleven categories of records, all relating to the West Hackberry Strategic Petroleum Reserve. *See Appeal at 3* (summarizing Appellant’s FOIA request). On September 25, 2019, the Appellant submitted a revised FOIA request (hereinafter “Revised Request”), asking for the following:

- 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 Decisions issued by OHA are available on the OHA website located at <http://www.energy.gov/OHA>.

² Appellant’s appeal does not challenge OPI’s redactions made pursuant to Exemptions 5 and 6.

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 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.

Revised FOIA Request from Nancy Milburn to Nicholas Mantzaris at 4 (September 25, 2019); Appeal Exhibit (Ex.) 8; Appeal Ex. 9.

OPI issued a final determination letter on August 28, 2020, in which it indicated that DOE's Office of Fossil Energy (FE) conducted the search for responsive documents and provided the Appellant with six documents in their entirety. *See Milburn* at 5 (2020).³ In this Appeal, Appellant's challenged the adequacy of the search for responsive documents. *Id.* at 1. After review of the record, OHA concluded that it was unable to verify how searches were conducted for responsive documents regarding items B through I of Appellant's Revised Request and whether the searches were reasonably calculated to uncover responsive documents. *Id.* at 5. On December 11, 2020, OHA granted the Appellant's appeal and remanded the matter to OPI. *Id.* at 6.

Following OHA's remand decision, OPI referred the case to FE to conduct the requested searches consistent with the scope of Appellant's Revised Request. In January 2021, both the FE Strategic Petroleum Reserve Project Management Office (SPRPMO) and FE Office of Petroleum Reserves (OPR) conducted searches.⁴ SPRPMO Search Certification (January 14, 2021); OPR Search Certification (January 14, 2021). The January 2021 SPRMO Search Certification stated that the requests for items D and E were extremely broad and that further clarification and narrowing was needed for those items if Appellant sought additional information. SPRPMO Search Certification at 2 (January 14, 2021). On March 23, 2021, OPI emailed Appellant requesting that Appellant answer clarifying questions regarding items D and E of its Revised Request, and OPI requested that Appellant submit any additional search terms that Appellant would like DOE to use in its search for responsive documents. Appeal Ex. 26. Subsequently, on April 1, 2021, Appellant clarified the scope of items D and E, and provided additional search terms for items B through E, and item H.⁵ Appeal Ex. 27-Email from Appellant to Pyc, Iwetta-OPI (April 1, 2021). SPRPMO then conducted a final search based on the information and additional suggested search terms provided by Appellant. SPRPMO Search Certification and Attachment 1-criteria and methods used

³ Decisions issued by OHA are available on the OHA website located at <http://www.energy.gov/OHA>.

⁴ OPR's search was limited to a specific subcategory of item A - i.e., the annual reports on the Strategic Petroleum Reserves that referenced the West Hackberry SPR, because OPR is the office responsible for creating those reports. SPRPMO conducted searches for the remaining subcategories of item A and searches for items B through I.

⁵ Appellant's clarification identified 1975-2019 as the time period for items D and E. Appeal Ex. 27. For item D, Appellant clarified it sought all records relating to releases (including but not limited to spills, discharges, or leaks) of any type of brine in or around West Hackberry SPR area (i.e., surrounding waters and marsh, but not releases to the Gulf of Mexico), including but not limited to records relating to releases that are reportable to federal and/or state regulatory agencies, and records related to nonreportable releases. *Id.* For item E, Appellant clarified it sought all records relating to spills or releases of any chemicals or any harmful or potentially harmful materials (including but not limited to oil, petroleum, petrochemicals, or contaminants) in or around the West Hackberry SPR area relating to releases that are reportable to federal and/or state regulatory agencies, and records related to nonreportable releases or spills. *Id.*

in search (May 13, 2021); *see* Appeal Ex. 27-Email from Appellant to Pyc, Iwetta-OPI (April 1, 2021).

OPI issued a Partial Determination Letter in which it released 19 documents in their entirety which were responsive to item A of Appellant’s Revised Request. (Partial Determination Letter from Alexander C. Morris to Nancy Milburn (May 26, 2021). OPI then issued a Final Determination Letter in which it released nine additional documents, some of which were partially redacted, that were responsive to items B, D, E, G, and H. Determination Letter from Alexander C. Morris to Nancy Milburn (July 26, 2021); Memorandum of Telephone Conversation between Chidi Nwosu and Brenda B. Balzon, OHA (September 10, 2021).

On August 24, 2021, OHA received Appellant’s appeal. Appellant asserts that OPI’s May 26, 2021, Partial Determination Letter with 19 documents that OPI released in response to item A is an inadequate search because it did not address the other two subcategories of requested annual reports for specified years: SPR Environmental Site Reports and annual reports to Congress pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). Appeal at 13. Additionally, Appellant argues that the Partial Determination Letter did not address Appellant’s request to search “archived, hard copy materials likely to include responsive documents from 1975 forward.” *Id.*

Regarding OPI’s July 21, 2021, Final Determination Letter, Appellant argues that DOE failed to address item F, did not provide the search terms used nor the locations search for each category of records sought, and did not describe its search methods for items C and I. *Id.* Appellant also indicates that DOE did not use the additional suggested search terms that Appellant provided to DOE. Appeal at 15–16. Additionally, Appellant argues that DOE did not explain what efforts it made to search for responsive records from 1975 forward in microfilm and other archived materials. *Id.* Appellant further asserts that DOE did not meet its obligation to search “all possible place[s] that responsive records are likely to be located,” including the National Archives and Records Administration’s [NARA] Federal Records Centers...and DOE’s searches were inadequate because they were not “reasonably calculated to uncover all relevant documents.”⁶ Appeal at 18.

II. Analysis

Adequacy of Search

⁶ Appellant asserts that “[a]mong other locations, DOE must search for records stored at National Archives and Records Administration’s [NARA] Federal Records Centers because those records remain under DOE control.” Appeal at 18, n.18.

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.

A lack of responsive records does not necessarily indicate that a search was unreasonable. Indeed, a search’s adequacy is “determined not by the fruits of the search, but by the appropriateness of [its] methods.” *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). We have not hesitated to remand a case where it is evident that the search conducted was, in fact, inadequate. *See, e.g., American Oversight*, OHA Case No. FIA-19-0010 (2019).

OHA contacted a representative from DOE FE Office of Petroleum Reserves (OPR) regarding the search conducted for item A. The OPR representative had conducted the search for annual reports on the Strategic Petroleum Reserves which reference West Hackberry Strategic Petroleum Reserve (West Hackberry SPR). Memorandum of Telephone Conversation between Tammy Hairston, FE-46, and Brenda B. Balzon (September 14, 2021); OPR provided OHA with a search certificate stating that automated and other searches were conducted for annual reports on the Office of Petroleum Reserves website and Strategic Petroleum Reserves (SPR) website, and that OPR searched using terms including “West Hackberry”, “environmental reports (1977-2018)”, and “annual reports.” OPR Search Certification (January 14, 2021). The search certificate also stated that the annual reports are public records and can be located on the OPR website which was also provided in the search certificate. *Id.* In addition, the OPR representative informed OHA that as part of her search, she also performed a manual search for annual reports from 1977 through 2017.⁷ Memorandum of Telephone Conversation between Tammy Hairston, FE-46, and Brenda B. Balzon (September 14, 2021). Further, the OPR representative explained that OPR is responsible for creating the Annual Reports regarding all the Strategic Petroleum Reserves (SPR) including but not limited to the West Hackberry SPR, and that OPR works with the DOE SPR field offices to obtain content from the specific SPR sites which is included in OPR’s Annual Reports. *Id.* Moreover, OPR stated that its Annual Reports would either be located in OPR’s manual files or on OPR’s website and that OPR searched in both those locations. *Id.* Thus, OPR did not search NARA for Annual Reports. *Id.*

OHA also contacted the FOIA Officer for the DOE FE Strategic Petroleum Reserve Project Management Office (SPRPMO). SPRPMO conducted searches for items A through I. SPRPMO Search Certification and Attachment 1-criteria and methods used in search (January 14, 2021); SPRPMO Search Certification and Attachment 1-criteria and methods used in search (May 13, 2021); Memorandum of Telephone Conversation between Kristin Frischhertz, FE-445, and Brenda B. Balzon (September 15, 2021) (“September 15, 2021, Memo”). Prior to conducting its final search, SPRPMO met with OPI to review and discuss Appellant’s April 1, 2021, email response

⁷ The OPR Search Certificate reflects that the types of searches OPR conducted included “Other.” OPR Search Certificate at 1 (January 14, 2021). The OPR representative stated that she inadvertently did not mark “Manual” although she did in fact also conduct a manual search of OPR’s files. Memorandum of Telephone Conversation between Tammy Hairston, FE-46, and Brenda B. Balzon (September 14, 2021).

clarifying its request for items D and E, as well as providing additional suggested search terms for items B through E, and item H. Email from Chidinma Nwosu, OPI, to FE officials (May 12, 2021); September 15, 2021 Memo. Subsequent to that meeting, SPRPMO conducted a new search based on the information and additional search terms provided in Appellant's April 1, 2021 email response. September 15, 2021 Memo. A review of the SPRMO May 13, 2021, Search Certification and Attachment 1, which contained further details of the search methods for each category of requested documents for items A through I, shows that the search terms used corresponded to the Appellant's additional suggested search terms.

SPRMO searched the remaining subcategories for item A which is evidenced by the May 13, 2021, search certification and Attachment 1. Specifically, SPRPMO searched their records for the other types of requested reports, i.e., annual environmental reports and reports issued pursuant to CERCLA for 1977-2018. SPRMO used search terms including CERCLA Reports, West Hackberry, brine releases, searched in both the SPRPMO Public Site and SPRPMO's SharePoint site from the time period from 1975-2019. The fact that SPRPMO's search did not result in any responsive documents to the additional subcategories of item A does not render the search inadequate. The search methods sufficiently covered the time frame requested to include archived records, the search certificates described how the search was conducted, and the search terms used where consistent with Appellant's Revised Request. Moreover, since SPRMO maintains records for West Hackberry SPR, SPRMO was a logical choice for the location of potential records. In addition, While SPRMO was unable to find annual reports for every calendar year requested, it did provide Appellant with the annual reports it found for the requested calendar years that were not available on the OPR public websites.

Regarding items B and C, the SPRPMO search certificate and Attachment 1 reflect that SPRPMO searched for requested records using Appellant's additional suggested search terms such as many different iterations of "brine, brining" as well as "Hackberry, West Hackberry, Olin, hydrocarbon, oil, gas, petroleum" in addition to terms related to storage and strategic reserve wells. Further, regarding items B and C which both requested documents prior to the development of the West Hackberry SPR, SPRPMO explained that SPRPMO does not have records of brine operations or other operations conducted prior to the time when the West Hackberry site was federally owned. Regarding item C, SPRPMO stated that West Hackberry SPR does not perform hydrocarbon storage operations, so SPRPMO would not have requested records pertaining to item C. Nevertheless, in a good faith effort, SPRPMO still searched for item C records using the search terms suggested by Appellant. Based on the detailed description above, we find that DOE's search was reasonably calculated to discover responsive documents.

Regarding items D and E, SPRPMO searched the SPR Public Website, Environmental Safety and Health documents, and SharePoint for information related to West Hackberry, Hackberry, Cameron, brine, oil, chemical spills, releases, spills, discharges, disposal, ditches, pits, ponds, brine, saltwater, petrochemicals, contaminants, chemicals, and harmful materials and SPRPMO used Appellant's suggested search terms. Further, SPRPMO explained that small drips or spills that do not meet the regulatory definition for reportable spills are immediately cleaned up, and that

this provides a logical rationale for why documents for nonreportable spills may not exist. Accordingly, we find that DOE's search for items D and E was adequate.

Items F, G, and H involve requests for records associated with potential and actual environmental impacts associated with West Hackberry SPR. Regarding items F and G, SPRPMO searched the SPR Public Website and SPRPMO SharePoint database using Appellant's search terms and several additional terms that would reasonably result in identifying existing responsive documents. Search terms included but were not limited to West Hackberry Environmental Impacts, West Hackberry geological impacts, impacts to surface water, and harmful materials, petroleum, and contaminants. These terms are related to potential environmental impacts and environmental impacts involving West Hackberry which supports the conclusion that the search was adequate. In addition, the representative who conducted the search for SPRPMO's Environmental Safety and Health (ES & H) division confirmed that ES & H conducted a comprehensive search of the SPR digitized official record for the time period and keywords specified in the original FOIA request. Thus, if pre-1982 archived responsive documents existed, the search for items F and G would have identified those documents. This is also true of the search performed for item H, which was a search involving remediation, or other restorative work performed to address potential and actual environmental impacts caused by West Hackberry SPR. SPRPMO including its ES & H division similarly searched the SPR Public Website and SPRPMO SharePoint database for the requested time period, and included Appellant's suggested search terms in its search. Searches were done within SPR SharePoint sites where official documents are managed and archived. Because the locations searched are the repositories for existing documents, contrary to Appellant's arguments, DOE did search for pre-1982 archived documents.

Finally, Appellant asserts that DOE did not describe its search methods for item I in its final determination letter. SPRPMO's search certification and Attachment 1 provided a significantly detailed description of the search it conducted for item I. Specifically, multiple divisions of SPRPMO assisted in conducting searches for item I. A review was conducted of all real estate files in the SPR office including, but not limited to West Hackberry files. A review was also conducted of all real estate files on the SPR SharePoint site. The Senior Site Representative at the West Hackberry site also stated that there have not been land leases at the site. Over 5 hours was spent researching this item and no responsive documents were found. SPRPMO's Real Estate Office could not find any leases granted by DOE or other federal entities for use of federally owned land in the West Hackberry Strategic Petroleum Reserve area. Based on the above description of the search methods for the requested records, we find that DOE conducted an adequate search for item I.

OHA reviewed the nine documents submitted with OPI's final determination letter and found them to contain responsive documents. Each document was labeled according to its responsiveness to a specific item or items of Appellant's Revised Request. For example, OPI labeled Document 1 as "Item B", and included information regarding brine production, petroleum storage, in addition to operations conducted by Olin Mathieson, a corporation which Appellant sought records about regarding West Hackberry SPR. OPI Final Response-Attachment 1 at 1, 3. Document 2 was labeled responsive to Item D and included information on brine pumps and brine disposal. OPI Final Response-Attachment 1 at 37, 54. Document 5 was labeled Item G and is responsive because it includes email and other records referencing risk assessments by SPRO, discussion of SPRO

risk assessment processes, and identification of SPR sites in need of remediation. OPI Final Response-Attachment 1 at 105–117. Since the document identified risk including indications of risks that relate to potential environmental impacts associated with SPR sites, this item would be responsive to item G. Similarly, Document 6 is responsive to Item G because it discusses topics such as SPROs oil brine interface surveys that are conducted to detect changes in oil-brine interface, and effects of temperature changes. OPI Final Response-Attachment 1 at 119. The topics discussed provide discussion on monitoring of factors that have potential environmental impacts involving the SPR sites such as Hackberry SPR.

Accordingly, we conclude that the search was reasonably calculated to uncover the records requested by Appellant, and that the search was therefore adequate.

Order

It is hereby ordered that the Appeal filed by Ms. Nancy Milburn on August 24 , 2021, No. FIA-21-0015, is denied.

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:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
Email: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals