UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
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Ref: 8ENF-L

February 16, 2012

By email and First Class Mail
Linnea Brown, Esq.
Temkin Wielga & Hardt LLP
1900 Wazee Street, Suite 303
Denver, Colorado 80202
Email: brown@twhlaw.com

Re: Encana's Consolidated Freedom of Information Request regarding the Pavillion Field Area
FOIA Request Number 08-FOI-00114-12

Dear Ms. Brown:

In December 2011 Encana sent separate Freedom of Information Act (FOIA) requests regarding the "Pavillion Field Area" to each of several United States Environmental Protection Agency (EPA) offices: Region 8, Region 3, the Robert S. Kerr Environmental Research Center, and the Office of Research and Development (ORD).[1] Through a series of overlapping and redundant inquiries, these requests sought: (1) "all communications" within, to, or from EPA concerning the Pavillion field; (2) multiple types of technical documents; and (3) all documents "related to" several categories of technical information. Since receiving your requests we have been diligently working to manage the complex task of responding. This task is complex because of the overlap among and within your requests, the breadth of many of the requests, the voluminous nature of the documents sought, and their location in multiple EPA offices. To date EPA has clarified some of the ambiguities in your requests, administratively consolidated the four original requests into a single request to allow a more efficient response, prepared to conduct the massive search and review dictated by your "all communications" and "related to" requests, and publicly posted online more than seven hundred documents, many of which are described by your request. At each stage we clearly communicated our progress to you through extensive written correspondence and telephone conversations.

Your assistance in discussions concerning interpretive issues and consolidating the requests has been helpful, but your letter dated February 8, 2012 contains inaccuracies. It accuses EPA of a

[1] These four requests were assigned tracking numbers 08-FOI-00076-12, 03-FOI-00216-12, HF-FOI-00469-12/08-FOI-00090-12, and 08-FOI-000089-12, respectively.

"continued failure to expeditiously and fully respond" to your requests, despite our early production of hundreds of the technical documents you specifically seek and the impossibility of completing a response to your requests within a few short weeks. You assert that the "delays are untenable under FOIA," although we informed you early in our dialogue about this matter that under EPA's regulations, the breadth of your requests creates "unusual circumstances," for which FOIA specifically allows a longer response time. Despite the fact that the requests for "all communications" would involve a very large number of attorney-client communications and other FOIA privileged documents, with associated costly and time-consuming review needs, you declined to narrow your request to exclude any records exempt from disclosure under FOIA. Aside from altering the timetable for your FOIA request to not initially seeking redacted documents, you have not narrowed the scope of your request in any meaningful respect. Accordingly, I must disagree with your characterizations of EPA's efforts to date.

In the remainder of this letter we provide a comprehensive update on the status of our response to your requests, including information regarding specific documents.

Consolidation of the original four FOIA requests

As we previously indicated, to ensure consistency and efficiency and reduce duplication of effort, we have administratively consolidated the four original requests under a new tracking number: **08-FOI-00114-12**. This letter and its Attachment 1 restate Encana's consolidated FOIA request in full.

To ensure that the consolidation would accurately capture your requests, various EPA attorneys discussed it with you in considerable detail, along with related questions of clarification and narrowing of scope. On January 13, 2012, you sent an email with a table consolidating the four original FOIA Requests (Attachment 1; for future reference, referred to as the Consolidated FOIA Request Table).[2] The Consolidated FOIA Request Table contains *italic text* in areas where you modified the original four FOIA requests. After you sent the January 13 email containing the Consolidated FOIA Request Table, you provided additional clarification in a January 13 conversation with Michelle Marcu, EPA attorney, as follows:

1. In addition to the modifications set forth in the Consolidated FOIA Request in *italic text*, Encana agreed to narrow and clarify the scope of the original four FOIA Requests in your December 20, 2011 and January 23, 2012 letters, specifically as follows:

    a. Encana does not seek documents concerning its gas processing plant located to the east of the Pavillion Field area.

    b. Encana does not seek National Environmental Policy Act (NEPA) documents for other projects (other "federal actions") even if those records reference the Pavillion Field area.

    c. Encana agrees that it requests only a list of the documents that EPA determines are FOIA-exempt, but will not initially seek redacted copies of those documents listed.

[2] Please note, per your January 13, 2012 conversation with Ms. Marcu, she modified the formatting of the EXCEL spreadsheet to allow printing of the entire EXCEL document. We also included the consolidated FOIA Request Number throughout the document. These are the only modifications we made to your original document.

We will provide you with the list of withheld records, consistent with 40 C.F.R.§ 2.104(h), as soon as practicable after we provide you with all releasable, responsive documents.

d. The Consolidated FOIA Request excludes all responsive records posted on EPA's website before January 5, 2012 or previously provided by EPA to Encana.

You also requested that if EPA determines that a record Encana has requested does not exist, EPA inform Encana in writing as soon as practicable that the record does not exist. As Ms. Marcu and Michael Boydston, EPA attorney, have indicated in multiple conversations, EPA agrees and intends to so inform you as applicable.

2. A number of subsections of Encana's Consolidated FOIA Request dated January 13, 2012 use the language "all records." During your January 13 conversation with Ms. Marcu, you provided "clarifying" language for these subsections of the Consolidated FOIA Request. As you indicated, the following subsections of the Consolidated FOIA Request for "all records" means *everything*, including "Laboratory reports, sample custody, sample preservation, sample storage, sample and reference material (spiking solution and calibration standards) preparation, raw instrumental records (e.g. chromatograms, spectra, integration reports) for calibrations, samples and QC measures. Electronic data files (raw and processed) for GC, GC/MS and LC/MS. Includes the third party data quality assessments, including field audits, laboratory audits, and data validation efforts. Method detection limit studies, precision and accuracy studies." We understand that Encana provided this information by way of illustration and not to limit EPA's response to the questions.

   Please note that this clarifying language does not supersede the FOIA definition of records, which still applies.

   During your January 13 and 18 conversations with Ms. Marcu and in your January 23, 2012 letter, you indicated that the clarifying language should be applied to only the following subsections in the Consolidated FOIA Request: 1.8, 1.9, 1.10, 1.11, 1.12, 1.13, 1.14, 2.1 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 5.2, 5.3, 5.8, 5.9, 5.10., 5.11, 5.12, 5.13, 5.14.

In your January 23 letter, you agreed to the description of the consolidation in my January 18, 2012 letter with one exception: adding subsection 2.1 to the list of requests to which clarifying language should be applied. We have made that change.

EPA's Estimated Time and Cost to Respond to the Consolidated FOIA Request

In multiple written and oral communications (including your conversation with Ms. Marcu and Mr. Boydston today), EPA has informed you that Encana's FOIA requests seek voluminous records and that responding will involve search and review efforts in multiple EPA offices by many EPA personnel. Therefore, "unusual circumstances" exist so that that EPA's responses to the requests will require significantly more than twenty business days to complete. *See* 40 C.F.R. §§ 2.104(c) and (d). Additionally, EPA's costs of responding to the requests will substantially exceed $250.00, and prepayment of estimated costs will be required as provided at 40 C.F.R. § 2.107(j).

Taking into account the number of people with potentially responsive documents (estimated at more than 170 people with varying numbers of responsive documents each), their location in multiple EPA offices, the need to collect responsive documents, eliminate non-responsive documents, identify and eliminate duplicates, review documents for privilege determination, and complete other processing tasks, EPA estimates that it will be able to provide a complete response to Encana's Consolidated FOIA Request within six months from receipt of payment. We may be able to further refine this estimate as our search and review process proceeds, and if so will inform you accordingly. The estimated cost for EPA to respond is $114,360. As stated previously, EPA Region 8 requires prepayment to respond to FOIA requests above $250.00. 40 C.F.R. § 2.107(j). Please make the check for $114,360 payable to U.S. EPA (identify the FOIA Number 08-FOI-00114-12 on the check) and remit the payment to: EPA FOIA & Miscellaneous Payments, Cincinnati Finance Center, P.O. Box 979078, St. Louis, MO 63197-9000.

If the cost for EPA's response to the FOIA Request exceeds $114,360, EPA will send a bill for the remainder of the charges. If the cost is less than $114,360, EPA will refund the difference.

The cost and time estimates above are principally driven by the broad "all communications" and "all records" requests. If Encana elects to significantly narrow the scope of its request, it may decrease the length of time and the cost of response.

EPA's Approach to Responding to the Consolidated FOIA Request

Contrary to the accusations in your February 8 letter, EPA has been responsive to Encana's various requests for information to date and provided a significant amount of information even before Encana submitted its FOIA Requests:

1. On June 8, 2010, before the drilling of EPA's monitoring wells, EPA provided Encana the Quality Assurance Project Plan for the wells' construction.
2. On August 5, 2010, EPA representatives met with Encana to orally share the Phase 2 sampling results before the public meeting in which EPA released the data.
3. On June 17, 2011, EPA provided the Quality Assurance Project Plan for Sampling of the Monitoring Wells. (Nonetheless, you asked for this document in the Consolidated FOIA Request.)
4. On November 17, 2011, in response to a request from Encana, EPA provided, by email, a link to EPA's Pavillion website, where EPA posted gas chromatograms from the Region 8 Laboratory.
5. On November 29, 2011, in response to a request from Encana, EPA provided, by email, 42 files and extensive additional information regarding construction, completion and sampling of the monitoring wells, field logs for drilling and sampling, and analytical methods used by EPA's Robert S. Kerr Environmental Research Center.

Since receiving Encana's FOIA requests, we have provided many additional Pavillion documents to Encana and have posted a substantial amount of information online. We have already referred you to two relevant pages on EPA's Pavillion website: the home page (http://www.epa.gov/region8/superfund/wy/pavillion), and the Pavillion Site Documents page

(http://www.epa.gov/region8/superfund/wy/pavillion/docs.html). For several weeks the home page has contained the main documents and links such as the Draft Report, the Federal Register notices, ATSDR's Health Consultation Document, the January 2010 Sampling Results Fact Sheet, and the Final Analytical Report. The home page also contains links to 58 figures. Further, as Ms. Marcu informed you in emails on January 31 and February 2, 2012, EPA's Pavillion Site Documents page contains many additional documents. As of the date of this letter, EPA has posted over 700 documents on the Site Documents page. Together, these pages provide information that is encompassed within many of Encana's requests and provide the vast majority of technical information relevant to the review of EPA's draft report, "Investigation of Groundwater Contamination near Pavillion, Wyoming," dated December 8, 2011.

EPA intends to continue to provide to Encana, and to post on the website, releasable records as we are able to do so. In particular, we expect to be able to provide Encana with records (to the extent they exist, in addition to those already posted) that are responsive to Encana's more precise requests. As indicated above and detailed below, however, EPA has already posted publicly, and provided to Encana, documents that may be responsive to many of these more precise elements of Encana's Consolidated FOIA Requests:

1. Attachment 1 (the Monitoring Well Installation Work Plan Narrative) to the May 2010 Final Monitoring Well Installation Work Plan. [requests 1.1 and 5.1 of the Consolidated FOIA Request]

   Already posted on the Pavillion website. In our February 8, 2012 conversation, you acknowledged that Encana has viewed this document on the website.

2. Product specifications, including model names and numbers and equipment serial numbers where applicable, for all equipment installed or placed in either of the two EPA deep monitoring wells. [1.6, 5.6]

   EPA provided the information in EPA's possession to Encana by email dated November 29, 2011, before EPA received Encana's FOIA requests.

3. Records concerning the source and preparation of the standards used for adamantane, 1,3-dimethyldamantane, 2-butoxyethanol, tris(2-butoxyethyl) phosphate, squalene, and terpinol in water samples. [1.9, 2.2, 3.2, 5.9]

   EPA has posted information for the EPA Region 3 Laboratory. In the near future, EPA expects to publicly post information for the Region 8 Laboratory.

4. Records of the analytical method development done by the Robert S. Kerr Environmental Research Center or Shaw Environment and Infrastructure Inc. for all methods used in connection with water samples from the Pavillion Field area [1.10, 5.10]

   EPA is reviewing its records to determine whether any additional documents related to the development of analytical methods used at Pavillion remain.

5. MSDSs for all products and other chemicals used in connection with drilling, installation, cleaning and decontamination, and sampling of the two EPA deep groundwater wells,

including drilling chemicals, pipe dopes, solvents, cleaners, adhesives (including electrical or other tape), lubricants, and sealing agents. [1.5, 5.5]

On November 29, 2011, EPA provided this information to Encana by email; the information is also posted on EPA's Pavillion website.

Similarly, we expect to be able to provide Encana with various specific documents (again, to the extent we have not already done so) that are mentioned in otherwise broad requests:

1. Sampling and Analysis Plans, Quality Management Plans, and Quality Assurance Project Plans associated with the October 2010 Field Sampling Event. [1.7, 5.7]

   As indicated above, in June 2010 EPA provided Encana with QAPPs for drilling and sampling.

2. Documents concerning EPA's soil gas sampling efforts in the Pavillion Field area or any evaluation of the same [1.8, 5.8]

   EPA has posted all soil gas sample results on EPA's Pavillion webpage. EPA is reviewing related documents and will post them where appropriate as our review is completed.

3. Laboratory reports from Kerr, Shaw, and Region 3 for water samples from the Pavillion Field area. [1.12, 2.5, 5.12]

   EPA has posted this information on EPA's Pavillion website.

4. Chromatograms from Region 8 (including Region 8 Lab), Region 3 (including Region 3 Lab), Kerr, Shaw, or any other lab that EPA had analyze water samples from Pavillion. [1.13, 2.6, 3.6, 5.13]

   In an email dated November 29, 2011, EPA provided to Encana Region 8 Lab chromatograms for Phase 3 and 4. In January 2012, EPA posted on EPA's Pavillion website most chromatograms for other EPA Laboratories. EPA has encountered file formatting issues, but we anticipate that we will post the remaining chromatograms in the near future.

5. Mass spectra from Region 8 (including Region 8 Lab), Region 3 (including Region 3 Lab), Kerr, Shaw, or any other lab that EPA had analyze water samples from Pavillion using GC/MS, HPLC or equivalent methods [1.14, 2.7, 3.7, 5.14]

   EPA expects in the near future to provide this information to Encana and publicly post it on EPA's Pavillion website.

6. Documents related to the two deep monitoring wells, including:

   a. Records associated with the drilling, installation, or sampling of the monitoring wells. [2.1, 3.1, 5.2]

   b. Records of the methods and materials used in drilling the two EPA deep wells to join lengths of well casing together and the methods and chemicals used to clean

and decontaminate well casing and down hole drilling and monitoring equipment before its being placed down hole, including verification swab samples. [1.3, 5.3]

c. Records on disposal of cuttings, drilling fluids, muds and other materials, and any other products or chemicals used in drilling and installation of the two deep monitoring wells. [1.4, 5.4]

d. Records related to the discrepancies in reporting limits, detections, and analytical results between or among the analytical results from Region 3 (including Region 3 Lab), Region 8 (including Region 8 Lab), Kerr, Shaw, or any other laboratory that EPA had analyze water samples from the Pavillion Field area. [1.11, 2.4, 3.4, 5.11]

As described above, beginning in June 2010 EPA provided to Encana technical information detailing the drilling, construction, completion and sampling of EPA's monitoring wells, as well as documents pertaining to sample analysis and results. Additionally, EPA publicly posted the information on our Pavillion website.

You have also, in your February 8 letter, identified several types of records to which you request that EPA assign urgent priority. Several have already been addressed above; below we respond to the remainder using the numbers in your letter:

3. Documentation of the specific locations at which the July 7, 2011 PAV 01 and PAV 02 water samples were obtained.

   Samples labeled Pav 01 and Pav 02 on the analytical report dated 7/22/2011 (Technical Directive 8OA778SF) were archived samples from the October 2010 (Phase III) sampling and were not collected during a separate sampling event. Monitoring wells MW01 and MW02 were only sampled in October 2010 and April 2011. These samples were obtained from MW01 (Pav 01) and MW02 (Pav 02, and were acidified at the time of collection with hydrochloric acid. The report's reference to a 7/7/2011 collection date refers to the date that the samples were taken from the archived sample and poured into sample containers that were then submitted to the lab for analysis. The purpose of this analysis was to evaluate effects of acidification on organic constituents remaining in the archived samples.

6. Records of "citizens' complaints of taste and odor problems," and a "public petition" referenced by the Congressional Research Service.

   EPA is reviewing related documents and will post them where appropriate when our review is completed.

As to your remaining requests, it is unlikely that before the estimated date of completing our response EPA will be able to release records responsive to broad requests that will require cross-office search and substantial review, which includes Encana's various "all communications" and "all records" requests.

Other Questions Encana Has Posed About the FOIA Process

EPA responds to concurrent, similar, information requests from members of Congress on parallel paths as much as practicable. We have a large team of employees who will be searching for responsive documents and evaluating their respective releasability pursuant to FOIA. EPA's responses to the requests will be provided as soon as EPA completes each request.

As set forth in this letter, and as Ms. Marcu and Mr. Boydston reiterated during their conversation with you today, we will continue, as expeditiously as possible, to provide releasable documents to Encana and will post them on EPA's Pavillion website. If you have any questions, please contact Mr. Boydston at boydston.michael@epa.gov or (303) 312-7103, or Ms. Marcu at marcu.michelle@epa.gov or (303) 312-6921.

Sincerely,

Matthew Cohn
Director
Legal Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

Attachment 1 – Table of Consolidated FOIA Requests (provided by Encana on January 13, 2012)

cc: Elizabeth Temkin, Esq., Temkin Wielga & Hardt LLP (temkin@twhlaw.com)