ENVIRONMENTAL INTEGRITY PROJECT

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April 22, 2015

National Freedom of Information Officer
U.S. Environmental Protection Agency
FOIA and Privacy Branch
1200 Pennsylvania Avenue N.W. (2822 T)
Washington, D.C., 20460

*Via electronic mail (*HQ.FOIA@epa.gov*) and EPA FOIAonline*

Re: Appeal of EPA's Denial of Consolidated FOIA Requests, Nos. EPA-R2-2015-004497, EPA-R3-2015-004498, EPA-R4-2015-004499, EPA-R5-2015-004500, EPA-R6-2015-004502, EPA-R7-2015-004503, EPA-R8-2015-004504, EPA-R9-2015-004505, and EPA-R10-2015-004506

Dear National Freedom of Information Officer:

On behalf of the Environmental Integrity Project (EIP), I am writing to appeal the U.S. Environmental Protection Agency's (EPA) denial of EIP's Freedom of Information Act (FOIA) request, dated February 24, 2015, on the grounds that the "request did not reasonably describe the records you were seeking in a way that would permit EPA employees to identify and locate them." *See* Letter from Adam Kron, EIP, to EPA Regions 2-10 (Feb. 24, 2015) (Ex. A); Letter from Becky Dolph, EPA, to Adam Kron, EIP (March 23, 2015) (Ex. B).

As demonstrated below, EPA's denial of the request on the "reasonably describe" grounds is in violation of FOIA, as it improperly expands the requirement and ignores multiple instances by telephone and email in which EIP clarified its request to EPA staff and accommodated EPA's requests for extension, consolidation, and partial responses. EPA's improper denial of EIP's request will prevent EIP's and the public's timely analysis of important documents related to the oil and gas industry's releases of dangerous wastes and pollutants. There is no legal basis for withholding the information EIP seeks, and EPA should promptly release the information.

I. FACTUAL BACKGROUND

On February 24, 2015, EIP sent FOIA requests to EPA Regions 2 through 10, requesting records concerning "[d]ocumented releases of wastes from oil and gas exploration, development, and production ('E&P wastes') into the environment." *See* Ex. A at 1. The requests additionally noted that "[s]uch releases of E&P wastes may be from oil and gas exploration, development, and production sites (such as well pads, impoundments, and storage tanks) or disposal facilities and practices (such as solid waste landfills, on-site burial, underground injection wells, wastewater disposal facilities, road spreading , and land application)." *Id.* EIP limited the time of the requests to records acquired or produced by EPA since January 1, 2005. *Id.*

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On that same day, EIP received confirmations of the requests' submission, which assigned the following tracking numbers: EPA-R2-2015-004497, EPA-R3-2015-004498, EPA-R4-2015-004499, EPA-R5-2015-004500, EPA-R6-2015-004502, EPA-R7-2015-004503, EPA-R8-2015-004504, EPA-R9-2015-004505, and EPA-R10-2015-004506.

On March 4 and March 11, 2015, Cynthia Sehnert-Jones of Region 7 sent emails stating that "[y]our request for this FOIA needs to be narrowed down to specific locations. We are in Region 7 which means we deal facilities in Iowa, Kansas, Missouri and Nebraska." On March 12, 2015, I responded by email and noted that EIP did not have "specific named locations or facilities in mind. We're seeking information on documented releases from certain types of disposal facilities and practices, such as landfills that receive oil and gas wastes, impoundments/pits that hold wastewater and solid oil and gas wastes, injection wells that receive oil and gas wastewater, and instances of 'road spreading' or land application of oil and gas wastewater." *See* Email from Adam Kron, EIP, to Cynthia Sehnert-Jones, EPA (March 12, 2015) (Ex. C). I additionally asked "[i]s it possible to process the request using types of facilities and practices rather than specifically named locations/facilities?," providing certain examples of such facilities in Kansas, Nebraska, and Missouri. *Id.*

On March 10, 2015, I received a telephone call from Edwin Quinones, Assistant Regional Counsel for EPA Region 6. On the call with Mr. Quinones were several officers of different programs within Region 6: On-Scene Coordinator Bryant Smalley, FOIA Program Officer Dee Dee Ortiz, and Oil Pollution Act Enforcement Officer Jamie Bradsher. Mr. Quinones and these officers asked several clarifying questions in regard to the FOIA request, which I answered to the full extent of my expertise. Among the questions were whether the request sought information on oil spills, regarding the exemption of "E&P wastes" from the hazardous provisions of the Resource Conservation and Recovery Act (RCRA), and whether the request sought information on "road spraying." I responded, respectively, that we were not seeking information on oil spills (unless they also involved E&P wastes); that we were aware of the RCRA exemption, but used the term because of its specificity to certain types of wastes; and that we were seeking information on road spraying.

Mr. Quinones additionally requested a thirty-day extension to the deadline for Region 6's response to the request and that Region 6 be allowed to respond on a rolling basis with partial responses. I agreed to both requests. On March 11, 2015, Mr. Quinones sent an email memorializing our conversation and confirming his understanding of the clarifications. *See* Email from Edwin Quinones, EPA, to Adam Kron, EIP (March 11, 2015) (Ex. D).

On March 11, 2015, I received a telephone call from Antoinette Powell-Dixon, within the Office of General Counsel at EPA Headquarters. Ms. Powell-Dixon stated that she was seeking clarification on the requests and asked whether we would be willing to consolidate the requests as one request with EPA Headquarters. I recounted the telephone conversations and emails with Region 6 and other Regions, as described above. I explained the way in which I had clarified the request for Region 6, but also noted that we were unable to clarify the requests to specific facilities, as requested by Region 7. With respect to the consolidation, I stated that I would speak to my colleagues. Ms. Powell-Dixon stated that she would call back on March 12.

On March 13, I received a telephone call from Phil Dellinger, with Region 6's Underground Injection Control program. Mr. Dellinger explained that he had been in contact with other Regions with respect to the FOIA requests and wished to clarify certain items. In particular, Mr. Dellinger asked whether our request sought records on all underground injection of E&P wastes. I stated that we only sought records in which these wastes were released to the environment from underground injection wells: i.e., where the wells somehow failed or where injection did not occur as intended. Mr. Dellinger stated that this clarification was helpful and that he would draft an email to the other Regions explaining this.

On March 17, 2015, EIP senior managing attorney Mary Greene spoke to Ms. Powell-Dixon by telephone. Pursuant to discussions between me and Ms. Greene, Ms. Greene explained to Ms. Powell-Dixon that we would agree to a consolidation of the requests. In response to additional questions, Ms. Greene further attempted to explain and clarify the request. It was Ms. Greene's understanding from the conversation that EPA would provide further written understanding of the request prior to any final action being taken on the request.

In a letter dated March 23, EPA denied the request, on the grounds that the "request did not reasonably describe the records you were seeking in a way that would permit EPA employees to identify and locate them." *See* Ex. B at 1. The denial letter describes, as part of its reasoning, the telephone conversation between me and Ms. Powell-Dixon and the conversation between Ms. Powell-Dixon and Ms. Greene. *Id.*

The denial letter does not describe or even mention the multiple telephone conversations and emails between EIP and the Regions, in which EIP clarified and further described the request to officers from several different program areas. Nor does the denial letter note the accommodations EIP made to the Regions in the form of a time extension and permission for partial responses. Overall, the denial letter provides a partial description of the events, but one that is inaccurate due to its omissions.

II. ARGUMENT

FOIA requires that "each agency, upon any request for records which reasonably describes such records and is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A).

EPA's regulations have further interpreted this directive within its "Procedures for making requests," stating that "Your request should reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them. Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, you should include any file designations or descriptions for the records that you want." 40 U.S.C. § 2.102(c). EPA's regulations additionally state that, "[i]f EPA determines that your request does not reasonably describe the records, it will tell you either what additional information you need to provide or

why your request is otherwise insufficient. EPA will also give you an opportunity to discuss and modify your request to meet the requirements of this section." *Id.*

From the outset, EIP framed its requests in a way so as to provide EPA employees with the information needed to identify and locate the records needed. This description included using the term "E&P wastes," which is a statutorily defined term that EPA has interpreted with a detailed definition. *See* 42 U.S.C. § 6921(b)(2)(A) ("drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil or natural gas"); EPA, *Exemption of Oil and Gas Exploration and Production Wastes from Federal Hazardous Waste Regulations* 10-11 (Oct. 2002), *available at* http://www.epa.gov/wastes/nonhaz/industrial/special/oil/oil-gas.pdf. This description also included stating the facilities, practices, and sites from which the releases in question may originate: "[s]uch releases of E&P wastes may be from oil and gas exploration, development, and production sites (such as well pads, impoundments, and storage tanks) or disposal facilities and practices (such as solid waste landfills, on-site burial, underground injection wells, wastewater disposal facilities, road spreading , and land application)." *See* Ex. A at 1.

Upon requests for clarification from EPA Regions, EIP discussed the requests in good faith, answered questions, and attempted to clarify what the requests did and did not seek. *See* Exs. C, D. In order to account for the fact that the requests spanned many facilities and programs, EIP granted each of EPA's procedural requests, including extending the deadline for response, allowing for partial responses, and consolidating the requests to a single request with Headquarters. The one main instance in which EIP was unable to grant EPA's requests for clarification was with respect to listing specific facilities and sites by name. In that same instance, however, EIP provided EPA with documentation of the specific types of facilities within the Region in question. *See* Ex. C.

Nonetheless, EPA's denial letter omits these multiple "opportunit[ies] to discuss and modify your request to meet the requirements of this section" and erroneously states that "[b]ecause your request does not reasonably describe the records requested and because EPA has been unsuccessful in its efforts to assist EIP in clarifying the request to enable the Agency to respond to EIP's request, EPA is denying the request." Ex. B at 2; 40 U.S.C. § 2.102(c).

For this reason, EPA has applied the "reasonably described" requirement inappropriately and in an overly broad manner through its denial. This denial constitutes a misapplication and violation of the requirements of FOIA, 5 U.S.C. § 552(a)(3)(A), as well as an undue and improper delay in processing EIP's request. Therefore, EIP appeals EPA's denial and requests that EPA: (1) restart its search to produce all responsive records; and (2) expeditiously disclose all such records to EIP on a partial response basis.

Thank you for your consideration of this appeal. If you have any questions or require additional information, please do not hesitate to contact me.

Sincerely,

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Enclosures