

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL)
DIVERSITY)
378 N. Main Ave.)
Tucson, AZ 85701,)

Civ. No. 15-22

Plaintiff,

**COMPLAINT FOR DECLARATORY
AND OTHER RELIEF**

v.

BUREAU OF SAFETY AND)
ENVIRONMENTAL ENFORCEMENT)
1849 C Street, NW)
Washington, DC 20240,)

BUREAU OF OCEAN ENERGY)
MANAGEMENT)
1849 C Street, NW)
Washington, DC 20240,)

Defendants.)

INTRODUCTION

1. Plaintiff Center for Biological Diversity (the “Center”) challenges Defendants Bureau of Safety and Environmental Enforcement’s (“BSEE”) and Bureau of Ocean Energy Management’s (“BOEM”) failure to comply with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

2. Specifically, the Center challenges BSEE’s and BOEM’s failure to issue a timely response to its FOIA request for records related to the extent that BSEE and BOEM have allowed hydraulic fracturing (i.e., “fracking”) and other unconventional well stimulation in offshore oil and gas operations in the Gulf of Mexico.

3. Fracking — a practice that involves blasting huge amounts of water and dangerous chemicals into the earth at enormous pressure to crack rock formations beneath the ocean floor — is inherently dangerous and has no place in fragile ocean ecosystems. Nevertheless, BSEE and BOEM have permitted fracking in the Gulf of Mexico.

4. On information and belief, BOEM and BSEE authorized fracking for at least 115 wells in the Gulf of Mexico in 2013, or about 15 percent of wells completed for production that year.

5. But by failing to respond to the Center’s FOIA request, BSEE and BOEM are keeping the Center, its members and local communities in the dark about exactly where, when and how much fracking has occurred in the Gulf, in violation of FOIA’s clear legal mandates.

6. Accordingly, the Center seeks an order from the Court declaring BSEE and BOEM to be in violation of FOIA, and compelling BSEE and BOEM to provide responsive records to the Center without any further delay.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B), and 28 U.S.C. § 1331 (federal question jurisdiction).

8. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

9. Plaintiff the Center is a non-profit corporation that works through science, law and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is dedicated to the preservation, protection and restoration of biodiversity and ecosystems throughout the world.

10. In pursuit of its mission, the Center informs, educates and counsels the public regarding environmental issues, policies and laws relating to environmental issues. Specifically, the Center works to provide the public with a better understanding of the government's management of offshore oil and gas activities in general, and fracking and other unconventional well stimulation in particular. The Center has been substantially involved in the management activities of numerous government agencies for years, and has consistently displayed its ability to disseminate information granted to it through FOIA. The Center informs, educates and counsels the public through media advocacy, the Center's webpage, and publications that are widely distributed.

11. The information the Center seeks to obtain from BSEE and BOEM through its FOIA request will further the Center's mission as a non-profit environmental advocacy organization. Through the Center's dissemination, the information is likely to contribute significantly to the public's understanding of the scope of fracking in the Gulf of Mexico and BSEE's and BOEM's role in permitting such practices.

12. The interests of the Center and its members are harmed by BSEE's and BOEM's failure to comply with FOIA. These injuries would be redressed by a favorable decision granting the Center its requested relief.

13. Defendant BSEE is a U.S. federal agency from which the Center requested records related to fracking in the Gulf of Mexico. BSEE is an agency within the meaning of 5 U.S.C. § 552(f)(1) and is required by law to comply with FOIA.

14. Defendant BOEM is a U.S. federal agency from which the Center requested records related to fracking in the Gulf of Mexico. BOEM is an agency within the meaning of 5 U.S.C. § 552(f)(1) and is required by law to comply with FOIA.

STATUTORY BACKGROUND

15. FOIA allows any person to obtain access to the records of federal agencies provided the statute's disclosure exemptions do not apply to the requested documents. 5 U.S.C. § 552.

16. Specifically, FOIA requires that upon receiving a request for records that "reasonably describes" the records sought and complies with "published rules . . . and procedures to be followed," the agency "shall make the records promptly available to any person." *Id.* § 552(a)(3)(A).

17. On January 21, 2009, President Obama issued an Executive Memo declaring a presumption under FOIA that "openness prevails," and providing that:

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. . . . 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.

18. After receiving a FOIA request, an agency has twenty working days to determine "whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination." 5 U.S.C. § 552(a)(6)(A)(i).

19. In "unusual circumstances," an agency may take up to ten additional working days to respond to a request by providing written notice to the requester and the unusual circumstances that necessitate the agency's need for additional time. *Id.* § 552(a)(6)(B).

20. Where an agency fails to respond to a FOIA request within the applicable time limit, the person making the request to the agency shall be deemed to have exhausted his administrative remedies. *Id.* § 552(a)(6)(C)(i).

21. FOIA does not permit an agency to delay a response indefinitely.

FACTUAL BACKGROUND

Offshore Fracking

22. Hydraulic fracturing, or fracking, involves injecting a mixture of water, sand and chemicals into a well at extremely high pressure to artificially propagate fractures in a rock layer and create cracks and passages through which oil, gas and other liquids can flow.

23. Offshore fracking is a similar practice intended to increase oil or gas production and the life of an offshore well. Oil companies have used fracking to stimulate production from offshore wells in the Gulf of Mexico. Unconventional well stimulation practices such as fracking can increase the risks of oil drilling.

24. On land, fracking has been linked to chemical and oil spills, air and water pollution, earthquakes and property damage. The damages from fracking to public health and the environment have been severe. Offshore fracking prompts similar concerns.

25. Journalists have reported that offshore fracking has been permitted in the Gulf of Mexico numerous times, but that fracking information has been withheld from public drilling permits. On information and belief, the permits have been issued with no meaningful evaluation of the environmental effects of offshore fracking. This raises concerns about the regulatory oversight of offshore fracking.

26. BSEE and BOEM are two of the federal agencies charged with the oversight of offshore oil and gas activities, including the permitting of drilling activities.

BSEE's Withholding of Information Concerning Offshore Fracking

27. In light of this information, on October 10, 2014, the Center filed a FOIA request with BSEE's Gulf of Mexico Regional Office (No. 2015-00019) seeking to discover the extent to

which offshore fracking is actually occurring in the region, BSEE's role in permitting the activity, and what (if any) environmental analysis BSEE completed prior to authorizing fracking.

28. In particular, the Center's FOIA request sought:

(1) All records identifying any wells in the Gulf of Mexico Outer Continental Shelf ("OCS") Region where hydraulic fracturing ("fracking") has been used since January 1, 1990;

(2) All records relating to decisions to approve fracking in any wells in the Gulf of Mexico OCS Region since January 1, 1990;

(3) All records relating to any analysis or conclusions under the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, in connection with any proposal to engage in fracking in the Gulf of Mexico OCS Region, including but not limited to analysis and conclusions in connection with any Applications for Permits to Drill ("APDs") and/or Applications for Permits to Modify ("APMs") involving fracking;

(4) All records relating to any analysis or consultations — both informal and formal — under the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, in connection with any proposal to engage in fracking in the Gulf of Mexico OCS Region, including but not limited to analysis and consultations in connection with any APDs and/or APMs involving fracking;

(5) All records of communications between the Bureau of Ocean Energy Management and/or the Bureau of Safety and Environmental Enforcement and other federal and/or state agencies and/or regulated entities regarding fracking in the Gulf of Mexico OCS Region; and

(6) All Development Operations Coordination Documents for oil and gas drilling operations in the Gulf of Mexico OCS Region where fracking has been used or proposed for use.

29. On October 23, 2014, BSEE sent the Center a letter stating that it received the Center's FOIA request on October 14, 2014. The letter indicated that BSEE would be reviewing the request for Item Numbers 1, 2 and 5, and that BOEM would be reviewing the request for Item Numbers 3, 4, 5 and 6.

30. On November 18, 2014, BSEE sent the Center a letter stating that it had invoked the ten-working-day extension, making the due date for a determination November 26, 2014.

31. To date, 90 days after submitting its FOIA request, the Center has not received a determination or single responsive record from BSEE.

32. BSEE did not issue a final determination within the time required by FOIA.

BOEM's Withholding of Information Concerning Offshore Fracking

33. On October 10, 2014, the Center also filed a FOIA request with BOEM's Gulf of Mexico Regional Office (No. BOEM-2015-00016) seeking the same documents detailed in Paragraph 28.

34. On October 21, 2014, BOEM sent the Center a letter acknowledging that it received the Center's FOIA request on October 14, 2014, and invoking a ten-working-day extension. BOEM's letter also noted that BSEE would be reviewing part of the request, and that BOEM would review Item Numbers 3, 4, 5 and 6, and would contact the Center on or before December 3, 2014, regarding the status of its FOIA request.

35. On December 3, 2014, BOEM sent the Center another letter stating that it had yet to make a final determination on the Center's FOIA request.

36. To date, 90 days after submitting its FOIA request, the Center has not received a determination or single responsive record from BOEM.

37. BOEM did not issue a final determination within the time required by FOIA.

CLAIMS FOR RELIEF

Violations of the Freedom of Information Act *Claim 1 – Failure to Respond With a Determination*

38. The Center realleges and incorporates, as if fully set forth herein, each and every allegation in the preceding paragraphs of this Complaint.

39. Upon receiving a FOIA request, an agency must determine within twenty working days of the date of receipt "whether to comply with such request" and must "immediately notify

the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination.” 5 U.S.C. § 552(a)(6)(A)(i). In “unusual circumstances,” an agency may take ten additional work days to issue a determination on a FOIA request. *Id.* § 552(a)(6)(B).

40. BSEE’s and BOEM’s failure to provide the Center with a determination as to whether they have records responsive to the Center’s FOIA request and whether they intend to release such records within the required timeframe violates 5 U.S.C. § 552(a)(6)(A)(i) and 5 U.S.C. § 552(a)(6)(B).

Claim 2 – Failure to Make Responsive, Non-Exempt Documents Promptly Available

41. The Center realleges and incorporates, as if fully set forth herein, each and every allegation in the preceding paragraphs of this Complaint.

42. FOIA requires that upon receiving a request for records that “reasonably describes” the records sought and complies with “published rules . . . and procedures to be followed,” the agency “shall make the records promptly available to any person.” 5 U.S.C. § 552(a)(3)(A).

43. The Center’s FOIA request reasonably described the records sought and complied with all applicable rules and procedures. BSEE’s and BOEM’s failure to make promptly available any non-exempt records responsive to the Center’s FOIA request violates section 552(a)(3)(A) of FOIA.

PRAYER FOR RELIEF

For the reasons stated above, the Center respectfully requests that the Court:

1. Declare that BSEE’s and BOEM’s failure to respond to the Center’s FOIA request

- with a determination as to whether they have responsive documents and whether they intend to release such documents violates FOIA;
2. Declare that BSEE's and BOEM's failure to make promptly available any non-exempt records responsive to the Center's FOIA request violates FOIA;
 3. Order BSEE and BOEM to immediately determine whether they have documents responsive to the Center's request and to produce, without charge and within 10 days from the date of such order, all such responsive documents;
 4. Award the Center its costs of litigation, including reasonable attorneys' fees; and
 5. Grant such other relief as the Court may deem just and proper.

DATED: January 8, 2015

Respectfully submitted,

/s/ William J. Snape

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Application for admission *pro hac vice* pending

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