

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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

Plaintiff,

v.

BUREAU OF SAFETY AND
ENVIRONMENTAL ENFORCEMENT,
1849 C Street, N.W.
Washington, D.C. 20240,

U.S. DEPARTMENT OF THE INTERIOR
1849 C Street, N.W.
Washington, D.C. 20240,

Defendants.

Civil Action No.: 1:19-cv-3154

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. The Center for Biological Diversity (“the Center”) challenges the failure of the Bureau of Safety and Environmental Enforcement and the U.S. Department of the Interior (collectively “the Bureau”) to provide records of their decisions to approve offshore fracking (also known as hydraulic fracturing) in the Gulf of Mexico from 2014 to the present, in violation of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*

2. Between 2010 and 2014, the Bureau approved more than 1,600 permits for offshore fracking in the Gulf of Mexico. The public knows this only because a prior FOIA request and subsequent lawsuit compelled the Bureau to disclose the information.

3. Offshore fracking poses unique risks to the marine environment and the climate. This oil extraction technique uses toxic chemicals, generates dangerous water and air pollution,

and increases the risk of oil spills. However, the federal government's approval of offshore fracking has been shielded in secrecy with scarce information available to the public and no meaningful environmental review.

4. This lawsuit is about the Bureau's stonewalling of the Center's attempts to obtain public records that would shed light on its approvals of offshore fracking in connection with the Center's August 28, 2017 FOIA Request ("2017 FOIA Request").

5. It has been more than two years since the Center requested records about offshore fracking in the Gulf of Mexico. In its 2017 FOIA Request, the Center sought (1) all records identifying any wells in federal waters in the Gulf of Mexico where fracking has been used since October 10, 2014; and (2) all records mentioning, including, and/or referencing the Bureau's decision to approve fracking in the Gulf of Mexico since October 10, 2014.

6. By failing to respond to the Center's 2017 FOIA Request and failing to comply with FOIA, the Bureau is obstructing the Center, its members, and the public from gaining an understanding of the federal government's approvals and oversight of fracking in the Gulf of Mexico.

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

JURISDICTION AND VENUE

8. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1331 (federal question jurisdiction), and 28 U.S.C. § 1346 (actions against the United States) because this action arises under FOIA and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

9. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B).

10. Declaratory relief is appropriate under 28 U.S.C. § 2201; injunctive relief is appropriate under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 2202.

PARTIES

11. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-profit conservation organization that works through science, law, and policy to secure a future for all species hovering on the brink of extinction. The information the Center seeks from the Bureau will further the Center's mission as a non-profit environmental organization. The Center has a long-standing interest in the oversight of government approvals and regulation of offshore oil and gas activities that can harm marine wildlife. The Center has more than 67,000 members throughout the United States who depend on the organization to provide information that will inform their civic participation in government decision-making.

12. The Center frequently communicates to its members and the press about the dangers of offshore oil and gas drilling and fracking, the fact that fracking is occurring offshore, and how fracking can increase the risks inherent in offshore oil and gas drilling. The Center communicates information about offshore fracking to its members and the public by publishing a newsletter, sending action alerts, and using news and social media, which makes the information at issue in this case a vital interest to the Center and its members. Through the Center's dissemination, the responsive records are likely to contribute significantly to its members and the public's understanding of the scope of fracking in the Gulf of Mexico and the Bureau's role in permitting and regulating such practices.

13. The Bureau is unlawfully withholding the requested records by failing to search for and provide all responsive records to the Center. As a result, the Center and its members are suffering procedural and informational injuries. The failure to provide the requested records also obstructs the Center and its members' ability to engage with the government to address

government oversight of and environmental damage from offshore fracking. These injuries are traceable to the Bureau's actions and inactions challenged in this case, and they can be redressed by the declaratory and injunctive relief sought herein.

14. Defendant BUREAU OF SAFETY AND ENVIRONMENTAL ENFORCEMENT is a federal agency within the Department of the Interior. The Bureau has custody and/or control of the records subject to the Center's FOIA request, and it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

15. Defendant DEPARTMENT OF THE INTERIOR is a Cabinet-level federal agency responsible for overseeing the activities of the Bureau, and it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

STATUTORY BACKGROUND

16. FOIA's basic purpose is government transparency. FOIA seeks "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *Nat'l Labor Relations Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citations omitted).

17. Accordingly, FOIA establishes the public's right to access all federal agency records unless such records may be withheld pursuant to one of nine, narrowly construed FOIA exemptions. 5 U.S.C. § 552(b)(1)-(9).

18. FOIA imposes strict deadlines on federal agencies when they receive requests for records pursuant to FOIA. Specifically, an agency must determine whether to disclose responsive records and notify the requester of its determination within 20 working days of receiving a FOIA request, and it must make releasable records "promptly" available. *Id.* § 552(a)(3)(A), (a)(6).

19. In “unusual circumstances,” an agency may take up to 10 additional days to respond to a request by providing written notice to the requester that describes the unusual circumstances necessitating the agency’s need for additional time. *Id.* § 552(a)(6)(B).

20. The burden is on the agency to prove that it may withhold responsive records from a requester. *Id.* § 552(a)(4)(B).

21. Each agency is required to search for records in a manner reasonably calculated to locate all records responsive to the FOIA request. *Id.* § 552(a)(3)(C)-(D). The cut-off date for the agency’s search is the date that the agency conducts the search and not any earlier date. 43 C.F.R. § 2.12(b).

22. FOIA provides for statutory fee waivers to waive or significantly reduce fees “if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). *See also* 43 C.F.R. § 2.45(a).

23. The Department of Interior has issued regulations implementing FOIA, 43 C.F.R. Part 2, which apply to federal agencies within the Department, including the Bureau.

24. Requesters may appeal an adverse determination. 5 U.S.C. § 552(a)(6)(A)(i); 43 C.F.R. § 2.57(a)(6). An agency shall make a determination with respect to any appeal within 20 working days after the receipt of such an appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

25. A requester “shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions . . .” 5 U.S.C. § 552(a)(6)(C)(i). *See also* 43 C.F.R. § 2.12(a). In that event, FOIA authorizes the requester to sue the agency in federal court. 5 U.S.C. § 552(a)(4)(B).

26. The U.S. district courts have jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

FACTUAL BACKGROUND

A. Offshore Fracking

27. Hydraulic fracturing, or fracking, is an unconventional well-stimulation technique that uses high-pressure injections of water and toxic chemicals into rock formations until they fracture or crack, releasing oil or natural gas trapped inside.

28. Fracking has been linked to wide-ranging environmental harms and risks such as air pollution, water contamination, earthquakes, habitat fragmentation, noise and light pollution, and climate change.

29. Along with the boom in fracking on land, offshore fracking has also increased significantly in the last 20 years. The Bureau has approved numerous permits for fracking offshore oil and gas wells.

30. The extent of fracking in the Gulf of Mexico has been opaque at best.

31. In 2014, news media reported that the federal government was approving permits allowing offshore fracking without informing the public or conducting environmental review. The Center subsequently sent a FOIA request to the Bureau on October 10, 2014 (“2014 FOIA Request”), seeking, in pertinent part, records relating to (1) the extent to which offshore fracking is occurring in the Gulf of Mexico Region; (2) the Bureau’s role in permitting fracking activity; and (3) what, if any, environmental analysis the Bureau completed prior to authorizing fracking from January 1, 1990, through October 10, 2014.

32. The Bureau failed to respond to the Center’s 2014 FOIA Request within the timeline mandated by law. The Center filed suit in January 2015, seeking a court order to compel

the Bureau to provide the requested documents. Following the filing of the lawsuit, the Center and the Bureau entered into a settlement agreement. Under the terms of the settlement agreement, Center agreed to narrow its request to records regarding the Bureau's permitting of offshore fracking from 2010 to October 2014, and the Bureau agreed to begin disclosing the requests records in July 2015.

33. The records released in response to that litigation revealed that the Bureau authorized more than 1,600 applications for fracking in the Gulf of Mexico from 2010 to 2014.

34. On information and belief, offshore fracking has continued in the Gulf of Mexico since 2014.

B. The Center's FOIA Request

35. On August 28, 2017, the Center submitted to the Bureau a FOIA request seeking offshore fracking records:

(1) All records identifying any wells in the Gulf of Mexico OCS Region where hydraulic fracturing ("fracking") has been used since October 10, 2014; and (2) all records mentioning, including, and/or referencing [the Bureau's] . . . decision to approve fracking in any wells in the Gulf of Mexico OCS Region since October 10, 2014, including, but not limited to, approvals of Applications for Permits to Drill ("APDs") and/or Applications for Permits to Modify ("APMs") involving fracking.

36. On September 19, 2017, the Bureau acknowledged the Center's 2017 FOIA Request, assigned it tracking number 2017-00226, and denied the Center's fee waiver request.

37. On October 6, 2017, the Bureau sent the Center a status update letter reassigning the Center's 2017 FOIA Request from the "Complex" to the "Exceptional/Voluminous" track, and it stated that the estimated completion date on the FOIA request would be "no sooner than August 31, 2018." The Bureau also provided that the cost of record production in response to the Center's 2017 FOIA Request "would be approximately \$8,000.00."

C. The Center's Administrative Appeals

38. On November 6, 2017, the Center appealed the Bureau's fee waiver denial and under protest offered to pay up to \$25.00 in fees while the Bureau considered its appeal.

39. On November 17, 2017, the Bureau sent the Center a notice of hold, stating that it would not process the request until the Center provided written assurance or until the Appeals Office made a determination on the appeal.

40. On November 30, 2017, the Center once again sent the Bureau a response via electronic mail agreeing to pay, under protest, up to \$25.00.

41. On December 1, 2017, the Bureau notified the Center that the search already exceeded two hours and that the request would continue to be suspended until an appeal determination is made.

42. On March 19, 2018, the Center sent the Bureau a request for a status update and an estimated date of completion.

43. On March 22, 2018, the Bureau sent the Center an explanation that the request would continue to be suspended until an appeal determination is made. That same day, the Center requested a status update and estimated date for a determination on the appeal. The Bureau never responded.

44. On March 30, 2018, the Center sent the Bureau another request for a status update and appeal determination.

45. On April 9, 2018, the Center sent a letter notifying the Bureau of its deadline violation and offering to assist the agency in processing the Center's FOIA request.

46. On April 26, 2018, the Bureau sent the Center a letter stating that the Center had “established that it is entitled to a fee waiver for the processing of the August 28, 2017, FOIA request.” The letter also estimated a completion date to be no sooner than August 31, 2018.

47. On April 30, 2018, the Bureau sent the Center an email, stating, “this email is to inform you that a letter was sent to your organization on Friday, April 27, 2018,” and providing a tracking number for the letter.

48. Subsequently, the Center received a letter from the Bureau dated April 27, 2018, stating that the Bureau had resumed processing the 2017 FOIA Request, and that its estimated completion date was no sooner than March 22, 2019.

49. On April 30, 2018, the Center sent the Bureau an email asking for clarification about the agency’s estimated date of completion. In that email, the Center stated that it “received [the Bureau’s] letter in the mail” that day. The email sought to confirm the estimated completion date because that letter “provide[d] an estimated completion date of March 22, 2019, however in Interior’s determination letter it lists an estimated completion date of August 31, 2018.” The Center directly asked, “Could you clarify which is the correct date?”

50. On May 1, 2018, the Bureau responded to the Center by email, stating, “the estimated completion date for your request is March 22, 2019.”

51. On August 28, 2018, the Center appealed the Bureau’s assignment of the Center’s 2017 FOIA request to the Exceptional/Voluminous track.

52. To date the Center has received neither records responsive to the 2017 FOIA Request nor a determination on its appeal of the assignment to the exceptional/voluminous track.

D. The Center Has Constructively Exhausted Its Administrative Remedies

53. It has been 538 working days since the Center submitted its 2017 FOIA Request to the Bureau.

54. The Bureau's estimated date of completion of March 22, 2019, was long past the statutory deadline and any reasonable response time; it has been 148 working days since even that overdue date.

55. A determination on the Center's 2017 FOIA Request was due 20 days after receipt of the request—September 17, 2017. 5 U.S.C. § 552(a)(6)(A)(i).

56. The Bureau's failure to respond within the 20-day statutory time limit constitutes a violation of FOIA, 5 U.S.C. §552(a)(6)(A)(i), and a constructive denial of the Center's 2017 FOIA Request, permitting judicial review.

E. The Bureau's Withholding of Information Concerning Offshore Fracking

57. The Bureau's actions and inactions are obstructing the public from obtaining records containing information about offshore fracking and the Bureau's regulatory activities and environmental review of offshore fracking.

58. Offshore fracking activities have been shrouded in secrecy, and it is difficult to obtain information about the frequency of fracking, which wells are fracked, what environmental analyses and safety measures are required, and what the Bureau is doing to regulate this controversial practice.

59. The Center sought similar records from the Bureau in 2014, and like here, the Center had to resort to litigation over the release of the responsive records. As a result of that litigation, the Bureau produced the responsive records.

60. The release of records responsive to the 2014 FOIA Request enabled the Center to create a map of all known instances of offshore fracking in the Gulf of Mexico, which did not previously exist. A number of news outlets picked up and published the map, including *NOLA/The Times-Picayune*, *San Antonio Current*, *Digital Journal*, *Truth Out*, *Desmogblog*, and *EcoWatch*.

61. The failure of the Bureau to release updated records in response to the 2017 FOIA Request denies the Center and public the ability to understand and engage in the operations and activities of the government—and thus fulfill their civic duties. The inability of the Center to obtain the responsive records for more than two years frustrates the Center’s ability to fulfill its commitment to educate its members and the public about the government’s oversight of offshore fracking and the environmental risks of that practice.

62. The Bureau’s initial denial of the Center’s fee waiver request, its assignment of the Center’s 2017 FOIA Request to the exceptional/voluminous track, and its delays in responding to the 2017 FOIA Request and appeals are a barrier to government transparency and accountability.

63. The Bureau is in violation of the statutory obligations of FOIA to timely provide responsive records and adequately search for records.

FIRST CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT

(Failure to adequately search for records responsive to the Center’s 2017 FOIA Request)

64. The Center re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

65. The Center has a statutory right to have the Bureau process the 2017 FOIA Request in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Bureau is violating the

Center's rights in this regard by unlawfully failing to undertake a search reasonably calculated to locate all records that are responsive to the Center's 2017 FOIA Request. *Id.*

66. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Bureau in the foreseeable future.

67. The Center's organizational activities will be adversely affected if the Bureau continues to violate FOIA's requirement to undertake a search that is reasonably calculated to locate records responsive to the Center's 2017 FOIA Request.

68. Unless enjoined and made subject to this Court's declaration of the Center's legal rights, the Bureau will continue to violate the Center's rights to receive public records under FOIA.

SECOND CLAIM FOR RELIEF
VIOLATION OF THE FREEDOM OF INFORMATION ACT

(Failure to promptly disclose the records responsive to the Center's 2017 FOIA Request)

69. The Center re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

70. The Center has a statutory right to the records it seeks. The Bureau is violating FOIA and its implementing regulations by refusing to promptly disclose the records responsive to the Center's FOIA Request. 5 U.S.C. § 552(a)(3), (6).

71. None of FOIA's statutory exemptions apply to the records that the Center seeks.

72. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to the Bureau in the foreseeable future.

73. The Center's organizational activities will be adversely affected if the Bureau continues to violate FOIA's disclosure provisions as it has in this case.

74. Unless enjoined and made subject to this Court's declaration of the Center's legal rights, the Bureau will continue to violate the Center's rights to receive public records under FOIA.

REQUEST FOR RELIEF

WHEREFORE, the Center prays that this Court:

1. Declare that the Bureau's failure to make a timely search, determination, and disclosure of all records responsive to the Center's 2017 FOIA Request, as alleged above, is unlawful under FOIA, 5 U.S.C. § 552(a)(3), (6)(A)(i).
2. Order the Bureau to immediately produce without charge all responsive records within 20 days from the date of such order.
3. Award the Center its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E).
4. Grant such other and further relief as the Court may deem just and proper.

DATED: October 22, 2019

Respectfully submitted,

/s/ Catherine Kilduff

Catherine Kilduff (D.C. Bar No. 101260)
CENTER FOR BIOLOGICAL DIVERSITY
801 Boush St., Suite 200
Norfolk, VA 23510
(202) 780-8862
ckilduff@biologicaldiversity.org

Cari Miyoko Sakashita
(*Pro hac vice* application forthcoming)
CENTER FOR BIOLOGICAL DIVERSITY
1212 Broadway, Suite 800
Oakland, CA 94612
(510) 844-7108
miyoko@biologicaldiversity.org

Attorneys for Plaintiff