UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 14-9281 PSG (FFMx)	Date	August 14, 2015
Title	Environmental Defense Center v. Bureau of Safety and Environmental Enforcement, *et al*.		

Present: The Honorable	Philip S. Gutierrez, United States District Judge	
Wendy Hernandez		Not Reported
Deputy Clerk		Court Reporter
Attorneys Present for Plaintiff(s):		Attorneys Present for Defendant(s):
Not Present		Not Present

Proceedings (In Chambers): **Order DENYING Intervenor-Defendant Exxon's motion for entry of a protective order**

Pending before the Court is Intervenor-Defendant Exxon Mobil Corporation's ("Exxon") motion for entry of a protective order in connection with sixteen documents. Dkt. # 59. The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78(b); L.R. 7-15. After considering the papers submitted by the Parties, the Court DENIES Exxon's motion.

I. Background

On December 3, 2014, Plaintiff Environmental Defense Center ("EDC" or "Plaintiff") filed this action against Defendants Bureau of Safety and Environmental Enforcement ("BSEE"), Brian Salerno, in his official capacity as Director of BSEE, Jaron E. Ming, in his official capacity as the Pacific Region Director of BSEE, Bureau of Ocean Energy Management ("BOEM"), Walter Cruickshank, in his official capacity as Acting Director of BOEM, Ellen G. Aronson, in her official capacity as Pacific Region Director of BOEM, the United States Department of the Interior ("DOI"), and Sally Jewell, in her capacity as Secretary of the Interior (collectively, the "Federal Defendants"). *Compl.* ¶¶ 10-31.

Plaintiff claims that the Federal Defendants violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, in connection with BSEE's approval of fifty-one applications for Permits to Drill ("APDs") and applications for Permits to Modify ("APMs") authorizing well stimulation methods – including acid well stimulation and hydraulic fracturing – to facilitate oil and gas development and production from offshore platforms located within federal, Outer Continental Shelf ("OCS") waters off the coast of California. *Id.* ¶ 3.

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Specifically, Plaintiff challenges APDs and APMs that authorized well stimulation methods "during drilling operations from offshore oil platforms located within the Santa Barbara Channel." *Id.* ¶ 75. Plaintiff seeks that the Court, *inter alia*, enjoin the Federal Defendants from further implementing the challenged APDs and APMs, "as well as all pending and future APDs and APMs authorizing offshore well stimulation, until and unless Defendant BSEE complies with NEPA and all other applicable laws." *Id.* 39:8-13.

On April 2, 2015, the Court granted Exxon's motion to intervene in the matter. Dkt. # 34. Exxon is a "long standing and active participant in oil and gas exploration and development activities in the Pacific OCS Region." Dkt. # 19-3, *Declaration of Ken Dowd* ("Dowd Decl.") ¶ 3. Exxon operates the Santa Ynez Unit, which is located in the Santa Barbara Channel and contains 16 OCS leases with interest in each owned exclusively by Exxon. *Id.* ¶¶ 4-5. Exxon conducts its activities from the Heritage Platform, the Harmony Platform, and the Hondo Platform – all of which are located in the Santa Ynez Unit. *Id.* ¶ 6. Exxon currently operates over one hundred wells in the Santa Ynez Unit and has made "substantial investments in acquiring, exploring, and developing the lease interests that make up the Santa Ynez Unit." *Id.* ¶¶ 10-11.

Exxon obtained ten of the APDs and nineteen of the APMs that Plaintiff challenges, has obtained additional permits for well stimulation in the three platforms described above, and intends to apply for an additional APD in the Santa Ynez Unit that contemplates well stimulation technologies at issue in this litigation. *Dowd Decl.* ¶¶ 6, 17-20. Furthermore, Exxon plans to "continue to evaluate and generate new opportunities to develop the [Santa Ynez Unit] leases including but not limited to the drilling of new wells and stimulation of new and existing wells." *Dowd Decl.* ¶ 24.

The Government Defendants filed the administrative record on June 11, 2015. Dkt. 46. Less than a week later, on June 15, 2015, the Court granted Exxon's motion to temporarily seal certain documents to "provide [Exxon] an opportunity to assess whether any of [the] documents contained confidential business information." Dkt. # 53.

Exxon now moves for a protective order in connection with the following sixteen documents which consist of a 1982 Development and Production Plan ("DPP"), a 1987 update to the DPP ("DPP Update"), Applications for Permit to Drill ("APD"), and Applications for Permit to Modify ("APM"):

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Bates Number	**Document Description**	**Description of Specific Page(s)**
DOI0000397	APD	Worst Case Discharge Scenario
DOI0000501-510	APD	Entire APD with attachments
DOI0000562-563	APD	Worst Case Discharge Scenario
DOI0000655	APD	Worst Case Discharge Scenario
DOI0000763	APD	Worst Case Discharge Scenario
DOI0000821-931	APD	Entire APD with attachments
DOI0000987	APD	Worst Case Discharge Scenario
DOI0001822-1836	APM	Entire APM with attachments
DOI0001837-1851	APM	Entire APM with attachments
DOI0001852-1866	APM	Entire APM with attachments
DOI0001877-1881	APM	Entire APM with attachments
DOI0001882-1889	APM	Entire APM with attachments
DOI0001890-1895	APM	Entire APM with attachments
DOI0001896-1946	APM	Entire APM with attachments
DOI0003204-3746	DPP	Entire DPP
DOI0002706-3151	DPP Update	Entire DPP Update

Mot. 1:18-2:8.

According to Exxon, the 1982 Development and Production plan is a "comprehensive document submitted by [Exxon] pursuant to the Outer Continental Shelf Lands Act ("OCSLA") that describes the facilities and operations related to the proposed development of the Santa Ynez Unit." *Id.* 3:17-22. The 1982 DPP includes:

> [D]etailed information regarding the regional, near-surface, and subsurface geology related to the Unit; reservoir evaluation information including the number and location of wells to be drilled to each reservoir, anticipated production rates, the expected life of the field, and a total production forecast; and information regarding the major components of the platform drilling systems and the operational plans and procedures for the field developments.

Id. 3:23-4:1. The 1982 DPP also contains an Appendix A, whose pages have been identified by Exxon as proprietary information, containing "formation maps and structure cross-sections . . . as well as reservoir evaluation information, including reservoir and fluid properties, development well locations, drill stem test summaries, and production forecasts for each platform." *Id.* 4:3-13.

Exxon also seeks to protect a 1987 DPP Update which contains "project changes implemented after the original 1982 DPP was submitted" and information similar to that contained in the 1982 DPP. *Id.* 4:14-21.

The APDs and APMs, which were submitted to BSEE, "set forth the specific drilling activities and operations to be conducted on a given well." *Id.* 4:23-26. Exxon informs the Court that the documents it seeks to protect were expressly designated as proprietary by Exxon and include, "detailed information such as summaries of drilling operations, wellbore sketches, construction schematics, reservoir data, and casing and cement designs" as well as "structure maps and formation data." *Id.* 4:27-5:9.

Plaintiffs and the Federal Defendants filed oppositions to Exxon's motion. Dkts. # 66, 67.

II. Legal Standard

There is a strong presumption in favor of public access to court records, grounded in the common law right "to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *see Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) (citing *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)); *San Jose Mercury News, Inc. v. United States District Court*, 187 F.3d 1096, 1102 (9th Cir. 1999).

To overcome this presumption, "[a] party seeking to seal a judicial record . . . must articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process." *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (internal citations, quotations, and alterations omitted). Conclusory statements that documents are confidential do not satisfy this standard. *Id.* at 1182; *see Foltz*, 331 F.3d at 1130-31 (explaining that even under the more lenient "good cause" standard applicable to unfiled discovery materials, the movant "bears the burden . . . of showing that specific prejudice or harm will result if no protective order is granted").

The court hearing the application to seal must then "base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Hagestad*, 49 F.3d at 1434 (citing *Valley Broad. Co. v. United States District Court*, 798 F.2d 1289, 1294 (9th Cir. 1995)); *see also In re Midland Nat'l Life Ins. Co. Annuity Sales Practices Litig.*, 686 F.3d 1115, 1119 (9th Cir. 2012) (per curiam) (citing *Kamakana*, 447 F.3d at 1179) ("the district court must articulate a factual basis for each compelling reason to seal").

Under Federal Rule of Civil Procedure 26, however, the Court may:

> [F]or good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden and expense, including one or more of the following . . . requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.

Fed. R. Civ. P. 26(c)(1)(G).

III. Discussion

Exxon argues that there is good cause to protect these documents because the "information is at the core of the company's exploration, development, and production of offshore oil and gas." *Mot.* 5:12-21. To support its argument, Exxon looks to the Freedom of Information Act ("FOIA"), which, according to Exxon, "recognizes that disclosure of this type of information could result in harm" and exempts disclosure of the information that Exxon seeks to protect. *Mot.* 5:12-7:12. Plaintiff and the Federal Defendants argue in opposition that there is no good cause to issue the protective order because the OCSLA and its "implementing regulations authorize the public disclosure of the documents identified." *Fed. Defs.' Opp.* 1:1-4; *see also Pff.'s Opp.* 2:5-7 ("the documents [Exxon] seeks to protect are properly considered public documents under regulations implementing the [OCSLA]"). The Court agrees with Plaintiff and the Federal Defendants that Exxon has not made the showing necessary for relief under Federal Rule of Civil Procedure 26.

A. The Freedom of Information Act

FOIA provides that federal agencies "shall make available to the public" certain information upon request. 5 U.S.C. § 552(a). The statute, however, specifically notes that it does not apply to certain matters including "trade secrets and commercial or financial information obtained from a person and privileged and confidential" (Exemption 4) and

"geological and geophysical information and data, including maps, concerning wells" (Exemption 9). 5 U.S.C. § 552(b)(4),(9).

In order to show good cause to protect the documents listed above, Exxon contends that the items fall into FOIA exemptions 4 and 9. *See Mot.* 5:22-7:7. In opposition, the Federal Defendants and the Plaintiffs do not argue that the documents would not fall under these disclosure exemptions, but, rather, that good cause has not been shown because the OCSLA and its regulations provide for the public disclosure of these documents notwithstanding the exemptions listed in the Freedom of Information Act. *See Pffs.' Opp.* 3:7-16; *Fed. Defs.' Opp.* 10:13-12:8.

As the Supreme Court held in *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979), "Congress did not design the FOIA exemptions to be mandatory bars to disclosure." 441 U.S. at 293. Consequently, even if a document falls into one of the exemptions enumerated in the FOIA, an agency is not required to withhold a document from public disclosure. *See Pacific Architects and Engineers Inc. v. U.S. Dept. of State*, 906 F.2d 1345, 1346-47 (9th Cir. 1990). The Ninth Circuit has recognized an exception to the permissive nature of FOIA and that is when the release of information is barred by another statute or regulation. *See id.* at 1347 ("If, however, release of requested information is barred by some other statute or regulation, the agency does not have discretion to release it.").

The Trade Secrets Act, 18 U.S.C. § 1905, as the Parties recognize, "qualifies as a barring statute." *Id.* at 1347. In recognition of this exception to the permissive nature of FOIA, the FOIA regulations provide, as Exxon points out in Reply, that "[i]f a bureau determines that the requested information is protected from release by Exemption 4 of the FOIA, the bureau has no discretion to release the information" and that "[r]elease of information protected from release by Exemption 4 is prohibited by the Trade Secrets Act." 43 C.F.R. § 2.36; *see Reply* 4:12-5:10. It is clear from the language in this regulation that the government does not have the discretion to disclose information that is prohibited by the Trade Secrets Act. *See Pacific Architects*, 906 F.2d at 1347 (recognizing that FOIA Exemption 4 and the Trade Secrets Act have been held to be the same).

In relevant part, the Trade Secrets Act prevents the government from disclosing information related to the "trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, of expenditures of any person, firm, partnership, corporation, or association," but the act is limited to the disclosure of this information "to any extent not authorized by law." 18 U.S.C. § 1905. Therefore, the Trade Secrets Act "expressly permits the disclosure of trade secrets and other

privileged information to the extent that disclosure is authorized by law." *Fed. Defs.' Opp.* 8:1-3.

Consequently, the Court disagrees with Exxon that merely showing that the documents outlined above fall into the FOIA exemptions protects them from disclosure and proves that there is good cause to enter the protective order. According to the Plaintiff and the Federal Defendants, Exxon cannot show that there is good cause for non-disclosure of documents that are expressly authorized by law. The Court agrees. The question, then, becomes whether the documents listed above are authorized by law.

B. The Outer Continental Shelf Lands Act

Plaintiff and the Federal Defendants argue that the documents that Exxon seeks to protect are public information pursuant to the Outer Continental Shelf Lands Act.

The Outer Continental Shelf Lands Act governs the leasing and "exploration, development, and production of the minerals of the outer Continental Shelf." *See* 43 U.S.C. §§ 1332(4), (1337). Under the OCSLA, potential lessees or permittees must provide the government with certain information in order to obtain a lease allowing for the exploration, development, and production of minerals of the outer Continental Shelf. *See* 43 U.S.C. § 1352.

With regards to the handling of this information, the OCSLA explicitly provides that "[t]he secretary shall prescribe regulations to (1) assure that the confidentiality of privileged or proprietary information received by the Secretary under this section will be maintained, and (2) set forth the time periods and conditions which shall be applicable to the release of such information." 43 U.S.C. § 1352(c).

The regulations promulgated by the Secretary of the Interior, in compliance with the OCSLA, include the time periods and conditions for the release of information received pursuant to the OCSLA. *See* 30 C.F.R. §§ 250.197, 550.197.

30 C.F.R. § 550.197 relates to information that is submitted to the Bureau of Ocean Energy Management ("BOEM"). *See* 30 C.F.R. § 550.197. Specifically, the regulations provide that information submitted in forms BOEM-0137 will be available to the public "[w]hen the well goes on production." *See* 30 C.F.R. §§ 550.197(a)(9). Additionally, the regulations provide that when a lease is still in effect "[g]eophysical data, [p]rocessed geophysical information, [and]

[i]nterpreted G&G information" is available within "10 years after [the applicant] submit[s] the data and information." 30 C.F.R. § 550.197(b)(4).

30 C.F.R. § 250.197, in turn, governs data and information submitted to BSEE. *See* 30 C.F.R. § 250.197. Under this regulation, information contained in APDs and APMs becomes publicly available at the time "the well goes on production." *Id.* §§ 250.197(a)(1), (a)(3).

Here, Exxon has failed to show that the information described above is not subject to public disclosure under these regulations. First, the Federal Defendants contend, and Exxon does not dispute, that "[a]ll of the wells to which the above-listed APDs and APMs relate went on production after submission of the applications." *See Fed. Defs.' Opp.* 5:10-11; *see also Declaration of John Kaiser* ("Kaiser Decl.") ¶ 4. Accordingly, "pursuant to the governing statute and regulations, all the information submitted with those forms (including attachment to the form) is now publicly available." *Fed. Defs.' Opp.* 5:11013.

Additionally, the Court is not persuaded that because the regulations provide that in submitting APDs and APMs, an applicant must submit a public copy of the documents and an original version, with the public copy excluding information exempt from public disclosure "under law or regulation" means that documents exempt from disclosure under FOIA or the Trade Secrets Act may never be disclosed by BSEE. *See Reply* 30 C.F.R. §§ 250.410, 250.186. *Reply* 6:21-7:18. OCSLA explicitly provides that proprietary and privileged information must be protected, but also mandates that the Secretary promulgate regulations dictating the length and the manner that such information will be protected. *See* 43 U.S.C. § 1352(c).[1]

Second, Exxon has also not convinced the Court that the 1982 DPP and 1987 DPP Update are not subject to public disclosure under OCSLA and its regulations. *See generally Mot.* In reply, Exxon contends that the Plans concern, "not only wells that have been drilled and are in production, but wells that have not yet been drilled and may or may not be based upon numerous factors." *Reply* 1:25-28. It also contends, generally that "a majority of the analyses and conclusions set forth in the Plans are not the type of information covered by 30 C.F.R. §197(b)" but fails to identify these analyses and conclusions. *See id.* at 2 n.1.

[1] For the same reason, the Court rejects Exxon's corollary argument that the regulations contemplate that certain information submitted to BOEM will be eternally protected from public disclosure merely because "the regulation requires the submission of both a proprietary version of the DPP and a public version that omits information exempt from disclosure under FOIA." *Reply* 3:19-4:12; *see* 30 C.F.R. § 550.206.

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Exxon also argues in reply that the Court should, at the very least, issue a protective order covering "Reservoir Evaluation Information," which includes "detailed reservoir and production assumptions, including anticipated production rates, assumptions regarding the expected life of the field, and a total production forecast" because the "information is at the core of the company's business of development and production of offshore oil and gas, and its release would make available to [Exxon] competitors valuable assumptions regarding the productivity of the Santa Ynez Unit." *Reply* 3:11-18. This argument, however, fails to address whether this information subject to public disclosure under the OCSLA.

Exxon fails to make a specific showing of good cause for relief under Rule 26 in light of the fact that it has failed to convince the Court that the documents listed above are not subject to public disclosure under the OCSLA. Furthermore, the Court is not persuaded that it must grant the protective order in spite of the potential applicability of the OCSLA regulations. As the Court explained above, there is a strong presumption in favor of public access to documents and before preventing public access to information it must identify compelling reasons to do so.

Accordingly, it is appropriate to deny Exxon's motion for a protective order as to the documents identified above. Additionally, because Exxon has failed to show the Court that this relief is warranted, the Court holds that it is proper to unseal the record in its entirety.

IV. Conclusion

For the reasons stated above, the Court DENIES Intervenor-Defendant Exxon's motion for a protective order and hereby ORDERS that the administrative record is unsealed in its entirety.

IT IS SO ORDERED.