

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATURAL RESOURCES DEFENSE )  
COUNCIL, )  
1314 Second Street )  
Santa Monica, CA 90401, )  
 )  
Plaintiff, )  
 )  
v. ) C. A. No. \_\_\_\_\_  
 )  
FEDERAL MARITIME COMMISSION, )  
800 North Capitol Street, N.W. )  
Washington, DC 20573, )  
 )  
Defendant. )  
\_\_\_\_\_ )

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. This action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, arises from a FOIA request to the Federal Maritime Commission (“FMC”) for all records related to its review of the Clean Trucks Programs administered by the California ports of Los Angeles and Long Beach. Defendant FMC has violated FOIA by failing to produce records requested by Plaintiff Natural Resources Defense Council (“NRDC”) and by denying Plaintiff’s requests for a full public interest fee waiver and, in the alternative, for status as a representative of the news media entitled to be assessed only duplication fees.

**JURISDICTION**

2. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

## **PARTIES**

3. Plaintiff NRDC is a national, not-for-profit environmental and public health membership organization with approximately 430,000 members nationwide.

4. Defendant FMC is an agency of the United States government and has possession of and control over the records Plaintiff seeks.

## **FACTS**

5. The Clean Trucks Programs are environmental initiatives aimed at reducing air pollution generated by port-serving trucks by 80% over five years. The programs are designed to result in greater operational efficiencies than the current port trucking system, enhancing energy conservation through, among other things, reduced truck fuel consumption.

6. By letter dated October 9, 2008, signed by Project Attorney Adrian Martinez, NRDC submitted a FOIA request to FMC for all records related to FMC's investigation of the Clean Trucks Programs at two California ports, Los Angeles and Long Beach. The request specifically encompassed all communications between FMC and outside parties regarding the Clean Trucks Programs. The request was limited to records dated, originating, or received by FMC after August 1, 2006.

7. In its October 9, 2008 FOIA request, NRDC requested a full waiver of fees because the requested records would be "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). In support, NRDC provided a detailed explanation of the interest that the Clean Trucks Programs have generated among the press and the public and the ways in which release of these records would contribute to the public's understanding both of the information and interests the FMC considered in deciding to

investigate the Clean Trucks Programs and of the review process FMC applied to the programs. Additionally, NRDC provided an extensive list of publications, newsletters, websites, and media appearances through which it disseminates information on environmental issues and prior instances where NRDC has used records obtained under FOIA to educate the public about the government's activities with respect to those issues. NRDC also explained that it had no commercial interest in the requested records.

8. In its October 9, 2008 FOIA request, NRDC also requested, in the alternative, that it be recognized as a representative of the news media and thus entitled to be assessed only duplication fees and not search fees. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II). In support of this request, NRDC described its quarterly magazine, which has approximately 450,000 readers; its periodic newsletter sent to its nearly 430,000 members; and its electronic newsletters, actions alerts, and public reports and analyses available in its free online library. NRDC also described its staff's regular contributions to numerous periodicals and books; television, radio, and web programs; and hearings and conferences. Finally, NRDC documented its intent to disseminate through its publications any newsworthy information obtained through its FOIA request.

9. In its October 9, 2008 FOIA request, NRDC provided that in the event its fee waiver request was denied, it was prepared to pay up to \$250 under protest, reserving its right to challenge the denial of the fee waiver.

10. By letter dated November 17, 2008, FMC Secretary Karen Gregory informed NRDC that FMC needed additional time to process the request and anticipated a response by November 25, 2008.

11. By email dated December 6, 2008, Secretary Gregory proposed that NRDC narrow its request in three ways: 1) not include publicly available documents like newspaper

articles; 2) not include records dated after October 12, 2008; and 3) not include records dated prior to March 2007. Secretary Gregory also estimated that copying fees might be \$2,500 and indicated that FMC's initial assessment was that NRDC was not entitled to a fee waiver, but that a written decision was forthcoming. Finally, she informed NRDC that FMC would start releasing records, some on compact disc, in batches every two to three weeks until completion.

12. By letter dated December 17, 2008, signed by Adrian Martinez, NRDC agreed to Secretary Gregory's first proposed narrowing of the request in the December 6, 2008 email. NRDC did not agree to Secretary Gregory's second and third proposals. In addition to Secretary Gregory's proposals, NRDC provided that the request could be limited in two additional ways: 1) exclude records provided to FMC by NRDC, Sierra Club, and the Coalition for Clean Air; and 2) exclude records available on the Public Access to Court Electronic Records ("PACER"). Finally, NRDC agreed to pay, under protest and with a reservation of rights, up to \$2,500 in fees. (To date, however, no records in any form have been produced.)

13. By letter dated March 4, 2009, FMC denied NRDC's request for a full waiver of fees under the public interest fee waiver and, instead, granted a 20 percent reduction in fees. In addition, FMC concluded that NRDC did not qualify as a representative of the news media entitled to be assessed only duplication fees and not search fees. In concluding that it would assess 80 percent of search and duplication fees against NRDC, FMC relied heavily on NRDC's involvement in administrative and court actions with respect to one aspect of FMC's review of the Clean Trucks Program, from which FMC inferred that the requested release would primarily serve the interests of NRDC, not the public. FMC also found that the agency's interest in the Clean Trucks Program was already documented in those court and agency proceedings and thus

any release would duplicate publicly available information. In that letter, FMC requested that NRDC consent to incur fees in excess of \$2,500 without giving any estimated cost.

14. By letter dated March 17, 2009, signed by Adrian Martinez, NRDC appealed FMC's partial denial of a public interest fee waiver and its failure to grant NRDC news media representative status. NRDC noted that the administrative and court actions concerned one aspect of the FMC's review of the Clean Trucks Programs and that NRDC's much broader FOIA request was intended primarily to further the public's interest in knowing about this review process, not any litigation interest. It further explained that it had no commercial interest in the litigation in any event. NRDC also demonstrated that the information in the requested records is not duplicative, as it concerns the external communications and factors considered by the FMC in deciding to investigate, not the agency's own explanation.

15. By letter dated April 15, 2009, FMC denied NRDC's appeal. In upholding the partial denial of a public interest fee waiver, FMC reiterated the rationale that the FMC investigation was already in the public domain, quoting extensively from a declaration by an agency official submitted in conjunction with litigation that explained FMC's interests in the Clean Trucks Program. FMC asserted that any released records would, therefore, not contribute further to the public's understanding of the investigation. Moreover, it claimed that NRDC had formed a coalition with labor unions, which, FMC asserted, is "in support of the non-environmental components of the Port's Clean Trucks Plans, specifically including the employee driver mandate." FMC found that the unions "stand to gain" from the NRDC's advocacy for the Clean Trucks Programs and asserted that release of the records is therefore "destined for a use or purpose that primarily furthers commercial, trade, or profit interests of others on whose behalf the request is made." FMC also upheld the finding that NRDC was not a representative of the

news media, concluding that NRDC lacked “a firm intention to disseminate and publish information from its FOIA request.”

16. NRDC has exhausted its administrative remedies with respect to its requests for a full public interest fee waiver and for the alternative status as a representative of the news media.

17. Under 5 U.S.C. § 552(a)(6)(A)(i), FMC had 20 working days to respond to Plaintiff’s FOIA request. More than 20 working days have passed since Plaintiff’s October 9, 2008, request, and NRDC received neither a denial of its request nor any records produced in response to its request.

18. NRDC has exhausted all administrative remedies with respect to its FOIA request to FMC. *See* 5 U.S.C. § 552(a)(6)(C)(i).

#### **CLAIMS FOR RELIEF**

19. NRDC has a statutory right under FOIA to the records it seeks, and FMC has no legal basis for its failure to produce those records.

20. Under 5 U.S.C. § 552(a)(4)(A)(iii), NRDC is entitled to a full waiver of fees that otherwise would be assessed in conjunction with its request, and FMC’s denial in part of NRDC’s request for a public interest fee waiver violates FOIA.

21. Under 5 U.S.C. § 552(a)(4)(A)(ii)(II), NRDC is entitled to a waiver of search fees under the status of representative of the news media, and FMC’s denial of NRDC’s request for news media representative status violates FOIA.

WHEREFORE, Plaintiff requests that this Court

- A) Declare that Defendant’s failure to disclose records requested by Plaintiff is unlawful;

- B) Declare that Defendant's failure fully to waive fees associated with Plaintiff's request is unlawful;
- C) Declare that Defendant's failure to grant Plaintiff status as a representative of the news media is unlawful;
- D) Order Defendant to produce all the requested records to Plaintiff without delay and at no cost;
- E) Award Plaintiff her costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E); and
- F) Grant all other proper relief.

Respectfully submitted,



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Dated: May 19, 2009