IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

NATURAL RESOURCES DEFENSE COUNCIL, INC.,	)	
Plaintiff,	)	
v.	)	
UNITED STATES DEPARTMENT OF COMMERCE,	)	18-cv-583 ECF Case
Defendant.	)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Defendant United States Department of Commerce (Commerce) has violated the Freedom of Information Act (FOIA), 5 U.S.C. § 552, by failing to fully disclose records relating to a July 2017 determination by the Secretary of Commerce that New Jersey had complied with its obligation to implement management measures aimed at conserving summer flounder. Plaintiff Natural Resources Defense Council (NRDC) requested these records from Commerce six months ago.

2. Commerce's National Oceanic and Atmospheric Administration (NOAA), regional fishery management councils, and the interstate Atlantic States Marine Fisheries Commission (the Fisheries Commission or Commission) work together to conserve and manage various fish populations along the Atlantic coast. As part of these efforts, the Fisheries Commission adopts management plans to protect certain fish species against depletion. Under Federal law, the Commission

identifies Atlantic coastal states to be included in its various management plans and then works to ensure that those states implement and enforce the plans.

3. In June 2017, the Fisheries Commission determined that New Jersey was out of compliance with the Commission's management plan for summer flounder, a fish species that is currently subject to overfishing. In July 2017, contrary to the Commission's determination, the Secretary of Commerce found that the summer flounder management measures New Jersey had failed to implement were not necessary for the conservation of summer flounder. The Secretary's determination allowed New Jersey's recreational summer flounder fishing season to proceed.

4. On July 26, 2017, NRDC submitted a FOIA request to Commerce for documents related to the Secretary's finding that the summer flounder management plan measures New Jersey had failed to implement were unnecessary for conserving summer flounder.

5. In October and November, Commerce—via NOAA (a component of Commerce)—provided NRDC with two "interim" releases of responsive documents. These interim releases consisted solely of documents from NOAA's files, and nothing from other Commerce components or the Office of the Secretary.

6. After the most recent interim release, Commerce informed NRDC that there were no more responsive documents in NOAA's files. Commerce further informed NRDC that it was unable to provide an update regarding the status of its

search for additional responsive documents outside of NOAA, other than noting a "significant logjam" due to the volume of Commerce FOIA requests.

7. Although Commerce has had six months to search for and produce responsive documents, it has not provided NRDC with any records from components of Commerce other than NOAA. Nor has Commerce provided NRDC with a final determination as to whether it will comply with NRDC's request. The statutory deadline for such a final determination was, at the latest, September 11, 2017, with the final production of documents due promptly thereafter.

8. It is important that NRDC receives these documents in a timely manner. The Commission has already begun setting management measures for the 2018 summer flounder recreational fishing season, and the Commission and individual states will make key management decisions over the next four months prior to the opening of the season in May 2018. Particularly if New Jersey or other states choose not to comply with the relevant management plan for the 2018 fishing season, the requested documents could provide critical information to NRDC and the public in making advocacy decisions.

9. NRDC seeks a declaration that Commerce has violated FOIA by failing to provide a final determination as to whether it will comply with NRDC's request, and by failing to produce all non-exempt responsive records, by the statutory deadline. NRDC seeks an injunction ordering Commerce to disclose at no cost and without further delay all non-exempt, responsive records to NRDC.

THE PARTIES

10. Plaintiff NRDC is a national, non-profit environmental and public health membership organization with hundreds of thousands of members nationwide. NRDC engages in research, advocacy, public education, and litigation related to protecting public health and the environment. The organization's work includes efforts to end overfishing and promote the long-term sustainability of fishing practices in the United States.

11. Defendant Commerce is a federal agency within the meaning of FOIA, 5 U.S.C. § 551(1), and has possession or control of the records that NRDC seeks.

JURISDICTION AND VENUE

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

13. Venue is proper in this court because plaintiff NRDC resides and has its principal place of business in this judicial district. 5 U.S.C. § 552(a)(4)(B).

STATUTORY AND REGULATORY FRAMEWORK

14. FOIA requires that federal agencies release, upon request, information to the public, 5 U.S.C. § 552(a)(3), unless one of nine statutory exemptions applies, *id.* § 552(b).

15. Within 20 business days of an agency's receipt of a FOIA request, the agency must "determine . . . whether to comply with such request," *id.* § 552(a)(6)(A)(i); *see also* 15 C.F.R. § 4.6(b) (Commerce FOIA regulation), and "immediately notify the person making such request of . . . such determination and

the reasons therefor," 5 U.S.C. § 552(a)(6)(A)(i). If the agency determines that it will comply with the request, it must "promptly" release responsive, non-exempt records to the requester. *Id.* § 552(a)(6)(C)(i); *see also* 15 C.F.R. § 4.7(c).

16. In "unusual circumstances," an agency may extend the time limit for responding to a FOIA request by up to 10 business days. 5 U.S.C. § 552(a)(6)(B)(i).

17. If the agency fails to comply with the statutory time limits, the requester is deemed to have exhausted her administrative remedies and may immediately file suit "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." 5 U.S.C. §§ 552(a)(4)(B), 552(a)(6)(C)(i).

FACTUAL BACKGROUND

18. Summer flounder is an important fish for commercial and recreational fishing industries along the Mid-Atlantic coast, and is found in waters from Nova Scotia, Canada, to the east coast of Florida. Despite conservation efforts, the summer flounder population is below target levels and is currently subject to overfishing.

19. Summer flounder and the fishing of summer flounder—collectively known as the summer flounder fishery—are jointly managed by NOAA (a component of Commerce), the Mid-Atlantic Fishery Management Council, and the Fisheries Commission. Together, these entities seek to conserve summer flounder and prevent depletion of the species.

20. Under the Atlantic Coastal Fisheries Cooperative Management Act (Atlantic Coastal Act), 16 U.S.C. §§ 5101-5108, the Fisheries Commission is tasked with developing management plans to conserve summer flounder (as well as other fish species in the Atlantic coastal region), *see id.* § 5104(a). The Atlantic Coastal Act provides that, for each management plan, the Commission must identify the states that are required to implement and enforce the plan. *Id.* § 5104(a)(1). Under some management plans, the Commission allows states to implement their own management measures, so long as the state's measures achieve the same level of conservation as the Commission's plan.

21. If the Fisheries Commission finds that a state has failed to implement or enforce measures in compliance with the Commission's management plan for a particular fish species, the Atlantic Coastal Act requires the Commission to make a formal non-compliance determination. *Id.* § 5105(a). This determination is subject to review by the Secretary of Commerce, who makes an independent compliance determination. *Id.* § 5106(a)(1). If the Secretary agrees that the state has failed to implement and enforce the measures contained in the management plan, and also that such measures are "necessary for the conservation of the fishery," the Secretary must declare a moratorium on fishing that species in the waters of the non-complying state. *Id.* § 5106(a), (c)(1).

22. In February 2017, in response to new science indicating the declining population status of summer flounder, the Fisheries Commission tightened measures in its summer flounder management plan applicable to recreational

fishing. These stricter measures included increased minimum size requirements and a reduction in the maximum number of summer flounder allowed to be caught and kept by any one person.

23. State officials from New Jersey—one of several states required to implement and enforce the Commission's summer flounder management plan—vocally opposed these stricter measures. Soon after the Fisheries Commission voted on the new restrictions, the New Jersey Department of Environmental Protection Commissioner wrote a letter to the Secretary of Commerce, asking the Secretary to stop them from going into effect, claiming the restrictions would lead to the "destruction of" New Jersey's recreational summer flounder industry.

24. New Jersey ultimately proposed its own summer flounder recreational management measures, instead of implementing the new measures adopted by the Commission. Although the Commission's summer flounder management plan allowed New Jersey to do so if the measures would achieve the same level of conservation as the Commission's plan, after reviewing the measures proposed by New Jersey, the Commission found that the measures would not sufficiently protect summer flounder and were therefore inconsistent with the Commission's plan.

25. New Jersey nonetheless implemented its own measures, prompting a formal non-compliance determination by the Fisheries Commission on June 1, 2017.

26. In July 2017, for the first time in the twenty-four-year history of the Atlantic Coastal Act, the Secretary of Commerce made a finding contrary to the Commission's non-compliance determination, allowing New Jersey's recreational

summer flounder season to proceed. Specifically, the Secretary found that the measures New Jersey failed to implement were "not necessary for the conservation of summer flounder." 82 Fed. Reg. 33,481 (July 20, 2017). The notice announcing the Secretary's compliance determination was brief and devoid of any substantive explanation. *See id.*

27. On July 26, 2017, NRDC served a FOIA request on Commerce, seeking records supporting, explaining, or otherwise relating to the Secretary's finding that the summer flounder management measures New Jersey failed to implement were not necessary for the conservation of summer flounder. NRDC also requested a fee waiver.

28. NRDC received an email notification indicating that the request would be processed by NOAA, a component of Commerce. NRDC also received a letter from NOAA on August 4, 2017, acknowledging receipt of the request and stating that the agency was invoking the statutory ten-day extension applicable in "unusual circumstances." In its letter, NOAA stated that it anticipated completing NRDC's request by September 7, 2017.

29. On August 23, NRDC received a letter from NOAA recommending that NRDC narrow the scope of its request. After a phone call with NRDC on August 24 and an additional email from NRDC on August 25, NOAA agreed to move forward with the request. Around the same time, Commerce granted NRDC's fee waiver request.

30. NOAA provided NRDC with two "interim releases" of responsive documents in October and November, but did not provide a final date for Commerce's completion of NRDC's request. The interim releases consisted solely of documents from NOAA's files, and a NOAA representative confirmed that NOAA itself has no other responsive documents. NOAA further informed NRDC that it was unable to provide more information regarding the status of Commerce's search for additional responsive documents, other than noting a "significant logjam" due to the volume of Commerce FOIA requests.

31. It has been six months since NRDC served its FOIA request on Commerce, and more than four months since the statutory deadline passed, yet Commerce has failed to provide NRDC with a final response to its request.

CLAIM FOR RELIEF

32. Plaintiff incorporates by reference all preceding paragraphs.

33. NRDC has a statutory right under FOIA to obtain without further delay all records responsive to its request that are not exempt from disclosure.

34. Commerce violated its duty under FOIA, 5 U.S.C. § 552(a), to release by the statutory deadline all non-exempt, responsive records to NRDC.

REQUEST FOR RELIEF

Plaintiff respectfully requests that this Court enter judgment against Commerce as follows:

A. Declaring that Commerce has violated FOIA by failing to produce all non-exempt records responsive to NRDC's FOIA request by the statutory deadline;

B. Ordering that Commerce disclose the remaining requested records to NRDC at no cost and without further delay;

C. Ordering that Commerce produce an index identifying any documents or parts thereof that it withholds and the basis for the withholdings, in the event Commerce determines that certain responsive records are exempt from disclosure;

D. Retaining jurisdiction over this case to rule on any challenged assertions by Commerce that certain responsive records are exempt from disclosure;

E. Awarding NRDC its costs and reasonable attorneys' fees; and

F. Granting such other relief that the Court considers just and proper.

Respectfully submitted,

/s/ Catherine Marlantes Rahm

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