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Attorneys for Plaintiff
ECOLOGICAL RIGHTS FOUNDATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ECOLOGICAL RIGHTS FOUNDATION, a non-profit corporation, Plaintiff, v. NATIONAL MARINE FISHERIES SERVICE, Defendant.	Case No. 3:18-cv-00888-JSC **EXCHANGED SETTLEMENT CONFERENCE STATEMENT**

Plaintiff's Exchanged Settlement Conference Statement

A. Substance of the Suit

i. Facts giving rise to the case:

Concerned that the U.S. Army Corps of Engineers ("Corps") and Defendant National Marine Fisheries Service ("NMFS") have shirked their Endangered Species Act ("ESA") duties concerning two Corps dams and other Corps activities on the Yuba River that adversely affect threatened Chinook salmon, steelhead, and green sturgeon, EcoRights sent a FOIA request to NMFS seeking records related to unlawful take of these protected fish species that the Corps and /or its licensees may be perpetuating and concerning NMFS ESA section 7 consultations with the Corps. EcoRights has intended to use this information to ensure that the threatened fish in the Yuba River are protected as required by the ESA. For these purposes, it has remained critically necessary for EcoRights to timely receive current information in NMFS's possession on this topic. Without current information, EcoRights is hampered, possibly even entirely thwarted, in its efforts to serve as an effective public interest watchdog over NMFS's and the Corps' compliance with the ESA.

In response to EcoRights' request, NMFS released 239 documents in their entirety and 54 documents that were heavily redacted. EcoRights timely appealed NMFS's release determination, claiming that NMFS's search was inadequate and that non-exempt information was improperly withheld from ten documents. NMFS did not respond to EcoRights appeal within the 20 working days mandated by FOIA. Despite twice indicating it would release the appeal determination within a week NMFS did not do so, and at the time EcoRights initiated this action the determination was 309 days overdue. This type of egregious delay from NMFS in responding to EcoRights' FOIA requests and appeals was the subject of two previous actions against NMFS by EcoRights and Our Children's Earth Foundation ("OCE"). They sought and obtained a declaration from another judge of this Court that NMFS had a past pattern and practice of violating FOIA's deadlines in response to EcoRights' and OCE's FOIA requests. The court ordered NMFS to comply with FOIA's deadlines in response to future requests due to the court's finding that NMFS had failed to do so previously and the potential that these offenses might continue. However, NMFS violated this order by failing to make its appeal determination within FOIA's 20 working days deadline.

EcoRights exhausted its administrative remedies due to NMFS's failure to timely respond to the appeal and EcoRights initiated this action seeking judicial review of the issues of inadequate search and improper withholding raised in the appeal.

ii. The claims and defenses, including the statutory or other grounds upon which the claims are founded:

a. First Claim for Relief:

NMFS has violated FOIA's 20 working day deadlines for making a final determination in response to EcoRights' FOIA appeal and has failed to produce responsive records promptly. 5 U.S.C. § 552(a)(6)(A)(ii); 552(a)(3)(A).

b. Second Claim for Relief:

NMFS has violated 5 U.S.C. § 552(a)(8)(A) by withholding documents under invalid and unjustified claims of exemption under 5 U.S.C. §§ 552(b)(5), (b)(6), and b(7)(C). NMFS violated FOIA by failing to comply with the 5 U.S.C. § 552(a)(6)(A)(i) requirement that the agency provide enough information, presented with sufficient detail, clarity, and verification, so that the requester can fairly determine what has not been produced and why. NMFS has not shown what foreseeable harm would occur if withheld documents were released and has not segregated and released non-exempt information as required by 5 U.S.C. § 552(a)(8)(A). NMFS also violated 5 U.S.C. § 552(a)(3)(A)'s mandate that requested records be promptly released unless they fall within a FOIA exemption.

c. Third Claim for Relief:

NMFS has violated 5 U.S.C. § 552(a)(3)(C) by failing to conduct a reasonable, legally adequate search for records responsive to EcoRights' request.

iii. Summary of the proceedings to date and a description of any pending motions:

EcoRights initiated this action on February 10, 2018. NMFS answered on March 19, 2018. On March 23, 2018, EcoRights submitted a confidential settlement proposal to NMFS. The parties did not agree on settlement terms and on April 20, 2018, EcoRights filed a motion for summary judgment on all of its claims. NMFS filed a cross-motion for summary judgment and opposition to EcoRights' motion on May 25, 2018. EcoRights filed its opposition/reply on June 8, 2018. The Court has granted an extension

for NMFS to file its reply in support of its motion for summary judgment. NMFS's reply is now due June 22, 2018.

iv. Statement of the facts not reasonably in dispute:

On December 6, 2016, EcoRights, via counsel, sent a FOIA request to NMFS seeking three categories of documents: 1) documents containing input NMFS West Coast Region staff provided to National Oceanic and Atmospheric Administration ("NOAA") headquarters detailing the impacts of a Corps memo known as the Stockdale Memo. The Stockdale Memo lays out strict guidelines limiting Corps ESA section 7 consultations with NMFS and the U.S. Fish and Wildlife Service; 2) documents to or from NMFS counsel Chris Kiefer related to a draft letter from NMFS to the Corps entitled "Endangered Species Act Section 7(a)(2) Concurrence Letter for the U.S. Army Corps of Engineers' (Corps) Ongoing Operation and Maintenance of Englebright Dam and Reservoir on the Yuba River" ("Englebright concurrence letter"); and 3) documents in the possession of any NOAA Fisheries Office, Department and/or Division, including any NOAA law enforcement division, related to whether any entities or individuals may have caused or did cause, or may be causing, or are causing unauthorized take of threatened or endangered fish species in the Yuba River in the vicinity of Englebright Dam, Narrows 1 and 2 powerplants, Daguerre Point Dam and the Hallwood-Cordua Diversion, including but not limited to, any and all documents generated by, sent by, or received by NOAA law enforcement agent, Don Tanner.

On December 14, 2016, NMFS sent a letter to EcoRights counsel, Christopher Hudak, acknowledging receipt of the request on December 12, 2016 and assigning it tracking number DOC-NOAA-2017-000257. The acknowledgement letter stated that NMFS was extending the time for its response by ten business days because the agency needed to search for and collect the requested records from field facilities or other establishments separate from the office processing the request.

On February 13, 2017, NMFS sent EcoRights a final determination partially granting and partially denying EcoRights' request. NMFS stated it had located 309 documents responsive to the request and had released 239 of these documents in their entirety, via FOIAonline. NMFS partially withheld 54 documents under claims of attorney work product, attorney-client privilege, deliberative process exemptions pursuant to 5 U.S.C. 552(b)(5) ("Exemption 5") and the right to privacy exemption

pursuant to 5 U.S.C. § 552(b)(6) ("Exemption 6"). NMFS's final determination also stated that 16 documents that had originated from other agencies were referred to those agencies for release determination and direct response to EcoRights.

On March 10, 2017, EcoRights appealed NMFS's determination to the Office of the General Counsel of the Department of Commerce ("DOC Counsel"). The appeal challenged the adequacy of the search and the redactions in ten records totaling 87 pages. The appeal contended that NMFS: 1) improperly withheld information under vague and unjustified claims of deliberative process and attorney-client privilege exemptions; 2) withheld information with no exemption claim; 3) had not shown the existence of foreseeable harm to an interest protected by Exemptions 5 and 6 that would permit the agency to withhold information under these exemptions under the standard of the FOIA Improvement Act of 2016; and 4) failed to segregate factual material and make partial disclosures where possible.

EcoRights' appeal contended NMFS's search was inadequate because it appeared none of the documents NMFS had released were from the NOAA Office of Law Enforcement ("OLE") although EcoRights had specifically asked for OLE documents and EcoRights had reason to know that at least one OLE agent (Don Tanner) had responsive records. The 20 business days deadline for NMFS to provide its final determination for EcoRights' appeal was April 7, 2017.

On March 13, 2017 the DOC Counsel's Office acknowledged receipt of EcoRights appeal. On July 18, 2017, four months after the statutory deadline for the appeal determination, NMFS posted to FOIAonline two redacted emails responsive to EcoRights' request. EcoRights was not notified that NMFS had released these two documents on FOIAonline. The two redacted documents posted to FOIAonline on July 18, 2017 were also released to EcoRights in the initial document release on February 13, 2017, but NMFS's approach to redactions in these two emails was inconsistent. One email, addressed to OLE Special Agent Don Tanner, was released without any redactions in the first document production. A near duplicate of the email, along with Agent Tanner's reply, was also released in the first document production with redactions pursuant to Exemption 6. Although Agent Tanner's name was redacted, information identifying the author of the email as being from the OLE, and his cell phone number, was not redacted. The version posted to FOIAonline in July 2017 was redacted pursuant to

Exemptions 6 and 7(C) and the information identifying the author of the email as being from the OLE and the cell phone number was redacted. Similarly, the second email posted in July 2017 had a recipient's name redacted pursuant to Exemption 6 in the initial document release. In the version of this email released in July 2017 NMFS asserted that Exemption 7(C) also applied to the recipient's name.

On October 2, 2017 EcoRights' counsel, Christopher Hudak, sent an email to NMFS FOIA officers and the DOC Counsel's office requesting an update on the status of the appeal. The DOC Counsel did not respond and NMFS provided information about a different, unrelated request but not the appeal. On October 25, 2017 Mr. Hudak sent another email to NMFS FOIA officers and the DOC Counsel's office requesting that NMFS provide the final appeal determination by November 3, 2017 and warned that if the determination was not provided by that date EcoRights might seek judicial relief.

On October 30, 2017 Michael Bogomolny, Acting Chief, Information Law Division, of the DOC Counsel's Office responded to EcoRights' October 25, 2017 request and stated that he expected EcoRights would have the appeal determination "this week." However, the DOC Counsel's office did not provide the appeal determination that week. On January 31, 2018, EcoRights' counsel, Patricia Linn, sent another email to the DOC Counsel's office requesting a status update. Mr. Bogomolny responded that same day stating he would provide "a full status update before the end of the week." However, he did not. Instead, on February 2, 2018 he sent yet another email stating he was "committing to releasing a final determination of the appeal in this matter next week." However he did not release the appeal determination that week. NMFS did not release the appeal determination until May 25, 2018, the same day that NMFS filed its cross-motion for summary judgment. The appeal determination was released one year and 48 days after the statutory deadline.

Also on May 25, 2018 , NMFS withdrew its application of Exemptions 6 and 7(C) to two of the challenged documents and released these two records in full.

v. <u>List of the key facts in dispute and the specific evidence relevant to a determination of those facts.</u>

Ecorights does not believe that any key facts are in dispute.

vi. <u>Brief statement of issues of law with respect to liability and damages:</u>

a. To ensure that the public is kept current concerning its government's activities and can timely acquire current information government agencies possess, Congress imposed strict deadlines for agency responses to FOIA requests. Within 20 working days, federal agencies must provide a determination that (1) informs the requester as to the disposition of its FOIA request, i.e., whether records will be provided or withheld and if the latter, why, and (2) that informs the requester of a right to appeal to the agency head any decision not to provide requested records. 5 U.S.C. § 552(a)(6)(A)(i). Agencies must resolve appeals of FOIA determinations within 20 working days after the receipt of an appeal. 5 U.S.C. §552(a)(6)(A)(ii). FOIA further requires agencies to provide non-exempt requested records "promptly." 5 U.S.C. § 552(a)(3)(A).

NMFS has violated 5 U.S.C. §§ 552(a)(6)(A)(ii) by failing to provide the final disposition for EcoRights' appeal within the statutory deadline. NMFS's unreasonable delay in responding to the FOIA appeal is a repeat of the conduct that another judge of this Court previously found unlawful. *See Our Children's Earth Found.*, *v. Nat'l Marine Fisheries Serv.*, Nos. 14-4365 & 14-1130, 2015 U.S. Dist. LEXIS 143392) at *29 (N.D. Cal. Oct. 21, 2015) (finding NMFS had a past pattern or practice of violating FOIA's deadlines in response to EcoRights' and its co-plaintiff's requests); *see also Our Children's Earth Found. v. Nat'l Marine Fisheries Serv.*, 2015 U.S. Dist. LEXIS 94997 at *33 (N.D. Cal. July 20, 2015) ("*OCE II*") (ordering NMFS to comply with FOIA's deadlines in response to future requests from EcoRights and its co-plaintiff).

NMFS has also violated 5 U.S.C. § 552(a)(3)(A) by failing to *promptly* provide all non-exempt responsive records. NMFS's release in full of the two documents that had been redacted pursuant to Exemptions 6 and 7(C) was not prompt. The records were released on May 25, 2018 which was 15 months after NMFS made its February 13, 2017 determination, and 13 months after the statutory deadline for NMFS's response to EcoRights' appeal. *See Citizens for Responsibility and Ethics in Washington v. Federal Election Com'm* ("*CREW*"), 711 F.3d 180, 188 (D.C. Cir. 2013) (prompt production "typically would mean within days or a few weeks of a 'determination,' not months or years."). NMFS is also withholding, without adequate justification, other non-exempt information, and NMFS's long delay in producing these records violates FOIA's mandate that non-exempt records be produced promptly.

EcoRights' claim that the appeal determination was not timely is not moot because it is capable of repetition but could avoid review. NMFS's egregious delay in providing the appeal determination, failure to comply with a court order, past pattern or practice of NMFS's violations, and the possibility that they might recur with EcoRights's future requests show that a declaratory judgment is appropriate here. *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174-75 (9th Cir. 2002) ("the cessation of conduct does not necessarily render a declaratory judgment moot."); *Natural Res. Def. Council, Inc. v. EPA* ("*NRDC*"), 966 F.2d 1292, 1299 (9th Cir.1992) (declaratory judgment warranted because it will "delineate [ ] important rights and responsibilities, and will be of "significant educational and lasting importance").

b. NMFS has violated 5 U.S.C. § 552(a)(3) by failing to perform an adequate search. NMFS must conduct a reasonable search for documents responsive to EcoRights' FOIA request with methods that are reasonably expected to produce all existing documents. 5 U.S.C. § 552(a)(3)(C); *Zemansky v. United States EPA*, 767 F.2d 569, 571 (9th Cir. 1985); *OCE I*, 85 F. Supp.3d at 1082. NMFS's search must be more than perfunctory and NMFS must follow obvious leads to discover requested documents. *Valencia-Lucana v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999). EcoRights' motion for summary judgment presented evidence that OLE's search was not reasonably thorough and NMFS's opposition failed to rebut that evidence. By presenting evidence that there are more responsive records than NMFS produced, EcoRights presented "positive indications of overlooked materials," thus shifting the summary judgment burden to NMFS to justify its search. *Valencia-Lucana,* 180 F.3d at 326. S*ee also Campbell v. United States Dep't of Justice*, 164 F.3d 20, 28 (D.C.Cir.1998) (search was inadequate when agency's disclosed documents revealed that searching other records systems might uncover the documents sought); *Center for National Security Studies v. United States Department of Justice*, 215 F. Supp.2d 94, 110 (D.D.C.2002) (finding search inadequate where disclosed document clearly indicated existence of earlier, relevant undisclosed documents). However, NMFS has not carried its burden warranting an award of summary judgment to EcoRights on this claim.

c. NMFS has failed to carry its burden to demonstrate that the records it is withholding fall within Exemption 5 attorney-client and deliberative process privileges. FOIA indicates a strong presumption in favor of disclosure and its exemptions are to be interpreted narrowly. *Assembly of Cal. v.*

U.S. Dep't of Commerce, 968 F.2d 916, 920 (9th Cir. 1992); *Church of Scientology of Cal. v. U.S. Dep't. of the Army*, 611 F.2d 738, 742 (9th Cir. 1979). Government agencies bear the burden of proof to show that any withheld documents are properly exempt from disclosure. 5 U.S.C. § 552(a)(4)(B); *Yonemoto v. Dept. of Veterans Affairs*, 686 F.3d 681, 688 (9th Cir. 2012); *Willamette Industries, Inc. v. U.S.*, 689 F.2d 865, 868 (9th Cir. 1982). 5 U.S.C. § 552(a)(6)(A)(i) "requires that the agency provide enough information, presented with sufficient detail, clarity, and verification, so that the requester can fairly determine what has not been produced and why, and the court can decide whether the exemptions claimed justify the nondisclosure." *Fiducia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1043 (9th Cir. 1999). NMFS's *Vaughn* index fails to meet these standards.

d. FOIA requires that "any reasonably segregable portion of a record" must be released after application of the Act's nine exemptions. 5 U.S.C. § 552(b); *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1167, (D.C. Cir. 2011). The FOIA Improvement Act further added that an agency shall "consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible." 5 U.S.C. § 552(a)(8)(A)(ii). NMFS has not complied with 5 U.S.C. § 552(b)'s requirement that when asserting a document contains materials exempt from disclosure the agency must segregate and release any purely factual material. *See Roth*, 642 F.3d at 1186- 87. Although NMFS's affidavit states that the agency conducted a page by page and line-by-line review of each challenged record and determined there is no further segregable information to be released, EcoRights has identified factual material in the two drafts of the Englebright Concurrence letter that could reasonably be segregated and NMFS's failure to release this information violates FOIA.

e. NMFS's withholding of information under Exemptions 6 and 7(C) was not justified warranting declaratory judgment. Exemption 6 protects from disclosure information about individuals that constitutes personnel, medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6); *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 673 (D.C. Cir. 2016). Exemption 7(C) authorizes the withholding of "records or information compiled for law enforcement purposes" only to the extent they "could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ." 5 U.S.C. § 552(b)(7)(C).

NMFS's lack of explanation about why it originally believed release of OLE Agent Don Tanner's name and work phone number in two emails would be an unwarranted personal privacy invasion, but release of the name and work email address from the same emails of another NMFS employee investigating violations of the ESA would not be, suggests that NMFS has a policy of asserting a blanket exemption protecting from disclosure the names and work contact information of OLE agents, regardless of the actual circumstances/justification for privacy. NMFS seems to assert that any OLE record is a law enforcement record. However, such interpretations are wrong. There is no blanket exemption for the names and work contact information of OLE agents. *See, e.g.*, *Gordon v. FBI*, 390 F. Supp. 2d 897, 902 (N.D. Cal. 2004) (names of agency employees are not personal information about those employees that meets Exemption 6 threshold), *summary judgment granted*, 388 F. Supp. 2d 1028, 1040-42 (N.D. Cal. 2005). Further, all OLE records are not law enforcement records simply by virtue of the function the OLE serves. *Roth,* 642 F.3d at 1173. To ensure that NMFS does not continue an apparent policy contrary to law, declaratory judgment is warranted that NMFS's withholding of the OLE agent's name under Exemptions 6 and 7(C) violated FOIA.

f. NMFS's lack of adequate information at the administrative level explaining the reasons for withholding responsive records violated 5 U.S.C. § 552(a)(6)(A)(i). NMFS did not estimate the volume of requested material that was withheld in violation of 5 U.S.C. § 552(a)(6)(F). NMFS's determination did not identify the specific exemptions claimed for all of the withholdings. NMFS failed to identify the specific exemption claimed for three redacted documents. One document had no indication which exemption was claimed and the other two documents merely identified "(b)(5)" as the exemption claimed, which could mean attorney-client privilege, deliberative process privilege or attorney work product. There was no indication NMFS had complied with the requirements of the FOIA Improvement Act, 5 U.S.C. § 552(a)(8)(A). NMFS did not identify the foreseeable harm to a protected interest that would occur if the withheld material was released. NMFS also did not indicate that it had reviewed the records and released all reasonably segregable non-exempt factual material.

g. Declaratory relief should be awarded against NMFS for all of EcoRights' claims. In addition, injunctive relief should be awarded for EcoRights' claims of inadequate search and improper withholding.

h. EcoRights should be awarded its attorneys' fees and costs. FOIA authorizes awards of attorneys fees for EcoRights if they have "substantially prevailed," which is defined as having "obtained relief through either – (I) a judicial order, or an enforceable written agreement or consent decree; or (II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii). EcoRights must also "demonstrate both eligibility for and entitlement to such a recovery." *Long v. IRS,* 932 F.2d 1309, 1313 (9th Cir. 1991). Here, it is clear that the filing of EcoRights' complaint and motion for summary judgment directly caused a "voluntary or unilateral change in position" by NMFS (the release of the long overdue appeal determination and two records redacted under Exemptions 6 and 7(C)), which is "not insubstantial." EcoRights also readily meet the factors required to demonstrate eligibility and entitlement for a recovery.

B. Relief Sought.

EcoRights seeks a declaratory judgment establishing that NMFS violated FOIA by: failing to provide a final disposition of EcoRights' appeal in accordance with the statutory deadline and failing to promptly produce responsive records; failing to perform a reasonably thorough search for responsive records; withholding information responsive to the FOIA Request that is not subject to a lawful FOIA exemption set forth at 5 U.S.C. § 552(b) and without providing a legally adequate explanation for finding the documents exempt from disclosure. EcoRights further seeks an injunction pursuant to 5 U.S.C. § 552(a)(4)(B) ordering NMFS to immediately produce all documents responsive to the FOIA Request that have been illegally withheld. EcoRights also seeks an injunction pursuant to 5 U.S.C. section 552(a)(4)(B) ordering NMFS to perform a renewed search for responsive records. Finally, EcoRights seeks an award of attorneys' fees and costs.

C. Settlement Discussions/Demand and Response Required.

EcoRights' counsel served a settlement demand on Defendant on June 19, 2018 by email. The demand is attached hereto as Exhibit 1.

D. Persons Attending Conference for EcoRights

i. Patricia Linn, Lead Attorney for EcoRights in this matter.

ii. Edward Scher, EcoRights' Board member, Party Representative with decision-making authority.

Date: June 19, 2018

Respectfully submitted,

/s/Patricia Linn
Patricia Linn
Attorney for Plaintiff
Ecological Rights Foundation

EXHIBIT 1

PATRICIA LINN
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June 19, 2018

Via Electronic Mail

Jennifer S. Wang
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Re.: *Ecological Rights Foundation v. National Marine Fisheries Service*, case no. 18-cv-00888-JSC

CONFIDENTIAL SETTLEMENT COMMUNICATION

Dear Jennifer,

Magistrate Judge Ryu has required that EcoRights submit a settlement demand to NMFS prior to the parties' settlement conference on June 29, 2018 concerning the above referenced case. The following are EcoRights' terms to settle this case without further litigation.

1. Deposition of Larry Thompson and Don Tanner on the adequacy of the search by August 15, 2018.

2. Declaration by July 7, 2018 stating the search cut-off dates that NMFS used. If the search cutoff dates were not set equal to the time of search, NMFS will perform new searches with cutoff dates set equal to the start of the new searches. New searches will be completed and any additional responsive material located will be released by August 3, 2018.

3. Stipulation to declaratory relief that the appeal determination was late in violation of FOIA.

4. Release of all withheld information by July 7, 2018.

5. Payment of EcoRights' attorneys fees and costs. As of June 18, 2018 our attorneys' fees lodestar is $100,589.92. Costs are approximately $500. By July 31, 2018 NMFS will request that the U.S. Treasury pay these fees and costs.

If NMFS agrees to these terms EcoRights will forego further declaratory and injunctive relief.

Sincerely,
Patricia Linn
Counsel for Ecological Rights Foundation