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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.	Civil Case No. **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Ecological Rights Foundation ("EcoRights") alleges as follows:

INTRODUCTION

1. EcoRights brings this action under the Freedom of Information Act ("FOIA"), which allows an aggrieved party to seek relief when documents are unlawfully withheld, and authorizes a reviewing court to enjoin the agency from withholding records and to order the production of any agency records improperly withheld from the complainant. 5 U.S.C. § 552(a)(4)(B). EcoRights seeks declaratory and injunctive relief for FOIA violations by the National Marine Fisheries Service ("NMFS"). At issue in this case is a FOIA request to NMFS seeking documents related to NMFS West Coast Region's Endangered Species Act ("ESA") Section 7 consultations with the Army Corps of Engineers ("Corps") and NMFS's regulatory oversight of Corps operations and infrastructure on the Yuba River that adversely impact spring run Chinook salmon, steelhead trout, and green sturgeon which are listed as a threatened species under the ESA. EcoRights alleges that NMFS: 1) failed to provide a final determination for EcoRights' administrative appeal within statutory time limits; 2) improperly withheld information not subject to specific, enumerated exemptions; 3) failed to provide legally adequate explanations for the withholding of requested information; 4) failed to promptly release non-exempt information responsive to EcoRight's FOIA request; 5) failed to segregate and release non-exempt information; and 6) failed to perform a reasonable, legally adequate search for responsive records.

JURISDICTION

2. This Court has subject matter jurisdiction under 5 U.S.C. section 552(a)(4)(B), which allows an aggrieved party to seek relief when records are unlawfully withheld, and authorizes a reviewing court to enjoin the agency from withholding records and to order the production of any agency records improperly withheld from the complainant.

3. This Court has personal jurisdiction over NMFS and its officials because NMFS, a branch of the National Oceanic and Atmospheric Administration ("NOAA"), is an agency of the federal government operating within the United States.

VENUE

4. Venue in the United States District for the Northern District of California is proper under 5 U.S.C. section 552(a)(4)(B) because the complainant has its principal place of business in the Northern District, and many of the records sought by complainants are most likely situated in the NMFS and NOAA offices located within the Northern District.

INTRADISTRICT ASSIGNMENT

5. Intradistrict assignment of this matter to the San Francisco Division of the Court is appropriate pursuant to Civil Local Rule 3-2(d) because EcoRights' principal place of business is located in Garberville, California.

THE PARTIES

6. Ecological Rights Foundation ("EcoRights") is a non-profit, public benefit corporation, organized under the laws of the State of California, devoted to furthering the rights of all people to a clean, healthful and biologically diverse environment. To further its environmental advocacy goals, EcoRights actively seeks federal and state agency implementation of state and federal wildlife-related laws, and as necessary, directly initiates enforcement actions on behalf of itself and its members.

7. Defendant NMFS, a division of the Department of Commerce, is the agency of the United States Government responsible for administering and implementing the ESA for anadromous fisheries and generally is responsible for the stewardship of the nation's living marine resources and their habitat.

STATUTORY BACKGROUND

8. FOIA requires that an agency disclose records to any person except where the records fall under a specifically enumerated exemption. 5 U.S.C. § 552. The courts have emphasized the narrow scope of these exemptions and "the strong policy of the FOIA that the public is entitled to know what its government is doing and why." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980).

9. FOIA requires that an agency, upon any request for records, shall make the records available promptly. 5 U.S.C. § 552(a)(3)(A). An agency shall make a determination whether to comply with a request within twenty (20) business days after the receipt of the request and shall immediately notify the

party making the request of such determination, the reasons for the determination, and the party's right to appeal. 5 U.S.C. § 552(a)(6)(A)(i). In unusual circumstances, the agency may extend the time for the determination, for no more than ten (10) days, by written notice to the party, specifying the reasons for the extension and the date on which the determination is expected to be sent. 5 U.S.C. § 552(a)(6)(B)(i).

10. Federal agencies are under a duty to conduct a reasonable search for records responsive to a party's request using methods that can be reasonably expected to produce the information requested to the extent they exist. 5 U.S.C. § 522(a)(3)(C).

11. When an agency decides to withhold records under a claim of exemption it must notify the person making such request of such determination and the reasons therefor. 5 U.S.C. § 552(a)(6)(A)(i). Government agencies bear the burden of proof to show that any withheld documents are exempt from the duty to disclose. 5 U.S.C. § 522(a)(4)(B).

12. A party may appeal to the head of the agency any adverse determination. 5 U.S.C. § 552(a)(6)(A)(i). An agency shall make a determination with respect to any appeal within twenty (20) business days after the receipt of such appeal. 5 U.S.C. § 552(a)(6)(A)(ii). If an agency does not respond within the FOIA time limits, a party will be deemed to have exhausted its administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

13. On June 30, 2016, President Obama signed into law the FOIA Improvement Act of 2016. The Act made significant amendments to FOIA, effective as of enactment on June 30, 2016. 5 U.S.C. § 522, § 6; OIP Summary of the FOIA Improvement Act of 2016. The amendments include changes to the standard by which NMFS must evaluate withholdings. The FOIA Improvement Act of 2016 dictates that agencies shall withhold information only if disclosure would harm an interest protected by an exemption – what is referred to as the "foreseeable harm standard." 5 U.S.C. § 552(a)(8)(A)(i); OIP Summary of the FOIA Improvement Act of 2016.

14. Additionally, FOIA requires an agency to consider partial disclosure whenever the agency determines that a full disclosure of a requested record is not possible and to take reasonable steps necessary to segregate and release nonexempt information. 5 U.S.C. § 552(a)(8)(A).

15. An agency's process for dealing with FOIA requests constitutes "withholding" if its net effect is significantly to impair the requester's ability to obtain the records or significantly increase the amount of time he or she must wait to obtain them. *McGehee, III v. Central Intelligence Agency*, 697 F.2d 1095, 1110 (D.C. Cir. 1983), *vacated in part on other grounds*, 711 F.2d 1076 (1983).

FACTUAL BACKGROUND

NMFS's Response to EcoRights' December 6, 2016 FOIA Request

16. 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 NOAA headquarters detailing the impacts of an Army Corps of Engineers ("Corps") memo known as the Stockdale Memo. The Stockdale Memo laid 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;" 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 are causing or have caused unauthorized take of threatened or endangered fish species in the Yuba River in the vicinity of Englebright Dam and Daguerre Point Dam.

17. 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.

18. On February 13, 2017 NMFS sent EcoRights its 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. Fifty-four documents

were partially withheld under 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"). The 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.

19. On March 10, 2017 EcoRights timely appealed NMFS's final determination to the Office of the General Counsel of the Department of Commerce ("DOC Counsel"). EcoRights' administrative appeal contended that NMFS: 1) had failed to make a reasonable search for responsive documents; 2) had improperly withheld documents under vague and unjustified claims of deliberative process and attorney-client privilege exemptions; 3) had withheld information with no exemption claim; 4) 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; and 5) had failed to segregate factual material and make partial disclosures where possible.

20. EcoRights' appeal contended NMFS's search was inadequate because 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 had responsive documents.

21. The 20 business days deadline for NMFS to provide its final determination for EcoRights' appeal was April 7, 2017.

22. On July 18, 2017 NMFS posted to FOIAonline two redacted emails, apparently from the OLE. EcoRights was not notified that NMFS had released these two OLE documents on FOIAonline. The two emails had information redacted pursuant to Exemption 6 and Exemption 7 (5 U.S.C. § 552(b)(7)(C).

23. On October 2, 2017 EcoRights' counsel 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 and NMFS did not respond.

24. On October 25, 2017 EcoRights' counsel sent another email to NMFS FOIA officers and the DOC Counsel's office which requested 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.

25. 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.

26. On January 31, 2018 Ecorights' counsel sent another email to the DOC Counsel's office requesting a status update. Mr. Bogomolny responded that same day and stated 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 determination that week.

27. As of the date of this Complaint the DOC Counsel has not released the appeal final determination and it is 309 days overdue.

FIRST CLAIM FOR RELIEF
NMFS Violation of FOIA
5 U.S.C. §§ 552(a)(6)(ii) and 552(a)(3)(A)
Request for Declaratory Relief

28. EcoRights reasserts and realleges paragraphs 1 through 27 above.

29. NMFS has violated 5 U.S.C. § 552(a)(6)(A)(ii) by failing to provide a final determination for EcoRights' appeal within 20 business days after receipt of the appeal. EcoRights timely submitted the appeal on March 10, 2017. FOIA required NMFS to provide its appeal determination by April 7, 2017. However, NMFS did not provide the determination by April 7, 2017 and as of the date of this Complaint the appeal determination is 309 days overdue.

30. EcoRights has constructively exhausted its administrative remedies given NMFS's failure to provide its appeal determination within FOIA's statutory time limits. 5 U.S.C. § 552(a)(6)(C)(i).

SECOND CLAIM FOR RELIEF
NMFS Violation of FOIA
5 U.S.C. §§ 552(a)(8)(A), 552(a)(6)(A)(i) and 552(a)(3)(A)
Request for Declaratory Relief and Injunction to Compel NMFS to Comply with FOIA Requirement to Release Documents Unless a Valid Exemption Applies

31. EcoRights reasserts and realleges paragraphs 1 through 30 above.

32. 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 may not withhold documents unless foreseeable harm will occur to an interest protected by an enumerated exemption. 5 U.S.C. §§ 552(a)(8)(A)(i). NMFS has not shown that such foreseeable harm exists. NMFS has also violated 5 U.S.C. §§ 552(a)(8)(A)'s mandate that NMFS segregate and release non-exempt information. NMFS has redacted the entire substantive contents of 67 pages of information under attorney-client privilege and deliberative process exemptions without an adequate showing that NMFS attempted to segregate and release the non-exempt information in these pages.

33. NMFS has also 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. Exemptions are read narrowly and NMFS bears the burden of proving exemptions apply, which it has failed to do. 5 U.S.C. § 552(a)(4)(b). NMFS has failed to identify the specific exemption claimed for several documents that were redacted. Several documents identify Exemption 5 as the exemption claimed. However Exemption 5 could mean attorney work product, attorney-client privilege, or deliberative process. One document is redacted without any basis for the withholding identified.

34. NMFS's improper withholding of nonexempt documents also violates 5 U.S.C. § 552(a)(3)(A)'s mandate that requested records be promptly released unless they fall within one of FOIA's specifically enumerated disclosure exemptions. It has been eleven months since EcoRights submitted its appeal. Except for two redacted emails released 18 weeks after the appeal (not promptly), NMFS continues to withhold documents, without justifying they are exempt from disclosure.

THIRD CLAIM FOR RELIEF
NMFS Violation of FOIA
5 U.S.C. §§ 552(a)(3)(c)
Request for Declaratory Relief and Injunction to Compel NMFS to Perform a Reasonable Search

35. EcoRights reasserts and realleges paragraphs 1 through 34 above.

36. 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. NMFS's search was inadequate because none of the documents NMFS initially released were from the OLE although EcoRights had specifically asked for OLE documents and EcoRights had reason to know that at least one OLE agent had responsive documents. After EcoRights submitted its appeal, NMFS released two emails, one apparently to an OLE agent and one apparently from an OLE agent. Ecorights makes these assumptions because the names of the sender and recipient have been redacted under Exemptions 6 and 7. The emails concern take of listed salmon and steelhead in the Yuba River. One of the emails indicates the OLE is likely to have more documents responsive to EcoRights' request, but NMFS failed to locate them because of its inadequate search.

PRAYER FOR RELIEF

WHEREFORE, EcoRights seeks the following relief:

a. A declaratory judgment pursuant to 5 U.S.C. § 552 declaring that NMFS violated FOIA by failing to provide the final determination for EcoRights' appeal in accordance with FOIA's statutory deadline;

b. A declaratory judgment that NMFS' failure to provide the appeal determination within the statutory deadline and produce non-exempt records promptly as required by FOIA constitutes illegal withholding of records;

c. A declaratory judgment pursuant to 5 U.S.C. § 552 that NMFS violated FOIA by: improperly withholding records that are not exempt from disclosure; failing to adequately explain how and why withheld information falls within a particular exemption; failing to adequately explain how disclosure would foreseeably harm interests protected by claimed exemptions; and failing to segregate and disclose non-exempt requested information;

d. A declaratory judgment that NMFS failed to perform a reasonable, legally adequate search for documents responsive to EcoRight's request;

e. An injunction pursuant to 5 U.S.C. § 552(a)(4)(B) ordering NMFS to: 1) conduct a reasonable, legally adequate search for records responsive to EcoRights' FOIA request within 20 days; 2) produce all non-exempt records in NMFS' possession responsive to EcoRights FOIA request within 30 days; and 3) provide EcoRights with a detailed, legally adequate explanation for the withholding of any information responsive to Ecorights FOIA request within 30 days;

f. An award of attorneys fees and costs to EcoRights pursuant to 5 U.S.C. § 552(a)(4)(E); and

g. Such other and further relief as this Court deems just and proper.

DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS

Based on EcoRights' knowledge to date, pursuant to Civil Local Rule 3-15, the undersigned certifies that, as of this date, other than the named parties, there is no such interest to report.

Respectfully Submitted,

Dated: February 10, 2018

By: *Patricia Linn*
Patricia Linn
Counsel for Ecological Rights Foundation

JS-CAND 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
Ecological Rights Foundation

(b) County of Residence of First Listed Plaintiff Humboldt
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Patricia Linn, Law Office of Patricia Linn, 115 Oakdale Ave., Mill Valley, CA 94941 (415) 388-2303; additional attorney information is attached

DEFENDANTS
National Marine Fisheries Service

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- [ ] 1 U.S. Government Plaintiff
- [ ] 3 Federal Question *(U.S. Government Not a Party)*
- [x] 2 U.S. Government Defendant
- [ ] 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)* *(For Diversity Cases Only)*

	PTF	DEF		PTF	DEF
Citizen of This State	1	1	Incorporated *or* Principal Place of Business In This State	4	4
Citizen of Another State	2	2	Incorporated *and* Principal Place of Business In Another State	5	5
Citizen or Subject of a Foreign Country	3	3	Foreign Nation	6	6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- 110 Insurance
- 120 Marine
- 130 Miller Act
- 140 Negotiable Instrument
- 150 Recovery of Overpayment Of Veteran's Benefits
- 151 Medicare Act
- 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- 153 Recovery of Overpayment of Veteran's Benefits
- 160 Stockholders' Suits
- 190 Other Contract
- 195 Contract Product Liability
- 196 Franchise

REAL PROPERTY
- 210 Land Condemnation
- 220 Foreclosure
- 230 Rent Lease & Ejectment
- 240 Torts to Land
- 245 Tort Product Liability
- 290 All Other Real Property

TORTS

PERSONAL INJURY
- 310 Airplane
- 315 Airplane Product Liability
- 320 Assault, Libel & Slander
- 330 Federal Employers' Liability
- 340 Marine
- 345 Marine Product Liability
- 350 Motor Vehicle
- 355 Motor Vehicle Product Liability
- 360 Other Personal Injury
- 362 Personal Injury -Medical Malpractice

PERSONAL INJURY
- 365 Personal Injury – Product Liability
- 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- 370 Other Fraud
- 371 Truth in Lending
- 380 Other Personal Property Damage
- 385 Property Damage Product Liability

CIVIL RIGHTS
- 440 Other Civil Rights
- 441 Voting
- 442 Employment
- 443 Housing/ Accommodations
- 445 Amer. w/Disabilities–Employment
- 446 Amer. w/Disabilities–Other
- 448 Education

PRISONER PETITIONS

HABEAS CORPUS
- 463 Alien Detainee
- 510 Motions to Vacate Sentence
- 530 General
- 535 Death Penalty

OTHER
- 540 Mandamus & Other
- 550 Civil Rights
- 555 Prison Condition
- 560 Civil Detainee–Conditions of Confinement

FORFEITURE/PENALTY
- 625 Drug Related Seizure of Property 21 USC § 881
- 690 Other

LABOR
- 710 Fair Labor Standards Act
- 720 Labor/Management Relations
- 740 Railway Labor Act
- 751 Family and Medical Leave Act
- 790 Other Labor Litigation
- 791 Employee Retirement Income Security Act

IMMIGRATION
- 462 Naturalization Application
- 465 Other Immigration Actions

BANKRUPTCY
- 422 Appeal 28 USC § 158
- 423 Withdrawal 28 USC § 157

PROPERTY RIGHTS
- 820 Copyrights
- 830 Patent
- 835 Patent–Abbreviated New Drug Application
- 840 Trademark

SOCIAL SECURITY
- 861 HIA (1395ff)
- 862 Black Lung (923)
- 863 DIWC/DIWW (405(g))
- 864 SSID Title XVI
- 865 RSI (405(g))

FEDERAL TAX SUITS
- 870 Taxes (U.S. Plaintiff or Defendant)
- 871 IRS–Third Party 26 USC § 7609

OTHER STATUTES
- 375 False Claims Act
- 376 Qui Tam (31 USC § 3729(a))
- 400 State Reapportionment
- 410 Antitrust
- 430 Banks and Banking
- 450 Commerce
- 460 Deportation
- 470 Racketeer Influenced & Corrupt Organizations
- 480 Consumer Credit
- 490 Cable/Sat TV
- 850 Securities/Commodities/ Exchange
- 890 Other Statutory Actions
- 891 Agricultural Acts
- 893 Environmental Matters
- [x] 895 Freedom of Information Act
- 896 Arbitration
- 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

- [x] 1 Original Proceeding
- [ ] 2 Removed from State Court
- [ ] 3 Remanded from Appellate Court
- [ ] 4 Reinstated or Reopened
- [ ] 5 Transferred from Another District *(specify)*
- [ ] 6 Multidistrict Litigation–Transfer
- [ ] 8 Multidistrict Litigation–Direct File

VI. CAUSE OF ACTION Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
5 U.S.C. section 552
Brief description of cause:
violations of Freedom of Information Act

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, Fed. R. Civ. P. **DEMAND $** CHECK YES only if demanded in complaint: **JURY DEMAND:** Yes [x] No

VIII. RELATED CASE(S), IF ANY *(See instructions)*: JUDGE DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)
(Place an "X" in One Box Only) [x] **SAN FRANCISCO/OAKLAND** [ ] **SAN JOSE** [ ] **EUREKA-MCKINLEYVILLE**

DATE 02/10/2018 **SIGNATURE OF ATTORNEY OF RECORD** Patricia Linn

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