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NATIONAL MARINE FISHERIES SERVICE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ECOLOGICAL RIGHTS FOUNDATION, Plaintiff, v. NATIONAL MARINE FISHERIES SERVICE, Defendant.	CASE NO. 18-cv-888 JSC **STIPULATION OF SETTLEMENT AND DISMISSAL WITH PREJUDICE**

Plaintiff Ecological Rights Foundation, and defendant, National Marine Fisheries Service ("NMFS"), hereby enter into this Stipulation of Settlement and Dismissal with Prejudice ("Stipulation"), as follows:

WHEREAS, plaintiff filed the above-captioned action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, regarding the FOIA request submitted to defendant on December 6, 2016, DOC NOAA-2017-000257 (the "FOIA Request");

WHEREAS, the parties wish to avoid any further litigation and controversy and to settle and compromise fully any and all claims and issues that have been raised, or could have been raised in this action;

Now therefore, in consideration of the mutual promises contained in this Stipulation, and other good and valuable consideration, receipt of which is hereby acknowledged, the parties stipulate as follows:

1. The parties do hereby agree to settle and compromise each and every claim of any kind, whether known or unknown, arising directly or indirectly from the acts or omissions that gave rise to the above-captioned action under the terms and conditions set forth in this Stipulation.

2. Defendant NMFS is a component of the United States Department of Commerce ("DOC"). As used in this Stipulation, "defendant" shall refer to DOC as well as its component, NMFS.

3. Defendant agrees to (i) conduct a search of emails sent or received by NMFS Special Agent Donald Tanner between January 1, 2013 and December 31, 2014 for documents potentially responsive to the FOIA Request using only the search terms listed in Exhibit A; (ii) review the potentially responsive documents that are returned by the search described in this paragraph and produce any responsive, nonexempt records to plaintiff; (iii) make reasonable efforts to produce any responsive, nonexempt records located through the search described in this paragraph within 30 days of the entry of this Stipulation onto the Court's docket; and (iv) within 30 days of the entry of this Stipulation onto the Court's docket, provide to plaintiff a declaration from Agent Tanner regarding the emails deleted during the incident referenced in paragraph 13 of the Declaration of Donald Tanner In Support of Defendant's Reply In Support of Motion for Summary Judgment, filed on June 22, 2018, ECF No. 33-3. Defendant further agrees to pay the sum of Fifty Five Thousand Dollars ($55,000) ("Settlement Amount") for plaintiff's reasonable attorney's fees and costs, which sum shall be in full and final satisfaction of all plaintiff's rights and claims in this case, including but not limited to those for attorney's fees, costs and other litigation expenses, including interest, and defendant shall have no further liability for any further amounts. Electronic payment of the Settlement Amount will be made to plaintiff by payment to Environmental Advocates' IOLTA trust account.

4. Plaintiff agrees to promptly furnish defendant with the information necessary to effectuate payment pursuant to Paragraph 3, including but not limited to, bank name and address, wire transfer number, ABA number, routing number, account number, name of account, and federal taxpaper identification number. Defendant's counsel agrees to submit all paperwork necessary to effectuate the

electronic funds transfer to National Oceanic and Atmospheric Administration ("NOAA") within fourteen calendar days of either entry of this Stipulation onto the Court's docket, or receipt from plaintiff of the information described in this Paragraph, whichever is later. Payment shall be made as promptly as practicable, consistent with normal processing procedures followed by NOAA, after plaintiff provides the necessary information for the electronic funds transfer to the undersigned Assistant United States Attorney. Counsel for plaintiff agrees to send confirmation of the receipt of the payment to counsel for defendant within fourteen calendar days of such payment.

5. Plaintiff hereby agrees to accept production of the responsive, nonexempt records identified by defendant as described in Paragraph 3, and the Settlement Amount in full settlement and satisfaction of all claims, and hereby releases and forever discharges defendant, its successors, the United States of America, and any department, agency, or establishment of the United States, and any officers, employees, agents, successors or assigns of such department, agency or establishment, from any and all claims and causes of action that plaintiff asserts or could have asserted in this litigation, or which hereafter could be asserted by reason of, or with respect to, or in connection with, or which arise out of, the FOIA request on which this action is based or any other matter alleged in the Complaint, including but not limited to all past, present or future claims for attorneys' fees or costs, or litigation expenses in connection with the above-captioned litigation. Plaintiff further specifically agrees that it may not contest or challenge in any way (i) the adequacy of defendant's search as described in Paragraph 3, including, but not limited to, the agency records searched, the date range used, the method of search, or the search terms used; or (ii) defendant's determination to withhold any record located in the search described Paragraph 3, in whole or in part, on the ground that it is either subject to a FOIA statutory exemption or not responsive to plaintiff's FOIA Request.

6. This Stipulation shall not constitute an admission of liability or fault on the part of the defendant or the United States or their agents, agencies, servants, or employees, and is entered into by both parties for the sole purpose of compromising disputed claims and avoiding the expenses and risks of further litigation. This Stipulation shall not be construed as evidence or as an admission on the part of defendant, the United States, its agents, servants, or employees regarding any issues of law or fact, or regarding the truth or validity of any allegation or claim raised in this action, or as evidence or as an

admission by the defendant regarding plaintiff's entitlement to attorney's fees, costs, or other litigation expenses under FOIA. This Stipulation shall not be used in any manner to establish liability for fees or costs in any other case or proceeding involving defendant.

7. This Stipulation shall be binding on and inure to the benefit of the parties hereto and their respective successors and assigns.

8. Execution of this Stipulation by counsel for the parties shall constitute a dismissal of all claims in this action with prejudice, effective upon entry of this stipulation onto the Court's docket, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii).

9. The persons signing this Agreement warrant and represent that they possess full authority to bind the persons on whose behalf they are signing to the terms of the settlement.

10. The provisions of California Civil Code Section 1542 are set forth below:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

Plaintiff, having, been apprised of the statutory language of Civil Code Section 1542, and fully understanding the same, nevertheless elects to waive the benefits of any and all rights it may have pursuant to the provision of that statute and any similar provision of federal law. Plaintiff understands that, if the facts concerning plaintiff's claim and the liability of the government for damages pertaining thereto are found hereinafter to be other than or different from the facts now believed by it to be true, the Stipulation shall be and remain effective notwithstanding such material difference.

11. If any withholding or income tax liability is imposed upon plaintiff or plaintiff's counsel based on the Settlement Amount or any other term of this Stipulation, plaintiff and plaintiff's counsel shall be solely responsible for paying any such determined liability from any government agency. Nothing in this Stipulation constitutes an agreement by defendant concerning the characterization of the Settlement Amount for the purposes of the Internal Revenue Code, Title 26 of the United States Code.

12. If any provision of this Stipulation shall be invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provision shall not in any way be affected or impaired thereby.

13. This Stipulation may be pled as a full and complete defense to any action or other proceeding, including any local, state or federal administrative action, involving any person or party which arises out of the claims released and discharged by this Stipulation.

14. This Stipulation shall constitute the entire agreement between the parties, and it is expressly understood and agreed that this Stipulation has been freely and voluntarily entered into by the parties hereto. The parties further acknowledge that no warranties or representations have been made on any subject other than as set forth in this Stipulation.

15. This Stipulation may not be altered, modified, or otherwise changed in any respect except in writing, duly executed by all parties or their authorized representatives.

16. This Stipulation may be executed in counterparts and is effective on the date by which both parties have executed the Stipulation.

IT IS SO STIPULATED.

DATED: July 13, 2018

Respectfully submitted,

ALEX TSE
Acting United States Attorney

/s/ Jennifer S Wang
JENNIFER S WANG
Assistant United States Attorney
Attorneys for Defendant National Marine Fisheries Service

DATED: July 13, 2018

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

Exhibit A

1. Yates Stockdale
2. Keifer Stockdale
3. Keifer Draft Englebright
4. Concurrence Letter
5. Tanner Yuba
6. Tanner Englebright
7. Tanner Daguerre
8. Tanner Narrows
9. Tanner Hallwood-Cordua
10. Thompson Yuba
11. Thompson Englebright
12. Thompson Daguerre
13. Thompson Narrows
14. Thompson Hallwood-Cordua
15. Yates
16. Keifer
17. Baker
18. Tucker
19. Thompson Take
20. Thompson Death
21. Thompson Mortality
22. Thompson Stranding
23. Thompson

24. Dewatering
25. Thompson Sprague
26. Ellrott
27. Flow Deviations
28. rescue
29. Englebright
30. Narrows
31. Hallwood
32. Cordua
33. Daguerre
34. Take
35. Yuba
36. Yuba BiOp
37. 2007 BiOp
38. 2002 BiOp
39. Powerhouses
40. Lawson Fite
41. Narrows 1
42. Narrows 2
43. Brophy
44. entrainment
45. Tanner