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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OUR CHILDREN'S EARTH  
FOUNDATION, et al.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES  
SERVICE, et al.,

Defendants.

Case No. [14-cv-01130-WHO](#)  
Case No. 14-cv-04365 WHO

**ORDER RESOLVING REMAINING  
ISSUES**

These related FOIA cases have been litigated almost to conclusion before the Hon. Samuel Conti, who has now retired. Three issues remain, each of which I decide with reference to Judge Conti's prior Orders. For the reasons described below, I agree with the arguments of defendant National Marine Fisheries Service (NMFS) that bring these cases to an end and ask that the parties submit a stipulated form of judgment within ten days.

**BACKGROUND**

The parties are intimately familiar with the facts and procedural history of these related cases. For present purposes, it suffices to explain that plaintiffs are environmental organizations who submitted FOIA requests to NMFS regarding agency actions regarding a plan by Stanford University to upgrade water diversion facilities and the impacts those upgrades may have on steelhead trout and other endangered species. Plaintiffs' first lawsuit – *OCE I*, Case No. 14-1130 – generally involves whether NMFS's responses to plaintiffs' FOIA requests were adequate and plaintiffs' second related lawsuit – *OCE II*, Case No. 14-4365 – involves allegations that NMFS has a pattern and practice of tardy and incomplete responses to FOIA requests. *OCE III*, Case No. 15-2558, was dismissed as moot and is no longer at issue. October 21, 2015 Order (Dkt. No. 31) at 22.

1 **DISCUSSION**

2 **I. WITHHOLDING OF INFORMATION FROM EXHIBIT 3 TO COSTA REPLY**

3 Plaintiffs argue that Judge Conti did not rule on whether NMFS appropriately redacted  
4 names and contact information from an email chain that was attached as Exhibit 3 to the Costa  
5 Declaration (14-1130, Dkt. No. 46-3, “Exhibit 3”). The issue first arose in Judge Conti’s March  
6 30, 2015 Order concerning *OCE I*. Dkt. No. 59. Judge Conti explained that NMFS “redacted the  
7 names and contact information for two individuals in its Office of Law Enforcement, stating in its  
8 Vaughn Index that the ‘withheld information consists of the names and contact information of  
9 NOAA law enforcement officers. The withheld information constitutes personal information that  
10 would constitute an unwarranted invasion of personal privacy in which no public interest has been  
11 identified.” *Id.* at 13. Judge Conti concluded that under FOIA Exemption 6 (5 U.S.C. §  
12 552(b)(6)) NMFS “has failed to provide a particularized explanation of what non-trivial privacy  
13 interest would be implicated if these individuals’ names and contact information are disclosed.”  
14 *Id.* at 14-15. While NMFS argued in its briefs (but not in its declarations or *Vaughn* index) that  
15 disclosure of this information could subject the individuals to harm because plaintiffs’ intended to  
16 publicize those individuals’ role in the underlying dispute over the water system upgrade, the  
17 Court concluded on the record at that juncture “there is no reason aside from speculation for  
18 concluding these individuals will be subjected to ‘harassment,’ ‘embarrassment,’ ‘stigma,’ or  
19 other negative consequences if their associations with this email are publicly revealed.” *Id.* at 15.  
20 As a result the Court ordered NMFS to supplement the factual record “to enable the Court to more  
21 fully assess what, if any, privacy interests are at stake,” and held the summary judgment motion as  
22 to Exhibit 3 “in abeyance, until the record is supplemented and the Court determines if additional  
23 filings or in camera review is necessary.” *Id.* at 16.

24 In the briefing following that Order, NMFS asserted that the names and contact  
25 information were protected by Exemptions 6 and 7(C), as explained in the declaration of Logan  
26 Gregory (Dkt. No. 60-2). Gregory stated that the agency redacts that type of information in order  
27 to protect its law enforcement officers from being targeted, possibly retaliated against, or harassed  
28 as a result of the officers’ civil and criminal investigations. Dkt. No. 60-2 ¶¶ 4-5. In response,

1 plaintiffs argued NMFS had waived any reliance on 7(C) and failed to comply with Judge Conti's  
2 order to provide a particularized explanation showing that a non-trivial privacy interest existed to  
3 support the redactions. Dkt. No. 69.

4 On July 20, 2015, Judge Conti issued an order addressing issues in both *OCE I* and *OCE*  
5 *II*. He did not address withholding under Exemption 6, but did engage in a lengthy discussion of  
6 Exemption 7(C) with particular respect to the withholding of law enforcement officer names from  
7 an investigator's memo ("Investigator's Memo"). Dkt. No 25 at 14-17. He held that redaction of  
8 law enforcement officer names was justified under 7(C) in that NMFS had shown a cognizable  
9 privacy interest that was not outweighed by the public interest in determining whether the  
10 investigator had access to specific information. *Id.* at 15-16.

11 Plaintiffs argue that Judge Conti could not have resolved the Exhibit 3 issue in the July 20,  
12 2015 Order because he did not address Exemption 6, did not address plaintiffs' waiver argument  
13 as to 7(C), and only expressly addressed the withholding of law enforcement names from the  
14 Investigator's Memo under Exemption 7(C). 14-4365, Dkt. No. 32. While that is correct, NMFS  
15 contends that Judge Conti necessarily decided the issue because under either Exemption 6 or 7(C),  
16 plaintiffs failed to identify any public interest in the production of the names and contact  
17 information that would outweigh NMFS assertions of privacy. NMFS argues that the privacy  
18 interest in the names and contact information redacted from Exhibit 3 are materially  
19 indistinguishable from the privacy interest in the names redacted from the Investigator's Memo.  
20 *Id.*

21 Judge Conti's July 20, 2015 Order did not resolve whether NMFS appropriately redacted  
22 the names and contact information from Exhibit 3. However, NMFS did not waive the ability to  
23 assert Exemption 7(C); Judge Conti invited NMFS to supplement the record on this issue and gave  
24 plaintiffs the opportunity to respond. *See* Dkt. Nos. 59, 62, 69. Under Judge Conti's 7(C)  
25 analysis – as explained at pages 14-16 of his July 20, 2015 Order – I conclude that NMFS has  
26 identified a cognizable privacy interest supporting redaction of the names and contact information  
27 from Exhibit 3 similar to the interest asserted by NMFS with respect to the Investigator's Memo.  
28 On the other side of the balance, I do not see any public interest in disclosing the names and

1 contact information. The only public interest argument put forth by plaintiffs is their ability “to be  
2 able to evaluate whether NMFS is adequately searching its files by tasking these personnel with  
3 reviewing their files.” Dkt. No. 47 at 19. The adequacy of NMFS’s search is no longer at issue,  
4 following Judge Conti’s orders. Consistent with Judge Conti’s determination as to the  
5 Investigator’s Memo, I conclude that NMFS was justified in redacting the law enforcement officer  
6 information from Exhibit 3.

7 **II. PATTERN AND PRACTICE OF SETTING IMPROPER CUTOFF DATES**

8 Plaintiffs alleged in *OCE I* and *OCE II* that NMFS has a pattern and practice of improperly  
9 setting the cut-off date for FOIA searches at the date NMFS receives FOIA requests or the date the  
10 agency issues a Tasker memo<sup>1</sup>, and not the date when searches actually begin which plaintiffs  
11 contend is required under FOIA. *See* 15 C.F.R. § 4.5(a) (“Records responsive to a request shall  
12 include those records within the Department’s possession and control as of the date the  
13 Department begins its search for them.”).

14 In his July 20, 2015 Order, Judge Conti discussed this claim and concluded that it was at  
15 most a factual dispute – because under FOIA responsive records must be produced up to the date  
16 the search was started – and ordered NMFS to provide a more detailed account of “exactly when it  
17 began its actual search [to] clarify the proper search cutoff dates and allow the Court to resolve  
18 this issue on summary judgment.” Dkt. No. 25 at 24. NMFS was directed to provide “additional  
19 evidence regarding the date(s) that searches actually began vice the date that searches were merely  
20 tasked.” *Id.* In response, NMFS submitted additional argument and evidence regarding the date it  
21 began its search for responsive documents on two of plaintiffs’ FOIA requests, as the “the date the  
22 subject-matter expert involved begins the search.” Dkt. No. at 27 at 7; *see also* Dkt. No 30 at 7-8  
23 (Supp. Resp.). Plaintiffs challenged that additional argument and evidence, asserting that NMFS’s  
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25 <sup>1</sup> In their Supplemental Response in support of their Motion for Summary Judgment, plaintiffs  
26 described the Tasker memo as follows: “NOAA and NMFS create a record when they process a  
27 FOIA request. When the request is received the NOAA FOIA office creates a “tasker memo” that  
28 is then sent to a NMFS lead office. The lead office determines who the appropriate subject matter  
expert is, creates instructions for the search, and then forwards the instructions, the tasker memo,  
and the request to the subject matter expert. *See e.g.* Supp. Costa Decl., Exs. 16-17.” Dkt. No. 28  
at 11-12 n. 3.

1 supplemental declarations supported plaintiffs’ pattern and practice claim. Dkt. No. 28 at 11-13.

2 Following the additional briefing, Judge Conti again addressed the issue in his October 21,  
3 2015 Order. He rejected plaintiffs’ contentions and concluded that clear evidence demonstrated  
4 that the principal subject matter expert started his searches for the two FOIA requests on specific  
5 dates and included responsive documents from that date. Dkt. No. 31 at 16. Judge Conti  
6 concluded, “[t]he Court agrees that a better policy is the search start date of each individual SME,  
7 *see* Supp. Malbanan Decl. ¶ 18(b), but finds on these specific facts that Mr. Stern’s search alone  
8 was sufficient to establish when the Department began to search, and thus a cutoff date in these  
9 particular searches.” *Id.* Accordingly, the Court found that NMFS fulfilled its obligations as to  
10 the two FOIA searches at issue and granted summary judgment in NMFS’s favor. *Id.* at 17.

11 Plaintiffs now complain that Judge Conti limited his analysis to the two specific FOIA  
12 requests and did not address plaintiffs’ broader pattern and practice claims. Dkt. No. 32 at 4-5.  
13 Plaintiffs argue that I should – based on the arguments they presented in their Supplemental  
14 Response to Judge Conti – rule that the evidence establishes NMFS had a pattern and practice of  
15 setting improper response dates. *Id.* at 5.

16 NMFS responds that Judge Conti granted summary judgment in their favor on plaintiffs’  
17 allegation regarding improper cut-off dates in full, and I agree. As framed by Judge Conti, the  
18 issue was what the evidence showed. He reviewed the parties’ evidence and their arguments and  
19 granted summary judgment to NMFS on this claim *without* reserving the issue of potential pattern  
20 and practice violations for cutoff dates.<sup>2</sup> Any disagreement with Judge Conti’s resolution of this  
21 issue is appropriately raised on appeal and not before me.

22 **III. FUTURE INJUNCTIVE RELIEF OR DISMISSAL OF CASES**

23 Plaintiffs in *OCE I* and *OCE II* also assert that NMFS has a pattern and practice of not  
24 responding to FOIA requests within the required deadlines. In his July 20, 2015 Order, Judge  
25 Conti: (i) issued a declaratory judgment that NMFS has violated FOIA’s statutory deadlines in  
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27 <sup>2</sup> Plaintiffs’ argument that Judge Conti reserved the issue because he intended to view plaintiffs’  
28 objections to NMFS’s evidence in light of the “tardy response” pattern and practice claims  
addressed later in the October 21, 2015 Order is not persuasive.

1 responding to plaintiffs’ FOIA requests; (ii) required NMFS to provide supplemental briefing on  
2 plaintiffs’ pattern and practice claim, but with particular respect to NMFS’s compliance with  
3 deadlines for one of plaintiffs’ newer FOIA requests; and (iii) ordered NMFS to comply with its  
4 FOIA deadlines “due to the Court’s finding that the Fisheries Service has failed to do so  
5 previously and the potential that these offenses might continue.” Dkt. No. 25 at 25. Judge Conti  
6 however, denied without prejudice further injunctive relief “at that time,” based in part on  
7 plaintiffs repeatedly filing large and complex FOIA requests in rapid succession and evidence that  
8 NMFS was making a good faith effort to comply with those requests. *Id.* The Court concluded  
9 that “[e]vidence of good faith and the case involved in the motion to relate suggests efforts may  
10 have been made to comply with the deadlines, and implies that upon receipt of this order the  
11 Fisheries Service will significantly improve its future performance in continuation of its good faith  
12 without an injunction by the Court. Therefore, further injunctive relief is DENIED WITHOUT  
13 PREJUDICE. The Court will entertain a new petition for injunctive relief at such time as  
14 declaratory relief alone fails.” *Id.*

15 In the briefing that followed, the parties continued to dispute whether evidence supported  
16 plaintiffs’ pattern and practice of delay claim and plaintiffs’ argument that further declaratory and  
17 injunctive relief was necessary. *See* Dkt. Nos. 27 – 30. In his October 25, 2015 Order, Judge  
18 Conti reviewed the further briefing and evidence and concluded that “pieces of information  
19 suggest that insofar as there may have been a pattern-and-practice, it is being corrected.” Dkt. No.  
20 31 at 18. The evidence, according to Judge Conti, indicated that there was a “trend” towards  
21 NMFS curing its past delays, the average processing time was decreasing, and the western region  
22 of NMFS had new procedures in place “using modern software, additional personnel, and policy  
23 changes (e.g., how the cut-off date changes where there are multiple SMEs assigned) to speed up  
24 its process.” *Id.* However, that “hopeful news is eclipsed by the evidence the Court has received  
25 showing an unmistakable history that the Fisheries Service fails to meet its statutory deadlines  
26 under FOIA,” in part based upon “the sheer volume of the violation history evidenced just  
27 between Plaintiffs and the Fisheries Service” and based on evidence of NMFS’s backlog on other  
28 requests. *Id.* at 19.

1 Judge Conti weighed the evidence of past and continued violations as well as the good  
2 faith efforts of NMFS to correct them. He relied on his continuing “belief that some leniency in  
3 the exercise of [his] discretion” was warranted and ruled as follows:

4 GRANTS declaratory relief and states: (1) that the Fisheries Service  
5 has previously been engaged in a pattern-and-practice of failure to  
6 meet FOIA deadlines; (2) that the Fisheries Service has previously  
7 provided responses that were frequently and unreasonably delayed;  
8 (3) that due to these delays the Fisheries Service effectively  
9 provided no ability to FOIA requestors to anticipate when data  
10 might be provided; and (4) that due to these delays information was  
11 often provided after a long enough period of time that the data could  
12 be out-of-date, effectively negating its value and effectuating a  
13 complete denial of information.

14 The Court also GRANTS a limited form of injunctive relief, and  
15 ORDERS that, in addition to its earlier Declaratory Relief, and  
16 insofar as any production to Plaintiffs remains outstanding in any  
17 FOIA request made on or prior to September 9, 2015 (the date of the  
18 last filed supplemental brief), all final results of such searches be  
19 provided within 30 days of the date of this Order.

20 Yet the Court is still sympathetic to the fact that the Fisheries  
21 Service continues to receive ongoing, complex FOIA responses,  
22 flooding it with administrative work which interferes with its  
23 primary duties -- and now the Fisheries Service will need to take  
24 even more of its time to answer the below inquiries of the Court.  
25 Moreover, the Court recognizes it has not provided the Fisheries  
26 Service enough time since issuing its Declaratory Relief to  
27 reasonably remedy this pattern-and-practice. The Court believes that  
28 the current efforts of the Fisheries Services will assist in this goal.  
Accordingly, the Court exercises its discretion to DENY WITHOUT  
PREJUDICE any further injunctive relief at this time.

This grace period is subject to continued, clear, and effective efforts  
by the Fisheries Service that it is curing its prior legal violations.  
How precisely to continue such efforts or organize an agency to best  
comply with the law is beyond the purview of the Court. Such fixes  
and organization must come from the Fisheries Service itself, other  
agencies that control the Fisheries Service, the Executive, or  
Congress. The Court therefore ORDERS the Fisheries Service to  
SHOW CAUSE how it is curing its prior legal violations to a  
sufficient degree the Court should continue to withhold injunctive  
relief. To meet this showing, the Fisheries Service is ORDERED to  
submit a document detailing precisely the status of its backlog, how  
the Fisheries Service intends to (or has been) fixing the problem, the  
effectiveness of recent changes in eliminating the backlog, how the  
Fisheries Service will ensure any immediate success will persist  
beyond the involvement of the Court, and any other information that  
may be useful for the Court to consider.

*Id.* at 20-21.

1           In response to the Order to Show Cause, NMFS submitted a detailed description of the  
2 current status of the backlog, supported by the declarations of Paul Doremus and Barry Tom. Dkt.  
3 No. 34. NMFS contends that a dismissal is appropriate because it has reduced its backlog by 78%  
4 since June 2014 and expects to eliminate it in its West Coast Region (“WCR”) soon. Doremus  
5 Decl. ¶ 9; Thom Decl. ¶ 3 (noting that as of November 19, 2015, WCR only has three backlogged  
6 requests, which were on hold for identified reasons). NMFS also explains in detail how it  
7 achieved its progress on the issues identified by Judge Conti; its technical, administrative, and  
8 staffing improvements. Doremus Decl. ¶¶ 15-22; Thom Decl. ¶¶ 7, 8-11, 13, 18, 23.

9           In response, plaintiffs do not dispute the substance of the evidence provided by NMFS.  
10 Instead, they point to alleged delays by NMFS in responding to additional FOIA requests from  
11 plaintiffs. Dkt. No. 35. They complain that NMFS has failed to provide a final response to an  
12 October 28, 2015 FOIA request seeking updated information on the Stanford project and a  
13 November 14, 2015 FOIA request designed to “find out more about NMFS’s FOIA compliance  
14 efforts.” *Id.* at 2. Plaintiffs also assert that NMFS has not completed its response to the October  
15 28 and November 14 requests (although they fail to acknowledge that NMFS denied the fee  
16 waiver request in part which, NMFS argues, suspends the response deadlines). *See* NMFS  
17 Supplemental Response (Dkt. No. 36) at 2 (citing 5 U.S.C. § 552(a)(6)(A); 15 C.F.R. § 4.11(j)).  
18 Plaintiffs further contend that in response to an August 18, 2015 FOIA request, NMFS withheld  
19 one document pending review for release by the EPA, and that the EPA is apparently being  
20 dilatory in their review of that document. Dkt. No. 35 at 3. Lastly, plaintiffs argue that the  
21 evidence of improvement and commitment to continued improvement by NMFS is insufficient in  
22 light of past FOIA litigation conducted by plaintiffs’ counsel where NSFS’s assertions that it was  
23 improving its FOIA response times by implementing new computer systems and adding personnel  
24 did not actually result in improvements. Dkt. No. 35 at 9-10.

25           In light of these “ongoing failures” to comply with FOIA, plaintiffs argue that I should  
26 retain jurisdiction. They ask that I (i) order NMFS to comply with Judge Conti’s previous order  
27 and issue a final decision on the still-pending October 31, 2015 FOIA administrative appeal and  
28 provide responses to the August 18 and October 28 requests; and (ii) keep the present orders “in



1 effect,” requiring NMFS to comply with FOIA deadlines and to submit a response to a further  
2 order to show cause after six months as to why a broader injunction should not issue.

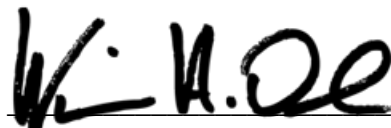
3 Having considered the evidence submitted in response to Judge Conti’s Order to Show  
4 Cause, as well as the prior record in this case, I find that further injunctive relief is not warranted.  
5 In particular, the hard evidence provided about WCR’s elimination of its backlog and the actual  
6 hiring of additional staff (as opposed to the mere promise or expectation of hiring additional staff),  
7 lead me to conclude that further injunctive relief is not warranted and that this case should, finally,  
8 come to its conclusion. It is apparent – as Judge Conti found – that NMFS was at one time  
9 routinely failing to obey FOIA’s deadlines. It is also apparent that NMFS has made significant  
10 improvements and structural changes (in technology and staffing) that are to continue in the  
11 future. For purposes of these cases, that is enough.

12 **CONCLUSION**

13 Having fully reviewed the record in these related cases, I conclude that no further action by  
14 the Court is warranted. Within 10 days of the date of this Order the parties shall submit a  
15 stipulated form of judgment.

16 **IT IS SO ORDERED.**

17 Dated: January 20, 2016

18 

19 WILLIAM H. ORRICK  
20 United States District Judge