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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 **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** Hearing date: July 19, 2018 Time: 2:00pm Location: Courtroom F, 15th Floor

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I. INTRODUCTION

EcoRights is entitled to summary judgment on all of its Freedom of Information Act ("FOIA") claims in this matter. EcoRights has demonstrated that its requested declaratory and injunctive relief is warranted. Defendant National Marine Fisheries Service ("NMFS") does not dispute that its determination for EcoRights' FOIA appeal was more than a year overdue. NMFS has failed to show that its searches were reasonably thorough and that the agency's withholdings were justified. Indeed, NMFS has withdrawn its claims that FOIA Exemptions 6 and 7(C) protected certain information from disclosure and has released in full emails previously redacted under these exemptions. NMFS's *Vaughn* index concerning its Exemption 5 withholdings is not sufficiently detailed and fails to overcome FOIA's strong presumption in favor of disclosure. Because NMFS has failed to carry its burden of proof the Court should deny NMFS's cross-motion for summary judgment.

II. ARGUMENT

A. Declaratory Judgment is Warranted That NMFS Violated FOIA's Deadlines.

At long last NMFS has issued its determination for EcoRights' appeal, more than a year past the statutory deadline. NMFS has not provided any explanation for its egregious delay in providing the appeal determination, other than to suggest, incredibly, that EcoRights' motion is to blame in part for the delay. Def. Mot. at 7. NMFS ignores that it indicated to EcoRights in October 2017 that the agency would release the determination within a week, and made the same promise in early February 2017. Dkt. 12-24, ¶ 11; Dkt. 12-22; Dkt. 12-1, ¶ 2. Dkt. 12-2 at 3. If the agency was truly that close to finishing the determination, then it could have issued it shortly after EcoRights filed the complaint on February 10, 2017. Department of Commerce regulations allow NMFS to continue working on an appeal determination even after a court action has been initiated. 15 C.F.R. § 4.10(e). However, instead of providing the appeal determination expeditiously after the complaint was filed, NMFS delayed the determination for another three and a half months and attempted to use it as a bargaining chip, even though there was no legal basis for NMFS's withholding of the appeal response. Def. Mot. at 7; Wang Decl., Dkt. 27, ¶ 5 (appeal determination issued May 25, 2018). It was only when NMFS had to answer to the Court for the agency's failure to respond to the appeal that NMFS finally released the determination, the same day that it filed its cross motion for summary judgment. *Id.*

NMFS does not dispute that its appeal determination was more than a year late, but contends, without merit, that EcoRights' requested declaratory relief is not warranted because the claim that NMFS violated FOIA's deadlines is moot. Def. Mot. at 19. However, EcoRights' claim of untimely response is not moot because it is capable of repetition yet could evade review. EcoRights is a public advocacy group that intends to continue its advocacy work on behalf of Endangered Species Act ("ESA") listed fish that are within NMFS's jurisdiction, and intends to send additional FOIA requests to NMFS in the future. Linn Reply Decl. ¶ 10. Thus, NMFS's unreasonable delay in responding to EcoRights' requests may continue. Indeed, NMFS's unreasonable delay in responding to the FOIA request at issue here 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 due to the court's finding that NMFS "has failed to do so previously and the potential that these offenses might continue").

That NMFS belatedly provided the appeal determination does not absolve the agency of its FOIA deadline violation nor does it give NMFS carte blanche to defy FOIA's deadlines in the same way in the future. NMFS is wrong that the only proper remedy for an agency's failure to timely respond to a FOIA request is that the requester has a direct avenue to the district courts. FOIA imposes no limits on courts' equitable powers in enforcing its terms. *Renegotiation Bd. v. Bannercraft Clothing Co*., 415 U.S. 1, 19-20 (1974).

NMFS should not be allowed to ignore a statutory deadline and respond to a FOIA appeal whenever it pleases without facing any consequence, particularly when the agency has been found to have a past pattern or practice of unreasonably delayed FOIA responses and has been enjoined by another judge of this Court to comply with FOIA's deadlines as a result of an earlier lawsuit brought by EcoRights. NMFS's contention that it is not bound by the injunction issued in *OCE II* and that

EcoRights must re-litigate the issue of NMFS's pattern or practice of FOIA deadline violations before declaratory judgment can issue is without merit.

Voinche v. FBI and *Tracy v. Department of Justice* provide no support for NMFS's mootness argument. Def. Mot. at 20. Neither of these cases involved an agency that had been found to have a past pattern or practice of unreasonable delay in responding to the plaintiff's FOIA requests and neither of the agencies had been enjoined to comply with FOIA's deadlines in responding to the plaintiff's future requests. Further, in both of these cases the only issue raised in the complaint that was properly before the court was the timeliness of the response. *See Voinche v. FBI*, 999 F.2d 962, 963 (5th Cir. 1993); *Tracy v. Department of Justice*, 117 F. Supp. 3d 1, 5 (D.D.C. July 31, 2015). The plaintiffs did not challenge the adequacy of the response as EcoRights has done here.

The egregious delay in the instant case, NMFS's failure to comply with a court order, the 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."); *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1028 (4th Cir. 1988) (action seeking to bar release of documents not mooted by the documents' release because new request for similar documents pending; agency action thus capable of repetition yet evading review); *OCE II,* 2015 U.S. Dist. LEXIS 94997 at *26; *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.,* No. 06-2845, 2008 WL 2523819 at *6 (E.D. Cal. June 20, 2008) ("*SYRCL*").

B. NMFS Has Not Carried Its Burden to Demonstrate Its Searches Were Adequate.

1. The Office of Law Enforcement Searches Were Not Adequate.

NMFS is wrong that EcoRights' only alleged deficiency is the Office of Law Enforcement ("OLE")'s failure to search for responsive records. Def. Mot. at 11. EcoRights' motion also contends that the OLE search, if one was done, was not reasonably thorough. Pl. Mot. at 9-10. While the Def. Mot. has confirmed that OLE did perform a search, NMFS has not carried its burden to show its searches were reasonable.

First, it appears from the Graff declaration that the OLE, and particularly Agent Tanner, did not search paper files, and other files for information *not* stored electronically. The Graff declaration only

describes the regional FOIA coordinator and Agent Tanner performing an electronic search of his computer using a set of key words. Dkt. 26, ¶ 13.

Second, as EcoRights discusses in its motion, an email NMFS released in response to an earlier FOIA request indicated that Agent Tanner may have records concerning poaching at the Yuba River and concerning his observations of hazards in the Yuba River where fish strandings are occurring. Pl Mot. at 9. Dkt. 12-9. EcoRights' purpose in providing this evidence was not to argue NMFS's search was inadequate because it did not locate this particular email. Instead, EcoRights' purpose was to provide evidence of the potential existence of other, relevant undisclosed records that NMFS failed to locate, such as, potentially, Agent Tanner's handwritten notes or photographs from his Yuba River visit. It is highly unlikely that Agent Tanner went to the Yuba to investigate poaching and observe hazards causing fish strandings near Narrows 2, looked around, but did not take any notes, or photographs, or collect any physical evidence and then concluded his investigation without writing any kind of report. NMFS does not deny that such material exists, instead taking the position that it need not check to see if it has overlooked such material because, in the agency's view, it has done enough to satisfy FOIA.

In addition to the above mentioned email, two weeks before NMFS's cross-motion was due EcoRights also provided NMFS with other evidence of potentially overlooked material suggesting insufficient search: 1) the February 13, 2014 email chain between Larry Thompson from the NMFS Hydro staff and Agent Tanner in which Mr. Thompson discussed contacting Agent Tanner in November 2013 about fish strandings and Agent Tanner's reply indicating Agent Tanner is keeping track of the stranding reports; and 2) a letter from NMFS to FERC in February 2014 that states the OLE advised NMFS staff to ask the FERC Compliance division if any entity has collected and retained salmon carcass remains as a result of the strandings and to provide that information and other evidence to NMFS. Linn Reply Decl. ¶¶ 7, 8, Ex. 5. Dkt. 12-3. Taken together these documents indicate, at the very least, the presence of OLE record keeping of the 2013 fish strandings and potential collection of physical evidence. However, OLE's search did not locate any records that demonstrate Agent Tanner, or anyone else at OLE, is keeping track of these fish strandings as Agent Tanner indicated in his February 2014 email that he is doing. *Id.* ¶ 9.

A further indication of overlooked material that EcoRights provided to NMFS is a series of emails that Agent Tanner was copied on about a fish stranding event in October 2015. Linn Reply Decl. ¶¶ 3-5. Exs. 2-4. These emails indicate Mr. Thompson spoke to Agent Tanner about the event and continued to follow up with him about the attempted rescue of stranded fish. *Id.* The emails indicate Agent Tanner told Mr. Thompson to contact the California Department of Fish and Wildlife ("CDFW") about the stranding, and after the stranding CDFW collected salmon carcass remains. *Id.* These emails indicate some OLE record keeping of this event and sharing of information between CDFW and the OLE. *Id.* However, OLE did not release any records of its own about the October 2015 stranding event and fish mortality, although Mr. Thompson indicated he contacted Agent Tanner numerous times and received direction from him about how to proceed. *Id.* ¶ 6.

The Def. Mot. does not address this additional evidence. Instead, NMFS contends that the agency is not required to do any more than it already has. However, by ignoring this evidence of potentially overlooked material, which EcoRights provided to NMFS two weeks before the agency filed its cross-motion, NMFS has not carried its burden to demonstrate its searches were reasonable. If NMFS fails to come forward with details in its reply explaining how, if it performed a reasonable search, it did not locate any OLE documents about poaching or fish stranding such as were discussed above, EcoRights should be granted summary judgment on this issue. S*ee 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); *SYRCL*, 2008 WL 2523819 at *15, n.8 (the existence of unreleased but responsive documents might bear on adequacy of search).[1]

[1] The dearth of records generated by the OLE concerning the thousands of federally protected fish that have been taken without authorization by the Yuba River water diversions, Narrows 1 and 2 powerplants, and other entities provides information in and of itself. EcoRights sent its request to find out what the OLE has been doing to enforce the Endangered Species Act prohibition of unauthorized take of Yuba River protected fish, and the answer from NMFS is, the OLE is doing nothing.

Alternatively, the Court should allow EcoRights to conduct limited discovery pursuant to Fed. R. Civ. P. 56(d) because NMFS has failed to show that its search was adequate, and facts pertaining to the search are currently unavailable to EcoRights. Fed. R. Civ. Pro. 56(d) (where a non-moving party shows by declaration that facts are unavailable to the non-moving party, a court may: (1) defer considering the motion or deny it; (2) allow the party time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order). Indeed, in similar FOIA cases where the adequacy of the search is in doubt on summary judgment, courts have allowed the FOIA requester to conduct limited discovery to gather additional relevant information. *Lion Raisins, Inc. v. U.S. Dep't of Agriculture*, 636 F. Supp. 2d 1081, 1107 (E.D. Cal 2009) (denying summary judgment and allowing plaintiff to depose agency officials about the adequacy of their search and whether additional responsive documents exist); *Kozacky & Weitzel, P.C. v. United States,* No. 07 -2246, 2008 U.S. Dist. LEXIS 29779 at **17-18 (N.D. Ill. Apr. 10, 2008) (permitting the use of interrogatories concerning the adequacy of the agency's search); *El Badrawi v. Dep't of Homeland Sec.,*583 F. Supp. 2d 285, 321 (D. Conn. 2008) (permitting plaintiff to take depositions of agency employees regarding the adequacy of the agency searches).

Here, the Linn Reply Declaration presents all of the requisite evidence to support postponing NMFS's cross-motion for further discovery. *See Tatum v. City & County of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006) ("A party requesting a continuance pursuant to [Rule 56(d)] must identify by affidavit the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment."); Linn Reply Decl. ¶¶ 3-9. As explained above and in the Linn Reply Declaration, the documents that NMFS has produced in response to EcoRights' request indicate overlooked material that appears to be responsive to the request and that NMFS has not produced. Thus, it is likely that additional responsive documents exist that have not been produced to EcoRights—controverting NMFS's summary judgment claim that it has produced a full and final response to EcoRights' request. Linn Reply Decl. ¶ 6,9. EcoRights could not have obtained evidence that NMFS had conducted an unreasonable search for documents earlier in this proceeding because NMFS did not provide the appeal determination and full description of its search until May 25, 2018 when it filed its cross-motion for summary judgment. In this case, only NMFS has access to the material facts related to

the adequacy of its search. Without discovery, EcoRights is limited to the description of the search in the Graff declaration. *Id.* ¶ 11.

2. NMFS Has Not Provided Information On Its Search Cut-off Dates.

EcoRights cannot ascertain whether NMFS complied with FOIA's mandate that the agency search for all responsive documents in its possession as of the date it commences its searches because NMFS has not provided its search cut-off dates. Since there were a series of searches, the last of which occurred in summer 2017, NMFS should have searched for and released records that were created through the summer of 2017. However, there is no indication which cut-off date for responsive records NMFS used. If NMFS only looked for records created as of the date the request was received, or as of the date of the first searches, that violates FOIA and demonstrates the searches were not adequate. *See Oregon Natural Desert Asso. v. Dep't of Commerce*, 419 F. Supp. 2d 1284 (D. Or. 2006) (practice of using date request received as the search cut-off date is unlawful). Because NMFS has not provided its search cut-off dates, the agency has not demonstrated that its searches were reasonably thorough.

C. NMFS Has Conceded That Its Withholding of Records Under Exemptions 6 and 7(C) Was Not Justified Warranting Declaratory Judgment.

NMFS has determined that it is "no longer necessary to withhold information under exemption 7(C)" and has released in full two emails, between Mr. Thompson of the NMFS Hydro staff and Agent Tanner, the only two documents that were released by the OLE. Dkt. 26, ¶ 17. Dkt. 26-1 at 10-11. The Graff declaration ignores that Agent's Tanner's name and work contact information were also redacted from these emails under Exemption 6 and that EcoRights also challenged the Exemption 6 claim. Pl. Mot. at 17. By failing to rebut EcoRights' Exemption 6 argument, and releasing the redacted emails in full, NMFS has conceded that withholding Agent Tanner's name and work contact information under Exemption 6 also was not justified.

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 Agent Tanner's name, work email address, and work phone in these two emails would be an unwarranted personal privacy invasion, but release of Mr. Thompson's name and work email address 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.[2] 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 v. U.S. Dept. of Justice*, 642 F.3d 1161, 1173 (D.C. Cir. 2011) (internal citation omitted). To ensure that NMFS does not continue an apparent policy contrary to law, declaratory judgment is warranted that NMFS's withholding of Agent Tanner's name and work contact information under Exemptions 6 and 7(C) violated FOIA. Such judgment will "delineate [ ] important rights and responsibilities, and will be of "significant educational and lasting importance." *Natural Res. Def. Council, Inc. v. EPA* ("*NRDC*"), 966 F.2d 1292, 1299 (9th Cir.1992). The release of agency staff names and contact information, including OLE agents, serves an important public interest which enables EcoRights and other public interest groups to scrutinize whether NMFS staff are carrying out their ESA duties to protect endangered fish species in the Yuba River and

[2] Ironically, in this matter, it was Mr. Thompson who was performing the NMFS law enforcement function, identifying and investigating violations of ESA Section 9, while Agent Tanner, apparently, provided only moral support, yet NMFS never redacted Mr. Thompson's name from released documents, only Agent Tanner's name.

other waterways and to be able to follow intelligibly NMFS's document releases by using names to discern the common linkages between released documents.

D. Declaratory Judgment Is Warranted That NMFS's Lack of Adequate Explanation at The Administrative Level Violates FOIA.

NMFS is wrong that its identification of "the number of pages collected for processing and the specific exemptions being claimed for the withholdings" satisfied its obligations under FOIA at the administrative stage. Def. Mot. at 13. First, NMFS's administrative level determination did not indicate the number of *pages* collected for processing as the Def. Mot. contends. It merely indicated that 54 *documents* had been partially withheld. *See* Dkt. 12-16 at 3. NMFS's determination did not satisfy FOIA's mandate that the agency estimate the volume of material withheld. 5 U.S.C. § 552(a)(6)(F). Simply stating 54 documents were redacted and then listing the exemptions being claimed does not provide adequate information. To satisfy FOIA, NMFS must estimate how many pages in those 54 documents were redacted and specifically how many pages were withheld under attorney-client privilege, how many were withheld under attorney work product, how many were withheld under deliberative process privilege, and how many were withheld under Exemption 6. *Id.* Second, as the Def. Mot. concedes, 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. As EcoRights notes in its MSJ, "(b)(5)" could mean attorney-client privilege, attorney work product, or deliberate process privilege. Pl. Mot. at 11.

NMFS is wrong that EcoRights is asking for the agency to issue a *Vaughn* index at the administrative stage. Def. Mot. at 14. The law is clear that a *Vaughn* index is not required until a requester has exhausted administrative remedies. However, the law is also clear that the agency must, at the administrative level, review the responsive material it has collected, and make a determination about what information it will release and what information it will withhold, and provide the requester with the *reasons* for withholding any responsive information. 5 U.S.C. § 522(a)(6)(A)(i). NMFS contends that identifying the exemption(s) it is claiming for each specific document satisfies FOIA's mandate that the agency provide reasons for its withholdings. However, a bare bones, conclusory statement that an

exemption is being applied to withheld information is not an adequate reason, especially in light of the FOIA Improvement Act which requires more in-depth agency review and analysis at the administrative level. *See* Department of Justice Office of Information Policy Summary of the FOIA Improvement Act of 2016, available at https://www.justice.gov/oip/oip-summary-foia-improvement-act-2016 ("OIP FOIA 2016 Summary").

Under the FOIA Improvement Act, NMFS is now required to evaluate each responsive record to determine whether an exemption applies, and then to *further* identify what foreseeable harm to a protected interest would result if the information is released, to consider whether a discretionary release is appropriate, and then to only withhold the information if a foreseeable harm to a protected interest would result from disclosure. 5 U.S.C. § 552(a)(8)(A).[3] NMFS presumably complied with this mandatory review process, and having determined to withhold information, should have included in its explanation for withholding material what foreseeable harm to a protected interest would result if the material was disclosed, since that was the basis upon which NMFS made its decision to withhold information.

Similarly, NMFS should have included in its explanation about the withholdings that the agency had reviewed each responsive record and, where full disclosure was not possible, identified and released the factual, non-exempt material that could reasonably be segregated from the exempt material, as required by 5 U.S.C. § 552(a)(8)(A). If NMFS complied, at the administrative stage, with the mandate to segregate non-exempt information NMFS should have included in its determination a statement to that effect.

Since FOIA mandates that NMFS make determinations about foreseeable harm, discretionary releases of exempt material, and segregability of non-exempt information at the administrative stage there is no reason NMFS should not have provided this explanatory information to EcoRights at the administrative stage.[4] Requiring that such information be provided to EcoRights at the point at which a

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[3] Department of Commerce FOIA regulations also mandate that NMFS make discretionary releases of exempt information when required to do so in accordance with the FOIA Improvement Act. 15 C.F.R. § 4.1(a).

[4] Indeed, NMFS's belated administrative response to EcoRights' appeal did provide an explanation of NMFS's segregability analysis and did not contend that the explanation was not required at the

determination is made will increase the likelihood that, in the future, NMFS will carefully look at whether its justifications for withholding information are truly defensible.

By failing to identify the specific exemption claimed for each withheld record, failing to identify the foreseeable harm to a protected interest that might result from disclosure of withheld information, failing to estimate the volume of material withheld, and failing to explain whether all reasonably segregable material had been released, NMFS did not provide an adequate explanation, at the administrative level, why its withholdings are justified, in violation of 5 U.S.C. § 552(a)(6)(A)(i). Declaratory judgment is therefore warranted that NMFS's approach of providing only a conclusory statement that an exemption has been applied to withheld information does not comport with 5 U.S.C. § 552(a)(6)(A)(i). This will incentivize NMFS in the future to provide sufficiently detailed explanations why it contends the information it withholds is indeed FOIA exempt. Requesters can then evaluate NMFS's FOIA exemption claims and pursue meaningful administrative appeals *before seeking recourse to the courts*. The requested declaration is appropriate as it will "delineate[] important rights and responsibilities" by helping to ensure that NMFS only withholds information with proper justification when responding to EcoRights' future FOIA requests. *NRDC*, 966 F.2d at 1299.

E. NMFS Has Not Shown that Attorney-Client and Deliberate Process Privileges Protect Redacted Information.

The Def. Mot.'s boilerplate argument (at 17) that releasing the material withheld under deliberative process privilege "could have a chilling effect on the discussions within the agency in the future, discouraging a frank and open dialogue among agency employees" is not enough to overcome FOIA's strong presumption in favor of disclosure. *Nat'l Ass'n of Home Builders v. Norton*, 209 F.3d 26, 32 (D.C. Cir. 2002) (internal citation omitted). NMFS must demonstrate *how*, if at all, releasing *each* redacted portion of a particular document would expose the agency's decision making process in such a way as to discourage candid discussion. *Morley v. CIA*, 508 F.3d 1108, 115 (D.C. Cir. 2007); *Elec. Frontier Foundation v. CIA*, 2013 U.S. Dist. LEXIS 142146 at *48 (N.D. Cal. 2013).

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administrative stage: "...a line-by-line review of the document was conducted, and all segregable information was released. The information that would remain if additional segregation was attempted would leave information of minimal or no informational value." Dkt. 27-1 at 9.

For material redacted under the attorney-client privilege, NMFS makes no showing at all of the foreseeable harm to an interest protected by this privilege that would occur if the redacted material were disclosed. NMFS also does not provide a *particularized* explanation that *each* attorney-client communication at issue was kept confidential. There is only a conclusory statement in the Graff declaration that the communications were confidential. Dkt. 26 ¶ 32. If the redacted information was disclosed to a third party, the privilege has been waived. *In re Sealed Case*, 676 F.2d 793, 808-9 (D.C. Cir. 1982). Voluntary disclosure by the client to a third party breaches the confidentiality of the attorney-client relationship and waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the same subject matter. *Id.*; *In re United Mineworkers Employment Benefit Plans*, 159 F.R.D. 307, 310 (D.D.C. 1994). NMFS must demonstrate the confidentiality of communications sought to be protected and the Court cannot assume confidentiality. *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977).

Because NMFS has failed to make an adequate showing of foreseeable harm to the interests protected by the deliberative process and attorney-client privileges, as required by the FOIA Improvement Act, and has not made a showing that attorney-client communications were kept confidential, the redacted material must be disclosed. Further, as discussed below, the explanations in NMFS's *Vaughn* index and the Graff declaration also do not carry NMFS's burden to show the Exemption 5 redactions are justified, warranting declaratory judgment and an order to release all withheld information.

Documents 5079-1 and 5276-1.[5] NMFS has not justified why the redacted information on the first page of this routing and tracking ledger sheet is protected under attorney-client privilege. Dkt. 12-18 at 2, 38. The second page of this document is a near duplicate of the first page and NMFS did not redact what appears to be the same information that is on the first page from the second page. *Id.* at 3, 39. Further, the unredacted information on the second page, which EcoRights presumes is what was redacted from the first page, is not confidential in nature. The comment on the second page of the ledger that the document is a "[n]on routine informal sufficiency review letter" and "S7 & GC Review needed"

[5] For ease of reference EcoRights has adopted the document numbers used in NMFS's *Vaughn* index.

does not reveal anything more than what the unredacted email to which this ledger was attached explains-- that this document is the Yuba River Englebright Dam Project Informal Letter for the General Counsel's review. Dkt. 26, ¶ 38. Dkt. 26-1 at 22. If the comment on the second page is not the same as the comment redacted on the first page but is instead a comment "informing legal counsel that the letter related to a matter in active litigation" that is also not confidential information exempt from disclosure. *Id.* It was public knowledge that the Corps was requesting only informal consultation with NMFS about Englebright Dam and that the consultation was a matter in active litigation, so the agency was not conveying the type of private information to its counsel that would warrant withholding that information.

NMFS has also not justified withholding the other pages of this ledger under attorney-client privilege. Dkt. 2-18 at 6-10 and 42-46. There is no indication the information in these pages was kept confidential and NMFS has not identified the foreseeable harm that would occur if this information was disclosed.

Document 5200. This is an email chain between NMFS Fish Biologist Gary Sprague and NMFS attorney Christopher Keifer sent October 29-30, 2013. This is one of the documents with generic "b5" exemptions claimed. NMFS now asserts both deliberative-process and attorney-client privileges for these "b5" redactions. Def. Mot. at 13. NMFS is claiming that another redaction in this document is only attorney-client privileged information.

In regards to the attorney-client privilege claims, NMFS states the redacted material "consists solely of discussion between agency staff and an attorney regarding Biological Assessments received from the Corps." Dkt. 26, ¶ 39. Dkt. 26-1 at 16. This statement provides no basis for finding that the withheld information was a confidential communication related to the giving or receiving of legal advice. NMFS merely states a staff member and a staff attorney were having a discussion about Corps Biological Assessments. *Id.* For the attorney-client privilege to apply, there must be some *indicia* that the agency was dealing with its attorney as would any private party seeking legal advice to protect personal interests. *Coastal State Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 863 (D.C. Cir. 1980). There is no such indication here. Further, just because the emails were sent to and from an attorney does not make these communications privileged. *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996).

Additionally, there is no indication that this document was kept confidential and NMFS has not identified the foreseeable harm to a protected interest that would result from disclosure.

In regards to deliberative process privilege, NMFS states the redacted material is "deliberative and predecisional as it discusses "impressions regarding the ability to move forward towards consultation." Dkt. 26-1 at 16. While this communication may have been pre-decisional, as it pre-dates the May 2014 biological opinion, there is no basis for finding the communication deliberative. A document is "deliberative" if "it reflects the give-and-take of the consultative process." *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006) (internal citation omitted). When an agency claims the deliberative process privilege it must establish the role played by the document at issue in the course of that process. *Animal Legal Def. Fund, Inc. v. Dep't of Air Force*, 44 F. Supp. 2d 295, 299 (D.D.C. 1999); *Senate of Puerto Rico ex rel. Judiciary Comm. v. United States DOJ,* 823 F.2d 574, 585-86 (D.C. Cir. 1987). NMFS fails to explain what role these emails played in the formulation of the May 2014 biological opinion. There does not appear to be any give-and-take discussion of the type intended to assist NMFS in arriving at the 2014 Biological Opinion. Rather, it appears Mr. Sprague and Mr. Kiefer were merely ruminating about the chances the consultation would move forward.

Document 5215. This document is an email chain from January 30, 2014 between NMFS Sacramento River Basin Chief, Howard Brown, and NMFS attorney, Christopher Keifer. This is another of the redacted documents with generic "b5" exemptions claimed and with no exemption at all indicated on one of the redactions. NMFS now asserts that both deliberative process and attorney-client privileges apply to all of these redactions. Def. Mot. at 13.

NMFS explains that material redacted from the emails "consists solely of a status update on the [Yuba] consultations." Dkt. 26-1 at 17. In regards to attorney-client privilege, this statement provides no basis for finding that the withheld information was a confidential communication related to the giving or receiving of legal advice. For the attorney-client privilege to apply, there must be some *indicia* that the agency was dealing with its attorney as would any private party seeking legal advice to protect personal interests. *Coastal State,* 617 F.2d 854 at 863. There is no such indication here. It appears Mr. Kiefer was merely requesting a status update and Mr. Brown provided one. Further, just because the emails were sent to and from an attorney does not make these communications privileged. *Chen*, 99 F.3d at 1501.

Additionally, there is no indication that this material was kept confidential and NMFS has not identified the foreseeable harm to a protected interest that would result from disclosure.

As for deliberative process privilege, NMFS's contention that the withheld material is protected because "it identified proposed future steps for consultation and a need for executive policy decision-making" provides no basis for finding the communication deliberative. Dkt. 26-1 at 17. NMFS fails to explain what role the withheld material played in the formulation of the May 2014 biological opinion. There does not appear to be any give-and-take discussion of the type intended to assist NMFS in arriving at the 2014 Biological Opinion. There is no indication that Mr. Brown was making recommendations or offering his opinion about steps to take. It appears he was merely reporting to Mr. Keifer about steps that had already been proposed and the lack of decision-making.

Document 5224. This document is a January 31, 2014 email, subject "Update on Yuba Consultations with U.S. Army Corps," from NMFS Sacramento River Basin Chief, Howard Brown, to a number of NMFS staff including attorney Christopher Keifer. This is another of the redacted documents with no exemption at all identified. NMFS now asserts that both deliberative process and attorney-client privileges apply to this redaction. Def. Mot. at 13.

NMFS contends the redacted material is exempt under these privileges because the material "discusses changes in the scope of the activities associated with the dams and the implications for the ongoing consultation." Dkt. 26-1 at 17. In regards to attorney-client privilege, this statement provides no basis for finding that the withheld information was a confidential communication related to the giving or receiving of legal advice. For the attorney-client privilege to apply, there must be some *indicia* that the agency was dealing with its attorney as would any private party seeking legal advice to protect personal interests. *Coastal State,* 617 F.2d 854 at 863. There is no such indication here. Mr. Brown was merely providing a status update. Further, just because a staff attorney was among those to whom the email was sent does not make the communication privileged. *Chen*, 99 F.3d at 1501. Additionally, there is no indication that this document was kept confidential and NMFS has not identified the foreseeable harm to a protected interest that would result from disclosure.

As for deliberative process privilege, while this communication may have been pre-decisional, as it pre-dates the May 2014 biological opinion, there is no basis for finding the communication

deliberative. NMFS fails to explain what role this email played in the formulation of the May 2014 biological opinion. There does not appear to be any give-and-take discussion of the type intended to assist NMFS in arriving at the 2014 Biological Opinion. There is no indication that Mr. Brown was making recommendations or offering his opinion about how the consultation should proceed. It appears he was merely reporting to Mr. Keifer and other staff on the progress being made in the consultation.

Document 5247. This is an email from Howard Brown to Christopher Keifer subject, "Response to Environmental Advocates." Dkt. 12-18 at 18. The email had a draft letter attached, which is discussed below. NMFS has not justified withholding information from the email under attorney client privilege. There is no indication that the email was kept confidential and NMFS has not identified the foreseeable harm to a protected interest that would result from disclosure. Dkt. 26-1 at 17. The Court cannot assume confidentiality. *Mead Data Central*, 566 F.2d at 254.

Document 5247-2. This document is Mr. Brown's draft response to a letter from Christopher Sproul, an attorney for the South Yuba River Citizens League and Friends of the River, seeking to engage NMFS in a collaborative consultation process. Dkt 12-18 at 16-17. NMFS is wrong the information redacted from this response is protected deliberative process. NMFS makes no showing that the draft response played any part in the formulation of the May 2014 biological opinion. NMFS states the redacted material "revealed information about the ongoing consultation, and indicated future steps the agency would take to meet with stakeholders." Dkt. 26-1 at 18. It appears Mr. Brown was presenting the agency's position about the consultation to Mr. Sproul, and there is no indication that Mr. Brown was making recommendations or offering his own subjective opinions as part of the consultation process for the 2014 Biological Opinion.

Documents 5250-1 and 20774-2 . These two documents are drafts of a letter from NMFS to the Corps concurring with the Corps that only informal ESA consultation concerning Englebright Dam was required because the Corps' operation of Englebright is not likely to adversely affect threatened fish species in the Yuba River ("concurrence letter"). Dkt. 12-18 at 19-37 and 47-72. NMFS contends the redacted information is protected deliberative process because it contains discussions of the proposed action, the authorities for the proposed action, the action area, the action agency's effects determination, the consultation history, litigation history, future actions requiring separate consultations, and

discretionary and non-discretionary actions. NMFS has not made a showing that this material is exempt from disclosure. It is likely the redacted material was adopted or incorporated by NMFS into the final concurrence letter and, if so, is not exempt from disclosure. *NLRB v. Sears*, 421 U.S. 132 (1975); *Swisher v. Department of the Air Force*, 660 F.2d 369 (8th Cir. 1981); *see also Starkey v. DOI*, 238 F. Supp. 2d 1188, 1193 (S.D. Cal. 2002) (where disclosure has already occurred the government has little interest in secrecy); *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (disclosure may be compelled even over otherwise valid agency exemption claim when agency has effectively revealed information); *Ecological Rights Found. v. Fed. Emergency Mgmt. Agency*, No. 16-05254 at **15-16 (N.D. Cal. November 30, 2017) ("*EcoRights*").

NMFS and the Corps completed the Yuba River ESA consultation at issue in these documents more than four years ago. NMFS cannot demonstrate why it needs to keep the redacted information secret, especially where NMFS's decisions pertaining to this ESA consultation with the Corps are already so publicly known. NMFS and the Corps have publicly released numerous documents which have already revealed a great deal about these agencies' consideration of their ESA section 7 obligations concerning the Corps' Yuba River project--and shown that NMFS and the Corps decided not to engage in formal ESA section 7 consultation over much of the Corps' ongoing operation and maintenance of its two Yuba River dams and other Yuba activities because of the Corps' conclusions concerning the limits of its discretionary authority. Dkt. 12-1 ¶ 8. For example, NMFS's 2014 Yuba River Biological Opinion and Englebright concurrence letter have publicly disclosed this information. *Id.* NMFS and the Corps have also disclosed this information in their briefing in a lawsuit brought by Friends of the River against the agencies. *See Friends of the River v. Nat'l Marine Fisheries Serv.*, No. 16-00818, Dkt. 39 at 9-11 (E.D. Cal. June 23, 2017). In response to Friends of the River's FOIA requests, NMFS has also released numerous documents commenting on the consultation, the sufficiency of the Yuba BAs, and drafts of the Englebright concurrence letter. Dkt. 12-1 ¶ 8. Given how public NMFS's decisionmaking pertaining to this consultation has been, it is unlikely there is content in these documents that NMFS has a legitimate need to keep secret.

Even if the withheld information would have been exempt from disclosure prior to enactment of the FOIA Improvement Act as technically falling within the attorney-client or deliberative process privilege, disclosure of the material should now be ordered under the new standard of the FOIA

Improvement Act. EcoRights' request was specifically tailored to gather information about government decision-making and, more importantly, the federal government's compliance with its own laws – in this case, the ESA. Information about government decision-making and consultation that is required by law is exactly the type of information that FOIA was intended to disclose to the public. Such disclosure ensures that citizens are informed and their government is held accountable. *See Coastal States,* 617 F.2d at 868. NMFS's inclination to withhold such information under a claim of deliberative process privilege is contrary to the mandates of the FOIA Improvement Act and Department of Commerce FOIA regulations that mandate NMFS release exempt information when required to do so in accordance with the FOIA Improvement Act. 15 C.F.R. § 4.1(a).

Document 30833. This is a document entitled "Legal Analysis: Analyzing Ongoing Projects Under Section 7 of the Endangered Species Act (ESA)-*Draft*." Dkt. 12-18 at 73-88. On the face of the document, NMFS claims the withheld information is protected under attorney-client privilege. NMFS's appeal determination also explains the basis for withholding the redacted material under attorney-client privilege. Dkt. 27-1 at 7. However, in the *Vaughn* index NMFS also asserts the redacted material is protected by the deliberative process privilege. This belated claim that the material is protected deliberative process is mere *post hoc* rationalization for litigation purposes, not an administrative decision actually made by NMFS when it withheld the document, that the Court must ignore. *Nat'l Wildlife Fed'n v. NMFS*, 481 F.3d 1224 1237 n.9 (9th Cir. 2007).

In regards to attorney-client privilege, NMFS has failed to justify its claim. There is no indication this document was a confidential communication between attorney and client, made for the purpose of giving legal advice. *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011). First, it does not appear the document was communicated at all. The agency does not identify which NMFS attorney authored the document, to whom it was communicated, how it was communicated, and when it was communicated. There is no email associated with this document. Second, there is no indication the document was prompted by a request for legal advice. Perhaps the attorney who drafted this document was simply working on a law review article about this subject. Without more detailed explanation from NMFS, there is no basis for finding this document a protected attorney-client communication.

Unless NMFS, in its reply, comes forward with evidence substantiating the claim that the information redacted in the ten documents described above falls within Exemption 5 deliberative process and/or attorney-client privileges and explaining how NMFS's interests would be harmed by the information's release, the Court must issue a declaration that NMFS has improperly invoked Exemption 5, contrary to the requirements of FOIA (as amended by the FOIA Improvement Act) and enjoin NMFS to release the information withheld under this exemption. *See EcoRights*, 2017 U.S. Dist. LEXIS 197451 at *27. (Note: if NMFS does in fact come forward with such ostensible evidence, discovery or *in camera* review may be appropriate to probe the veracity of such assertions). *Fiducia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1043 (9th Cir. 1999); *Lion Raisins, Inc. v. U.S. Department of Agriculture*, 636 F. Supp. 2d 1081, 1107 (E.D. Cal 2009).

F. NMFS Has Failed to Segregate and Release All Non-Exempt Factual Material.

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); 5 U.S.C. § 552(a)(8)(A)(ii); *Roth* ,642 F.3d at 1167. It appears likely that NMFS has not complied with FOIA's mandate to segregate and release non-exempt factual material in the two draft concurrence letters (Documents 5250-1 and 20774-2). NMFS claims the redacted material contains the consultation history and litigation history surrounding the NMFS and Corps Yuba River consultations. Dkt. 26-1 at 18. History is factual material--who did what, when did they do it, and what was the outcome. There is no basis for finding this information exempt from disclosure. Further, the consultation history and litigation history are discrete sections in a concurrence letter and can readily be segregated from other sections. NMFS should be enjoined to release this reasonably segregable, non-exempt factual material.

G. NMFS Should Be Enjoined to Comply With FOIA's Mandates.

The Court has authority to issue an injunction requiring agencies to take corrective action to come into compliance with existing FOIA obligations and to deter future FOIA violations that are likely to occur. 5 U.S.C. § 552(a)(4)(B); *Long v. IRS*, 693 F.2d 907, 909 (9th Cir. 1982); *see also United States v. An Article of Drug*, 661 F.2d 742, 747 (9th Cir. 1981). Given NMFS's more than year long delay in responding to EcoRights' appeal, injunctive relief is a proper remedy. *See, e.g.,OCE II,* 2015 U.S. Dist. LEXIS 94997 at *33 (enjoining NMFS to respond to plaintiffs' pending and future FOIA requests within

statutory deadlines); *SYRCL*, 2008 WL 2523819 at *17 (same); *see also Elect. Privacy Info. Ctr. v. Dep't of Justice*, 416 F. Supp. 2d. 30, 43 (D.D.C. 2006) (ordering agency to process plaintiff's expedited FOIA request within 20 days). Injunctive relief in a FOIA context is appropriate where the public would be benefited by the disclosure. *Long*, 693 F.2d at 909. In making this determination, courts consider whether "there has been a voluntary cessation of allegedly illegal conduct, [whether] ... prolonged delays have repeatedly hindered the timely disclosure of non-exempt documents, ... the likelihood of recurrence, ... the good faith of any expressed intent to comply, the effectiveness, if any, of the discontinuance and the character of past violations." *Id.* These factors weigh in favor of granting an injunction. In the past NMFS failed, for the most part by exceedingly large margins, to respond within FOIA's deadlines to EcoRights' requests and appeals. Despite an order from a judge of this Court NMFS has not ceased its practice of untimely responses. Therefore, NMFS should be enjoined to comply with FOIA's deadlines in responding to EcoRights' future requests and appeals.

In regards to NMFS's withholding of information under Exemption 5, NMFS has failed to justify its withholdings in the ten records at issue. The Court should therefore enjoin NMFS to promptly release in full these ten records. *See e.g. EcoRights*, 2017 U.S. Dist. LEXIS 197451 at * 27 (ordering agency to produce all documents redacted pursuant to Exemptions 5 and 6 within two weeks of the date of the order). NMFS should further be ordered to perform a renewed search and to promptly release any non-exempt records responsive to EcoRights' request.

EcoRights has been hindered by NMFS's year long delay in responding to EcoRights' appeal, NMFS's unreasonable search for responsive records, and its improper withholding of non-exempt information. EcoRights is a public advocacy group that intends to continue its advocacy work on behalf of ESA-listed anadromous fish that are within NMFS's jurisdiction, and thus will almost certainly send additional FOIA requests to NMFS in the future. Accordingly, there is a likelihood that NMFS's FOIA violations will recur.

III. CONCLUSION

For the reasons stated above, EcoRights requests that the Court grant declaratory judgment establishing that NMFS violated FOIA by: (1) failing to provide the determination for EcoRights' appeal within the deadline mandated by 5 U.S.C. § 552(a)(6)(A)(ii); (2) not providing all non-exempt

information promptly as mandated by 5 U.S.C. § 552(a)(3)(A); (3) not performing an adequate, reasonable search for responsive records; (4) failing to provide a legally adequate explanation, at the administrative level, for finding information exempt from disclosure; and (5) unlawfully withholding non-exempt information. EcoRights further requests that the Court issue appropriate injunctive relief requiring NMFS to: (1) immediately release all withheld information that is not exempt from disclosure; (2) perform an additional search for documents responsive to EcoRights' request that are in NMFS's possession at the time NMFS performs its new search, including a renewed search of files at the OLE; (3) produce responsive records located in the new search within 20 working days of the Court's order; and (4) respond to EcoRights future FOIA requests and appeals in accord with the deadlines imposed by 5 U.S.C. § 552(a)(6)(A) and 5 U.S.C. § 552(a)(3)(A).

Date: June 8, 2018

Respectfully submitted,

/s/Patricia Linn
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