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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 **DEFENDANT'S REPLY IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT** Date: July 19, 2018 Time: 2:00 p.m. Place: Courtroom F, 15th Fl.

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I. INTRODUCTION

This lawsuit relates to a FOIA request submitted by plaintiff, Ecological Rights Foundation (plaintiff or "EcoRights") to NMFS dated December 6, 2016. The agency completed its document release in response to plaintiff's FOIA request and issued its final response on February 13, 2017, releasing 239 documents in their entirety, and 54 documents in part.

NMFS conducted searches that could be reasonably expected to discover records subject to plaintiff's request. Based on various emails of a NMFS Fishery Biologist and a letter NMFS sent to the Federal Energy Regulatory Commission ("FERC"), plaintiff speculates that NMFS' Office of Law Enforcement ("OLE") conducted an investigation and generated as yet uncovered records. The emails and letter do not evidence an OLE investigation; rather, they refer to actions and duties of other entities – California Department of Fish and Wildlife and FERC. Having no grounds upon which to challenge either the reasonableness of the agency's search or good faith declarations, plaintiff asks to undertake discovery, but fails to specify what facts could be elicited from such discovery.

Plaintiff has challenged the agency's withholdings under FOIA Exemption 5 for material protected by the attorney client and deliberative process privileges on ten documents. The agency has agreed to release an unredacted version of two of the records previously at issue. Only eight documents remain in dispute. The agency has explained, through its submissions, including a Second Declaration of NOAA FOIA Officer Mark Graff ("Second Graff Decl.") and revised Vaugh index filed concurrently with this Reply Brief, the basis for the attorney-client and deliberative process privileges claimed.

The remainder of plaintiff's claims assert purported technical violations of FOIA that are either moot or lack any legal support. One, plaintiff complains of an inconsistency in the agency's redaction of OLE Agent Donald Tanner's name and email information across three records in the agency FOIA release. The two records that contained redactions Exemptions 6 and 7(C) were re-released without withholdings, and any claim regarding those exemptions is now moot. Two, plaintiff complains that the agency's February 13, 2017 final response letter was deficient because it did not breakdown by page count (as opposed to document count), the number of withholdings and only listed the exemption categories (e.g., attorney-client, deliberative process, privacy) claimed, without providing information about the basis for the withholdings. Plaintiff does not cite a single case in support of its position.

Finally, although plaintiff's lawsuit seeks the Court's determination on the same issues raised in plaintiff's administrative appeal, in moving for summary judgment, plaintiff complained that it had not received the agency's appeal determination. It is undisputed that the appeal determination has been provided. Any claim seeking the determination is now moot. Plaintiff has failed to establish any pattern and practice of delayed determinations on plaintiff's administrative appeals that would warrant declaratory or injunctive relief. Accordingly, the Court should grant summary judgment in favor of defendant and deny plaintiff's summary judgment motion.

II. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT

A. NOAA Conducted a Search Reasonably Calculated to Uncover Responsive Records

NMFS has met its burden to demonstrate the adequacy of its search with "reasonably detailed, nonconclusory affidavits submitted in good faith." *Zemanksy v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985). An agency's search for records is considered "adequate" if it was conducted "using methods which can be reasonably expected to produce the information requested." *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). "[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but whether the search for those documents was adequate." *Zemansky*, 767 F.2d at 571 (emphasis original); *SafeCard Servs. Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (the agency need only show that "the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant."). "Agency affidavits enjoy a presumption of good faith, which will withstand purely speculative claims about the existence and discoverability of other documents." *Ground Saucer Watch v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981).

The declarations provided by NOAA FOIA Officer Mark Graff , OLE Deputy Director Robert L. Gregory ("Gregory Decl."), and OLE Agent Tanner ("Tanner Decl."), establish that the agency's search targeted the offices where responsive documents are likely to be located, the NOAA Fisheries West Coast Region offices and OLE. *See* ECF No. 26, Declaration of Mark Graff in Support of Defendant's Cross Motion for Summary Judgment ("Graff Decl.") ¶¶ 5-8, 13-15; Second Graff Decl. ¶ 4; Gregory Decl. ¶¶ 11-17; Tanner Decl. ¶¶ 8-11. Both hard copy and electronic files were searched, and the search terms used were identified. *See id.* Second Graff Decl. ¶ 4; Gregory Decl. ¶ 13; Tanner Decl. ¶ 8.

Plaintiff does not contend insufficiency in the search terms used or that relevant offices or personnel were omitted from the search.

Once an agency makes a showing that it conducted a search in good faith that was reasonably calculated to uncover all relevant documents, the agency's position can only be rebutted by showing that the agency's search was not made in good faith. *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir.1993). The plaintiff bears an "evidentiary burden" to "present evidence rebutting the agency's initial showing of a good faith search." *See Wilson v. DEA*, 414 F. Supp. 2d 5, 12 (D.D.C. 2006). An agency's "failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for requested records." *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004) (per curiam).

Plaintiff has failed to meet its burden. The primary search deficiency alleged is the absence of investigative records in the agency's FOIA release. Citing various emails of NMFS Fishery Biologist, Larry Thompson, and a letter from NMFS to FERC, plaintiff argues that based on the content of these emails, OLE should have conducted an investigation.[1] *See* ECF No. 12-1, Linn Decl. Exs. G-H; ECF No. 30-1, Reply Linn Decl. Exs. 2-5. But nothing in these emails suggest the agency's search failed to capture responsive records. The records cited by plaintiff do not refer to the existence of an investigation or creation of records by Agent Tanner. None of the documents submitted with the Plaintiff's Opposition and Reply suggest the existence of as yet uncovered OLE records: the emails indicate that in 2015, FERC's Office of Compliance was contacted about fish strandings, California Department of Fish and Wildlife ("CDFW") "technically have the lead" on fish rescues, and the decision on any actions were up to CDFW.[2] *See* Reply Linn Decl. Exs. 2-4. The letter cited by plaintiff indicates

[1] Though plaintiff expresses its belief that OLE should have undertaken investigations, this issue is beyond the scope of the FOIA and not the proper subject of a FOIA lawsuit. Pl. Opp. & Reply at n. 1.

[2] Plaintiff inaccurately states that defendant did not address an October 21, 2015 email from Larry Thompson, *see* Linn Decl. Ex. G, in its Cross-Motion for Summary Judgment. Plaintiff believes that documents included in NMFS' release, such as the October 21, 2015 email, indicate Tanner is involved in investigations related to flow fluctuations and poaching at the Yuba River based solely on plaintiff's position that OLE should have initiated an investigation into the issues discussed in the records. *See* Def.'s Cross-Mot. for Summ. J. at 17. This amounts to no more than "[m]ere speculation that as yet uncovered documents might exist," is which is not enough to "'undermine the determination that the agency conducted an adequate search for the requested records.'" *Morley v. CIA*, 508 F.3d 1108, 1120 (D.C. Cir. 2007) (citation omitted). In the Opposition and Reply, plaintiff introduces additional records about the same incident discussed in the October 21, 2015 email, and suggests that

that NMFS discussed fish strandings with FERC and refers to a process involving FERC, not an OLE investigation. *See id*. Ex. 5. Tanner has further explained that although he received emails from Thompson regarding the FERC project, Thompson did not make a referral to OLE to investigate take allegations, and Tanner did not collect any records related to this incident. Tanner Decl. ¶ 7.

Defendant previously addressed a September 24, 2014 email authored by Thompson that plaintiff referenced in its Motion for Summary Judgment: the email indicates nothing more than a plan by Thompson to visit the lower Yuba River and to discuss stranding hazards with Tanner because Tanner "may attend the future FERC public meeting on the subject." Linn Decl. Ex. H. The email did not contain any substantive discussion of any "take," reference to an investigation, suggestion of any steps that Tanner may have taken after the visit, or suggestion that Tanner created any investigative documents yet to be produced. *See id*. Tanner has explained that Thompson never made a referral to OLE for the initiation of an investigation, and Tanner did not create any records related to his site visit. Tanner Decl. ¶¶ 5-7. Tanner did not see any evidence of "take" at the site visit. *See id*.

Plaintiff further contends that Agent Tanner indicated in a February 13, 2014 email that he was tracking fish strandings, but these reports were not located the agency's search. *See* Linn Decl. Exs. A-B; Pl. Opp. & Reply at 9. Plaintiff mischaracterizes Tanner's statement. The email shows that Thompson forwarded to Tanner, among others, a letter about salmon strandings that NMFS filed in proceedings on a FERC project and stated that he would keep the email recipients "abreast of the FERC response." Tanner responded: "Thanks Larry. I'm keeping track of your reports." *See* Linn Decl. Exs. A-C. Tanner did not indicate that he was independently tracking fish strandings or creating any reports.

Next, plaintiff challenges the adequacy of NOAA's search on the ground that OLE, "and particularly Agent Tanner," did not search paper files. Pl. Opp. & Reply at 8-9. This ignores the facts provided by Graff. He explained that Tanner's paper files were searched. *See* Graff Decl. ¶ 13. With this Reply, defendant has provided the declaration of OLE Deputy Director Robert Gregory to further

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plaintiff made defendant aware of these emails prior to Defendant's Cross-Motion for Summary Judgment. *See* Pl. Opp. and Reply at 9-10. Plaintiff fails to mention that plaintiff had these records before it filed plaintiff's Motion for Summary Judgment, but did not identify or address them in its Motion. *See* Reply Linn Decl. Ex. 1. As explained above, these emails further demonstrate the speculative nature of plaintiff's argument.

describe the OLE searches conducted as part of DOC's inquiry in response to plaintiff's appeal. Gregory has explained that in April 2017, OLE was tasked in undertaking additional searches, and that search included both electronic and paper records. *See* Gregory Decl. ¶ 13.

Finally, plaintiff questions the search cut-off dates used in the searches that followed plaintiff's administrative appeal. In his Second Declaration, Graff has explained that the cut-off date used in the additional search conducted by NOAA Fisheries' West Coast Region offices was the date the search was executed. Second Graff Decl. ¶ 4. Gregory has similarly explained that the end date used by OLE was the date the search was executed. Gregory Decl. ¶ 13.

Here, NMFS has demonstrated through the Graff, Gregory, and Tanner declarations that it conducted a reasonable search for relevant documents, and thus, has demonstrated that it is entitled to summary judgment on this issue. Plaintiff attempts to challenge the sufficiency of the agency's search based on its interpretation of emails, that on their face, do not indicate that an OLE investigation was conducted. Plaintiff's arguments rely on nothing more than their belief that more action should have been taken by OLE, ignores the facts provided by the agency's declarations, and as such, do not overcome the presumption of the agency's good faith search.

B. Plaintiff's Request for Discovery Should Be Denied

Plaintiff also requests under Federal Rule of Civil Procedure 56(d), that the Court permit discovery related to defendant's searches. To obtain discovery under Rule 56(d), plaintiff must demonstrate: (1) that it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) that the facts sought exist; and (3) that these sought-after facts are "essential" to resist defendant's summary judgment motion. *See California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998). A Rule 56(d) motion must show how additional discovery would preclude summary judgment and why a party cannot immediately provide "specific facts" demonstrating a genuine issue of material fact. *See Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 523-24 (9th Cir. 1989). Plaintiff has not made such a showing. No declaration has been provided setting forth specific "essential" facts to be elicited from discovery. The Reply Linn Declaration does not describe what discovery plaintiff proposes to undertake, or any facts that plaintiff believes would be obtained from that discovery.

None of plaintiff's actions or contentions demonstrate grounds for discovery. Plaintiff takes two inconsistent positions. It contends that the Reply Linn Declaration presents all the "requisite evidence" allegedly demonstrating that "overlooked" material was not produced. At the same time, plaintiff also contends that it does not have "essential" evidence on the agency's search and could not have obtained needed evidence earlier because NMFS did not provide the appeal description and full description of its search until May 25, 2018, with its summary judgment motion. *See* Pl. Opp. & Reply at 6. Plaintiff's own declarations contradict this assertion. Defendant provided plaintiff's counsel a detailed summary of the agency's search prior to May 25, 2018 and prior to the initial case management conference. *See* Reply Linn Decl. Ex. 1 (confirming plaintiff's receipt of defendant's receipt of NMFS' search terms and parameters); ECF No. 20, May 10, 2018 Joint Case Management Statement at 5. Here, plaintiff was informed that defendant was willing to provide an appeal determination, that the determination would address the plaintiff's concerns regarding the agency's search, and that defendant proposed the parties meet and confer after plaintiff had the opportunity to review the appeal determination. ECF No. 27, Declaration of Jennifer S Wang In Support of Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment ("Wang Decl.") ¶¶ 2-4. Plaintiff ignored these opportunities and opted to pursue an early summary judgment motion prior to the completion of the parties' Rule 26(f) conference and the initial case management conference. *See id.*

"Discovery is not favored in lawsuits under the FOIA." *Judicial Watch v. U.S. Dep't of Justice*, 185 F. Supp. 2d 54, 65 (D.D.C. 2002). Courts have uniformly acknowledged that discovery is "an extraordinary procedure in a FOIA action." *Thomas v. Dep't of Health & Human Servs.*, 587 F. Supp. 2d 114, 115 (D.D.C. 2008); *see also Lawyer's Comm. for Civil Rights of San Francisco Bay Area v. U.S. Dep't of Treasury*, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008) (observing that discovery is "sparingly granted" in FOIA cases); *Huene v. U.S. Dep't of the Treas.*, No. 2:11-cv-01209 JAM KJN PS, 2012 WL 1681940, at *3 (E.D. Cal. May 14, 2012). Discovery is typically only permitted in extreme cases, such as whether there has been a showing of bad faith, which is not the case here. A showing of bad faith is "when there is evidence of wrongdoing such as illegal destruction of documents or a material conflict in agency affidavits." *Citizen for Responsibility and Ethics in Washington v. U.S. Dep't of Justice*, 467 F. Supp. 2d 40, 56 (D.D.C. 2006). Discovery is not warranted "when it appears that discovery would only

. . . afford [the plaintiff] an opportunity to pursue a bare hope of falling upon something that might impugn the affidavits." *Flowers v. Internal Revenue Serv.*, 307 F. Supp. 2d 60, 68 (D.D.C. 2004) (citing *Military Audit Project v. Casey*, 656 F.2d 7y24, 751-52 (D.C. Cir. 1981). Courts generally do not grant discovery even if an agency's affidavits regarding its search are deficient. Instead, courts direct the agency to supplement its affidavits. *Jarvik v. CIA*, 741 F. Supp. 2d 106, 122 (D.D.C. 2010) (citing *Judicial Watch*, 185 F. Supp. 2d at 65).

The Court should not permit discovery. Plaintiff has neither established the insufficiency of the agency's declarations, nor met Rule 56(d) requirements by setting forth specific facts to be elicited from further discovery and explaining how the sought-after facts are "essential" to resist summary judgment.

C. NOAA Properly Withheld Material Pursuant to Exemption 5

Upon additional review, NOAA is releasing two of the ten documents at issue, Documents 5250-1 and 20774-2. These two documents were drafts of the May 12, 2014 concurrence letter issued by NMFS addressing the U.S. Army Corps of Engineers' ("Corps") maintenance and operation of Engelbright Dam on the Yuba River in California. *See* Second Graff Decl. ¶ 8.

NOAA has met its burden to establish exemptions for the eight documents that remain at issue, and plaintiff has not offered any legitimate basis to challenge the decision to withhold the information.

Documents 5079-1, Document 5276-1: The only withholding that plaintiff appears to challenge on these documents, which are solicitations for legal opinion from NOAA Office of General Counsel ("GC"), is the redaction on the first page. One, plaintiff speculates that the information redacted on the first page is the same as that which appears, and was not redacted, on the second page. There is no basis for plaintiff's speculation. Two, plaintiff theorizes that the redacted information consists of facts that are public knowledge, but does not explain why, if true, the material is not subject to Exemption 5. The attorney-client privilege applies to facts divulged by a client to his or her attorney. *See Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005).

Document 5200: NOAA has explained that the redacted material on this email consists of discussion between NOAA staff and a NOAA attorney regarding Biological Assessments received from the Corps

protected by the attorney-client and deliberative process privileges. These Biological Assessments were part of an Endangered Species Act ("ESA") consultation process that was the subject of then-pending litigation. The redacted material constitutes a discussion between a client and his attorney regarding the legal completeness and sufficiency of the Biological Assessments and reflects the attorney's thought process on that subject. *See* Second Graff Decl. ¶ 12. The revised Vaughn index further discloses the context in which this email was prepared and the role of this document in the agency's deliberations as to future action by the agency: it discusses impressions regarding NMFS's ability to move forward towards ESA Section 7 consultation. *See id.* Ex. 6. This type of internal analysis is exempt from disclosure. *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1118–19 (9th Cir. 1988) ("we believe a better analytical tool than merely determining whether the material itself was essentially deliberative or factual should be used: we should focus on whether the document in question is a part of the deliberative process" and explaining that the deliberative process privilege has been held to cover all "recommendations, draft documents, proposals, suggestions and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency").

Document 5215: As described in the revised Vaughn index, the redacted material on this email reflects a confidential exchange between a NOAA scientist and a NOAA attorney regarding agency compliance with requirements of a court order issued in then-pending litigation about the subject ESA Section 7 consultation. *See* Second Graff Decl. Ex. 6. The material is also deliberative and pre-decisional as it identifies proposed future steps for consultation and a need for executive policy decision-making. *See Nat'l Wildlife Fed'n*, 861 F.2d at 1122 (documents properly withheld as deliberative where they represent "the mental processes of the agency in considering alternative courses of action prior to settling on a final plan").

Document 5224: The material redacted from this email consists of a confidential communication by the NMFS Sacramento River Basin Chief to his attorney requesting legal advice on an aspect of the ESA Section 7 consultation process with the Corps. *See* Second Graff Decl. Ex. 6. The redacted material was also withheld under the deliberative process privilege because it is pre-decisional, rendered before the agency's final letter of concurrence was issued, reflects the Section Chief's view of a legal issue raised in the consultation process, and solicits legal advice regarding that view. *Id.* This is precisely the

type of material protected by the deliberative process privilege. *See Nat'l Wildlife Fed'n*, 861 F.2d at 1118-19; *Columbia Snake River Irrigators Ass'n v. Lohn*, C07-1388MJP, 2008 WL 750574, at *3 (W.D. Wash. March 19, 2008) ("recommendations, draft documents, proposals, suggestions and other subjective documents which reflect the personal opinions of the written rather than the policy of the agency . . . .are deliberative and are properly withheld under exemption five.").

Document 5247: NOAA has explained the applicability of the attorney-client privilege to this email. The redacted material comprises a request by NOAA staff to a NOAA attorney for legal advice on how to respond to Environmental Advocates, plaintiff's counsel, during the course of an ESA consultation and litigation related to that consultation. *See* Second Graff Decl. Ex. 6.

Document 5247-2. This is a draft response to a letter received from Environmental Advocates and was attached to the above-described attorney-client communication, which sought legal advice on the response.[3] The portions withheld represent deliberations that were pre-decisional in nature as the parties were considering how to respond to Environmental Advocates, how to handle certain issues discussed in Environmental Advocates' letter, and what changes to make to the draft response. *See* Second Graff Decl. Ex. 6. FOIA protects not just records, but the agency's deliberative process. The exchange of drafts is itself part of that process, and thus exempt from disclosure. *National Wildlife* Fed'n, 861 F.2d at 1118. Moreover, in formulating a response to Environmental Advocates' letter and evaluating how to handle certain issues raised in the letter, NMFS "exercise[d] policy implicating judgment," and the document it created is deliberative and properly withheld under exemption five. *Columbia Snake River Irrigators Ass'n*, 2008 WL 750574, at *3.

Document 30833: NOAA has explained that this document was prepared by a NOAA attorney, at the request of NOAA program managers for the legal analysis captured in the document, and is therefore protected attorney-client communication. The revised Vaughn index further explains that the legal issues addressed are the subject of recurring litigation, and therefore also properly withheld as attorney work product.[4] *See* Graff Decl. Ex. 6. The redacted portions of the document reflect a draft legal

[3] Because this document is part of an attorney-client communication, the revised Vaughn index reflects an additional basis for withholding the document under the attorney-client privilege. *See* Graff Decl. Ex. 6.

[4] The revised Vaughn reflects that an additional basis for withholding Document 30833 is the

analysis and draft proposed consultation approach that could be applied on a national- or project-level basis and which, if implemented, would likely be the subject of legal challenges. *See* Second Graff Decl. Ex. 6; *Am. Civil Liberties Union of N. California v. United States Dep't of Justice*, 880 F.3d 473, 487 (9th Cir. 2018) (attorney work product protection under exemption 5 applies to records prepared in anticipation of recurring legal issues). The revised Vaughn also discloses that the document was created as part of an ongoing discussion regarding development of agency legal and policy positions, but the legal analysis reflected in the document was never finalized or adopted by the agency as official legal guidance. This type of internal analysis and review is exempt from disclosure. *Nat'l Wildlife Fed'n*, 861 F.2d at 1118.

Plaintiff argues that because the agency did not assert deliberative process privilege over this document during the administrative stage, the Court must ignore the assertion of the privilege in litigation. Plaintiff misstates the law. The authority plaintiff cites, *Nat'l Wildlife Fed'n v.* NMFS, 481 F.3d 1224, 1237 n. 9 (9th Cir. 2007), does not discuss either FOIA or the deliberative process privilege. "[A]n agency does not waive FOIA exemptions by not raising them during the administrative process . . . . [W]aiver is inappropriate because FOIA provides for de novo judicial review, 5 U.S.C. § 552(a)(4)(B); agencies do not litigate FOIA requests and therefore do not create a record suitable for review." *Young v. CIA*, 972 F.2d 536, 538–39 (4th Cir. 1992) ("It is unremarkable that the CIA, when it filed its declarations and Vaughn Indices, changed its position as to a few of the many documents originally at issue two years before in the administrative proceeding."); *Gula v.Meese*, 699 F. Supp. 956, 959 n. 2 (D.D.C. 1988); ("[T]he defendant in a FOIA case may assert new exemptions at the federal district court level . . . not previously asserted at the administrative level, even if the circumstances have not changed in the interim.").

Plaintiff's contention that the agency failed to maintain the confidentiality of attorney-client communications is unsubstantiated. Graff has confirmed that all documents with attorney-client privilege material were confidential, and that the agency maintained that confidentiality. *See id.* ¶ 10.

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attorney work production protection. *See id.*

Plaintiff generally asserts, with respect to all of the documents at issue, that the agency has failed to establish a foreseeable harm if the redacted information were released. Plaintiff does not cite any authority that suggests that such particularized explanation of the harm that would result from a client's solicitation of legal advice from his attorney in a Vaughn index is required to establish the exemption. With respect to all attorney-client communications, the fundamental harm is that disclosure breaks the privilege. *See also* Second Graff Decl. ¶ 7 (release of the material withheld under the attorney-client privilege would discourage NOAA staff from seeking legal advice from NOAA attorneys about the legal implications of and legal sufficiency of agency actions and discourage a frank and open dialogue regarding implementation of policy and legal interpretations, with the result that NOAA GC's ability to advocate and offer advice to their clientwill be limited).

Graff has previously explained that further disclosure of the records at issue would adversely affect the candor of future agency deliberations. *See* Graff Decl. ¶¶ 30, 36. In his second declaration, Graff has further explained that the agency evaluated each of the withholdings at issue to consider whether a foreseeable harm would result from disclosure of the redacted information. *See* Second Graff Decl. ¶¶ 6-7. The revised Vaugh index provides further details, with respect to each of the remaining disputed assertions of the deliberative process privilege, the foreseeable harm that would result from discovery of the redacted information. *See* Second Graff Decl. Ex. 6.

D. NMFS Has Met FOIA's Segregability Requirement

The only alleged failures by NMFS to segregrate non-exempt material relate to the two draft concurrence letters (documents 5250-1 and 20774-2). Pl. Opp. & Reply at 24. As discussed above, defendant will release unredacted versions of these documents.

E. Neither Declaratory Nor Injunctive Relief Is Warranted

None of plaintiff's requests for declaratory or injunctive relief should be granted. Plaintiff has failed to demonstrate that either is warranted or appropriate in this case.

1. NOAA's Complied With Obligations at the Administrative Stage

During the administrative stage under FOIA, an agency need only "indicate the scope of the documents it intends to produce and the exemptions it will claim." *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission ("CREW")*, 711 F.3d 180, 187 n. 4 (D.C. Cir.

203). A FOIA response must identify "reasons" for a determination. *See* 5 U.S.C. § 552(a)(6)(A)(i). "The administrative process need not explore all issues or arguments." *See id.*

Here, NOAA satisfied its statutory obligations at the administrative stage by identifying the number of documents[5] collected for processing, the number produced with and without redactions, and the specific exemptions being claimed for the withholdings in its February 13, 2017 letter: 5 U.S.C. § 552(b)(5) attorney client work product, 5 U.S.C. § 552(b)(5) attorney client privilege, 5 U.S.C. § 552(b)(5) deliberative process, and 5 U.S.C. § 552(b)(6) individuals' right to privacy. *See Bayala v. U.S. Dep't of Homeland Security*, 72 F. Supp. 3d 260, 265-66 (D.D.C. 2014) *rev'd on other grounds*, 827 F.3d 31 (D.C Cir. 2016) (enumeration of applicable FOIA exemptions by reference to statutory citation in letter sufficient to meet obligation that the agency provide "the reasons" for its determinations). At the administrative stage, NMFS properly identified the exemptions it was claiming with respect to the redacted documents at issue. The agency's omission of a missing reference to (b)(5) on a single redaction box on a one page email in NMFS's release, does not constitute a failure by the agency of complying with FOIA obligations. *See* ECF No. 12-15, Hudak Decl. Ex. 5 at 15. This is particularly so, when, as discussed above, the agency has met its obligations by listing the relevant FOIA exemptions in its February 13, 2017 letter and when the agency may assert new exemptions at the district court level, not previously asserted at the administrative level. *See Young*, 972 F.2d at 538–39 (agency does not waive FOIA exemptions by not raising them during the administrative process); *Gula*, 699 F. Supp. at 959 n. 2 (agency may assert new FOIA exemptions at the district court that were not previously asserted at the administrative level).

At the administrative stage, an "agency is not required to produce a document like a Vaughn index, which district courts typically rely on in adjudicating summary judgment motions in FOIA case." *CREW*, 711 F.3d at 187 n. 4. Plaintiff admits that "[t]he law is clear that a *Vaughn* index is not required" at the administrative stage, *see* Pl. Opp. & Reply at 14. Although plaintiff asserts that it is not asking the Court to issue an order requiring that NMFS issue a Vaughn index at the administrative stage,

[5] In Defendant's Cross Motion for Summary Judgment, mistakenly stated that the February 13, 2017 letter identified the number of pages collected for processing. This error is immaterial as FOIA does not require that an agency provide total number of pages collected for processing.

the information that it contends the agency must provide at the administrative stage, is, in substance, that which would be included in a Vaughn index at summary judgment: an explanation for withholding information, an explanation for what foreseeable harm to a protected interest would result from disclosures. *See* Pl. Opp. and Reply at 10-11.

Plaintiff identifies the following alleged failings of the agency's February 13, 2017 final response: of the 54 documents produced with redactions, one redaction box on a single one-page email did not contain an exemption basis; two redaction boxes simply listed (b)(5), and the response letter failed to identify the number of pages (as opposed to the number of documents) collected for processing; the number of pages in the 54 documents that contained redaction; how many were withheld under the attorney-client privilege; how many were withheld under the deliberative process privilege; and how many were withheld under Exemption 6. Plaintiff does not cite a single case that supports its contentions. Moreover, through the agency's document release, the agency provided plaintiff most of the above-listed information: the number of pages in the 54 documents that contained redaction, and on all but three documents, the number of withholdings under the various exemptions claimed. Plaintiff was informed that the agency located 309 responsive records, and the disposition of those records. Declaratory judgment is not warranted because, as discussed above, plaintiff misstates the law and the agency's obligations at the administrative stage.

2. Plaintiff's Claims Are Moot

(i) Withholding under Exemption 6 and 7(C)

The issue of whether Tanner's name and contact information was properly withheld on two emails under Exemption 6 and 7(C) is moot. The agency has provided an unredacted version of the emails. Graff Decl. Ex. 2. NOAA has determined that this withholding is no longer necessary. *Id.* ¶ 17. This is not a concession by the agency on the propriety of the withholding. FOIA "exemptions are permissive, and an agency may voluntarily release information that it would be permitted to withhold under the FOIA exemptions." *Mobil Oil Corp. v. U.S. E.P.A.*, 879 F.2d 698, 700 (9th Cir. 1989).

Plaintiff has failed to explain any grounds to justify declaratory relief on an issue that is now moot. The limitations upon issuance of a declaratory judgment reflect concerns similar to those underlying the case and controversy limitation of Article III. *See United States v. State of Wash.*, 759

F.2d 1353, 1357 (9th Cir. 1985). "Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." *Id.*; *see Olagues v. Russoniello*, 770 F2d 791, 803 (9th Cir. 1985) ("allegations of a subjective 'chill' are not an adequate substitute for a claim of a specific present objective harm or a threat of specific future harm" sufficient to establish standing). As plaintiff acknowledges, the information at issue – Agent Tanner's name and email address –was redacted on the two subject emails, but released on another version of one of the subject emails. *See* Linn Decl. at 3, Exs. A-D; Second Graff Decl. ¶ 5. It is undisputed that plaintiff has had Tanner's information since the agency's February 2017 response to the Request. It is also undisputed that the agency has now released the two subject emails without any redaction. Graff Decl. Ex. 2. Accordingly, there is no existing controversy for this Court to decide.

(ii) Determination on Administrative Appeal

Any FOIA claim premised on DOC's failure to provide the final appeal determination is moot; the agency has provided its determination, and indeed, had offered to provide the response without the need for the present Motion. Wang Decl. ¶ 5, Ex. 1. When a government agency fails to meet the timelines set in the FOIA, filing suit provides a remedy by compelling the agency to act. But once an agency has responded to the request the issue of timeliness becomes moot. *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). Mere delay in issuing a final determination on plaintiff's appeal does not warrant declaratory judgment. "Even if the agency does not adhere to FOIA's explicit timelines," the consequence for a delay is simply that the agency cannot use the administrative exhaustion requirement to prevent parties from filing a case in court. *CREW*, 711 F.3d at 189.

No exception to the mootness doctrine applies here. While an agency's pattern and practice of delayed responses to FOIA requests by the same plaintiff may provide an exception to the mootness doctrine, plaintiff have failed to demonstrate that such a pattern exists here. *Cf. Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1174 (9th Cir. 2002) (explaining that exception to mootness doctrine requires that the challenged action will affect the plaintiff in the future). Here, plaintiff alleges a single instance where DOC delayed issuance of its response to plaintiff's administrative appeal. Beyond

speculative a statement that plaintiff will "almost certainly" submit FOIA requests to NMFS in the future, Reply Linn Decl. ¶ 10, plaintiff does not provide any evidence that EcoRights will submit a FOIA request to NOAA, that EcoRights will administratively appeal NOAA's response, *and* that NOAA's final determination on that appeal will be delayed. Instead, plaintiff appears to suggest that it need not demonstrate a pattern and practice relevant to EcoRights' FOIA requests, and the specific FOIA violations alleged in this lawsuit, because of a 2015 order of injunctive relief against NMFS. There is no legal basis for plaintiff's argument. The 2015 order related to a different plaintiff, different FOIA requests, and a different FOIA violation – the agency's failure to respond to multiple FOIA requests submitted by Our Children's Earth Foundation – not at issue here. *Our Children's Earth Foundation v. National Marine Fisheries Service* 85 F. Supp. 3d 1075 (N.D. Cal. 2015) (*OCE I*) and *Our Children's Earth Foundation v. National Marine Fisheries Service*, Case Nos. 14-4365 SC, 14-1130 SC, 2015 WL 4452136, (N.D. Cal. July 20, 2015) (*OCE II*). Plaintiff cites no caselaw supporting this position, that going forward, *any* plaintiff in a FOIA lawsuit against NMFS, may obtain declaratory relief without the need to show a pattern and practice, regardless of the FOIA violation alleged.

3. No Injunctive Relief is Warranted

In deciding whether to grant an injunction, the court should consider the effect on the public of disclosure or nondisclosure, the good faith of any intent to comply expressed by the agency, and the character of past violations. *Long v. IRS*, 693 F.2d 907, 909 (9th Cir. 1982). Here, plaintiff alleges one instance where DOC delayed issuance of its response to plaintiff's administrative appeal. NMFS showed good faith in responding to plaintiff's FOIA request, promptly releasing its final response. DOC promptly reviewed the issues raised in plaintiff's appeal and requested further searches be conducted.

III. CONCLUSION

For the foregoing reasons, defendant respectfully responses that the Court enter judgment in favor of NMFS and deny plaintiff's motion for summary judgment.

DATED: June 22, 2018

Respectfully submitted,
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_/s/_____
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