UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ECOLOGICAL RIGHTS FOUNDATION,	)	
Plaintiff,	)	
v.	)	Civil Action No. 18-cv-00888
NATIONAL MARINE FISHERIES SERVICE,	)	
Defendant.	)	

DECLARATION OF MARK H. GRAFF

Pursuant to 28 U.S.C. § 1746, I, Mark H. Graff, declare and state as follows:

1. I am currently the Freedom of Information Act (FOIA) Officer for the National Oceanic and Atmospheric Administration (NOAA), which is a part of the United States Department of Commerce (DOC). I have occupied this position since September 6, 2015. My primary duties include management of requests submitted to NOAA for records made under both the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a (PA). In that capacity, I oversee NOAA's receipt and log-in of in-coming FOIA requests, the tasking and coordination of searches for responsive records, and review of out-going responses.

2. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, upon conclusions and determinations reached and made in accordance therewith, and upon my personal examination of the withheld and redacted documents. I am personally familiar with the FOIA request of Plaintiff Ecological Rights Foundation (ERF), which is at issue in this case.

3. This Declaration is being submitted in support of DOC's motion for summary judgment.

I. PLAINTIFF'S FOIA REQUEST AND NMFS' INITIAL SEARCH

4. Plaintiff submitted the present FOIA request, dated December 6, 2016, seeking three categories of documents: documents related to a July 24, 2014 email from Chris Yates concerning input that he and other West Coast Region staff provided to NOAA HQ on the impact of a June 11, 2013 memorandum from Earl Stockdale, Chief Counsel of the U.S. Army Corps of Engineers (limited to documents generated on or prior to July 24, 2014, and only those documents related to the input those members provided to NOAA HQ on the impact of the memorandum); documents to or from Chris Keifer related to a draft letter to the U.S. Army Corps of Engineers providing an informal letter with the results of a consultation pursuant to Section 7 of the Endangered Species Act (ESA) for proposed activities at the Englebright Dam; and documents since January 1, 2000 from any office with NOAA Fisheries Service related to whether any entities are causing unauthorized take of threatened or endangered anadromous fish in the Yuba River at or near Englebright Dam, Narrows 1 and 2 powerhouses, Daguerre Point Dam, and the Hallwood-Cordua Diversion. A copy of Plaintiff's FOIA request was submitted as part of Plaintiff's Motion for Summary Judgment, Hudak Declaration, Exhibit 1 (ECF no. 12-14).

5. In response to Plaintiff's FOIA request, NOAA performed searches of the records in NOAA Fisheries West Coast Region and the Office of Law Enforcement.

6. The offices involved in the initial search of NOAA Fisheries West Coast Region were the West Coast Region Central Valley Area Office, the West Coast Region Sacramento Office, the West Coast Region California Coastal Office, the West Coast Region Santa Rosa Office, the West Coast Region Long Beach Office, and the West Coast Region Protected Resources Division and the NOAA Office of the General Counsel Southwest Section. These offices were

chosen as they contain all the employees who have specific knowledge of the actions described in plaintiff's request and were likely to have potentially responsive documents. In conducting these searches, NMFS examined all email files, hard drives, cloud-based systems, and paper files of the employees of the aforementioned offices. As such, there were no other offices or locations where responsive records were reasonably likely to be found, and the search was calculated to uncover all relevant documents.

7. Seven search logs are available from this initial search of the NOAA West Coast Region. These search logs are attached as Exhibit 1. The logs vary in the detail that they offer. For example, the search performed by Jeff McLain was performed on December 13, 2016, and he searched email for the terms "Chris Yates", "Stockdale", "Narrow 1", "Narrow 2", "Narrows II", and for email with metadata indicating that it was from Christopher Keifer and to Jeff McLain. Gary Sprague's search does not indicate the search parameters, but indicates that the search took 31.25 hours spread out between January 3-23, 2017. Maria Rea documented two distinct searches, one for the keywords "Larry Thompson", "Steve Edmundson", "take", "Don Tanner", "Englebright", "Daguerre", and "Narrows" since January 1, 2000, and one search seeking email to or from Chris Keifer, Gary Sprague, or Howard Brown, or the draft Englebright letter, from February 14 – March 25, 2014. Don Tanner, the Resident Agent for NOAA Fisheries West Coast Region, documented a search but was sparse on the details.

8. An additional search was performed by NMFS' Office of Law Enforcement. This search targeted the terms Englebright Dam, Narrows 1 and 2 powerhouses, Daguerre Point Dam, Hallwood-Cordua Diversion, Yuba River, Chris Yates, Stockdale memo, Englebright concurrence letter, and Chris Keifer.

9. 309 documents responsive to Plaintiff's FOIA request was found through these searches. On February 13, 2017, NOAA made a determination that it would withhold 54 of those documents in part due to the presence of material exempt from disclosure pursuant to the attorney-client privilege, the deliberative process privilege, the attorney work product privilege, or because it contained personal information the disclosure of which would constitute a clearly unwarranted invasion of privacy. The rest of the information in those documents was disclosed, and the remainder of the documents were disclosed in full or were referred to other agencies where the documents originated for a disclosure determination and direct response to the requester. A copy of NOAA's final determination was submitted as part of Plaintiff's Motion for Summary Judgment, Hudak Declaration, Exhibit 3 (ECF no. 12-16).

10. On March 10, 2017, Plaintiff submitted an administrative appeal, challenging the partial withholdings on 10 documents. A copy of Plaintiff's appeal was submitted as part of Plaintiff's Motion for Summary Judgment, Hudak Declaration, Exhibit 4 (ECF no. 12-17). Those documents contained withholdings pursuant to the attorney-client privilege and the deliberative process, though sometimes the withholding was only labelled (b)(5) without specifying which specific privilege encompassed by (b)(5) was being exerted.

11. Plaintiff's appeal also challenged the adequacy of the search.

II. ADDITIONAL SEARCH PERFORMED BY NMFS

12. In response to Plaintiff's appeal regarding the adequacy of the search, DOC's Office of the General Counsel reviewed the available search logs, made further inquiries about the production of emails to and from the regional NMFS law enforcement agent Don Tanner and the search performed by the Office of Law Enforcement, and determined that, in order to ensure that all relevant documents had been located, additional searches would be advised. The additional

searches were intended to ensure that a consistent set of search terms were used, and to encompass all Office of Law Enforcement agents within the search.

13. Upon inquiry with Resident Agent Don Tanner, it was confirmed that he had located numerous documents that were released to Plaintiff in full. In searching for responsive material, the Resident Agent provided paper files and his computer to the regional FOIA coordinator. Both Resident Agent Tanner and the FOIA coordinator performed the relevant searches on the machine, including on the Resident Agent's email and hard drive. While the Resident Agent had been copied on the emails at issue, he did not author any responsive documents that were not produced.

14. Upon inquiry with the Office of Law Enforcement, it was confirmed that two responsive emails to/from Resident Agent Tanner had been located and produced to Plaintiff, though his name and email address had been redacted pursuant to (b)(6). The Office of the General Counsel informed that (b)(7)(C) is a more appropriate basis for redacting an agent's name and email, and the FOIA Coordinator for the Office of Law Enforcement took corrective action and re-released those emails with a corrected redaction code.

15. DOC's Office of the General Counsel instructed that all offices perform a search using the same keywords, checking both emails and network drives. The Office of Law Enforcement was specifically instructed to search the documents of all agents, not just the regional Resident Agent. The 45 sets of keywords to be used for the search were:

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

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

16. The additional searches were completed around Summer 2017. The additional searches did not uncover any additional responsive documents that had not already been produced to Plaintiff.

17. NOAA has now determined that it is no longer necessary to withhold information under exemption 7(C) for two documents (0.7.1707.5395 and 0.7.1707.5396) and releases them in full. *See* Exhibit 2.

III. MATERIAL PARTIALLY REDACTED IN PLAINTIFF'S CHALLENGES

A. THE CONSULTATION CONDUCTED PURSUANT TO ESA SECTION 7

18. Section 7(a)(2) of the ESA requires each federal agency ("action agency," in this case, the Corps) to ensure that any action authorized, funded, or carried out by that agency "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2).

19. The action agency must consult with the appropriate "consulting agency" (here, NMFS) whenever its action "may affect" a threatened or endangered species or critical habitat. 50 C.F.R. § 402.14(a). If the proposed action is "likely to adversely affect" a listed species or its critical habitat, "formal consultation" is required. 50 C.F.R. § 402.14(a).

20. Formal consultation begins when the action agency transmits a written request to the consulting agency, which may take the form of a "biological assessment," (BiOp) presenting a description of the proposed action and evaluation of its potential effects. *See* 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12. Formal consultation concludes with the issuance of a biological opinion by the consulting agency. 50 C.F.R. § 402.14(l)(1). A BiOp assesses the likelihood of

jeopardy to the species and the likelihood that the proposed action will result in destruction or adverse modification of critical habitat. *See* 50 C.F.R. § 402.14(g).

21. If the proposed action would cause jeopardy or adverse modification, the BiOp may include a reasonable and prudent alternative (RPA) that the consulting agency "believes would avoid the likelihood of" jeopardy or adverse modification of critical habitat. 50 C.F.R. § 402.02. The RPA must comprise actions that can "be implemented in a manner consistent with the intended purpose of the action," and that are "consistent with the scope of the [action agency's] legal authority and jurisdiction," and are "economically and technologically feasible." *Id*.

22. The BiOp may include an Incidental Take Statement ("ITS") that, if followed, provides the action agency a safe harbor from liability under the ESA's Section 9 prohibition on "take" of listed species. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i); *see also* 16 U.S.C. § 1536(o)(2). An ITS will include "reasonable and prudent measures" and terms and conditions the consulting agency considers necessary or appropriate to minimize the impact of such take. 50 C.F.R. § 402.14(i).

23. Informal consultation is an optional process between the action agency and the Service (again, here, NMFS) which can include various forms of communication about a proposed action. If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary. 50 CFR § 402.13(a)

24. On May 12, 2014, NMFS' West Coast Region issued a concurrence letter addressing the U.S. Army Corps of Engineers' (Corps) maintenance and operation of Engelbright Dam on the Yuba River in California. The letter stated that on October 22, 2013, NMFS had received the

Corps' request for a written concurrence with its determination that this action may affect, but was not likely to adversely affect, federally listed threatened Central Valley (CV) spring-run Chinook salmon, threatened California Central Valley (CCV) steelhead, threatened Southern distinct population segment (DPS) of North American green sturgeon, and the designated critical habitat for those listed species. NMFS prepared a response pursuant to section 7(a)(2) ESA, its implementing regulations at 50 CFR § 402, and agency guidance for preparation of letters of concurrence. In the letter, NMFS concurred with the Corps' determination that the proposed project was not likely to adversely affect the listed species treated within it, or their designated critical habitats in the Yuba River.

B. EXEMPTION APPLICABILITY

FOIA Exemption 5

25. Exemption 5 protects interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. Exemption 5 protects, inter alia, predecisional deliberative memoranda and attorney-client communications.

Deliberative Process Privilege

26. In order for the deliberative process privilege to apply, the responsive materials must be (a) predecisional and (b) deliberative.

27. Pursuant to Exemption 5, NOAA withheld portions of four of the documents listed below in Section III.C. Three are drafts of external correspondence regarding the Yuba River consultation or biological assessments; one is an internal email providing a staff update on the consultation.

28. Here, the information was predecisional because the documents antedate NOAA's decisions regarding these subjects and the agency was still considering its position on certain legal analyses, draft responses and discussions or opinions on ESA interpretations.

29. The information was deliberative because it reflects the deliberations of NOAA's staff, including internal comments, discussions, and recommendations of various agency employees, including NMFS and the Office of General Counsel (GC) regarding the interpretation of ESA laws, and draft memoranda, reports, or positions in agency discussions.

30. The release of such information could have a chilling effect on the discussions within the agency in the future, discouraging a frank and open dialogue among agency employees during the formulation of legal interpretations NOAA creates, ESA reports, and inter-agency collaborations on responses to concerns from members of the public.

Attorney Client Privilege

31. The attorney-client privilege protects confidential communications between an attorney and client relating to a legal matter for which the client has sought professional advice. This privilege also encompasses any opinions given by an attorney to the client based upon facts provided by the client.

32. Pursuant to the attorney-client privilege, NOAA withheld information from the responsive records that reflect or include confidential communications between NOAA employees and GC and/or DOJ discussing ESA legal analysis, discussions between NOAA and DOJ, and the legal review of the informal letter transmitting the Department's position regarding the ESA consultation.

Segregability

33. NOAA carefully reviewed each responsive record on a page by page and line by line basis in an attempt to identify reasonably segregable, non-exempt information.

34. Due to Plaintiff's challenge, *see supra* paragraphs 10-11, NOAA conducted an additional segregability review.

35. NOAA carefully reviewed each redacted or partially withheld record individually to identify non-exempt information that could be reasonably segregated from exempt information for release and implemented segregation where possible.

36. NOAA has determined that there is no further reasonably segregable information to be released and all segregable information has been released to Plaintiff. Further disclosure of these records would adversely affect the candor of future agency deliberations.

C. DESCRIPTION OF THE DOCUMENTS

37. The following paragraphs contain a description as to why material was withheld for each of the 10 documents challenged by Plaintiff. The basis for the withholdings is outlined within the accompanying *Vaughn* Index, attached as Exhibit 3.

38. Document 5079-1. This document is a 9-page ledger that was one of two attachments to an email from Aimee Moore to Julia Caracoza, which is attached as Exhibit 4. As the email clearly states, Ms. Moore was submitting the Yuba 2014 Englebright Dam Project Informal Letter to NOAA's Office of the General Counsel for review, as well as the routing and tracking ledger sheet that comprises this challenged document. The material redacted from the document, pursuant to the attorney-client privilege, consisted solely of comments directed to legal counsel indicating why legal review of the letter was being requested, and informing legal counsel that the letter related to a matter in active litigation.

39. Document 5200. This is a 2-page email chain between attorney Chris Keifer and biologist Gary Sprague with the subject line "Re: Yuba BA". The redacted material falls within the attorney-client privilege and consists solely of discussion between agency staff and an attorney regarding Biological Assessments received from the Corps. The material is also deliberative and predecisional as it discusses impressions regarding the ability to move forward towards consultation.

40. Document 5215. This document is an email conversation between attorney Chris Keifer, Sacramento River Basin Chief Howard Brown, and biologist Gary Sprague. The redacted material is attorney-client privileged and consists solely of a status update on the consultations. Some of the material withheld is also deliberative and predecisional as it identifies proposed future steps for consultation and a need for executive policy decision-making.

41. Document 5224. This one-page email from the Sacramento River Basin Chief clearly identifies on its face that it was being sent to NOAA employees working on the policy and legal aspects of the Section 7 consultation with the Corps. The redacted material falls under the attorney-client privilege and deliberative process privilege and discusses changes in the scope of the activities associated with the dams and the implications for the ongoing consultation.

42. Document 5247. This email from the Sacramento River Basin Chief to an attorney with NOAA General Counsel was partially withheld pursuant to the attorney-client privilege. The redacted material consists of agency staff and attorney deliberations upon how to respond to a letter from Environmental Advocates, counsel for the plaintiffs in this case. The email attached the letter from Environmental Advocates and the draft response (which is also being challenged).

43. Document 5247-2. This is the draft response to a letter received from Environmental Advocates, and was enclosed in an email from the Sacramento River Basin Chief to an attorney

with NOAA General Counsel seeking advice on the response. (See paragraph 42.) The redacted material, withheld under the deliberative process privilege, revealed information about the ongoing consultation, and indicated future steps that the agency would take to meet with stakeholders, as well as the appropriate role of NMFS as not the lead Federal action agency.

44. Document 5250-1. This draft concurrence letter was attached to an email from Fish Biologist Gary Sprague seeking review from NOAA legal counsel, attached as Exhibit 5. This material was withheld under the deliberative process privilege. The material contains discussions of proposed action, the authorities for the proposed action, the action area, the action agency's effects determination, the consultation history, future actions requiring separate consultations, non-discretionary actions, discretionary actions, effects of the action, effects of the proposed actions, conservation recommendations, and litigation history.

45. Document 5276-1. This is another copy of the routing and tracking ledger for the legal review of the informal letter transmitting the Department's position regarding the consultation. (See paragraph 38.) The material redacted from the document, pursuant to the attorney-client privilege, consisted solely of comments directed to legal counsel indicating why legal review of the letter was being requested. The cover email to which this was enclosed is attached as Exhibit 4.

46. Document 20774-2. This document was attached to a letter from DOJ Trial Attorney Bradley Oliphant to fish biologist Brian Ellrott (copying NOAA counsel and DOJ environmental law counsel). The document is another copy (see paragraph 44) of the concurrence letter in draft state, showing suggested changes in NMFS' concurrence letter to the Corps. The material redacted from the document was pursuant to the deliberative process privilege.

47. Document 30833. This document is a detailed legal analysis drafted by a NOAA attorney entitled *Analyzing Ongoing Projects Under Section 7 of the Endangered Species Act*. It provides a detailed legal framework analysis, a detailed review of the fundamental determinations that must be made in any consultation, and a summary of key analytical steps. It also identifies policy choices regarding how the effects associated with the continued existence of structures such as dams, and any non-discretionary actions required in connection with their operations, should be treated in a Section 7 consultation. The material withheld in this document was withheld pursuant to the deliberative process privilege and the attorney client privilege. This is a document devoted to considering the legal and policy considerations of how effects associated with permanent structures such as dams should be treated in a Section 7 consultation, intended for further internal policy development within NMFS.

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Pursuant to 28 U.S.C. § 1746, I hereby affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 24 day of May, 2018, Silver Spring, Maryland.

Mark H. Graff