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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 **SECOND DECLARATION OF MARK H. GRAFF IN SUPPORT OF 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. Hon. Jacqueline Scott Corley

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.	)	

SECOND 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. I previously submitted a declaration, dated May 24, 2018, in this action ("May 24, 2018 Declaration"). This Second Declaration is being submitted in support of Defendant's Reply in Support of Cross-Motion for Summary Judgment.

I. ADDITIONAL SEARCH PERFORMED BY NMFS

4. As I explained in my May 24, 2018 Declaration, in response to Plaintiff's appeal regarding the adequacy of the search conducted in response to its December 6, 2016 FOIA request, DOC's Office of the General Counsel determined that, in order to ensure that all relevant documents had been located, additional searches would be advised. DOC's Office of the General Counsel instructed that the relevant offices (those involved in the initial searches described in my prior Declaration), including Office of Law Enforcement (OLE), perform a search using the same keywords, checking both emails and network drives. All of the offices tasked included a search of their paper records. The end date used for the additional searches was the date the search was executed.

5. Upon inquiry with the OLE, DOC confirmed that two responsive emails to/from OLE Resident Agent Don 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 the OLE FOIA Coordinator that (b)(7)(C) is a more appropriate basis for redacting an agent's name and email, and the OLE FOIA Coordinator took corrective action and re-released those emails with a corrected redaction code. A similar version of one of these responsive emails had been located through searches conducted by NOAA West Coast Region offices and produced to Plaintiff, without redaction of Agent Tanner's name and email address. These two emails were produced, without redactions, to Plaintiff prior to Defendant's Motion for Summary Judgment.

6. Prior to the February 13, 2017 final response to Plaintiff's FOIA request, NOAA determined that it is reasonably foreseeable that disclosure of the material withheld from release would harm an interest protected by the exemptions claimed. The agency's evaluation of reasonable harm was confirmed during DOC Office of the General Counsel's consideration of Plaintiff's appeal.

7. In my May 24, 2018 declaration, I have discussed the foreseeable harm from disclosure of the material on the ten documents at issue in Plaintiff's lawsuit. With respect to the withholding of material protected by the attorney-client privilege, release of material protected by the attorney-client privilege would have the foreseeable harm of discouraging NOAA staff from seeking legal advice from NOAA attorneys regarding the legal implications of and legal sufficiency of agency actions and discourage a frank and open dialogue regarding implementation of policy and legal interpretations. This will limit the NOAA attorneys ability to advocate and offer advice to their client, NOAA staff.

II. DESCRIPTION OF THE DOCUMENTS AT ISSUE

8. To further explain the justification of asserting the applicable FOIA exemptions for the withholdings at issue, NOAA is submitting the Revised Vaughn Index attached hereto as Exhibit 6. As explained in my May 24, 2018 Declaration, NOAA withheld information on the ten documents at issue under Exemption 5 as material protected by the attorney-client and deliberative process privileges. 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' West Coast Region addressing the U.S. Army Corps of Engineers' (Corps) maintenance and operation of Engelbright Dam on the Yuba River in California discussed at paragraph 24 of my May 24, 2018 Declaration.

9. The following paragraphs contain an additional description as to why material was withheld for each of the remaining eight documents at issue. The basis for the withholdings is outlined within the accompanying Revised Vaughn Index, attached as Exhibit 6.

10. Each of the records over which NOAA has asserted the attorney-client privilege was sent with the intent that it remain confidential, and that confidentiality was maintained.

11. 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. This document comprises a solicitation for legal opinion from NOAA GC. Specifically, NOAA GC was asked to render legal advice and opinion as to whether there was a sufficient and reasonable legal basis for the administrative actions proposed, and the material redacted from the document described why legal review of the letter was being requested.

12. 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. These Biological Assessments were part of an ESA consultation process that was the subject of then-pending litigation. The document reflects a confidential attorney-client discussion regarding the legal completeness and sufficiency of the Biological Assessments and reflects the attorney's thought process. The material is also deliberative and pre-decisional as it discusses impressions regarding NMFS's ability to move forward towards ESA Section 7 consultation. The release of the redacted material would have the foreseeable harm of discouraging a frank and open dialogue among agency employees regarding the sufficiency of Biological Assessments and concerns with moving forward in the ESA Section 7 process.

13. 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. The redacted material 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 consultation. 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. The release of the redacted material would have the foreseeable harm of discouraging a frank and open dialogue among agency employees in considering the agency's next steps in the ESA Section 7 process.

14. Document 5224. This one-page email from the Sacramento River Basin Chief – a NOAA employee – 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. The material redacted from this document consists of a confidential communication by the Sacramento River Basin Chief to his attorney requesting legal advice on an aspect of the Section 7 consultation process with the Corps. 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. The release of the redacted material would have the foreseeable harm of discouraging NOAA staff from seeking legal advice from NOAA attorneys regarding potential agency actions, and discouraging

a frank and open dialogue among agency employees regarding the legal and policy implications of potential agency action.

15. 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). The redacted material comprises a request by agency staff to a NOAA attorney for legal advice on how to respond during the course of an ESA consultation and litigation related to that consultation.

16. 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. The redacted material, withheld under the deliberative process and attorney-client privilege, revealed information about the ongoing consultation, and indicated future steps that the agency considered taking to meet with stakeholders, as well as the appropriate role of NMFS as not the lead Federal action agency. The portions withheld represent deliberations that were predecisional 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. The disclosure of this draft would have the foreseeable harm of chilling communications from NOAA staff to NOAA attorneys to seek legal advice regarding agency actions.

17. 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.

18. Document 30833. This document is a draft legal analysis prepared by a NOAA attorney in the NOAA Office of General Counsel's Fisheries and Protected Resources Section entitled *Analyzing Ongoing Projects Under Section 7 of the Endangered Species Act*. It provides a proposed, detailed legal framework for conducting Section 7 consultations, along with draft suggestions for a legal approach that could be taken in consultations on particular types of agency actions. The material withheld in this document was withheld pursuant to the deliberative process privilege and the attorney client privilege. The document is also protected attorney work product. This is a document was intended for further internal review, discussion, feedback and development within NMFS and NOAA GC. The document was drafted by a NOAA attorney in consultation with other attorneys in response to a request by NOAA program managers for the above-described legal analysis. It was provided as a draft for discussion purposes to various individuals within NMFS and NOAA GC, including to the NMFS West Coast Regional Administrator. The issue addressed in this document had already been the subject of litigation. The redacted portions of the document reflect a draft legal analysis and draft proposed consultation approach that could be applied on a national- or project-level basis and which, if implemented, almost certainly would be the subject of legal challenges. The material withheld is pre-decisional and part of an ongoing discussion regarding development of agency legal and policy positions. The legal analysis reflected in the document was never finalized or adopted by the agency as official legal guidance. Release of the document would have a foreseeable chilling effect on the discussions within the agency during the formulation of legal interpretations and policy. Moreover, release of the document would create confusion from members of the public as the analysis and suggestions reflected in the document have not been adopted by the agency.

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 21 day of June, 2018, Silver Spring, Maryland.

Mark H. Graff

Exhibit 6

Ecological Rights Foundation v. NMFS, 18-cv-00888 (Revised Vaughn Index)

Document Number (short reference)	Plaintiff's Ex. 5 Page Number (Docket No. 12-18)	Information about record	Exemptions Applied	Basis for Exemptions
5079-1	2-10	9-page Routing & Tracking Ledger Sheet for the consultation upon "Englebright Dam and Resevoir" Was one of two attachments to an email from Aimee Moore to Julia Caracoza, copying C3Judson Feder, Chris Keifer, Gary Sprague, Howard Brown, and Anita Deguzman, subject "Englebright Dam and Reservoir Inofrmatl Consultation attached for GC Review", sent April 23, 2014 2:40 PM.	(b)(5) Attorney Client Privilege	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. This document comprises a solicitation for legal opinion from NOAA GC. Specifically, NOAA GC was asked to render legal advice and opinion as to whether there was a sufficient and reasonable legal basis for the administrative actions proposed, and the material redacted from the document described why legal review of the letter was being requested.
5200	11-12	2-page email from attorney Chris Kiefer to biologist Gary Sprague copying Sacramento River Basin Chief Howard Brown, subject "Re: Yuba BA", sent October 30, 2013 9:56 AM. The email chain contains an email from Gary Sprague sent October 30, 2013 at 7:38 AM.	(b)(5) Attorney Client Privilege and Deliberative Process Privilege	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. These Biological Assessments were part of an ESA consultation process that was the subject of then-pending litigation. The document reflects a confidential attorney-client discussion regarding the legal completeness and sufficiency of the Biological Assessments and reflects the attorney's thought process. The material is also deliberative and pre-decisional as it discusses impressions regarding NMFS's ability to move forward towards ESA Section 7 consultation. The release of the redacted material would have the foreseeable harm of discouraging a frank and open dialogue among agency employees regarding the sufficiency of Biological Assessments and concerns with moving forward in the ESA Section 7 process.

5215	13-14	Email conversation between attorney Chris Kiefer, Sacramento River Basin Chief Howard Brown, and biologist Gary Sprague, subject "Re: Yuba Consultation", sent January 30, 2014 11:56 AM. The email chain contains an email from Chris Kiefer sent January 30, 2014 11:06 AM.	(b)(5) Attorney Client Privilege and Deliberative Process Privilege	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. The redacted material 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 consultation. 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. The release of the redacted material would have the foreseeable harm of discouraging a frank and open dialogue among agency employees in considering the agency's next steps in the ESA Section 7 process.
5224	15	Email from the Sacramento River Basin Chief Howard Brown to Will Stelle, Maria Rea, Judson Feder, and Adam Issenberg, copying Gary Sprague and Chris Keifer, subject "Update on Yuba Consultations with U.S. Army Corps", sent January 31, 2014 12:08 PM.	(b)(5) Attorney Client Privilege and Deliberative Process Privilege	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. The material redacted from this document consists of a confidential communication by the Sacramento River Basin Chief to his attorney requesting legal advice on an aspect of the Section 7 consultation process with the Corps. 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. The release of the redacted material would have the foreseeable harm of discouraging NOAA staff from seeking legal advice from NOAA attorneys regarding potential agency actions, and discouraging a frank and open dialogue among agency employees regarding the legal and policy implications of potential agency action.
5247	18	Email from the Sacramento River Basin Chief Howard Brown to attorney Chris Keifer, copying Gary Sprague and Alice Berg, subject "Response to Environmental Advocates", sent February 04, 2014 12:47 pm.	(b)(5) Attorney Client Privilege	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). The redacted material comprises a request by agency staff to a NOAA attorney for legal advice on how to respond during the course of an ESA consultation and litigation related to that consultation.

5247-2	16-17	Word file titled "Stelle response to Environmental Advocates.docx". Was one of two attachments to document 5247 listed above.	(b)(5) Attorney Client Privilege and Deliberative Process Privilege	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. The redacted material, withheld under the deliberative process and attorney-client privilege, revealed information about the ongoing consultation, and indicated future steps that the agency considered taking to meet with stakeholders, as well as the appropriate role of NMFS as not the lead Federal action agency. The portions withheld represent deliberations that were predecisional 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. The disclosure of this draft would have the foreseeable harm of chilling communications from NOAA staff to NOAA attorneys to seek legal advice regarding agency actions.
5276-1	38-46	A copy of the routing and tracking ledger for the legal review of the informal letter transmitting NMFS' position regarding the consultation. (See entry for document 5079-1.)	(b)(5) Attorney Client Privilege	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 entry for Document 5079-1)
30833	73-88	Document with the heading "Legal Analysis: Analyzing Ongoing Projects Under Section 7 of the Endangered Species Act (ESA) - *Draft* "	(b)(5) Attorney Client Privilege; Attorney Work Product; and Deliberative Process Privilege	This document is a draft legal analysis prepared by a NOAA attorney in the NOAA Office of General Counsel's Fisheries and Protected Resources Section entitled Analyzing Ongoing Projects Under Section 7 of the Endangered Species Act. It provides a proposed, detailed legal framework for conducting Section 7 consultations, along with draft suggestions for a legal approach that could be taken in consultations on particular types of agency actions. The material withheld in this document was withheld pursuant to the deliberative process privilege and the attorney client privilege. The document is also protected attorney work product. This is a document was intended for further internal review, discussion, feedback and development within NMFS and NOAA GC. The document was drafted by a NOAA attorney in consultation with other attorneys in response to a request by NOAA program managers for the above-described legal analysis. It was provided as a draft for discussion purposes to various individuals within NMFS and NOAA GC, including to the NMFS West Coast Regional Administrator. The issue addressed in this document had already been the subject of litigation. The redacted portions of the document reflect a draft legal analysis and draft proposed consultation approach that could be applied on a national- or project-level basis and which, if implemented, almost certainly would be the subject of legal challenges. The material withheld is pre-decisional and part of an ongoing discussion regarding development of agency legal and policy positions. The legal analysis reflected in the document was never finalized or adopted by the agency as official legal guidance. Release of the document would have a foreseeable chilling effect on the discussions within the agency during the formulation of legal interpretations and policy. Moreover, release of the document would create confusion from members of the public as the analysis and suggestions reflected in the document have not been adopted by the agency.