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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 CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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NOTICE OF MOTION AND MOTION

Please take notice that on July 19, 2018 at 9:00 a.m.,[1] or as soon thereafter as the matter may be heard in Courtroom F, 15th Floor of the United States District Courthouse, 450 Golden Gate Avenue, San Francisco, California, the Honorable Jacqueline Scott Corley presiding, the defendant National Marine Fisheries Service ("NMFS") will appear and move the Court for an order (1) granting summary judgment in favor of NMFS pursuant to Federal Rule of Civil Procedure 56, and (2) denying plaintiff's motion for summary judgment. Defendant's motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Declaration of Mark Graff ("Graff Decl."), the Declaration of Jennifer S Wang ("Wang Decl."), the pleadings and other papers on file in this action, and on such oral argument and additional evidence as the Court may permit.

RELIEF SOUGHT

Defendant seeks an order granting summary judgment in its favor.

ISSUES TO BE DECIDED

1. Whether defendant conducted an adequate search in response to plaintiff's Freedom of Information Act ("FOIA") request?
2. Whether defendant properly withheld material protected by the attorney-client and deliberative process privileges pursuant to FOIA exemption (b)(5), 5 U.S.C. § 552(b)(5)?
3. Whether defendant disclosed segregable, non-exempt material?
4. Whether plaintiff's claim that the United States Department of Commerce failed to timely issue a final determination on plaintiff's appeal is moot?
5. Whether the Court should deny plaintiff's requests for declaratory and injunctive relief as unwarranted in this case?

MEMORANUDM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This lawsuit relates to a FOIA request submitted by plaintiff, Ecological Rights Foundation

[1] In compliance with Civil Local Rule 7-2(a), defendant has noticed this motion for a hearing date more than 35 days from the date of this filing, but notes that pursuant to the Court's Order re: Settlement Conference, ECF No. 22, the Court will set a hearing date on the parties' cross motions for summary judgment after a settlement conference date has been set.

("EcoRights") to NMFS dated December 6, 2016. NMFS (also known as "NOAA Fisheries") is responsible for the stewardship of the nation's ocean resources and their habitat, and is an office of the National Oceanic and Atmospheric Administration ("NOAA") within the United States Department of Commerce ("DOC"). Under the Endangered Species Act ("ESA"), NMFS is responsible for the protection, conservation, and recovery of endangered and threatened marine and anadromous species.

NOAA completed its document release in response plaintiff's FOIA request and issued its final response on February 13, 2017. NOAA released a total of 239 documents in their entirety, and 54 documents in part. The issues raised in this lawsuit are those raised by plaintiff in its administrative appeal of NOAA's FOIA response: plaintiff challenges the adequacy of search, and specifically, whether the Office of Law Enforcement conducted a search for documents responsive to plaintiff's FOIA request, and the agency's withholdings under FOIA exemption (b)(5) for material protected by the attorney client and deliberative process privileges on ten documents.

NMFS conducted searches that could be reasonably expected to discover records subject to the FOIA responsive to plaintiff's request, including a search of the Office of Law Enforcement. As shown by the concurrently-filed declaration of Mark Graff, the FOIA Officer for NOAA, which contains a narrative summary of each of the ten documents at issue, the information withheld by NOAA is exempt from disclosure.

Plaintiff's additional claims for relief fail. Plaintiff's claim related to the timeliness of DOC's determination on plaintiff's administrative appeal is moot. Defendant has now released the final determination. Plaintiff has failed to demonstrate that declaratory or injunctive relief is warranted. Accordingly, the Court should grant summary judgment in favor of defendant and deny plaintiff's summary judgment motion.

II. BACKGROUND

A. Plaintiff's FOIA Request

Plaintiff submitted a FOIA request to NMFS dated December 6, 2016 ("FOIA Request"). The FOIA request sought three categories of documents:

1. Any and all "documents" "related to" the "Chris Yates email" concerning input he, and any NMFS West Coast Region staff provided to NOAA HQ on the impact of the "Stockdale Memo." This request is only for the input on the impact of the "Stockdale Memo" the NMFS West Coast Region staff provided to NOAA HQ and is not a broader

request for other documents related to the "Stockdale memo." The request is only for "documents" generated on or prior to July 24, 2014.

2. Any documents to or from NMFS staff Chris Kiefer[2] "related to" the "draft Englebright concurrence letter."

3. Any and all NOAA Fisheries "documents" from January 1, 2000 to the present, in the possession of any NOAA Fisheries Office, Department, and/or Division, including any NOAA law enforcement division, "related to" whether any entities or individuals may have caused or did cause, or may be causing, or are causing "unauthorized take" of threatened or endangered anadromous fish in the Yuba River at, or in the vicinity of, Englebright Dam, Narrows 1 and 2 powerhouses, Daguerre Point Dam, and the Hallwood-Cordua Diversion including but not limited to any and all "documents" generated by, sent by, or received by NMFS Law Enforcement agent, Don Tanner.

See id. ¶ 4; Hudak Decl. Ex. 1 (FOIA Requst), ECF No. 12-14. The "Stockdale Memo" referenced in the FOIA Request refers to a memorandum dated June 11, 2013 from the United States Army Corp of Engineers ("Corps") Chief Counsel, Earl Stockdale, regarding guidance on Section 7(a)(2) of the ESA, which requires federal agencies to consult with the United States Fish and Wildlife Service and NMFS and ensure that proposed activities will not jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitats. *See* Hudak Decl. Ex. 1; Graff Decl. ¶ 18. The Corps maintains and operates the Englebright Dam on the Yuba River. *See* Graff Decl. ¶ 24.

NOAA provided its final response on February 13, 2017. *Id.* ¶¶ 4, 9; Hudak Decl. Ex. 3 (February 13, 2017 Letter), ECF No. 12-16. Through its final response letter of February 13, 2017, NOAA notified plaintiff of its appeal rights. Hudak Decl. Ex. 3. In its response, NOAA notified plaintiff that it had located 309 documents responsive to plaintiff's request; 239 of the responsive documents were being released in their entirety online at https://foiaonline.regluations.gov:443/foia/action/public/view/request/810733c7; 16 of the documents originated from other agencies and were therefore referred to those agencies for a release determination and direct response to plaintiff; and 54 of the responsive documents were being partially withheld under FOIA exemptions 5 U.S.C. §§ 552(b)(5) and (b)(6). *See id.* The response letter explained that the material subject to FOIA exemption (b)(5) contained information protected by the attorney-client

[2] Keifer's name is misspelled in the FOIA Request.

privilege, attorney work product doctrine, and deliberative process privilege. *Id.* NMFS further stated that information was withheld under FOIA exemption (b)(6) to protect individuals' privacy interest and personally identifying information. *Id.*

B. NOAA's Search for Responsive Records

In response to the FOIA Request, NMFS performed searches of the records in the NOAA Fisheries West Coast Region and NMFS's Office of Law Enforcement ("OLE"). Graff Decl. ¶ 5. Searches were conducted by the following NOAA Fisheries West Coast Region offices: Central Valley Area Office, Sacramento Office, California Coastal Office, Santa Rosa Office, Long Beach Office, and Protected Resources Division. Searches were also conducted by the NOAA Office of the General Counsel Southwest Section. *Id.* ¶ 6. These offices were chosen because they contain all the employees who have specific knowledge of the actions described in plaintiff's FOIA Request and were therefore likely to have potentially responsive documents. *Id.* The search terms used varied by personnel, but included: Chris Yates, Stockdale, Narrows 1, Narrows 2, Narrows II, From: Christopher Keifer to: Jeff McLain, emails to/from Chris K., emails to/from Howard, emails to/from Gary S, draft Englebright letter, Larry Thompson, Steve Edmundson, take, Don Tanner, Englebright, Daguerre, Narrows, Hallwood, Cordua, Daguerre, Brophy, entrainment, Yuba River, Englebright Dam, Narrows 1 and 2 powerhouses, Daguerre Point Dam, Hallwood-Cordua Diversion, Chris Keifer, Draft Englebright concurrence letter, Lawson Fite, Yates Stockdale, Keifer Stockdale, Keifer Englebright, Keifer Draft Englebright Concurrence Letter, Tanner Yuba, Tanner Englebright, Tanner Daguerre, Tanner Narrows, Tanner Hallwood-Cordua, Thompson Yuba, Thompson Englebright, Thompson Daguerre, Thompson Narrows, Thompson Hallwood-Cordua, Thompson Take, Thompson Death, Thompson Mortality, Thompson Stranding, Thompson Dewatering, Wooster Yuba, Wooster Englebright, Wooster Daguerre, Wooster Narrows, Wooster Hallwood-Cordua, Wooster Take, Wooster Death, Thompson Wooster, Wooster Stranding, Wooster Dewatering. *See id.* ¶ 7, Ex. 1. In conducting these searches, NMFS examined all email files, hard drives, cloud-based systems, and paper files of the employees of the above-listed offices. *Id.* ¶ 6.

An additional search was performed by OLE. 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. *Id.* ¶ 8.

C. Plaintiff's Administrative Appeal to DOC

By letter dated March 10, 2017, plaintiff administratively appealed NOAA's response to the FOIA Request to the DOC, Office of General Counsel. The appeal raised two issues: (1) the adequacy of NMFS's search, and (2) the withholdings on ten documents. *See* Hudak Decl. Ex. 4 (March 10, 2017 Letter), ECF No. 12-17. Plaintiff asserted that search conducted was inadequate based on plaintiff's belief that none of the 309 documents released were from OLE. *See id.* at 3.[3] According to plaintiff, "EcoRights knows from documents NMFS released in response to another FOIA request that OLE agent, Don Tanner, at the very least, has information related to take at Englebright Dam and the Narrows 1 and 2 Powerhouses." *Id.* Plaintiff asserted that this alleged "information" was not included in the documents produced. *Id.* Plaintiff requested that NMFS "perform a thorough search of OLE files and release any and all documents responsive to item #3" of the FOIA Request. *Id.*

Plaintiff asserted that one of the documents on appeal contained redactions without any reference to the FOIA exemption claimed, and that other documents identified FOIA exemption (b)(5) as the exemption claimed, without specifying whether the material was protected under the attorney work product doctrine, the attorney-client privilege, or the deliberative process privilege. *Id.* at 3-6. In addition, plaintiff asserted that in the February 13, 2017 response, NMFS did not "offer any explanation why the withholdings . . . are justified." *Id.* at 4. Finally, plaintiff expressed its concern that "NMFS perhaps had not complied with 5 U.S.C. § 552(b)'s requirement that when asserting a document contains materials exempt from disclosure the agency must segregate out" non-exempt material, and requested that NMFS review the ten records at issue on appeal and segregate out any releaseable information. *Id.* at 6.

D. Response to Plaintiff's Administrative Appeal

In response to plaintiff's appeal, 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 OLE. *Id.* ¶ 12. To ensure that all

[3] Unless otherwise noted, page numbers to documents that are available on the Court's docket refer to the page number provided on the ECF runner.

responsive documents had been located, additional searches were conducted to ensure that a consistent set of search terms were used and to encompass all OLE agents within the search. *Id.* All NOAA Fisheries West Coast Region offices and OLE preformed a search, including both emails and network drives, using the following 45 keywords: Yates Stockdale, Keifer Stockdale, Keifer Draft Englebright, Concurrence Letter, Tanner Yuba, Tanner Englebright, Tanner Daguerre, Tanner Narrows, Tanner Hallwood-Cordua, Thompson Yuba, Thompson Englebright, Thompson Daguerre, Thompson Narrows, Thompson Hallwood-Cordua, Yates, Keifer, Baker, Tucker, Thompson Take, Thompson Death, Thompson Mortality, Thompson Stranding, Thompson, Dewatering, Thompson Sprague, Ellrott, Flow Deviations, rescue, Englebright, Narrows, Hallwood, Cordua, Daguerre, Take, Yuba, YubaBiOp, 2007 BiOp, 2002 BiOp, Powerhouses, Lawson Fite, Narrows 1, Narrows 2, Brophy, entrainment, Tanner. *Id.* ¶¶ 12, 15. OLE's search encompassed the documents of all agents, not just those of Tanner. *Id.* The additional searches were completed aby around Summer 2017 and did not uncover any additional responsive documents. *Id.* ¶ 16.

During its review of plaintiff's administrative appeal, DOC confirmed with Tanner that in his original search, he had identified numerous documents, all of which had been released in full, and that he did not author any responsive, unreleased documents. In searching for responsive material Tanner provided paper files and his computer to the regional FOIA coordinator, and both Tanner and the FOIA coordinator performed searches on the computer, including a search of Tanner's email and hard drive. *Id.* ¶ 13. Upon inquiry to OLE, DOC confirmed that two emails to/from Special Agent Tanner had been located and produced to plaintiff, though his email address and name had been redacted under FOIA exemption (b)(6). *Id.* ¶ 14. The OLE FOIA coordinator was informed that FOIA exemption (b)(7)(C) was a more appropriate basis, and on July 18, 2017, the FOIA coordinator uploaded a corrected version of the two documents onto FOIAOnline, redacting the material under FOIA exemption (b)(7)(C). *Id.*; *see also* Def.'s Answer ¶ 22.

Although DOC undertook various steps and inquiries in its review of the plaintiff's administrative appeal, a final determination was not made by the last anticipated release date in February 2018. Plaintiff filed the instant lawsuit on February 10, 2018.

Defendant answered the Complaint on March 19, 2018. ECF No. 9. Less than a week later, on

March 23, 2018, plaintiff's counsel informed defendant of its intent to file a summary judgment motion "in the near future." Wang Decl. ¶ 2. On April 3, 2018, in response to plaintiff's stated intent to file an early summary judgment motion, defendant's counsel sent plaintiff's counsel an email, explaining that defendant disagreed with plaintiff's allegations regarding whether certain NMFS offices were searched, that the agency was willing to release an appeal determination shortly, and that the appeal determination would address this the search issue raised by plaintiff. *Id.* Defendant proposed that the parties meet and confer after plaintiff had an opportunity to review the appeal determination regarding the appropriate next steps in the action. *Id.* By emails on April 4 and 5, 2018, plaintiff's counsel declined defendant's proposal and stated that plaintiff would move forward with filing a summary judgment motion rather than review the agency's appeal response. *Id.* ¶ 3 Plaintiff filed its Motion for Summary Judgment on April 20, 2018, prior to the parties' completion of its meet and confer efforts under Federal Rule of Civil Procedure 26(f). *Id.* ¶ 4. The parties met and conferred pursuant to Rule 26(f) on April 23, 2018, and filed a stipulated summary judgment briefing scheduled with the Court on April 27, 2018. *Id.*, ECF No. 16. The Court approved the proposed briefing schedule on April 30, 2018. ECF No. 17. Defendant has since released the final appeal determination on FOIAOnline. *See id.* Ex. 1.

III. LEGAL STANDARD

A principal purpose of summary judgment is to identify and dispose of factually unsupported claims. *Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). Summary judgment must be granted where a party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322.

"FOIA was enacted to facilitate public access to Government documents" and requires federal agencies to release records responsive to a request for production. *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 973 (9th Cir. 2009) (quotation marks and citation omitted); *see* 5 U.S.C. § 552(a)(3)(A). "Congress recognized, however, that public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166-67 (1985). "FOIA represents a balance struck by Congress between the public's right

to know and the government's legitimate interest in keeping certain information confidential." *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 925 (D.C. Cir. 2003) (citing *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989)). Accordingly, "FOIA contemplates that some information may legitimately be kept from the public. The statute contains nine enumerated exemptions allowing the government to withhold documents or portions of documents." *Lahr*, 569 F.3d at 973 (citing 5 U.S.C. § 552(b)(1)-(9)). The FOIA Improvement Act of 2016, which was enacted on June 30, 2016, codified the Department of Justice's "foreseeable harm" standard and provides, among other things, that agencies "shall withhold information" "only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption" or "disclosure is prohibited by law." 5 U.S.C. § 552(a)(8)(A).

In a FOIA case, "federal jurisdiction is dependent on a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'" *Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 150 (1980). "A federal court can provide a remedy pursuant to the FOIA only 'if the agency has contravened all three components of this obligation.'" *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 689 (9th Cir. 2012) (citation omitted) *overruled on other grounds by Animal Legal Defense Fund v. FDA*, 836 F.3d 987 (9th Cir. 2016). If the agency provides the plaintiff everything to which he or she is entitled, the plaintiff's FOIA claim will be moot. *Id.* A district court only has jurisdiction to compel the agency to disclose improperly withheld agency records – records that do not fall within an exemption. *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996).

FOIA cases are typically decided on motions for summary judgment. *Yonemoto*, 686 F.3d at 688. On a motion for summary judgment, the defending agency has the burden of showing that its search was adequate and that any withheld documents fall within an exemption. *Carney v. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). The agency may meet its burden entirely through a reasonably detailed affidavit describing the agency's search and alleging facts sufficient to establish any claimed exemptions. *See Yonemoto*, 686 F.3d at 688; *Lane v. Dep't of the Interior*, 523 F.3d 1128, 1135-36, 1139 (9th Cir. 2008); *Lion Raisins v. Dep't of Agric.*, 354 F.3d 1072, 1082 (9th Cir. 2004). The court is to accord substantial weight to an agency's declarations regarding the application of an exemption from disclosure. *See Shannahan v. IRS*, 672 F.3d 1142, 1148 (9th Cir. 2012).

IV. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT

A. NOAA Conducted Adequate Search for Records

As described in the declaration of Mark Graff, the FOIA Officer for NOAA, NOAA conducted searches that could be reasonably expected to discover records subject to the FOIA responsive to plaintiff's request. Because those searches were adequate and conducted in good faith, they satisfied the agency's statutory obligations. "The adequacy of the agency's search is judged by a standard of reasonableness, construing the facts in the light most favorable to the requestor." *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1328 (9th Cir. 1995) (*citing Zemansky 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)); *Lahr*, 569 F.3d at 986; *SafeCard Servs. Inc.*, 926 F.2d at1201 (the agency need only show that "the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant."). The "issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Citizens Comm'n on Human Right*, 45 F.3d at 1328; *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) ("[T]he adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search."). An agency's search need not be exhaustive, merely reasonable. *Oglesby*, 920 F.2d at 68. The agency need not search every record system, but must conduct a good faith, reasonable search of those systems of records likely to possess the requested records. *Id.*

An agency may establish the adequacy of its search by submitting a reasonably detailed, non-conclusory affidavit describing its efforts, setting forth the search terms and the type of search performed. *Zemansky*, 767 F.2d at 571. In evaluating the adequacy of a search, courts recognize that "[a]gency affidavits enjoy a presumption of good faith, which will withstand purely speculative claims about the existence of other documents." *Ground Saucer Watch v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981). 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). "If an agency demonstrates that it has conducted a reasonable search for relevant documents, it has fulfilled its obligations under FOIA and is entitled to summary judgment on this issue." *Garcia v. U.S. Dep't of Justice*, 181 F. Supp. 2d 356, 366 (S.D.N.Y. 2002).

NOAA conducted an adequate search for records, searching in locations where responsive documents are likely to be located, the NOAA Fisheries West Coast Region offices and OLE, and using key words related to the requested subject matter. *See* Graff Decl. ¶¶ 5-6. For example, the first item in plaintiff's FOIA Request sought documents related to an email by Chris Yates, concerning input he and other West Coast Region staff provided on the impact of the Stockdale memo. The NOAA Fisheries West Coast Region offices that contained the employees with specific knowledge of the actions described in the FOIA Request performed a search of emails, hard drives, cloud-based systems, and paper files using keywords, including, among others, Yates Stockdale, Keifer Stockdale, Stockdale, and Yates. *See id.* ¶¶ 6-7, 15. The second item in the FOIA Request sought documents to or from Chris Keifer, a NOAA attorney in the NOAA Office of the General Counsel Southwest Section, *see e.g.*, Hudak Decl. Ex. 5 at 12, ECF No. 12-18, related to the "draft Englebright concurrence letter." NOAA's search included the documents of the NOAA Office of the General Counsel Southeast Section, and the terms Keifer, Keifer Draft Englebright, Englebright, and concurrence letter, were amongst the search terms used. Graff Decl. ¶¶ 6-7, 15 & Ex. 1. The last item of plaintiff's FOIA Request sought documents related to unauthorized take of threatened or endangered anadromous fish in the Yuba River in the vicinity of Englebright Dam, Narrows 1 and 2 powerhouses, Daguerre Point Dam, and the Hallwood-Cordua Diversion, including documents generated, sent, or received by Tanner. The NOAA Fisheries West Coast Region offices with the employees with specific knowledge of the actions described in the FOIA Request and OLE, of which Tanner was a part, conducted searches, using terms including: Tanner Yuba, Tanner Englebright, Tanner Daguerre, Tanner Narrows, Tanner Hallwood-Cordua, Thompson Yuba, Thompson Englebright, Thompson Daguerre, Thompson Narrows, Thompson Hallwood-Cordua, take, Englebright, Narrows, Hallwood, Cordua, Daguerre, Yuba, Narrows 1, Narrows 2, and Tanner. *Id.* ¶¶ 6-8, 15 & Ex. 1. Moreover, Tanner was amongst the NMFS personnel who

conducted searches in response to the FOIA Request. *Id.* ¶¶ 7, 13-14.

In both its administrative appeal and Motion for Summary Judgment, plaintiff articulates only one alleged deficiency in the agency's search: failure by OLE and Tanner to search for responsive records. *See* Hudak Decl. Ex. 4 at 3. Pl. Mot. at 16-17. Graff's declaration has confirmed that both OLE and Tanner conducted searches and described those searches. Graff Decl. ¶¶ 6-8, 13-14.

Based on documents released in response to the FOIA Request that, according to plaintiff, indicate Tanner is involved in investigations related to flow fluctuations and poaching at the Yuba River, plaintiff states that Tanner *should* have generated or received additional documents. But this amounts to nothing more than "'mere speculation that as yet uncovered documents might exist," which 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).

Although plaintiff points to the absence of a one page email from the agency's release to plaintiff's FOIA Request, Pl. Mot. at 16, the contents of that email show only that Fishery Biologist Larry Thompson had made a plan 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. There is no substantive discussion of any "take," no reference to an investigation, no suggestion of any steps that Tanner may have taken after the visit, and no suggestion that Tanner created any investigative documents yet to be produced. *See id.* The agency's alleged failure to locate this Thompson email, Linn Decl. Ex. H, does not evidence a deficient search, nor suggest that additional responsive records have yet to be uncovered. *See Wilbur*, 355 F.3d at 678 (an agency's "failure to turn up a particular document . . . does not undermine the determination that the agency conducted an adequate search for requested records."). Here, NMFS has demonstrated through the Graff declaration that it conducted a reasonable search for relevant documents, and thus, has demonstrated that it is entitled to summary judgment on this issue. Plaintiff's speculation does not overcome the presumption of the agency's good faith search.

B. NOAA Properly Withheld Information under Applicable FOIA Exemptions

An agency may be entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, it has conducted an adequate search for responsive records, and each

responsive record that it has located either has been produced to the plaintiff or is exempt from disclosure. *See Weisberg v. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980). To meet its burden, courts have long permitted agencies to rely on reasonably detailed and non-conclusory declarations describing the agency's search and alleging facts sufficient to establish any claimed exemptions. *See Lane*, 523 F.3d at 1135-36. As discussed below, the Graff declaration demonstrates that the agency properly withheld records in whole or in part that contained information that fell within FOIA Exemption 5.

In the Motion, plaintiff challenges the agency's assertion of FOIA exemptions 6 and 7(C) on two documents. Defendant has withdrawn its exemptions on these documents. The documents records were initially released with withholdings under FOIA exemption 6 in NMFS' February 13, 2017 response to the FOIA Request; that claim of exemption was not raised in plaintiff's administrative appeal. Subsequently, the two records were re-processed and released in July 2017, while DOC's review of the administrative appeal was pending. No further withholdings were made to the records; rather, FOIA exemption 7(C) was added as grounds for the withholdings. Graff Decl. ¶¶ 14, 17, Ex. 2. A new version of the records, without withholdings, is attached as Exhibit 2 to the Graff Declaration.

1. NOAA properly identified the basis for its withholdings at the administrative stage.

At the administrative stage, NMFS properly identified the exemptions it was claiming with respect to the redacted documents at issue. A FOIA response must identify "reasons" for a determination. *See* 5 U.S.C. § 552(a)(6)(A)(i). Plaintiff reads this provision to require the agency to provide documentation similar to a Vaughn index or privilege log with its document release in order to withhold any material. According to plaintiff, NOAA's FOIA response was deficient because the agency "fail[ed]to identify the specific privilege under Exemption 5 claimed, . . . to identify the forseeable harm to a protected interest that might result from disclosure, ... to estimate the volume of material withheld, and . . . to explain whether all segregable material had been released." Pl. Mot. at 19. Plaintiff misstates the law.

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). "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." *Id.; see also Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995) ("Agencies need not provide a Vaughn Index until ordered by the court after the plaintiff has exhausted the administrative process."), *aff'd*, 76 F.3d 1232 (D.C. Cir. 1996).

None of the cases cited by plaintiff support plaintiff's contentions regarding the agency's obligations at the administrative stage. Both *Campbell v. United States Dep't of Justice*, 164 F.3d 20 (D.C. Cir. 1998) and *Weiner v. FBI*, 943 F.2d 927 (9th Cir. 1991), address what information an agency must provide on summary judgment – not the administrative stage – to establish the agency's withholdings.

Here, NOAA satisfied its statutory obligations at the administrative stage by identifying the number of pages collected for processing 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. NMFS also labeled each redaction with the applicable FOIA exemption. *See, e.g.*, Hudak Dec. Ex. 5. The specific basis for the (b)(5) exemption claimed, whether attorney client privilege, attorney work product doctrine, or deliberative process privilege, was included on each redaction label. *Id.*

Plaintiff points to only three documents in the February 13, 2017 release, in which the specific basis for the (b)(5) exemption claimed, whether attorney client privilege, attorney work product doctrine, or deliberative process privilege, was not labelled. The redaction labels on two emails released to plaintiffs referenced (b)(5), without identifying whether attorney client privilege, attorney work product doctrine, or the deliberative process privilege applied, *see* Hudak Decl. Ex. 5 at 11, 13; the material withheld on these pages is protected by both the attorney-client and deliberative process privilege. Graff Decl. Ex. 3 (Vaughn index) at Doc. Number 5200 & 5215. A reference to (b)(5) was not on the redaction label on a one page email in NMFS's release, *see* Hudak Decl. Ex. 5 at 15; the material withheld on this email is protected by both the attorney-client and deliberative process

privileges. Graff Decl. Ex. 3 at Doc. Number 5224. This inadvertent error on a single redaction box does not establish failure by the agency to comply with its FOIA obligations.

Plaintiff seeks a declaratory judgment that NMFS' withholdings without explanation or identification of a foreseeable harm during the administrative stage violates FOIA. Pl. Mot. at 17-19. Declaratory judgment is not warranted because, as discussed above, plaintiff misstates the law and the agency's obligations at the administrative stage. Plaintiff cites no authority suggesting that the agency must provide a document akin to a Vaughn index at the administrative stage, with its document release.

2. NOAA properly withheld material pursuant to Exemption 5

FOIA exemption 5 protects "inter-agency 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." 5 U.S.C. § 552(b)(5). Exemption 5 is intended to protect "only those documents [that are] normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 800 (1984). In the ten documents at issue here, NMFS withheld two categories of documents pursuant to Exemption 5: documents subject to the deliberative process privilege and documents subject to the attorney-client privilege. As demonstrated through the Graff declaration, these exemption determinations were appropriate. The material withheld from the ten documents at issue are described in the Graff declaration and Vaugh Index attached as Exhibit 3 to the Graff declaration.

(i) NOAA properly withheld material under the deliberative process standard

The deliberative process privilege protects agencies from being "forced to operate in a fishbowl." *EPA v. Mink*, 410 U.S. 73, 87 (1973). "[D]ocuments reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" qualify as "inter-agency or intra-agency" memoranda within the meaning of Exemption 5. *Carter v. U.S. Dep't of Commerce*, 307 F. 3d 1084, 1089 (9th Cir. 2002) (quoting *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)). The deliberative process protection is not altered when an agency makes a final decision, or decides not to make a decision, unless a record is

expressly incorporated into some final agency action. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975).

For this privilege to apply, the document must be both (1) predecisional – "one prepared in order to assist an agency decisionmaker in arriving at his decision, and . . . which reflect[s] the personal opinions of the writer rather than the policy of the agency," *Carter*, 307 F.3d at 1089 (internal quotation omitted); and (2) deliberative, "in that it makes recommendations or expresses opinion on legal and policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

In meeting the first requirement, that the document be predecisional, an agency need not point to a specific final decision, but may show that the documents in question play a role in a particular deliberative process. *Sears, Roebuck & Co.*, 421 U.S. at 150 n. 18. Thus, as long as a document is generated as part of such a process of agency decision-making, Exemption 5 can apply.

Second, the agency must show that the document is deliberative in nature. In determining whether or not material is deliberative in nature, in *National Wildlife Federation v. United States Forest Service*, 861 F.2d 1114 (9th Cir. 1988), the Ninth Circuit focused on "whether the document in question is part of the deliberative process." *Id.* at 1119. Based upon the policy of protecting agencies' deliberative processes, not just agency documents or information, the Ninth Circuit held that "even if the content of a document is factual, if disclosure of the document would expose the decision-making process itself to public scrutiny by revealing the agency's evaluation and analysis of the multitudinous facts, the document would nonetheless be exempt from disclosure." *Id.* As a result, the Ninth Circuit has adopted a "process-oriented" or "functional" test in determining whether the deliberative process privilege of Exemption 5 applies. This test, "which looks to the underlying purpose of the deliberative process privilege, is consistent with the 'flexible, commonsense approach' to Exemption 5 that has been approved by the Supreme Court." *Id.* (quoting *Mink*, 410 U.S. at 91).

(a) Consultation conducted pursuant to ESA Section 7

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). 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).

Formal consultation begins when the action agency transmits a written request to the consulting agency, which may take the form of a "biological assessment," 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 ("BiOp") 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). 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.

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 action 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).

On May 12, 2014, NMFS' West Coast Region issued a concurrence letter addressing the 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) NOAA's withholding of consultation related documents

Pursuant to Exemption 5, NMFS withheld portions of four of the documents at issue entirely under the deliberative process privilege. 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. Graff Decl. ¶ 27, Ex. 3 at Docs. 5215, 5247-2, 5250-1, and 20774-2. The information withheld 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. *Id.* ¶ 28. 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. *Id.* ¶ 29. Graff has explained the foreseeable harm should such information be released. Graff explained that release of this 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. *Id.* ¶ 30. He further explained that further "disclosure of these records would adversely affect the candor of future agency deliberations." *Id.* ¶ 36.

(ii) NOAA properly withheld material under the attorney-client privilege standard

The attorney-client privilege applies when a client communications something to his or her lawyer with the intent that it remain confidential and for the purposes of securing either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceedings. *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998). In the FOIA context, documents are subject to the attorney-client privilege if the communications suggest that the government is dealing with its attorneys as would any private party seeking advice to protect personal interests. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980). The privilege applies both to facts divulged by a client to his or her attorney, as

well as "any opinions given by an attorney to his client based upon, and thus reflecting, those facts." *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 114 (D.D.C. 2005).

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 the Department of Justice discussing ESA legal analysis, discussions between NOAA and Department of Justice, and the legal review of the informal letter transmitting the Department's position regarding the ESA consultation. Graff Decl. ¶¶ 31-32.

C. NOAA Has Met FOIA's Segregability Requirement

Under FOIA, "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b). The agency need not disclose non-exempt portions of a document if "they are inextricably intertwined with exempt portions such that the excision of exempt information would impose significant costs on the agency and produce an edited document with little informational value." *Willamette Indus., Inc. v. United States*, 689 F.2d 865, 867-68 (9th Cir. 1982) (internal quotation marks and citations omitted). The agency must provide a "detailed justification" for its claim of non-segregability, but "is not required to provide so much detail that the exempt material would be effectively disclosed." *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (citation omitted). "The burden is on the agency to establish that all reasonably segregable portions of a document have been segregated and disclosed." *Pac. Fisheries Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008) (citing 5 U.S.C. § 552(a)(4)(B), (b)). "The agency can meet its burden by offering an affidavit with reasonably detailed descriptions of the withheld portions of the documents and alleging facts sufficient to establish an exemption." *Pac. Fisheries*, 539 F.3d at 1148 (internal citations omitted); *see Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 779 (9th Cir. 2015).

NMFS has met the segregability requirement. Here, of the documents at issue, those withheld in their entirety as material protected by the attorney-client privilege have no segregable parts. Accordingly, there are no segregable parts of the text of these documents. *See Pacific Fisheries*, 539 F.3d at 1148; *ACLU v. U.S. Dep't of Justice*, 880 F.3d 473, 488-89 (9th Cir. 2018); Hudak Decl. Ex. 4 at 11-12, 13-14, 15, 73-88. Moreover, the Graff declaration describes the documents at issue, the

information withheld, the exemptions claimed and why the exemptions apply. Graff has explained that a line by line review of documents was conducted. Graff Decl. ¶ 33. Based on that review, NOAA determined there was no further information "that could be reasonably segregated from exempt information for release and implemented segregation where possible." *Id.* ¶ 35. *See Johnson*, 310 F.3d at 776 (holding that the segregability requirement was met when the Vaughn index described each document withheld and applicable exemption and when an agency affidavit stated that a line-by-line review of documents had been conducted and that no releasable information could be reasonably segregated).

D. Declaratory and Injunctive Relief are Not Appropriate

This case does not present any circumstances that suggest either declaratory or injunctive relief is appropriate. A court that has jurisdiction to issue declaratory relief is under "no compulsion to exercise that jurisdiction." *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491 (1942). Rather, "[t]he decision whether to grant declaratory relief is within the sound discretion of the district court." *Olagues v. Russoniello*, 770 F.2d 791, 803 (9th Cir. 1985); *United States v. State of Wash.*, 759 F.2d 1353, 1356 (9th Cir. 1985) ("The decision to grant declaratory relief is a matter of discretion, even when the court is presented with a justiciable controversy."). "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." *United States v. State of Wash.*, 759 F.2d at 1357; *see Natural Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992) (explaining that declaratory judgement is appropriate when there are pure legal issues at question that need to be clarified by this Court to the parties and the public).

Similarly, with respect to injunctive relief under FOIA, "[i]n utilizing its equitable powers to enforce the provisions of the FOIA, the district court may consider injunctive relief where appropriate." *Long v. IRS*, 693 F.2d 907, 909 (9th Cir. 1982). 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. *Id.*

1. Plaintiff's claim is moot

Plaintiff complains that DOC failed to timely issue a response to plaintiff's 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) ("Insofar as [plaintiff] challenged the tardiness of the FBI's response, his claim was rendered moot by the FBI's response to his request."); *Tracy v. Department of Justice*, 117 F.Supp.3d 1, 5 (D.D.C. July 31, 2015) ("Plaintiff is not entitled to relief simply because the FBI disclosures were made more than 20 days after Plaintiff submitted her FOIA request . . . . Once the records are produced the substance of the controversy disappears and becomes moot since the disclosure which the suit seeks has already been made."). Furthermore, the extent of the delay has no bearing on the mootness of the claim. *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002) (holding that "the production of all nonexempt material, however belatedly, moots FOIA claims"); *Carter v. Veterans Admin.*, 780 F.2d 1479, 1481 (9th Cir. 1986).

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. *Citizens for Responsibility & Ethics in Wash. v. Federal Election Com'm ("CREW"),* 711 F.3d 180, 189 (D.C. Cir. 2013). Courts have recognized that "agencies may not always be able to adhere to [FOIA] timelines." *Id* ("[t]he 20-working day timeline is not absolute."). The court "cannot focus on theoretical goals alone, and completely ignore the reality that these agencies cannot possibly respond to the overwhelming number of requests received within the time constraints imposed by FOIA." *Cohen v. FBI*, 831 F. Supp. 850, 853-54 (S.D. Fla. 1993).

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, such a pattern does not exist 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); *see Payne Entertainment v. United States*, 837 F.2d 486 (D.C. Cir.

1988); *see also S. Yuba River Citizens League v Nat'l Marine Fisheries Serv.*, 2008 WL 2523819 at 16.

Here, plaintiff alleges a single instance where DOC delayed issuance of its response to plaintiff's administrative appeal. Plaintiff provides no evidence to show a pattern by DOC of delayed response to EcoRights' administrative appeals, nor evidence, beyond a declaration stating that it is "likely" plaintiff will submit FOIA requests to NMFS in the future, that this specific violation is likely to recur with respect to any future administrative appeal by plaintiff.

Plaintiff cannot point to any bad faith by DOC. Rather, although the formal issuance of final appeal determination was delayed, as demonstrated by the Graff declaration, the DOC undertook prompt review of the issues raised on appeal. As part of that process, by July 2017, NOAA Fisheries West Coast Region and OLE completed additional searches to confirm that responsive records had been located and had confirmed the scope of Tanner's original search.

None of the cases cited by plaintiff present circumstances similar to those of the present case. Plaintiff cites orders issued in *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)*. But in both *OCE I* and *OCE II* multiple FOIA requests were at issue in the case, and the agency response to those requests had been late. *Long v. IRS*, is similarly distinguishable; the Court found that IRS had repeatedly withheld or delayed release of a category of documents requested under FOIA until a lawsuit was filed, even though it had acknowledged that no exemptions applied to the documents at issue. *Long*, 693 F.2d at 907 (granting injunctive relief by ordering the IRS to comply with future requests for statistical tabulation on the Taxpayer Compliance Measurement program, which is periodically released by the IRS); *see also Ecological Rights Found. v. FEMA*, No. 16-05254, 2017 U.S. Dist. LEXIS 197451 at 31 (N.D. Cal. Nov. 30, 2017) (granting declaratory relief where FEMA had failed to timely fully respond to the three FOIA requests at issue); *S. Yuba River Citizens League v. National Marine Fisheries Serv.*, No. CIV. S-06-2845 LKK/JFM, 2008 WL 2523819 (E.D. Cal. June 20, 2008) (ordering declaratory and injunctive relief where the agency did not timely respond to the three FOIA requests at issue in the case, had yet to respond to one and plaintiff had lodged another FOIA request with the agency).

2. No injunctive relief is warranted

Plaintiff's request for injunctive relief should be denied. NOAA has shown good faith in responding to plaintiff's FOIA request, promptly releasing 239 documents in whole, and 54 in part, in February 2017. DOC promptly reviewed the issues raised in plaintiff's March 10, 2017 appeal, which included confirming the scope of the initial searches and directing that additional searches be completed by both NOAA Fisheries West Coast Region and OLE. These searches did not locate any additional records. Finally, before plaintiff filed its Motion, to the extent plaintiff sought an appeal determination, even though it had raised the same issues for this Court's review, defendant offered to provide it.

As explained through the Graff declaration, NOAA is not improperly withholding material from plaintiff. Although plaintiff urges the Court to order immediate release of the ten records at issue, should it find any inadequacy with the agency's summary judgment submissions, the Ninth Circuit instructs courts to ask the agency to provide further details and declarations through a Vaughn index to determine if the redacted documents met FOIA exemptions as the appropriate remedy before granting an injunction or declaratory judgment. *Wiener v. Federal Bureau of Investigation*, 943 F.2d 972 (9th Cir. 1991); *Pac. Fisheries*, 539 F.3d 1143 (holding that the IRS did not provide sufficiently specific information and should submit affidavits describing in more detail the withheld portions of these documents on remand.); *cf. Ecological Rights Found. v. FEMA*, Case No. 16-cv-5254-MEJ, 2017 WL 5972702 (N.D. Cal. Nov. 30, 2017) (ordering agency to produce withheld documents after the Court had previously provided FEMA "numerous opportunities" to address deficiencies in three Vaughn indices).

V. 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: May 25, 2018

Respectfully submitted,
ALEX G. TSE
Acting United States Attorney

_/s/ _____
JENNIFER S WANG
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