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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

COALITION FOR A SUSTAINABLE
DELTA, et al.,

Plaintiffs,

v.

DONALD KOCH, in his official
capacity as Director of the
California Department of
Fish and Game,

Defendant,

CENTRAL DELTA WATER AGENCY,
et al.,

Defendant-Intervenors,

CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE, et al.,

Defendant-Intervenors.

1:08-CV-00397 OWW GSA

MEMORANDUM DECISION RE
PLAINTIFFS' MOTION TO COMPEL
DOCUMENTS WITHHELD BASED ON
DELIBERATIVE PROCESS
PRIVILEGE (DOC. 87.)

I. INTRODUCTION

Plaintiffs move to compel production of 39 documents withheld under the deliberative process privilege. Doc. 87. Counsel unsuccessfully attempted in good faith to resolve the disputed issues, and the parties submitted a

1 joint statement of their dispute. Doc. 87-2. The
2 documents at issue have been produced for *in camera*
3 review. See Doc. 93. Oral argument was heard on
4 September 10, 2009. Doc. 95.

6 II. SUMMARY OF THE CASE

7 This case involves a challenge to California's
8 Department of Fish and Game's ("CDFG") enforcement of
9 state sportfishing regulations affecting striped bass
10 populations in the Sacramento-San Joaquin Delta ("striped
11 bass regulations"). Plaintiffs allege that CDFG's
12 enforcement of these regulations violates Section 9 of
13 the Endangered Species Act ("ESA"), because striped bass
14 prey upon four species listed under the ESA, namely, the
15 Sacramento River winter-run Chinook salmon, Central
16 Valley spring-run Chinook salmon, Central Valley
17 steelhead, and delta smelt ("Listed Species"). With
18 respect to the instant motion, the disputed factual
19 issues include:
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- 22 1. The extent of striped bass predation on the
23 Listed Species;
- 24 2. Whether the striped bass regulations result
25 in a larger striped bass population than there
26 would be absent the regulations; and
- 27 3. Whether the striped bass regulations
28 increase striped bass predation on the Listed
Species.

1 August 7, 2009, and in response to RFP #76, generally
2 asserted the deliberative process privilege:

3 Defendant objects to this request to the extent
4 [it] seeks information that is protected by the
5 attorney/client privilege, the attorney work-
6 produce privilege, or the deliberative process
7 privilege, or any combination of these....

8 Doc. 87-2 at 13.

9 Defendant eventually produced a privilege log, which
10 detailed the grounds upon which the disputed documents
11 were withheld:

- 12 • Documents 34 through 44 and 46 through 54 are
13 emails between CDFG staff reflecting advisory
14 opinions, recommendations, and deliberations relating
15 to the issue of whether CDFG should recommend
16 amendments to the Striped Bass Policy to the
17 California Fish and Game Commission ("CFGF").
- 18 • Document 45 is an email between CDFG staff
19 reflecting advisory opinions, recommendations, and
20 deliberations relating to the issue of whether CDFG
21 should recommend changes to the striped bass slot
22 limit to CFGF.
- 23 • Documents 46 and 47 also included within the
24 first category, are emails between CDFG staff
25 reflecting advisory opinions, recommendations and
26 deliberations relating to a petition to uplist the
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1 Delta Smelt to endangered status under the California
2 Endangered Species Act.

3 • Documents Nos. 62, 68, 73, and 75 through 89 are
4 drafts of bill analyses prepared for the Governor's
5 Office and emails between CDFG staff reflecting
6 advisory opinions, recommendations, and deliberations
7 relating to what position CDFG should take in
8 connection with Assembly Bill 1253.
9

10 IV. ANALYSIS

11 A. Summary of Plaintiffs' Position.

12 Plaintiffs argue:

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14 (1) Defendant failed to make a timely and
15 specific objection based on the deliberative
16 process privilege, which waived the privilege;

17 (2) Defendant failed to comply with the
18 procedural requirements necessary for invoking
19 this privilege, thereby waiving the privilege;

20 (3) Defendant failed to demonstrate the two
21 essential elements of the privilege:

22 (i) that the disputed documents are
23 predecisional, and

24 (ii) that they are deliberative in nature;

25 (4) Even if the documents are covered by the
26 qualified deliberative process privilege,
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1 Plaintiffs' need for the documents and the
2 public interest in their disclosure outweigh the
3 CDFG's interest in secrecy; and

4 (5) Even if the documents and/or groups of
5 documents are subject to this qualified
6 privilege, the factual material in these
7 documents should be separated and produced.
8

9 B. Timeliness of Assertion of the Privilege.

10 Rule 34(b)(2) requires a party to respond to a
11 request for production within 30 days, and the response
12 must "either state that inspection and related activities
13 will be permitted as requested or state an objection to
14 the request, including the reasons." Fed. R. Civ. P.
15 34(b)(2)(B). Rule 26(b)(5)(A) provides that, when
16 claiming a privilege, a party must "(i) expressly make
17 the claim; and (ii) describe the nature of the documents,
18 communications, or other tangible things not produced or
19 disclosed - and do so in a manner that, without revealing
20 information itself privileged or protected, will enable
21 the other party to assess the claim." Rule 26(b)(5)(A).
22 Rule 34 provides that, when objecting to a request to
23 produce documents, the responding party's objection "must
24 specify the part and permit inspection of the rest."
25 Rule 34(b)(2)(C).
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1 Plaintiffs complain (1) that Defendants failure to
2 assert the deliberative process privilege in their
3 initial responses to certain RFPs constitutes *per se*
4 waiver, and (2) that Defendants' subsequent production of
5 a privilege log seven months after service of Plaintiffs'
6 first RFP was untimely, amounting to waiver.
7

8 Plaintiffs' *per se* waiver argument is without merit.
9 A party's failure to assert a particular privilege in an
10 initial response is not a *per se* waiver. "Neither Rule
11 26(b)(5) nor Rule 34(b) mandate waiver upon a party's
12 failure to object." *First Sav. Bank, F.S.B. v. First*
13 *Bank System, Inc.*, 902 F. Supp. 1356, 1360 (D. Kan.
14 1995). The Ninth Circuit rejected a *per se* rule that
15 "failure to produce a privilege log in a timely manner
16 triggers a waiver of privilege," noting that Rule 26's
17 requirement for proper assertion of a privilege does not
18 correlate with Rule 34's 30-day deadline for serving
19 written responses to discovery requests, "nor does it
20 explicitly articulate a waiver rule." *Burlington*
21 *Northern & Santa Fe Railyard Co. v. United States*, 408
22 F.3d 1142, 1147 (9th Cir. 2005). Rather, a court should
23 use Rule 34's 30-day time period as a "default
24 guideline," for a "case-by-case determination" whether
25 the assertion of a privilege is timely and sufficient.
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1 *Id.* at 1149. *Burlington* instructs courts to take into
2 account the following factors:

3 1) The degree to which the objection or
4 assertion of privilege enables the litigant
5 seeking discovery and the court to evaluate
6 whether each of the withheld documents is
7 privileged;

8 2) The timeliness of the objection and
9 accompanying information about the withheld
10 documents (where service within 30 days, as a
11 default guideline, is sufficient);

12 3) The magnitude of the document production;
13 and

14 4) Other particular circumstances of the
15 litigation that make responding to discovery
16 unusually easy or unusually hard.

17 *Id.*

18 *Burlington* concerned two issues of first impression:

19 (i) whether "a general, boilerplate assertion of an
20 evidentiary privilege in response to a discovery request"
21 is effective to properly assert the privilege; and (ii)
22 whether "the effect of untimeliness in properly asserting
23 the privilege is to waive or otherwise abandon the
24 privilege." *Id.* at 1147. With respect to the first
25 issue, the Court found "that a proper assertion of
26 privilege must be more specific than a generalized,
27 boiler-plate objection." *Id.* On the second issue, the
28 Court found that the failure to produce a timely
privilege log, pursuant to "Rule 34's 30-day time limit,"
does not result in a *per se* waiver of the privilege. *Id.*
at 1149.

1 Plaintiffs read *Burlington* to hold that where a party
2 fails to assert a particular privilege in an initial
3 written response in any manner, boilerplate or otherwise,
4 it amounts to a *per se* waiver of that privilege, whether
5 or not the privilege was invoked in a later-produced
6 privilege log. This reading of *Burlington* is
7 inconsistent with the Ninth Circuit's refusal to apply a
8 *per se* waiver to a late-filed privilege log, even after
9 finding the boilerplate assertions of privilege in the
10 initial, written response to be insufficient. If
11 asserting a privilege in a boilerplate manner is
12 improper, then the party withholding documents in
13 *Burlington* failed to properly assert particular
14 privileges in their initial written responses.
15
16 Nevertheless, the *Burlington* court forgave this initial
17 failure and permitted the privilege log to assert the
18 privileges for the first time.

19
20 This case is sufficiently analogous. Even though the
21 initial written response to some of the earlier RFPs did
22 not assert the deliberative process privilege, once
23 Defendant had an opportunity to thoroughly examine the
24 responsive documents, it determined that assertion of the
25 privilege was appropriate and did so. Rather than
26 applying a *per se* waiver rule, *Burlington* demands that
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1 Defendant's actions be examined in light of the four
2 factor test.

3
4 1. State Defendant's Assertion of the Privilege
5 Enables the Plaintiffs and the Court to Evaluate
6 Whether the Documents are Privileged.

7 Defendant's privilege log describes the withheld
8 documents by providing the identities of the sender and
9 recipient and the general subject matter of the
10 communication. In addition, submission of the disputed
11 documents to the Court *in camera* permits the Court to
12 evaluate the privilege claim completely and thoroughly.

13 2. Under the Circumstances, the Objection Was
14 Timely.

15 The three remaining *Burlington* factors -- timeliness
16 of the assertion, magnitude of the production, and other
17 circumstances -- are appropriately discussed together.
18 Discovery in this case has been complex and voluminous.
19 Defendant has produced over 83,000 pages of documents,
20 including thousands of e-mail messages, all of which had
21 to be reviewed for privilege. First Wordham Decl., Doc.
22 88, at ¶10. Plaintiffs' first RFP, propounded on October
23 30, 2008, sought information dating back almost 30 years
24 to before 1980 in some cases. The parties then engaged
25 in a lengthy meet-and-confer over the scope of
26 Plaintiffs' discovery requests. Ultimately, the parties
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1 agreed that all requests would be limited to years after
2 1980. The parties also agreed that written responses
3 would be due on January 9, 2009, with document production
4 on January 21, 2009. .

5 Defendant engaged in extensive efforts to collect,
6 review and produce e-mails from numerous CDFG employees,
7 potentially involving tens of thousands of e-mails. The
8 parties agreed that the discovery demands would be
9 limited to e-mails from approximately eleven CDFG staff
10 who worked primarily on striped bass issues (the "CDFG
11 striped bass work group"). This limited the potentially
12 discoverable emails to several thousand.

13
14 Over the next few months, CDFG staff worked to
15 collect e-mails and provide them to counsel for review.
16 After e-mails were provided to counsel by staff, the e-
17 mails were reviewed for relevance and privilege and
18 prepared for production. During this review process,
19 counsel discovered that some of the e-mail communications
20 were subject to the deliberative process privilege, among
21 other privileges. On or about April 1, 2009, Defendant
22 produced more than 3,500 emails, the vast majority of
23 responsive, non-privileged e-mails.

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25 Around mid-March, 2009, counsel for the Defendant
26 determined that the Defendant needed to attempt to
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1 recover e-mails and documents that had been deleted from
2 CDFG staff computers between the time the plaintiffs
3 served the Defendant with a notice of intent to sue on or
4 about October 27, 2007 and the date the litigation was
5 initiated on February 22, 2008, at which time CDFG
6 imposed a litigation hold on CDFG staff e-mails and
7 documents. Counsel for the Defendant immediately began
8 the process of obtaining a contractor to search and
9 retrieve all such e-mails and documents. The process of
10 recovering deleted e-mails, reviewing them for relevance
11 and privilege, and preparing them for production was
12 completed on or about May 21, 2009, at which time they
13 were produced to plaintiffs. A privilege log, listing 54
14 e-mails withheld under claim of privilege, was then
15 produced on May 28, 2009. First Wordham Decl., Doc. 88,
16 Exhibit Q.

19 On June 3, 2009, plaintiffs propounded RFP Set 4,
20 which includes Request for Production No. 59 and Request
21 for Production No. 60. *Id.*, Exhibit R. Both requests
22 seek production of documents relating to California
23 Assembly Bill 1253. In response to RFP Set 4, Nos. 59
24 and 60, the Defendant objected in part and asserted the
25 attorney-client, attorney work product, and deliberative
26 process privileges. On or about July 23, 2009, counsel
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1 for the state defendant served on plaintiffs a revised
2 privilege log, listing the e-mails withheld from the
3 response to RFP Set 4. *Id.*, Exhibit T.

4 In total, Defense counsel has reviewed over 4,200
5 pages of e-mails. Of these over 4,200 pages,
6 approximately 150 pages, or a total of 89 e-mails, have
7 been determined to be responsive but subject to a claim
8 of privilege. Approximately 4,060 pages of e-mails have
9 been produced. *Id.* at ¶ 10.

11 Discovery in this case has been voluminous and
12 complex, particularly in light of the need to search for
13 and retrieve deleted emails. Once counsel began to
14 review responsive emails, Defendant took a reasonable
15 amount of time to determine that some of the
16 communications were subject to the privilege. Under this
17 totality of circumstances, it appears that Defendant's
18 claims of privilege were asserted as soon as reasonably
19 practicable. Under *Burlington*, the privilege has been
20 appropriately asserted.

23 C. Compliance with Procedural Requirements for Invoking
24 the Deliberative Process Privilege.

25 Plaintiffs cite this court's 1998 decision in
26 *Stockton East Water District, et al. v. Bureau of*
27 *Reclamation*, Consolidated Cases: CV-F-93-5896 OWW and CV-
28 F-96-5738 OWW DLB ("Stockton Order"), which held that

1 four requirements must be met before a claim of
2 deliberative process privilege may be sustained:

3 First, a formal claim of privilege lodged by the
4 head of the department having control over the
5 matter must be made after actual personal
6 consideration by that officer. An affidavit of
7 the responsible agency official must explain
8 reasons for preserving the confidentiality of
9 the governmental communication. A specific
10 designation and description of the documents,
11 i.e., a privilege log must be made in sufficient
12 detail to allow a reasoned determination as to
13 the legitimacy of the claimed privilege.
14 Discoverable factual material must be separated
15 from protected deliberative material.

16 Stockton Order at 8-9. Plaintiffs assert that these
17 requirements were not met in this case. However, the
18 district court specifically found in *Stockton* that these
19 requirements did not apply where the documents are
20 presented for *in camera* inspection. *Id.* at 9 (citing
21 numerous cases).

22 Defendant submitted concurrently with the joint
23 statement the declaration of John McCamman, Chief Deputy
24 Director of the CDFG. McCamman reviewed all of the
25 contested documents and, after describing these
26 documents, concludes that their disclosure would "inhibit
27 the free flow of ideas among CDFG staff" regarding
28 proposed changes to the Striped Bass Policy, the
possibility of adopting a striped bass slot limit, the
review of a petition to modify the species status of the
Delta smelt under the California Endangered Species Act,

1 and the provision of advice to the Governor's Office
2 regarding pending legislation. McCamman Declaration,
3 Doc. 88-4, at ¶¶ 2-5.

4 Mr. McCamman's official position as Chief Deputy
5 Director of CDFG meets the requirement that the attesting
6 person is an "individual with overall responsibility for
7 the administration of the agency." *United States v.*
8 *Rozet*, 183 F.R.D. 662, 665 (N.D. Cal. 1998).

9 As for the remaining procedural requirements, the
10 privilege log in this case accurately describes the
11 withheld documents and provides sufficient detail to
12 permit a reasoned determination as to the legitimacy of
13 the claimed privilege. Finally, contrary to Plaintiffs'
14 assertions, the withheld documents contain no
15 discoverable factual information that must be separated
16 from the deliberative material.

17 The privilege has been properly invoked.

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21 D. Application of the Privilege to the Documents in
22 Dispute.

23 According to the Supreme Court, "the ultimate purpose
24 of the long-recognized [deliberative process] privilege
25 is to prevent injury to the quality of agency decisions."
26 *National Labor Relations Board v. Sears, Roebuck & Co.*,
27 421 U.S. 132, 151 (1975) ("NLRB"). The privilege is
28 intended "to insure that a decision-maker will receive

1 the unimpeded advice of his associates. The theory is
2 that if advice is revealed, associates may be reluctant
3 to be candid and frank." *Federal Open Market Committee*
4 *v. Merrill*, 443 U.S. 340, 359-360 (1979). In a recent
5 decision addressing the privilege, the Supreme Court
6 declared:

8 The deliberative process privilege rests on the
9 obvious realization that officials will not
10 communicate candidly among themselves if each
11 remark is a potential item of discovery and
12 front page news, and its object is to enhance
13 "the quality of agency decisions" (citation
14 omitted) by protecting open and frank discussion
15 among those who make them within the Government.

16 *Department of the Interior, et al. v. Klamath Water Users*
17 *Protective Association*, 532 U.S. 1, 8-9 (2001). In
18 addressing the application of the privilege to internal
19 documents, the Supreme Court stated: "[i]t would be
20 impossible to have any frank discussion of legal or
21 policy matters in writing if all such writings were to be
22 subjected to public scrutiny." *EPA v. Mink*, 410 U.S. 73,
23 87 (1973) (superceded by statute on other grounds, 5
24 U.S.C. § 552).

25 The Ninth Circuit has repeatedly affirmed this public
26 policy to encourage frank and candid internal agency
27 discussions. See, e.g., *United States v. Fernandez*, 231
28 F.3d 1240, 1246 (9th Cir. 2000); *Nat'l Wildlife Fed'n v.*
United States Forest Serv., 861 F.2d 1114, 1117 (9th Cir.

1 1988) ("NWF"). Two conditions apply to the assertion of
2 the deliberative process privilege in the Ninth Circuit:

3 [U]nder the deliberative process' privilege, a
4 document must be both (1) predecisional or
5 antecedent to the adoption of agency policy and
6 (2) deliberative meaning it must actually be
related to the process by which policies are
formulated.

7 *NWF*, 861 F.2d at 1117 (internal citations and quotations
8 omitted) (emphasis added). As the *NWF* court explained:

9 These twin requirements recognize that the
10 underlying purpose of this privilege is to
11 protect[] the consultative functions of
12 government by maintaining the confidentiality of
13 advisory opinions, recommendations, and
14 deliberations comprising part of a process by
15 which governmental decisions and policies are
16 formulated.

17 *Id.*

18 "A document may be considered predecisional if it was
19 prepared in order to assist an agency decisionmaker in
20 arriving at his decision." *Carter v. U.S. Dept. of*
21 *Commerce*, 307 F.3d 1084, 1089 (9th Cir. 2002). "Material
22 which predates a decision chronologically, but did not
23 contribute to that decision, is not predecisional in any
24 meaningful sense." *Id.* On the one hand, the
25 "predecisional" requirement does not mandate that the
26 agency asserting the privilege has taken steps to
27 finalize its decision. As the Supreme Court has
28 observed:

Our emphasis on the need to protect pre-
decisional documents does not mean that the
existence of the privilege turns on the ability

1 of an agency to identify a specific decision in
2 connection with which a memorandum is prepared.
3 Agencies are, and properly should be, engaged in
4 a continuing process of examining their
5 policies; this process will generate memoranda
6 containing recommendations which do not ripen
7 into agency decisions; and the lower courts
8 should be wary of interfering with this process.

9 *NLRB*, 421 U.S. at 151, n.18. One California district
10 court concluded "that the Supreme Court meant to protect
11 documents that were part of the decision-making process,
12 regardless of a 'final decision'." *Cal. Native Plant*
13 *Soc'y v. EPA*, 251 F.R.D. 408, 411-412 (N.D. Cal. 2008).

14 On the other hand, the party opposing discovery must
15 identify a specific decision or policy to which the
16 withheld documents relate. As the Ninth Circuit
17 explained in *Maricopa Audubon Society v. U.S. Forest*
18 *Service*:

19 The [agency] argues that because agencies are
20 involved in a continual process of self-
21 examination, it need not identify a specific
22 decision in which the ... report and the ...
23 letter will culminate in an order for those
24 materials to be "predecisional." For this
25 position, it relies entirely on a footnote in
26 the Supreme Court's decision in *NLRB v. Sears,*
27 *Roebuck & Co.*, 421 U.S. 132 ... This cautionary
28 dictum, however, does not justify the broad
reading ... urged by the government ... Thus,
we are required to reject the government's
primary argument that a continuing process of
agency self-examination is enough to render a
document "predecisional" and hold, instead, that
the agency must identify a specific decision to
which the document is predecisional.

108 F.3d 1089, 1094 (9th Cir. 1997) (emphasis added). See
also *Assembly of the State of Cal. v. U.S. Dept. of*

1 Commerce, 968 F.2d 916, 921 (9th Cir. 1992) ("Material
2 which predates a decision chronologically, but did not
3 contribute to that decision, is not predecisional in any
4 meaningful sense.").

5 Documents are deliberative only if they are "actually
6 related to the process by which policies are formulated."
7 NWF, 861 F.2d at 1117. For example, purely factual
8 materials are generally not protected by the privilege.
9 Id. The important inquiry is whether disclosure of the
10 document exposes "an agency's decisionmaking process in
11 such a way as to discourage candid discussion within the
12 agency and thereby undermine the agency's ability to
13 perform its functions." Assembly, 968 F.2d at 920
14 (internal citation and quotation omitted).
15
16

17 1. Documents that Concern Whether to Recommend to
18 CFGF an Amendment to the Striped Bass Policy.

19 Defendants assert that Documents 34 through 44, 46
20 through 54, and 62 concern whether to recommend to CFGF
21 an amendment to the striped bass policy. The documents
22 submitted *in camera* reveal that the issue of whether CDFG
23 should make such recommendations to CFGF was raised
24 several times and considered over the course of more than
25 a year, but never acted upon.
26

27 Plaintiffs maintain that Defendant's assertion of the
28 privilege in connection with these documents is

1 insufficient under *Maricopa Audubon*. Defendant refused
2 to specify what amendments were proposed to which part(s)
3 of the striped bass policy. Because no information was
4 actually given about the substance or timing of the
5 putative decisions, Plaintiffs argue the discussion of
6 "an amendment to the Striped Bass Policy" is simply "part
7 of a continuing process of agency self-examination."
8

9 The *in camera* review reveals that most of the
10 communications in this category, namely Documents 34
11 through 44, 48 through 54, and 62 concerned specific
12 proposals to modify striped bass policy. That these
13 proposals were never acted upon does not render the
14 assertion of the deliberative process privilege
15 ineffective. This is not the kind of "continuing process
16 of agency self-examination" with which *Maricopa Audubon*
17 was concerned. *Maricopa Audubon* simply demands that
18 withheld documents be related to a specific policy
19 proposal. As to Documents 34 through 44, 48 through 54,
20 and 62, the discussion focused on specific proposals for
21 striped bass. The documents were predecisional,
22 satisfying the first requirement. These documents are
23 also deliberative because they concern the formulation of
24 policy.
25
26

27 Although it is a close call, a careful examination of
28

1 documents 46 and 47 reveals no connection to any specific
2 proposal to modify the striped bass policy. Modifying
3 the striped bass policy is mentioned as a possible remedy
4 for concerns raised in these two emails, but no specific
5 policy changes are discussed. Documents 46 and 47
6 qualify as communications generated as part of a
7 "continuing process of agency self-examination," to which
8 the deliberative process privilege does not apply under
9 *Maricopa Audubon*.

11 The deliberative process privilege is validly applied
12 to Documents 34 through 44, 48 through 54, and 62, but
13 does not apply to documents 46 and 47.

15 2. Document Concerning the Striped Bass Slot Limit.

16 Document 45 concerns a particular proposal, which
17 originated outside CDFG, to impose a slot limit¹ to
18 protect striped bass. The withheld communication
19 addresses whether CDFG should support that proposal.
20 This document is predecisional, as it concerned a
21 specific proposal (whether to support the slot limit)
22 that had not yet been adopted by CDFG, and deliberative,
23 because it concerned the formulation of policy. The
24 privilege is properly asserted with respect to Document
25

27 ¹ A slot limit allows anglers to take fish in a certain
28 size range, but requires the release of anything smaller
or larger.

1 45.

2
3 3. Documents Relating to Petition to Uplist the
4 Delta Smelt to Endangered Status under the
5 California Endangered Species Act ("CESA").

6 Documents 46 and 47, in addition to discussing
7 proposals to recommend changes to the striped bass
8 policy, include a specific proposal to uplist the Delta
9 smelt to endangered status under CESA. Although these
10 documents do tangentially discuss the CESA uplisting,
11 they are not deliberative on this issue. In other words,
12 they do not discuss and/or deliberate over policy actions
13 or decisions CDFG must take in relation to the CESA
14 petition. The privilege does not apply to documents 46
15 and 47 by virtue of their discussion of the CESA
16 petition.

17
18 4. Documents Reflecting Analysis of AB 1253.

19 Documents 68, 73, and 75 through 89 documents are all
20 drafts of bill analyses prepared by CDFG for the
21 Governor's Office and emails between CDFG staff relating
22 to what position CDFG should take in connection with
23 various drafts of Assembly Bill 1253. See McCamman Decl.
24 at ¶5. These are all predecisional, as they concern
25 drafts of a specific piece of legislation, and
26 deliberative, because they concern the formulation of
27 CDFG's policy toward that bill. The privilege properly
28

1 applies to Documents 68, 73, and 75 through 89.

2
3 5. Conclusion Re: Application of the Privilege.

4 The deliberative process privilege applies to all of
5 the documents withheld on that ground with the exception
6 of Documents 46 and 47. Plaintiffs' motion to compel is
7 GRANTED as to Documents 46 and 47.

8
9 E. Qualified Privilege Analysis: Is Defendant's
10 Interest in Non-Disclosure Overcome By The
11 Plaintiffs' And The Public's Interest In Disclosure?

11 The deliberative process privilege is a qualified
12 privilege. To determine whether the qualified privilege
13 is overcome, courts usually consider four non-exhaustive
14 factors: (1) the relevance of the evidence; (2) the
15 availability of other evidence that contains the same
16 information; (3) the government's role in the litigation,
17 i.e., whether there is any evidence of bad faith and/or
18 misconduct; and (4) the extent to which disclosure would
19 hinder frank and independent discussion regarding
20 contemplated policies and decisions. *FTC v. Warner
21 Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). The
22 court may also take into account (5) the interest of the
23 litigant, and society, in accurate judicial fact-finding.
24 *North Pacifica, LLC v. City of Pacifica*, 274 F. Supp 2d
25 1118, 1122 (N.D. Cal. 2003), and (6) the seriousness of
26 the litigation and the issues involved, *United States v.*
27
28

1 Irvin, 127 F.R.D. 169, 174 (C.D. Cal. 1989).

2 In the *Stockton* case, the district court refused to
3 permit disclosure after finding that the documents
4 withheld were only marginally relevant; the "information
5 sought [was] available ... from other sources"; the
6 "documents [did] not contain evidence of bad faith or
7 government misconduct"; permitting "disclosure would
8 chill the free flow of ideas between members of the
9 agency and effective cooperation in the development of
10 water policy by state and federal agencies in the state
11 of California;" and "the documents do not disclose 'the
12 smoking gun,' Plaintiffs' seek." *Stockton Order* at 7-41.

13 Here, Plaintiffs assert that the documents may reveal
14 relevant documents and/or the "smoking gun" not found in
15 the *Stockton* case. For example, Plaintiffs assert that:

16 [T]he Defendant's discussion of an amendment to
17 the striped bass abundance policy will probably
18 discuss the key issues of striped bass predation
19 on native fish and ESA implications. Among the
20 documents already produced by CDFG was an email
21 and Report from CDFG employee Marty Gingras,
22 CDFG's striped bass expert. (Rubin Decl. ¶ 16,
23 Exh. 7.) In the email Marty Gingras reported
24 that the CDFG "discussed the Commission's
25 striped bass policy as it relates to fishing
26 regulations, spending Striped Bass Stamp Funds,
27 and ESA," and advocated revision of this policy.
28 (*Id.* (emphasis added).) Moreover, the Report
attached to his email complains that the striped
bass abundance policy is "harmful ... primarily
because significant uncertainty remains about
the effect of striped bass predation on native
fishes." (*Id.*)

Doc. 97-2 at 46. Plaintiffs maintain that this disclosed

1 email is evidence that "Defendant is ... trying to hide
2 key evidence and admissions based on the deliberative
3 process privilege." *Id.* Similarly, Plaintiffs assert
4 "it is highly likely that during the discussion of the
5 striped bass slot limit, the CDFG discussed whether this
6 proposed striped bass regulation would increase or
7 maintain the striped bass population -- one of the
8 primary issues in dispute." *Id.* at 47.

10 A careful review of all of the remaining disputed
11 documents *in camera* proves Plaintiffs' contentions are
12 meritless. Although the communications do touch upon the
13 issue of striped bass predation upon native species, the
14 withheld documents are primarily concerned with various
15 ways to word policy recommendations so as to accurately
16 reflect the state of the science. The communications do
17 not reveal bad faith or any effort to withhold
18 information from the public. Rather, they reveal a
19 concern over giving policy advice that does not overstate
20 the science. The withheld communications do not discuss
21 scientific information in any detail, nor do they shed
22 meaningful light on the ultimate issues in this case,
23 e.g., whether the existing striped bass sportfishing
24 regulations cause unlawful take of ESA listed species.

27 Moreover, in general, the withheld emails would not
28

1 add to information already disclosed. For example,
2 Plaintiffs admit they are already in possession of an
3 email in which Marty Gingras advocated revisions to the
4 striped bass policy in light of ESA concerns. Disclosure
5 of the vast majority of withheld documents would "hinder
6 frank and independent discussion regarding contemplated
7 policies and decisions," without enhancing the record in
8 any meaningful way.
9

10 Plaintiffs have not overcome the privilege as to the
11 remaining documents.
12
13

14 **F. Plaintiffs' Request for Reasonable Expenses.**

15 Federal Rule of Civil Procedure 37(a)(5)(A) requires
16 the party or deponent whose conduct necessitated the
17 motion to compel "to pay the movant's reasonable expenses
18 incurred in making the motion, including attorney's
19 fees," unless "the opposing party's nondisclosure,
20 response, or objection was substantially justified."
21

22 Here, State Defendants' nondisclosure was substantially
23 justified. Although Defendants must disclose two of the
24 39 challenged documents, this reflects the district
25 court's balancing of the parties' and public's interest,
26 and does not undermine Defendant's right to assert the
27 privilege as to all 39 documents in the first instance.
28

1 Plaintiff's request for fees and reasonable expenses is
2 DENIED.

3
4 **V. CONCLUSION**

5 For the reasons set forth above:

6 (1) Plaintiffs' motion to compel is GRANTED as
7 to Documents 46 and 47 and DENIED as to all
8 other documents; and

9 (2) Plaintiffs' request for reasonable expenses
10 is DENIED.

11
12 Plaintiffs shall submit a form of order consistent with
13 this memorandum decision within ten (10) days of
14 electronic service.

15
16 SO ORDERED
17 Dated: October 15, 2009

18 /s/ Oliver W. Wanger
19 Oliver W. Wanger
20 United States District Judge