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26 UNITED STATES DISTRICT COURT
 27 FOR THE EASTERN DISTRICT OF CALIFORNIA

28 ARC ECOLOGY, *et al.*,
 Plaintiffs, and
 CALIFORNIA REGIONAL WATER
 QUALITY CONTROL BOARD,
 v.
 UNITED STATES MARITIME
 ADMINISTRATION, *et al.*,
 Defendants.

Case No. 2:07-cv-2320-GEB-GGH
 STIPULATION AND ORDER
 RESOLVING CERTAIN DISCOVERY
 DISAGREEMENTS

Judge: Magistrate Judge Hollows

1 Plaintiffs Arc Ecology, San Francisco Baykeeper, and Natural Resources
2 Defense Council, Inc. (collectively “Environmental Plaintiffs”) and defendants
3 United States Maritime Administration (“MARAD”), Sean T. Connaughton, in his
4 official capacity as Maritime Administrator, United States Department of
5 Transportation, and Ray H. LaHood, in his official capacity as Secretary of
6 Transportation (collectively “Defendants”), stipulate to and respectfully propose the
7 following:

8 WHEREAS, Environmental Plaintiffs propounded document requests on
9 March 17, 2008, and on March 4, 2009; and

10 WHEREAS, on March 4, 2009, Environmental Plaintiffs noticed a deposition
11 of defendant MARAD pursuant to Fed. R. Civ. P. 30(b)(6); and

12 WHEREAS, on April 21, 2009, and May 4, 2009, Environmental Plaintiffs
13 filed a Notice of Motion and Motion to Compel Discovery Responses concerning the
14 above-referenced document requests and deposition notice; and

15 WHEREAS, the deposition of MARAD pursuant to Fed. R. Civ. P. 30(b)(6)
16 commenced with the deposition of MARAD, through two of its designated witnesses,
17 Carolyn Junemann and Eugene Magee, on May 21, 2009 and May 22, 2009,
18 respectively; and

19 WHEREAS, Defendants produced more than 20,000 pages of documents to
20 Environmental Plaintiffs in the two weeks before MARAD’s deposition commenced,
21 and have produced several thousand pages of documents since the deposition of
22 designated witnesses Dr. Junemann and Mr. Magee; and

23 WHEREAS, as a result of testimony during the deposition of Mr. Magee,
24 certain disagreements arose among the parties concerning Defendants’ invocations
25 of privilege, including privileges associated with testimony concerning advice of
26 counsel; and

27 WHEREAS, the parties to this discovery dispute have had a disagreement
28 whether Defendants have waived attorney-client privilege; and

1 WHEREAS, the parties to this discovery dispute have disagreements
2 concerning the adequacy of Defendants' assertions of privilege with respect to a
3 number of documents that Defendants have withheld or redacted in responding to
4 Environmental Plaintiffs' document requests; and

5 WHEREAS, the parties to the discovery dispute have met and conferred and
6 resolved certain of their disagreements concerning discovery; and

7 WHEREAS, on June 4, 2009, Defendants withdrew their assertions of
8 privilege as to a number of documents and, on June 10, 2009, produced those
9 documents to Environmental Plaintiffs;

10 WHEREAS, the parties have agreed to memorialize certain of their
11 agreements in a Stipulation and Order; and

12 WHEREAS, as part of the parties' agreement, the parties are filing a
13 separate stipulation and proposed order to extend the last date for Environmental
14 Plaintiffs to conduct discovery of Defendants;

15 THEREFORE, Environmental Plaintiffs and Defendants hereby stipulate as
16 follows:

17 1. Defendants will not introduce in evidence any documents for which
18 Defendants have asserted a claim of privilege. In the case of redacted documents,
19 Defendants may introduce those portions of the documents that are not redacted, to
20 the extent those portions are otherwise admissible. To the extent otherwise
21 admissible, Defendant may introduce into evidence any documents or redacted
22 portions of documents for which Defendants have, as of June 19, 2009, withdrawn
23 prior assertions of privilege. Defendants will not elicit testimony of any defense
24 witness regarding a privileged matter on which that witness was instructed by
25 Defendants' counsel at deposition not to respond and as to which the assertion of
26 privilege was not withdrawn during the course of the deposition of that witness.
27 Defendants will not attempt to use other witnesses to elicit testimony regarding
28 these privileged matters with respect to which testimony or evidence could not be

1 introduced under this paragraph. Notwithstanding any other provision of this
2 paragraph, Defendants will not introduce any evidence regarding advice of counsel,
3 including any testimony or other evidence that Defendants received or relied upon
4 advice of counsel, unless Environmental Plaintiffs first elicit testimony or introduce
5 evidence as to whether Defendants received or relied upon advice of counsel. For
6 purposes of the preceding sentence, and notwithstanding Fed. R. Civ. P. 32(a)(6),
7 Environmental Plaintiffs' introduction of portions of a deposition transcript that
8 does not refer to advice of counsel, or Environmental Plaintiffs' introduction of a
9 portion of a deposition transcript, solely for purposes of impeachment, during which
10 a witness testified concerning advice of counsel, shall not authorize Defendants to
11 introduce evidence concerning advice of counsel. Examination conducted by
12 Environmental Plaintiffs that does not directly inquire into or refer to advice of
13 counsel will not be deemed to have elicited evidence as to whether Defendants
14 received or relied upon advice of counsel.

15 2. Environmental Plaintiffs will not present evidence or argument that
16 MARAD has waived any attorney-client privilege associated with the document
17 bearing BATES MARAD014966-14985 or any document or redaction portion of a
18 document evidencing the subject matter of the document bearing BATES
19 MARAD014966-14985. The preceding sentence shall not apply if Defendants
20 introduce any evidence concerning advice of counsel.

21 3. Environmental Plaintiffs may recall Dr. Junemann and Mr. Magee to
22 testify as MARAD's designated Fed. R. Civ. P. 30(b)(6) witnesses after
23 Environmental Plaintiffs have completed review of MARAD's recently produced
24 documents.

25 4. By June 12, 2009, Defendants will produce to Environmental Plaintiffs
26 the documents for which Defendants, on June 4, 2009, withdrew their claim of
27 privilege.

1 5. The parties have resolved the disputes that have presently been
2 identified relating to the discovery hearing calendared for June 25, 2009.
3 Environmental Plaintiffs' motion to compel is hereby taken off calendar.

4 Respectfully submitted,

5 *For Environmental Plaintiffs:*

6 July 22, 2009

By: /s/ Michael E. Wall

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1 *For Defendants:*

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5 July 22, 2009
6 7/2/2009

By: /s/ Michelle R. Lambert (as authorized

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17 ORDER

18 The foregoing stipulation by the parties is hereby approved and entered as an
19 ORDER of the Court. Nothing in this Stipulation and Order relieves the parties of
20 completing discovery by the presently scheduled cutoff date—August 31, 2009.

21 It is so ORDERED.

22 Date: July 22, 2009

/s/ Gregory G. Hollows

23 _____
24 HONORABLE GREGORY G. HOLLOWS
25 UNITED STATES MAGISTRATE JUDGE

26 Arc.stip2
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