

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

)	Case No. 14-1130 SC
)	
OUR CHILDREN'S EARTH FOUNDATION,)	ORDER GRANTING IN PART AND
et al.,)	DENYING IN PART MOTIONS FOR
)	<u>SUMMARY JUDGMENT</u>
Plaintiffs,)	
)	
v.)	
)	
NATIONAL MARINE FISHERIES)	
SERVICE, et al.,)	
)	
Defendants.)	
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I. INTRODUCTION

Now before the Court are cross-motions for partial summary judgment seeking to resolve Freedom of Information Act ("FOIA") claims in this environmental and administrative law case. ECF Nos. 34 ("Mot."), 39 ("Opp'n & Cross-Mot."). Plaintiffs are two groups of environmental advocates seeking summary judgment on their claims that Defendants,¹ the National Marine Fisheries Service (the

¹ The operative complaint, ECF No. 20 ("Compl.") names several other defendants including Penny Pritzker, Secretary of Commerce, Rodney McInnis, Regional Administrator of the Fisheries Service, and Sally Jewell, Secretary of the Interior. Nevertheless, because this motion solely concerns FOIA claims against the Fisheries Service and the Fish and Wildlife Service, these defendants' actions are not at issue in the motion. As a result, the Court will treat this order as though there were only two defendants, the Fisheries Service and the Fish and Wildlife Service.

1 "Fisheries Service") and the Fish and Wildlife Service ("FWS"),
2 failed to comply with the FOIA in responding to Plaintiffs'
3 requests for documents. Additionally, Plaintiffs allege that the
4 Fisheries Service has a pattern and practice of such failures.
5 Defendants disagree and have moved for summary judgment in their
6 own right, arguing they have complied with the law.

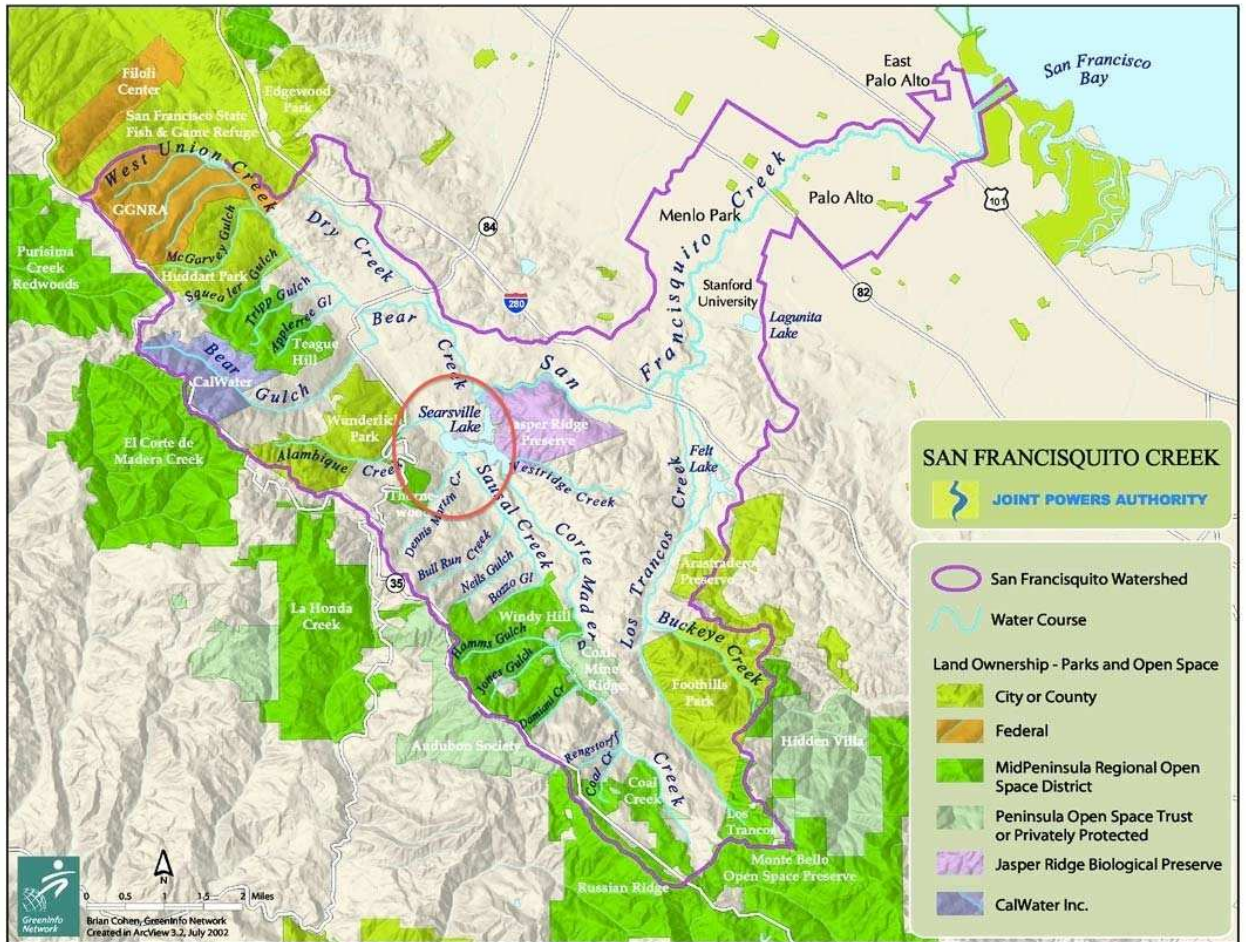
7 The motions are fully briefed, ECF Nos. 47 ("Pls.' Opp'n &
8 Reply"), 49 ("Gov't Reply"), and appropriate for resolution without
9 oral argument under Civil Local Rule 7-1(b). For the reasons set
10 forth below the motions are GRANTED IN PART and DENIED IN PART.

11
12 **II. BACKGROUND**

13 Plaintiffs have two intertwined concerns in this case: the
14 fate of a fish protected by the Endangered Species Act, the Central
15 California Coast Steelhead, and the activities of Stanford
16 University, which they believe are adversely impacting Steelhead
17 population and habitat.

18 The Steelhead is a species of trout with a habitat stretching
19 along the California coast from Sonoma County to Santa Cruz County.
20 See NOAA Fisheries, West Coast Region, Central California Coast
21 Steelhead, [http://www.westcoast.fisheries.noaa.gov/
22 protected_species/salmon_steelhead/salmon_and_steelhead_listings/
23 steelhead/central_california_coast/Central%20California%20Coast%20S
24 teelhead.html](http://www.westcoast.fisheries.noaa.gov/protected_species/salmon_steelhead/salmon_and_steelhead_listings/steelhead/central_california_coast/Central%20California%20Coast%20Steelhead.html) (last accessed March 27, 2015). Steelheads spend
25 most of their adult life in the ocean, but they spawn and raise
26 young in freshwater rivers or streams like the San Francisquito
27 Creek, which flows from the Santa Cruz Mountains above Menlo Park,
28 California into the San Francisco Bay. San Francisquito Creek and

1 its watershed are outlined in purple in this map:



19 Wikipedia, San Francisquito Creek, http://en.wikipedia.org/wiki/San_Francisquito_Creek (last accessed March 27, 2015).

21 Cirled in orange in the left-center of the above map is
22 Searsville Lake, a man-made reservoir formed by the Searsville Dam.
23 Stanford owns the dam, which was built in 1892, as well as the lake
24 and other related water diversions and infrastructure, which it
25 refers to collectively as the "Lake Water System." Stanford uses
26 the Lake Water System to provide non-potable water for its campus.
27 Plaintiffs believe the Lake Water System adversely affects the
28 Steelhead by reducing water flows in San Francisquito Creek and its

1 tributaries and cutting the Steelhead off from access to upstream
2 spawning habitat.

3 In a case pending before Magistrate Judge Laporte, Plaintiffs
4 seek to enjoin Stanford's activities. See Our Children's Earth
5 Foundation v. Stanford Univ., No. 13-cv-00402-EDL (N.D. Cal.). In
6 this action, Plaintiffs take a different tack, challenging the
7 Fisheries Service's issuance of a biological opinion to the U.S.
8 Army Corps of Engineers assessing the impact of Stanford's planned
9 upgrades to two water diversion facilities dubbed (inaptly in
10 Plaintiffs' view) the "Steelhead Habitat Enhancement Project."
11 Specifically, Plaintiffs believe the Fisheries Service failed to
12 assess all the appropriate effects of the Project in issuing its
13 report. See 50 C.F.R. § 402.02. Additionally, Plaintiffs argue
14 that the biological opinion's authorization of the "take" (a term
15 of art in the Endangered Species Act) of the Steelhead in the
16 course of the project was also improper. See 16 U.S.C. § 1538
17 (defining "take" within the meaning of the Endangered Species Act).
18 Plaintiffs challenge both actions under Section 706(2)(a) of the
19 Administrative Procedure Act, which prohibits arbitrary and
20 capricious agency actions. See 5 U.S.C. § 706(2)(a).

21 While this allegedly arbitrary and capricious biological
22 opinion forms the gravamen of Plaintiffs' complaint, these motions
23 involve only two related FOIA issues. The first concerns the
24 Fisheries Service and the FWS' allegedly tardy and incomplete
25 response to four FOIA requests Plaintiffs made regarding four
26 topics: (1) the Steelhead and two other endangered species with
27 habitat in the San Francisquito Creek watershed, (2) the Fisheries
28 Service's biological opinion, (3) Stanford's Steelhead Habitat

1 Enhancement Project, and (4) the rest of the Lake Water System.
2 The second dispute concerns whether the Fisheries Service has a
3 pattern and practice of such tardy and incomplete responses and, if
4 so, whether the Service should be enjoined from continuing that
5 practice. The parties have both moved for summary judgment.

6
7 **III. LEGAL STANDARD**

8 Entry of summary judgment is proper "if the movant shows that
9 there is no genuine dispute as to any material fact and the movant
10 is entitled to judgment as a matter of law." Fed. R. Civ. P.
11 56(a). Summary judgment should be granted if the evidence would
12 require a directed verdict for the moving party. Anderson v.
13 Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). "A moving party
14 without the ultimate burden of persuasion at trial—usually, but not
15 always, a defendant—has both the initial burden of production and
16 the ultimate burden of persuasion on a motion for summary
17 judgment." Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos.,
18 Inc., 210 F.3d 1099, 1102 (9th Cir. 2000).

19 "In order to carry its burden of production, the moving party
20 must either produce evidence negating an essential element of the
21 nonmoving party's claim or defense or show that the nonmoving party
22 does not have enough evidence of an essential element to carry its
23 ultimate burden of persuasion at trial." Id. "In order to carry
24 its ultimate burden of persuasion on the motion, the moving party
25 must persuade the court that there is no genuine issue of material
26 fact." Id. "The evidence of the nonmovant is to be believed, and
27 all justifiable inferences are to be drawn in his favor." Anderson,
28 477 U.S. at 255.

1 FOIA cases are typically decided on motions for summary
2 judgment. Yonemoto v. Dept. of Veterans Affairs, 686 F.3d 681, 688
3 (9th Cir. 2011) as amended (Jan. 18, 2012). "To carry their
4 summary judgment burden, agencies are typically required to submit
5 an index and 'detailed public affidavits' that, together, 'identify
6 the documents withheld, the FOIA exemptions claimed, and a
7 particularized explanation of why each document falls within the
8 claimed exemption.'" Id. (quoting Lion Raisins v. Dep't of Agric.,
9 354 F.3d 1072, 1082 (9th Cir. 2004) (alterations in original).
10 These submissions are typically referred to as a Vaughn index,
11 after Vaughn v. Rosen, 484 F.2d 820, 823-25 (D.C. Cir. 1973), and
12 they must be "from 'affiants who are knowledgeable about the
13 information sought' and 'detailed enough to allow court[s] to make
14 an independent assessment of the government's claim of exemption."
15 Yonemoto, 686 F.3d at 688 (internal alterations omitted) (quoting
16 Lion Raisins, 354 F.3d at 1079).

17

18 **IV. DISCUSSION**

19 The parties' motions concern four FOIA requests. Plaintiffs'
20 first request sought, among other things, documents related to
21 impacts on the Steelhead and two other species in the San
22 Francisquito Creek watershed stemming from Stanford's Lake Water
23 System. Second, Plaintiffs sought documents related to Stanford's
24 efforts to mitigate the impact of the Searsville Dam on the
25 Steelhead pending the Fisheries Service's final action on
26 Endangered Species Act authorization for Stanford's activities. In
27 their third request, Plaintiffs requested documents responsive to
28 their first request coming into the Fisheries Service's possession

1 after the date of that request as well as some additional
2 documents. Finally, Plaintiffs' fourth request targeted documents
3 relating to the search cutoff dates for Plaintiffs' first two
4 requests and documents pertaining to the Fisheries Service's
5 general policy toward search cutoff dates for FOIA searches.

6 Now the parties have moved for summary judgment to resolve
7 claims stemming from these requests and the Fisheries Service's and
8 FWS' response to them. Plaintiffs make three basic arguments.
9 First, Plaintiffs contend the Fisheries Service either failed to
10 adequately describe its searches or conducted an inadequate search
11 and withheld documents without sufficient justification. Second,
12 Plaintiffs argue they are entitled to declaratory judgment that the
13 Fisheries Service violated FOIA's deadlines in responding to these
14 four requests and in three related internal appeals, and FWS
15 violated FOIA's deadlines in responding to a referral of documents
16 from the Fisheries Service. Third, Plaintiffs argue these alleged
17 violations of the FOIA are a part of the Fisheries Service's
18 pattern and practice of non-compliance with the FOIA's mandates,
19 and ask the Court to issue an injunction ordering the Fisheries
20 Service to comply with the FOIA in the future. The Government
21 disagrees with these allegations, and urges the Court to decline to
22 enter declaratory or injunctive relief and instead enter summary
23 judgment in its favor.

24 The Court will address the adequacy of the search and improper
25 withholding arguments first, before turning to Plaintiffs' requests
26 for declaratory or injunctive relief.

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1 **A. Adequacy of the Search**

2 First, Plaintiffs challenge the adequacy of the Fisheries
3 Service's search for records responsive to their first and third
4 FOIA requests.

5 To comply with the FOIA, an agency must conduct a "'search
6 reasonably calculated to uncover all relevant documents.'" Zemansky v. EPA, 767 F.2d 569, 571 (9th Cir. 1985) (quoting
7 Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir.
8 1984)). In so doing, "the issue to be resolved is not whether
9 there might exist any other documents possibly responsive to the
10 request, but whether the search for those documents was adequate."
11 Id. (quotation omitted) (emphasis in original).
12

13 To prevail on a motion for summary judgment, the agency must
14 demonstrate "'beyond material doubt . . . that it has conducted a
15 search reasonably calculated to uncover all relevant documents.'" S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv., No.
16 CIV. S-06-2845 LKK/JFM, 2008 WL 2523819, at *11 (E.D. Cal. June 20,
17 2008) (quoting Zemansky, 767 F.2d at 571). In so doing, the agency
18 may rely on "reasonably detailed, non-conclusory affidavits and
19 declarations submitted in good faith," id., describing "what
20 records were searched, by whom, and through what process."
21 Lawyers' Comm. for Civil Rights v. U.S. Dep't of the Treasury, 534
22 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008) (citing Steinberg v. U.S.
23 Dep't of Justice, 23 F.3d 548, 552 (D.C. Cir. 1994)). The purpose
24 of this requirement is "to afford a FOIA requester an opportunity
25 to challenge the adequacy of the search and to allow the district
26 court to determine if the search was adequate in order to grant
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1 summary judgment." Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 68
2 (D.C. Cir. 1990).

3 To comply with this requirement, the Fisheries Service
4 submitted a declaration from Gary Stern, the Branch Chief of the
5 Fisheries Service's San Francisco Bay Branch detailing its searches
6 in response to Plaintiffs' first and third FOIA requests. ECF No.
7 41 ("Stern Decl."). After reviewing Plaintiffs' first request,
8 Stern "tasked all [Fisheries Service] staff within the San
9 Francisco Bay Branch and administrative support staff within the
10 [North-Central Coast Office] with searching for responsive
11 documents, because the San Francisco Bay Branch of the [North-
12 Central Coast Office] were [sic] the only [Fisheries Service]
13 branch and office in the West Coast Region that would be in
14 possession of any records sought by Plaintiffs" Id. at ¶
15 5; see also id. at ¶ 9 (making similar conclusions and giving
16 similar instructions regarding Plaintiffs' third FOIA request).
17 The searches were limited to these offices because the Fisheries
18 Service's work with Stanford, the Searsville Dam, and the San
19 Francisquito Creek all fell within the San Francisco Bay Branch's
20 geographic area of responsibility. Stern Decl. at ¶¶ 5, 9.

21 In response to Plaintiffs' first FOIA request, the Fisheries
22 Service staff and North-Central Coast Office administrative support
23 staff searched hard copy and electronic files including emails,
24 office files, and "relevant project folders" for responsive
25 records. Id. at ¶ 6. In describing these files, Stern provides
26 parenthetical examples, pointing, for example, to the project file
27 for the Fisheries Service's Endangered Species Act consultations
28 with the Army Corps of Engineers for Stanford's Steelhead Habitat

1 Enhancement Project. Id. Relevant project files were identified
2 using a database, and then, having retrieved the corresponding
3 paper records, reviewed by Stern and other Fisheries Service
4 biologists. Id. at ¶ 8. Fisheries Service staff took six weeks
5 (averaging 15 hours per week) to conduct the search and compile the
6 relevant records. Id. at ¶ 7. Records scanning and index
7 preparation took approximately five weeks (averaging 20 hours per
8 week). Id. Finally, Stern and his team reviewed the records over
9 the course of approximately one week, reviewing for an average of
10 two hours per day. Id. Once completed, the review yielded 1,051
11 documents (36,009 pages). Id.

12 The details of the Fisheries Service's search for Plaintiffs'
13 third FOIA request are scarcer. Stern describes the search in
14 similar terms, again stating the staff searched hard copy and
15 electronic files including emails, office files, and "relevant
16 project folders," and providing parenthetical examples. Id. at ¶
17 10. However, unlike his description of the search in response to
18 Plaintiffs' first request, Stern provides no detail on how
19 potentially relevant documents were reviewed, by whom they were
20 reviewed, and how "relevant project files" were identified.
21 Puzzlingly, unlike his description of the first search, Stern does
22 aver that "[t]he staff at the [North-Central Coast Office] searched
23 in all areas of its office where responsive documents could
24 reasonably be expected to be found." Id. at ¶ 10. In any event,
25 the search identified just one responsive document that had not
26 already been produced. Id. at ¶ 13.

27 Even if Stern's declaration were sufficiently detailed, the
28 Fisheries Service has not carried its burden of showing "beyond a

1 material doubt, and viewing the facts in the light most favorable
2 to the requester, that it 'has conducted a search reasonably
3 calculated to uncover all relevant documents.'" See Lawyers'
4 Comm., 534 F. Supp. 2d at 1131 (quoting Steinberg v. U.S. Dep't of
5 Justice, 23 F.3d 548, 551 (D.C. Cir. 1994)). As Plaintiffs point
6 out, an email chain (involving Stern), report, and other documents
7 produced in Plaintiffs' parallel litigation against Stanford
8 demonstrate that the Fisheries Service's Office of Law Enforcement
9 in Monterey, California had an open investigation between at least
10 2009 and 2013 into the Endangered Species Act "take" of the
11 Steelhead by the Searsville Dam. See Costa Reply Decl. Exs. 3, 33.
12 Documents from that investigation clearly fall within the scope of
13 Plaintiffs' first and third FOIA requests, which sought, among
14 other things, any documents in the Fisheries Service's possession
15 related to the impact of the Searsville Dam on the Steelhead. ECF
16 No. 43 ("Malabanan Decl.") at ¶ 12. Yet it is undisputed that
17 Plaintiffs' requests were not forwarded to the Office of Law
18 Enforcement and no searches took place there. See id. at ¶ 13.

19 Neither Stern, the FOIA coordinator for the Fisheries
20 Service's West Coast Region, Ana Liza Malabanan, nor the Fisheries
21 Service discusses this issue, even though Plaintiffs pressed it in
22 their opening brief. See Mot. at 18-19. Ignoring this issue is
23 particularly puzzling given that Stern personally exchanged emails
24 regarding the investigation and suggested a telephone conference to
25 discuss it. See Costa Reply Decl. Ex. 33. As a result, Stern and
26 the Fisheries service "had reason to know that [the Office of Law
27 Enforcement] . . . contain[ed] responsive documents," and was thus
28 "obligated under FOIA to search barring an undue burden."

1 Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 327 (D.C. Cir.
2 1999). This renders the Fisheries Service's searches in response
3 to Plaintiffs' first and third requests inadequate. Accordingly,
4 the Fisheries Service's motion is DENIED as to the adequacy of the
5 searches for the first and third requests and Plaintiffs' motion is
6 GRANTED as to the same. Because Plaintiffs do not challenge the
7 adequacy of Defendants' second and fourth searches, both of which
8 are supported by affidavits establishing the reasonability of the
9 searches conducted, summary judgment is GRANTED in favor of the
10 defendants on those searches.

11 **B. FOIA Exemptions**

12 The FOIA's goal is to "ensure an informed citizenry, vital to
13 the functioning of a democratic society, needed to check against
14 corruption and to hold the governors accountable to the governed."
15 NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978). While
16 this goal reflects a general philosophy of full agency disclosure,
17 John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989), FOIA
18 incorporates nine exemptions, which reflect the need to balance the
19 public's interest full disclosure against the sometimes legitimate
20 need for the Government to maintain secrecy. See 5 U.S.C. §
21 552(b)(1)-(9). Because, "[t]hese limited exceptions do not obscure
22 the basic policy that disclosure, not secrecy, is the dominant
23 objective of the Act," Dep't of Interior v. Klamath Water Users
24 Protective Ass'n, 532 U.S. 1, 7-8 (2001) (citation omitted),
25 exemptions are to be narrowly construed, and "information not
26 falling within any of the exemptions has to be disclosed"
27 Yonemoto, 686 F.3d at 688.

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1 The Court finds the record insufficient to decide whether the
2 Fisheries Service's withholdings are appropriate under Exemptions
3 b(6) or b(5). As a result, the Court orders further submissions
4 from the agency and will hold the motions for summary judgment as
5 to the agency's withholdings in abeyance until the record is
6 supplemented.

7 **1. Exemption (b)(6)**

8 First, Plaintiffs challenge the redaction of the names of two
9 Fisheries Service investigators from an email chain under FOIA
10 Exemption (b)(6), which exempts from disclosure "personnel and
11 medical files and similar files the disclosure of which would
12 constitute a clearly unwarranted invasion of personal
13 privacy" 5 U.S.C. § 552(b)(6). The email chain at issue,
14 Exhibit 3 to the Costa Reply Declaration, is the same email
15 discussed above between Gary Stern and individuals at the Fisheries
16 Service's Office of Law Enforcement regarding the Office's pending
17 investigation of Endangered Species Act "takes" of the Steelhead at
18 the Searsville Dam. While Stern's name and several others appear
19 unredacted in the email chain, the Fisheries Service redacted the
20 names and contact information for two individuals in its Office of
21 Law Enforcement, stating in its Vaughn Index that the "withheld
22 information consists of the names and contact information of NOAA
23 law enforcement officers. The withheld information constitutes
24 personal information that would constitute an unwarranted invasion
25 of personal privacy in which no public interest has been
26 identified." Malabanan Decl. Ex. 1 ("Vaughn Index") at Record No.
27 164.

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1 Under Exemption (b)(6), the Court must first determine whether
2 the email chain qualifies as a "similar file[]" within the meaning
3 of the exemption. Forest Serv. Emp. for Envt'l Ethics v. U.S.
4 Forest Serv., 524 F.3d 1021, 1024 (9th Cir. 2008). The phrase
5 "similar files" is to be construed broadly, and Congress intended
6 it to cover "detailed Government records on an individual which can
7 be identified as applying to that individual." U.S. Dep't of State
8 v. Wash. Post Co., 456 U.S. 595, 602 (1982). If the emails qualify
9 as "similar files," then two steps remain. First, the Court must
10 determine if "disclosure implicates a personal privacy interest
11 that is 'nontrivial'" Yonemoto, 686 F.3d at 693 (quoting
12 Forest Serv., 524 F.3d at 1026). If the agency fails to establish
13 that disclosure "would lead to the invasion of a non-trivial
14 personal privacy interest protected by Exemption 6, the FOIA
15 demands disclosure, without regard to any showing of public
16 interest." Id. at 694 (collecting cases). If, on the other hand,
17 the agency meets its burden, the Court then engages in a balancing
18 approach, asking whether the privacy interests the agency
19 identified outweigh the public's interest in the disclosure of
20 information that "'would shed light on an agency's performance of
21 its statutory duties or otherwise let citizens know what their
22 government is up to.'" Id. Nevertheless, if the agency's Vaughn
23 index fails to provide "a particularized explanation of why each
24 document falls within the claimed exemption," the court cannot
25 usually make a categorical judgment of the privacy interests at
26 issue. Id.

27 Here the agency has failed to provide a particularized
28 explanation of what non-trivial privacy interest would be

1 implicated if these individuals' names and contact information are
2 disclosed. True, as the Fisheries Service points out (in its
3 brief, not its declarations or Vaughn index), Plaintiffs have
4 stated they will publicize the information they receive. See Gov't
5 Reply at 8 (citing Costa Decl. Ex. 1, at 7-8). However, unlike
6 other cases in which courts have found privacy interests in
7 individuals' names or contact information, there is no reason aside
8 from speculation for concluding these individuals will be subjected
9 to "harassment," "embarrassment," "stigma," or other negative
10 consequences if their associations with this email are publicly
11 revealed. See Forest Serv., 524 F.3d at 1026; see also U.S. Dep't
12 of State v. Ray, 502 U.S. 164, 176 (1991) (concluding that
13 releasing the identities of individuals cooperating with a State
14 Department investigation "could subject them or their families to
15 embarrassment in their social and community relationships");
16 Prudential Locations LLC v. U.S. Dep't of Hous. & Urban Dev., 739
17 F.3d 424, 432 (9th Cir. 2013) (finding individuals who reported
18 violations of the Real Estate Settlement Procedures Act could
19 reasonably expect their names would remain anonymous based on HUD's
20 confidentiality policy); Lahr v. Nat'l Transp. Safety Bd., 569 F.3d
21 964, 975 (9th Cir. 2009) ("Releasing unredacted documents would
22 reveal publicly these eyewitnesses' involvement in a controversial
23 criminal investigation."). On the contrary, the investigation of
24 the Steelhead takes at the Searsville Dam is not hotly
25 controversial and is unlikely to subject any of the individuals
26 involved to harassment or embarrassment. Instead, the only obvious
27 consequence of disclosure is that Plaintiffs and interested members
28 of the public will be able "'shed light on an agency's performance

1 of its statutory duties' or otherwise let citizens know 'what their
2 government is up to.'" Dep't of Def., 510 U.S. at 497 (quoting
3 U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489
4 U.S. 749, 773 (1989)).

5 To be sure, there may well be some non-trivial privacy
6 interest implicated here. However the Court cannot conclude these
7 documents are categorically protected merely because they contain
8 names and contact information. See Yonemoto, 686 F.3d at 695-96
9 ("Disclosure of most of these records may indeed constitute a
10 nontrivial invasion of personal privacy, but the [Fisheries
11 Service] has yet to articulate why."). Yet that is the only basis
12 aside from speculation that the Fisheries Service has furnished.
13 As a result the Court ORDERS the Fisheries Service to supplement
14 the factual record within 30 days of the signature date of this
15 Order to enable the Court to more fully assess what, if any,
16 privacy interests are at stake. See id. at 696. The Court HOLDS
17 IN ABEYANCE the motion to summary judgment as to this document
18 until the record is supplemented and the Court determines if
19 additional filings or in camera review is necessary.

20 **2. Exemption (b)(5)**

21 Second, Plaintiffs argue that the Fisheries Service has failed
22 to adequately justify some of its withholdings under FOIA Exemption
23 (b)(5), which protects materials produced as part of the agency's
24 deliberative process or protected by attorney-client privilege.
25 Id. at (b)(5). The Fisheries Service has invoked this exception in
26 withholding 15 documents in part and another five documents in
27 their entirety.

28

1 Exemption (b)(5) applies to "inter-agency or intra-agency
2 memorandums or letters which would not be available by law to a
3 party other than an agency in litigation with the agency." 5
4 U.S.C. § 552(b)(6). As a result, the rule protects from disclosure
5 "those documents normally privileged in the civil discovery
6 context." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975).
7 There are two such privileges at issue here: attorney-client
8 privilege and the executive "deliberative process" privilege.
9 "(1) When legal advice of any kind is sought (2) from a
10 professional legal adviser in his or her capacity as such, (3) the
11 communications relating to that purpose, (4) made in confidence (5)
12 by the client, (6) are, at the client's instance, permanently
13 protected (7) from disclosure by the client or by the legal adviser
14 (8) unless the protection be waived." U.S. v. Martin, 278 F.3d
15 988, 999 (9th Cir. 2002). The privilege extends to agencies as
16 well to the extent the agency is consulting its attorney "'as would
17 any private party seeking advice to protect personal interest."
18 Ctr. for Bio. Diversity v. Office of Mgmt. & Budget, 625 F. Supp.
19 2d 885, 892 (N.D. Cal. 2009) (quoting Coastal States Gas Corp. v.
20 Dep't of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980)). To support
21 claims of attorney-client privilege, the agency must, in its Vaughn
22 index, "show that these documents involved the provision of
23 specifically legal advice or that they were intended to be
24 confidential and were kept confidential." Nat'l Resource Def.
25 Council v. U.S. Dep't of Def., 388 F. Supp. 2d 1086, 1104 (C.D.
26 Cal. 2005) (emphasis in original) (quotation omitted). The agency
27 fails to meet its burden if it uses boilerplate language and
28 makes "no effort . . . to tailor the explanation to the specific

1 document withheld" Wiener v. FBI, 943 F.2d 972, 978-79
2 (9th Cir. 1991).

3 Deliberative process privilege seeks "'to prevent injury to
4 the quality of agency decisions' by ensuring that the 'frank
5 discussion of legal or policy matters,' in writing, within the
6 agency, is not inhibited by public disclosure." Maricopa Audubon
7 Soc. v. U.S. Forest Serv., 108 F.3d 1089, 1092 (9th Cir. 1997)
8 (quoting Sears, 421 U.S. at 150-51). To fall within the
9 deliberative process privilege, the material withheld or redacted
10 must be "'predecisional' in nature and must also form part of the
11 agency's 'deliberative process.'" Id. at 1093 (quoting Sears, 421
12 U.S. at 151-52) (emphasis in original). Predecisional documents
13 are those "prepared in order to assist an agency decisionmaker in
14 arriving at his decision, and may include recommendations, draft
15 documents, proposals, suggestions, and other subjective documents
16 which reflect the personal opinions of the writer rather than the
17 policy of the agency." Assembly of State of Cal. v. U.S. Dep't of
18 Commerce, 968 F.2d 916, 920 (9th Cir. 1992) (quoting Formaldehyde
19 Inst. v. Dep't of Health & Human Servs., 889 F.2d 1118, 1122 (D.C.
20 Cir. 1989)) (internal citations and quotation marks omitted).
21 Documents falling within that definition are part of the agency's
22 "deliberative process" if disclosing those documents "would expose
23 an agency's decisionmaking process in such a way as to discourage
24 candid discussion within the agency and thereby undermine the
25 agency's ability to perform its functions." Id. (quoting
26 Formaldehyde, 889 F.2d at 1122).

27 Plaintiffs challenge the Fisheries Service's declarations and
28 Vaughn index, arguing that the Fisheries Service failed to comply

1 with its duty to provide Plaintiffs with "[a]ny reasonably
2 segregable portion of a record . . . after deletion of the portions
3 which are exempt" from disclosure under the FOIA. 5 U.S.C. §
4 552(b). Under this standard, "non-exempt portions of a document
5 must be disclosed unless they are inextricably intertwined with
6 exempt portions." Mead Data Ctr., Inc. v. U.S. Dep't of the Air
7 Force, 566 F.2d 242, 260 (D.C. Cir. 1977). The burden is on the
8 agency to establish that segregable portions of documents have been
9 disclosed, Pacific Fisheries, Inc. v. United States, 539 F.3d 1143,
10 1148 (9th Cir. 2008), and to meet this burden, the agency must
11 provide "'a detailed justification and not just conclusory
12 statements.'" ACLU of N. Cal. v. FBI, No. 12-cv-03728-SI, 2015 WL
13 678231, at *3 (N.D. Cal. Feb. 17, 2015) (quoting Charles v. Office
14 of the Armed Forces Med. Examiner, 979 F. Supp. 2d 35, 42 (D.D.C.
15 2013)). In so doing, "a blanket declaration that all facts are so
16 intertwined [as] to prevent disclosure under the FOIA does not
17 constitute a sufficient explanation of non-segregability."
18 Wilderness Soc'y v. U.S. Dep't of the Interior, 344 F. Supp. 2d 1,
19 19 (D.D.C. 2004).

20 The Fisheries Service has fallen well short of its burden as
21 to segregability. At issue are the four records, Record Nos. 595,
22 681, 682, and 684, which the Fisheries Service withheld in full
23 pursuant to the deliberative process privilege. The Fisheries
24 Service's declaration merely contains a blanket statement that
25 "[t]o the best of [FOIA Coordinator Ana Liza Malabanan's]
26 knowledge, to the extent . . . there is factual material . . . in
27 the withheld portions of the . . . documents listed in the Vaughn
28 Index, that information is not segregable from the withheld

1 portions." Malabanan Decl. ¶ 78. This is clearly insufficient.
2 See ACLU of N. Cal. v. FBI, No. 12-cv-03728-SI, 2014 WL 4629110, at
3 *9 (N.D. Cal. Sept. 16, 2014) (concluding a similarly conclusory
4 declaration was insufficient to carry the agency's burden on
5 segregability).

6 For similar reasons, the Fisheries Service's justification for
7 redactions and withholdings on attorney-client privilege grounds
8 are also insufficient. As in the segregability context, the agency
9 bears the burden of showing that the exemption applies, including
10 showing that "it supplied information to its lawyers with the
11 expectation of secrecy and the information was not known by or
12 disclosed to any third party." Elec. Frontier Found. v. CIA, No. C
13 09-3351 SBA, 2013 WL 5443048, at *16 (N.D. Cal. Sept. 30, 2013).
14 Also as in the segregability context, the Fisheries Service has
15 failed to comply with this rule, simply providing a blanket
16 conclusion that "to the best of" Ms. Malabanan's knowledge the
17 documents in the Vaughn index "have not been disclosed outside the
18 U.S. Government." Malabanan Decl. ¶ 79. Because the Fisheries
19 Service has made "no effort . . . to tailor the explanation to the
20 specific document withheld," it has not met its burden. See Elec.
21 Frontier, 2013 WL 5443048, at *16 (quoting Wiener, 943 F.2d at 978-
22 79).

23 Finally, Plaintiffs argue that the Fisheries Service
24 improperly withheld an attachment to an email chain between Gary
25 Stern and counsel for the National Oceanic and Atmospheric
26 Administration. See Malabanan Decl. ¶ 74. The attachment is "a
27 record of a telephone conversation between Gary Stern . . . and
28 Matt Stoecker ([from the organization] Beyond Searsville Dam),

1 being forwarded for legal advice" Id. Plaintiffs rightly
2 object to this conclusion, because "[a]ttachments which do not, by
3 their content, fall within the realm of the [attorney-client]
4 privilege cannot become privileged by merely attaching them to a
5 communication with the attorney." Pacamor Bearings, Inc. v.
6 Minebea Co., Ltd., 918 F. Supp. 491, 511 (D.N.H. 1996); see also
7 Hanson v. Wells Fargo Home Mortg., Inc., No. C13-0939JLR, 2013 WL
8 5674997, at *4 (W.D. Wash. Oct. 17, 2013) ("Documents attached to
9 or included in an attorney-client communication are not
10 automatically privileged, and the party asserting privilege must
11 prove that each attachment is protected by privilege.") (citing
12 O'Connor v. Boeing N. Am., Inc., 185 F.R.D. 272, 280 (C.D. Cal.
13 1999)). As it stands now, the Fisheries Service has not shown by
14 its description of the record that this attachment is likely to be
15 protected by the attorney-client privilege.

16 In light of these issues with the Fisheries Service's
17 submissions, the Court ORDERS the Fisheries Service to supplement
18 the record within 30 days of the signature date of this Order to
19 provide sufficient explanations for the non-segregability of the
20 records withheld in full under Exemption (b)(5) (with the exception
21 of those also withheld in full on the grounds of attorney-client
22 privilege, see Pacific Fisheries, Inc. v. U.S., 539 F.3d 1143, 1148
23 (9th Cir. 2008)), tailored explanations of whether the
24 confidentiality of records withheld on attorney-client privilege
25 grounds have been maintained, and a more detailed explanation of
26 why the record of Stern's phone conversation attached to Record No.
27 761 is protected by the attorney-client privilege. The Court HOLDS
28 IN ABEYANCE the motions for summary judgment as to these documents

1 until the record is supplemented and the Court determines if
2 additional filings or in camera review is necessary.

3 **C. Deadline Allegations**

4 The balance of the parties' submissions focuses on Plaintiffs'
5 allegations that the Fisheries Service and Fish and Wildlife
6 Service were tardy in responding to Plaintiffs' FOIA requests and
7 internal appeals. Further, Plaintiffs argue that the Fisheries
8 Service has a pattern and practice of late and incomplete
9 responses. Finally, Plaintiffs contend that the Fisheries Service
10 has deviated from Department of Commerce (of which the Fisheries
11 Service is a part) regulations and a prior ruling, Oregon Natural
12 Desert Association v. Gutierrez, 419 F. Supp. 2d 1284 (D. Or.
13 2006), addressing what "cutoff date" the agency may impose for its
14 searches.

15 The pattern and practice and cutoff date allegations are
16 repeated, with a fuller evidentiary record, in cross-motions for
17 summary judgment pending in the related case, Our Children's Earth
18 Foundation v. National Marine Fisheries Service, 14-4365 (N.D.
19 Cal.), and the Court will address them fully in a forthcoming order
20 in that case. For the purpose of this order, the Court addresses
21 only the first question -- whether declaratory judgment should
22 issue that the Fisheries Service and FWS violated the FOIA's
23 internal deadlines in responding to Plaintiffs' requests and
24 internal appeals.

25 **1. Declaratory Judgment**

26 Unless exceptional circumstances exist (in which case the
27 deadline is thirty working days), an agency must provide a
28 "determination" with respect to a FOIA request or internal appeal

1 within twenty working days of receipt. See 5 U.S.C. §
2 552(a)(6)(A)(i)-(ii). A "determination" need not be the full
3 production of documents, but at a minimum the agency must inform
4 the requester what documents it will produce and the exceptions it
5 will claim in withholding documents. See Citizens for
6 Responsibility & Ethics in Wash. v. Fed. Election Comm'n, 711 F.3d
7 180, 184 (D.C. Cir. 2013).

8 In adopting the FOIA, Congress was specifically concerned that
9 agencies would delay in responding to requests, and as a result "an
10 agency's failure to comply with the FOIA's time limits is, by
11 itself, a violation of the FOIA." Gilmore v. U.S. Dep't of Energy,
12 33 F. Supp. 2d 1184, 1187 (N.D. Cal. 1998); see also Long v. IRS,
13 693 F.2d 907, 910 (9th Cir. 1982) (concluding that an agency's
14 unreasonable delay in disclosing non-exempt documents violated the
15 FOIA and "courts have a duty to prevent those abuses"). As a
16 result, courts have found that entering declaratory judgment that
17 the agency violated the FOIA is appropriate when the agency has a
18 pattern and practice of violating these time limits, see Payne
19 Entertainment v. United States, 837 F.2d 486 (D.C. Cir. 1988), or
20 when the agency has violated the time limits in responding to a
21 particular set of requests, the agency's violations are consistent,
22 and they may recur. See S. Yuba River, 2008 WL 2523819, at *6.

23 The Fisheries Service does not dispute that it did not provide
24 a "determination" for Plaintiffs' FOIA requests or internal appeals
25 within either the twenty or thirty working day timeline provided in
26 the statute, nor could it. See Gov't Reply at 12 ("[The Fisheries
27 Service] does not dispute that it did not provide a full and final
28 'determination' on Plaintiffs' FOIA requests within 20 working

1 days."). On the contrary, the record is clear, undisputed, and
2 troubling. The Fisheries Service's determination on Plaintiffs'
3 first through fourth requests were, respectively, 295, 43, eight,
4 and 99 days overdue. Malabanan Decl. ¶¶ 23, 33, 39-40; ECF No. 44
5 ("Schumacher Decl.") ¶ 5, 8. Similarly, the Fisheries Service
6 responded to Plaintiffs' first internal appeal 24 days late, second
7 appeal 80 days late, and third appeal 82 days late. Malabanan
8 Decl. ¶¶ 25, 34, 41, Exs. 2, 3. As Congress recognized in enacting
9 the FOIA:

10 [i]nformation is often useful only if it is timely.
11 Thus, excessive delay by the agency in its response is
12 often tantamount to denial. It is the intent of this
13 bill that the affected agencies be required to respond to
inquiries and administrative appeals within specific time
limits.

14 Gilmore, 33 F. Supp. 2d at 1187 (quoting H. Rep. No. 876, 93d
15 Cong., 2d Sess. (1974)). In short, even though the Fisheries
16 Service does not take the FOIA's deadlines seriously, "[t]here can
17 be no doubt that Congress [did]." See id.

18 Nevertheless, the Fisheries Service argues, based on a recent
19 D.C. Circuit decision, CREW, that the only consequence that flows
20 from the agency's failure to respond within the statutory deadlines
21 is that a FOIA requester may file suit without being subject to the
22 ordinary requirement that he exhaust his administrative remedies.
23 See CREW, 711 F.3d at 189; Elec. Privacy Info. Ctr. v. Dep't of
24 Justice, 15 F. Supp. 3d 32, 41 (D.D.C. 2014) (finding that CREW
25 "makes clear that the impact of blowing the 20-day deadline relates
26 only to the requester's ability to get into court.'"). The Court
27 concurs with the CREW court's persuasive interpretation of the
28 statute. As a matter of statutory interpretation it is clear that

1 the only legal consequence that flows directly from an agency's
2 failure to provide a determination within the statutory time limits
3 is the waiver of the administrative exhaustion requirement.
4 However, that says nothing about whether or not, once a FOIA
5 requester is in court, the district court cannot exercise its
6 discretionary authority to issue a judgment declaring that the
7 agency has, in fact, violated the statutory timeline. See Payne,
8 837 F.2d at 494 ("The FOIA imposes no limits on courts' equitable
9 powers in enforcing its terms" and "unreasonable delays in
10 disclosing non-exempt documents violate the intent and purpose of
11 the FOIA, and the courts have a duty to prevent [such] abuses.").

12 The Court finds declaratory judgment is appropriate here. As
13 the Fisheries Service repeatedly reminds the court, issuing a
14 declaratory judgment is discretionary. See Olagues v. Russoniello,
15 770 F.2d 791, 803 (9th Cir. 1985). However, as the Ninth Circuit
16 has explained, "[a] court declaration delineates important rights
17 and responsibilities and can be 'a message not only to the parties
18 but also to the public and has significant educational and lasting
19 importance.'" Natural Res. Def. Council, Inc. v. EPA, 966 F.2d
20 1292, 1299 (9th Cir. 1992) (quoting Bilbrey ex rel. Bilbrey v.
21 Brown, 738 F.2d 1462, 1471 (9th Cir. 1984)). Here, both the
22 statutory deadlines and their violation are clear, and the
23 repeated, routine violation of these deadlines by agencies has been
24 a continual source of concern for Congress. As one report put it,
25 "many agencies have failed process FOIA requests within the
26 deadlines required by law. These delays in responding to FOIA
27 requests continue as one of the most significant FOIA problems."
28 Gilmore, 33 F. Supp. 2d at 1187 (quoting H. Rep. No. 794, 104th

1 Cong., 2d Sess. (1996)). Although the Court and many others have
2 recognized that agencies' resources are heavily taxed by the
3 quantity and depth of FOIA requests, that does not grant the agency
4 carte blanche to repeatedly violate congressionally mandated
5 deadlines. On the contrary, "[the Fisheries Service and Fish and
6 Wildlife Service's] failure to comply with the FOIA's time limits
7 is, by itself, a violation of the FOIA" Id.; see also
8 CREW, 711 F.3d at 189 ("We are intimately familiar with the
9 difficulty that FOIA requests pose for executive and independent
10 agencies.").

11 This is not to say that a declaratory judgment should always
12 issue when the agency violates these time limits. On the contrary,
13 the issuance of declaratory judgments must always be guided by
14 "whether a judgment will clarify and settle the legal relations at
15 issue and whether it will afford relief from the uncertainty and
16 controversy giving rise to the proceedings." Nat'l Resources Def.
17 Council, 966 F.2d at 1299. However under these and similar
18 circumstances, where the agency has repeatedly and substantially
19 violated the time limits, and it is possible the violations will
20 recur with respect to the same requesters, declaratory judgment is
21 appropriate. See S. Yuba River, 2008 WL 2523819, at *6.

22 As a result, Plaintiffs' request for declaratory judgment that
23 the Fisheries Service failed to respond to Plaintiffs' FOIA
24 requests and internal appeals within the statutory time limits is
25 GRANTED.

26 **D. Claims Against FWS**

27 The only claim Plaintiffs appear to press against FWS is that,
28 after receiving a referral of potentially relevant documents from

1 the Fisheries Service, FWS failed to process the referred documents
2 within the statutory time limits.

3 The Fisheries Service's referral of documents to FWS is
4 governed by the Department of Commerce's regulations for FOIA
5 referrals. In the relevant part, the regulations state that "[i]f
6 a component receives a request for a record in its possession in
7 which another Federal agency subject to the FOIA has the primary
8 interest, the component shall refer the record to that agency for
9 direct response to the requester." 15 C.F.R. § 4.5(b). The FOIA
10 provides that the need for consultation is an "unusual
11 circumstance," and states that "consultation . . . shall be
12 conducted with all practicable speed" 5 U.S.C.
13 552(a)(6)(B)(iii).

14 Based on the reference to "all practicable speed," FWS argues
15 that the FOIA's statutory timelines do not apply to referrals for
16 consultation. This appears to be a novel argument, and the Court
17 need not decide it. Instead, regardless of whether the referral is
18 governed by the general provision that no notice citing unusual
19 circumstances "shall specify a date that would result in an
20 extension for more than ten working days . . . ," 5 U.S.C. §
21 552(a)(6)(B)(i), or the specific term that agency consultations
22 shall be conducted with "all practicable speed," declaratory
23 judgment against FWS would be inappropriate under these
24 circumstances.

25 Unlike the Fisheries Service, there is no allegation that FWS
26 repeatedly violated the FOIA's time limits with respect to
27 Plaintiffs' requests. Furthermore, FWS is not named as a defendant
28 in the related case, and there is no indication that Plaintiffs

1 have made repeated FOIA requests to FWS (or that Plaintiffs'
2 requests have been repeatedly referred to FWS) or that any
3 violations of the FOIA's time limits are likely to recur with
4 respect to Plaintiffs. As a result, the Court finds that issuing a
5 declaratory judgment against FWS would neither "clarify and settle
6 the legal relations at issue [nor] . . . afford relief from the
7 uncertainty and controversy giving rise to the proceedings." See
8 Nat'l Resources Def. Council, 966 F.2d at 1299.

9 As a result, Plaintiffs' request for declaratory judgment
10 against the Fish and Wildlife Service is DENIED. Furthermore,
11 because Plaintiffs do not appear to challenge any of the Fish and
12 Wildlife Service's withholdings or redactions under the FOIA,
13 summary judgment is GRANTED in the Service's favor on those issues.

14

15 **V. CONCLUSION**

16 For the reasons set forth above, the cross-motions for summary
17 judgment are GRANTED IN PART and DENIED IN PART. The Court will
18 HOLD IN ABEYANCE the motions regarding the Fisheries Service's
19 exemption claims pending the supplementation of the record ordered
20 within thirty (30) days of the signature date of this order.

21

22 IT IS SO ORDERED

23

24 Dated: March 30, 2015

25


UNITED STATES DISTRICT JUDGE

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