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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ECOLOGICAL RIGHTS FOUNDATION,
Plaintiff,
v.
FEDERAL EMERGENCY
MANAGEMENT AGENCY,
Defendant.

Case No. 16-cv-05254-MEJ

**ORDER RE: CROSS-MOTIONS FOR
SUMMARY JUDGMENT & MOTION
FOR DISCOVERY**

Re: Dkt. Nos. 42, 46, 67

INTRODUCTION

Pending before the Court are the parties’ Cross-Motions for Summary Judgment regarding three Freedom of Information Act (FOIA) requests. EcoRights Mot., Dkt. No. 42; FEMA Mot., Dkt. No. 46. Plaintiff Ecological Rights Foundation (EcoRights) is an environmental advocate seeking summary judgment on its claims that Defendant Federal Emergency Management Agency (FEMA) failed to respond to EcoRights’ FOIA requests for documents. FEMA argues it has complied with the law. *See* FEMA Mot. EcoRights also requests the Court grant discovery (Pl.’s Suppl. Stmt., Dkt. No. 67), which FEMA opposes (FEMA Opp’n, Dkt. No. 71). The Court finds these matters appropriate for disposition without oral argument. *See* Fed. R. Civ. P. 78; Civ. L.R. 7-1(b). For the reasons set forth below, the Court **GRANTS IN PART** and **DENIES IN PART** both Cross-Motions for Summary Judgment and **DENIES** EcoRights’ request for discovery.

BACKGROUND

EcoRights propounded three FOIA requests to FEMA to obtain information regarding FEMA’s compliance with the Endangered Species Act (ESA) during the course of FEMA’s implementation of the National Flood Insurance Program (NFIP) in California. *See* Second Am. Compl. (SAC), Dkt. No. 43. FEMA received EcoRights’ first FOIA request on April 8, 2016; EcoRights’ second FOIA request on October 17, 2016; and EcoRights’ third FOIA request on October 19, 2016. EcoRights Mot. at 1.

1 In response to these requests, FEMA produced over 6,000 pages of documents to
2 EcoRights. *See* First Hunt Decl. ¶ 5, Dkt. No. 68. FEMA’s production included over 2,000
3 documents redacted in whole or in part pursuant to the deliberative process standard, 5 U.S.C. §
4 552(b)(5) (Exemption 5), and to protect personal private information exempt from disclosure, 5
5 U.S.C. § 552(b)(6) (Exemption 6). *Id.* To justify redacting these documents, FEMA served a
6 *Vaughn* Index consisting of 59 entries.¹ First *Vaughn* Index, Dkt. No. 47-14.

7 On January 19, 2017, the parties negotiated a partial settlement, whereby FEMA agreed to
8 provide unique identifier codes for each of FEMA’s Exemption 6 redactions that appeared in
9 FEMA’s document production in response to the October 19 FOIA request. Pl.’s Suppl. Stmt. at
10 5; *see* Dkt. No. 33 (Minute Entry re: Settlement).

11 The Court thereafter reviewed the First *Vaughn* Index and ordered FEMA to file a revised
12 index that referred to the new Bates-labeled production with particularized descriptions sufficient
13 to show the exceptions FEMA invoked applied to each document withheld or redacted. May 11,
14 2017 Order ¶ 4, Dkt. No. 50. The Court ordered the parties to meet and confer to discuss any
15 outstanding issues, including any disputes stemming from FEMA’s Second *Vaughn* Index. June
16 13, 2017 Order, Dkt. No. 54; *see* Second *Vaughn* Index, Dkt. No. 56-1. The parties met on June
17 19, 2017 but were unable to meaningfully address continued issues with the Second *Vaughn* Index
18 because EcoRights had only received the revised document after business hours on June 15, 2017.
19 First Hunt Decl. ¶ 7.

20 The Court again ordered the parties meet and confer in person to discuss deficiencies in the
21 Second *Vaughn* Index and issues related to “segregability,” pages EcoRights believes likely
22 contain segregable information that FEMA nonetheless redacted. June 28, 2017 Order, Dkt. No.
23 60. The parties met and conferred on July 13, 2017. First Hunt Decl. ¶ 9.

24 At the July 13, 2017 meet and confer session, EcoRights noted that FEMA had failed to
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27 ¹ The term “*Vaughn* Index” originates from *Vaughn v. Rosen*, wherein the court rejected an
28 agency’s conclusory affidavit stating that requested FOIA documents were subject to exemption.
484 F.2d 820, 828 (D.C. Cir. 1973).

1 produce by July 7, 2017 a complete, corrected set of documents responsive to EcoRights FOIA
2 requests, despite its promise to do so. *Id.* ¶ 10. As a result, the parties again could not fully
3 address many of the issues related to the sufficiency of the Second *Vaughn* Index, as well as the
4 segregability issue. *Id.*

5 EcoRights maintained the Second *Vaughn* Index did not address the problems the Court
6 had previously identified. *See* Pl.’s Suppl. Stmt. at 1. On the contrary, the Second *Vaughn* Index
7 indicated FEMA had withheld documents that were not subject to a FOIA exemption; for
8 example, documents that its sister agency, the National Marine Fisheries Service (NMFS), already
9 publicly published on the government website “FOIA On-line.” *Id.* at 2. FEMA produced a new
10 set of corrected documents on July 20, 2017. First Hunt Decl. ¶ 11.

11 On July 26, 2017, the Court ordered the parties to file a status report identifying “any
12 remaining issues . . . and their proposed means for resolving these issues” and encouraging the
13 parties to continue to meet and confer to resolve outstanding disputes. July 26, 2017 Order, Dkt.
14 No. 62. The parties met and conferred again on August 3, 2017 in an attempt to resolve disputes
15 related to the inadequacies of the Second *Vaughn* Index. First Hunt Decl. ¶¶ 11-12. EcoRights
16 contended the Second *Vaughn* Index was insufficient because it did not address the basis for
17 redacting or withholding a significant number of documents under Exemption 5 and because it
18 otherwise provided inadequate justifications. Final Joint Status Report at 10, Dkt. No. 63. FEMA
19 agreed to “correct certain errors” and provide a “final corrected *Vaughn* Index conforming to the
20 final corrected Bates-stamped version of the releases promptly.” *Id.*

21 On August 14, 2017, FEMA produced a Third *Vaughn* Index. First Hunt Decl. ¶ 13; *see*
22 Third *Vaughn* Index, Dkt. Nos. 68-1 & 69-1.² EcoRights contends the Third *Vaughn* Index does
23 not remedy the significant problems contained within the Second *Vaughn* Index; the only
24 difference is that the Third *Vaughn* Index adds seven entries and expands numerous entries to

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² EcoRights twice filed the Third *Vaughn* Index; however, the two versions are not substantively different. *Compare* Dkt. No. 68-1 with Dkt. No. 69-1. For purposes of this Order, citations to the Third *Vaughn* Index refer to both Docket Nos. 68-1 and 69-1. Both documents also contain EcoRights’ objections to FEMA’s justifications.

1 address redactions on pages that it had not included in the First or Second *Vaughn* Indices. First
2 Hunt Decl. ¶ 13.

3 On August 18, 2017, EcoRights moved for discovery, including deposing appropriate
4 witnesses to determine how FEMA segregated the release of any purely factual material from its
5 FOIA responses. Pl.’s Suppl. Stmt. at 4. FEMA opposes this request. *See* FEMA Opp’n.

6 LEGAL STANDARD

7 FOIA’s “core purpose” is to inform citizens about “what their government is up to.”
8 *Yonemoto v. Dep’t of Veterans Affairs*, 686 F.3d 681, 687 (9th Cir. 2012), *overruled on other*
9 *grounds by Animal Legal Defense Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987 (9th Cir.
10 2016) (internal quotation marks omitted). This purpose is accomplished by “permit[ting] access to
11 official information long shielded unnecessarily from public view and attempt[ing] to create a
12 judicially enforceable public right to secure such information from possibly unwilling official
13 hands.” *Environmental Protection Agency v. Mink*, 410 U.S. 73, 80 (1973), *superseded on other*
14 *grounds by statute as recognized in Islamic Shura Council of S. Cal. v. F.B.I.*, 635 F.3d 1160,
15 1166 (9th Cir. 2011). Such access “ensure[s] an informed citizenry, vital to the functioning of a
16 democratic society, needed to check against corruption and to hold the governors accountable to
17 the governed.” *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (internal quotation
18 marks omitted). Congress enacted FOIA to “clos[e] the loopholes which allow agencies to deny
19 legitimate information to the public.” *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 150
20 (1989) (internal quotation marks omitted).

21 At the same time, FOIA contemplates that some information can legitimately be kept from
22 the public through the invocation of nine Exemptions to disclosure. *See* 5 U.S.C. § 552(b)(1)-(9).
23 “These limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the
24 dominant objective of the Act[.]” *Department of Interior v. Klamath Water Users Protective*
25 *Ass’n*, 532 U.S. 1, 7-8 (2001) (internal quotation marks and edits omitted). “Consistently with this
26 purpose, as well as the plain language of the Act, the strong presumption in favor of disclosure
27 places the burden on the agency to justify the withholding of any requested documents.” *U.S.*
28 *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991); *see Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir.

1 1987) (agency seeking to withhold information has burden of proving the information falls under
2 the claimed Exemption).

3 “Most FOIA cases are resolved by the district court on summary judgment, with the
4 district court entering judgment as a matter of law.” *Animal Legal*, 836 F.3d at 989 (citation
5 omitted). To carry their burden on summary judgment, “agencies are typically required to submit
6 an index and ‘detailed public affidavits’ that, together, ‘identify[] the documents withheld, the
7 FOIA exemptions claimed, and a particularized explanation of why each document falls within the
8 claimed exemption.’” *Yonemoto*, 686 F.3d at 688 (edits in original) (quoting *Lion Raisins v. Dep’t*
9 *of Agric.*, 354 F.3d 1072, 1082 (9th Cir. 2004), *overruled on other grounds by Animal Legal*, 836
10 F.3d). “These submissions—commonly referred to as a *Vaughn* index—must be from ‘affiants
11 who are knowledgeable about the information sought’ and ‘detailed enough to allow a court to
12 make an independent assessment of the government’s claim of exemption.’” *Id.* (footnote and
13 edits omitted) (quoting *Lion Raisins*, 354 F.3d at 1079; citing 5 U.S.C. § 552(a)(4)(B)). While a
14 *Vaughn* index need not “disclose facts that would undermine the very purpose of its withholding”
15 but “it should reveal as much detail as possible as to the nature of the document, without actually
16 disclosing information that deserves protection.” *Id.* (internal quotation marks and citation
17 omitted). Courts “accord substantial weight to an agency’s declarations regarding the application
18 of a FOIA exemption.” *Shannahan v. I.R.S.*, 672 F.3d 1142, 1148 (9th Cir. 2012) (citing *Hunt v.*
19 *C.I.A.*, 981 F.2d 1116, 1119-20 (9th Cir. 1992)). However, while

20 the [agency’s] reasons are entitled to deference, the [agency’s]
21 declarations must still describe the justifications for nondisclosure
22 with reasonably specific detail, demonstrate that the information
23 withheld logically falls within the claimed exemptions, and show
that the justifications are not controverted by contrary evidence in
the record or by evidence of [the agency’s] bad faith. The [agency]
must do more than show simply that it has acted in good faith.

24 *Berman v. CIA*, 501 F.3d 1136, 1140 (9th Cir. 2007) (internal quotation marks and citations
25 omitted); *see also Kamman v. IRS*, 56 F.3d 46, 48 (9th Cir. 1995) (“[T]he government ‘may not
26 rely upon conclusory and generalized allegations of exemptions.’” (quoting *Church of Scientology*
27 *v. Dep’t of the Army*, 611 F.2d 738, 742 (9th Cir. 1980))). Moreover, “[a] basic policy of FOIA is
28 to ensure that Congress and not administrative agencies determines what information is

1 confidential.” *Lessner v. U.S. Dep’t of Commerce*, 827 F.2d 1333, 1335 (9th Cir. 1987). “As
2 such, courts do not defer to a federal agency’s determination that the requested information falls
3 under a particular FOIA exemption.” *Carlson v. U.S. Postal Serv.*, 504 F.3d 1123, 1127 (9th Cir.
4 2007).

5 DISCUSSION

6 EcoRights’ first FOIA request seeks documents addressing ESA Section 7 consultations,
7 as well as ESA Section 10, 16 U.S.C. § 1539, habitat conservation plans or permits that have been
8 initiated by or proposed to FEMA’s implementation of the NFIP in California. EcoRights’ second
9 FOIA request seeks documents responsive to the first request coming into FEMA’s possession
10 after the date of that request, that is, April 8, 2016. EcoRights’ third FOIA request targets
11 documents relating to ESA Section 7 consultations about certain Letters of Map Amendments
12 (LOMAs) issued for properties in Monterey Country, California through the NFIP.

13 EcoRights raises five arguments: (1) FEMA improperly withheld from disclosure
14 information pursuant to FOIA Exemption 5; (2) FEMA has improperly withheld from disclosure
15 information pursuant to FOIA Exemption 6; (3) FEMA’s use of a date-of-search cut-off is
16 inappropriate; (4) FEMA violated FOIA in releasing documents after the statutory deadline for
17 doing so had passed; and (5) FEMA improperly withheld segregable material. EcoRights Mot. at
18 8-20. EcoRights also requests the Court allow discovery so EcoRights can determine what FEMA
19 did to segregate and release factual material from its FOIA response. Pl.’s Suppl. Stmt. at 4.

20 A. FOIA Exemption 5

21 Exemption 5 protects “inter-agency or intra-agency memorandums or letters that would not
22 be available by law to a party other than an agency in litigation with the agency[.]” 5 U.S.C.
23 552(b)(5). “The exemption is cast in terms of discovery law, . . . and entitles an agency to
24 withhold from the public documents which a private party could not discover in litigation with the
25 agency. . . . Exemption 5 thus covers the attorney-client privilege, the attorney work product
26 privilege, and the executive deliberative process privilege. . . .” *Maricopa Audubon Soc’y v. U.S.*
27 *Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997) (internal quotation marks and citations omitted).
28 FEMA withheld documents pursuant to these three privileges.

1 1. Deliberative Process

2 The deliberative process privilege’s ultimate aim is to prevent injury to the quality of
3 agency decisions. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). The purpose of the
4 privilege is “to allow agencies [to] freely [] explore possibilities, engage in internal debates, or
5 play devil’s advocate without fear of public scrutiny.” *Assembly of Cal. v. U.S. Dep’t of*
6 *Commerce*, 968 F.2d 916, 920 (9th Cir. 1992). The fact that a document may be used by the
7 agency in the future is insufficient justification. *Id.* at 921.

8 To withhold a document under the deliberative process privilege, the agency must show
9 the document is both predecisional and deliberative. *National Wildlife Fed’n v. U.S. Forest Serv.*,
10 861 F.2d 1114, 1117 (9th Cir. 1988). A document is “predecisional” if it was “prepared in order
11 to assist an agency decisionmaker in arriving at his decision.” *The Renegotiation Bd. v. Grumman*
12 *Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975). Predecisional documents may include
13 “recommendations, draft documents, proposals, suggestions, and other subjective documents
14 which reflect the personal opinions of the writer rather than the policy of the agency.” *Assembly*
15 *of Cal.*, 968 F.2d at 920 (citation omitted). A predecisional document is deliberative if “the
16 disclosure of the materials would expose an agency’s decision making process in such a way as to
17 discourage candid discussion within the agency and thereby undermine the agency’s ability to
18 perform its functions.” *Id.* (brackets and citation omitted); *see also Maricopa Audubon Soc’y*, 108
19 F.3d at 1093 (same).

20 FEMA has not sufficiently justified its invocation of the deliberative process exemption.
21 First, FEMA’s Third *Vaughn* Index includes numerous entries that refer to documents that
22 postdate a letter dated September 23, 2014. First Hunt Decl. ¶ 9. The September 23 letter is a
23 decision document, reciting FEMA’s version of what FEMA and FWS/NMFS had agreed upon
24 concerning ESA § 7 consultations. *See* Hudak Decl., Ex. 10 (“[W]e believe that by reaching
25 agreement on these key items, FEMA and the Services have paved the way for further positive
26 coordination between our offices as we head toward a formal Section 7 consultation on the
27 implementation of the NFIP.”), Dkt. No. 47. The September 23 letter was provided to EcoRights
28 unredacted in a separate FOIA request between EcoRights and NMFS. *Id.* ¶ 11. In its April 13,

1 2017 release, FEMA released to EcoRight its own copy of the September 23 letter, which was
2 heavily redacted pursuant to the deliberative process privilege. *See id.*, Ex. 12 (redacted
3 September 23 letter). FEMA submitted an unredacted copy of the September 23 letter in support
4 of its Cross-Motion for Summary Judgment. *Id.*, Ex. 10.

5 EcoRights contends documents discussing means for implementing this policy cannot be
6 “pre-decisional” and constitute the giving of advice in the decision making process. First Hunt
7 Decl. ¶ 9. Indeed, documents that postdate the September 23, 2014 letter could well explain how
8 that decision was to be implemented. In other words, the decision that FEMA references in its
9 Third *Vaughn* Index appears to have already occurred, and the referenced documents reflect
10 disputes with NFMS/FWS over whether those decisions were appropriate. These documents
11 cannot be considered to be part of the deliberative process in advance of a particular decision.
12 “[T]he purpose of the deliberative process privilege is to protect the quality of an agency’s
13 decision; revealing ‘communications made after the decision and designed to explain it’ do not
14 affect a decision’s quality.” *Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964, 981 (9th Cir. 2009)
15 (quoting *Sears*, 421 U.S. at 152).

16 Second, FEMA’s Third *Vaughn* Index contains numerous inconsistencies where FEMA
17 produced identical documents in forms that are completely unredacted, partially redacted, and/or
18 completely redacted. To analyze the issues raised by FEMA’s Third *Vaughn* Index, the Court
19 considered FEMA’s most recent production of documents to date, lodged by EcoRights. *See* Pl.’s
20 Notice of Lodging, Dkt. No. 70. Using the lodged documents, the Court compared FEMA’s Third
21 *Vaughn* Index justifications to multiple redacted and unredacted documents. To illustrate,
22 documents at Bates range 824-830 also appear at Bates range 1935-1946. FEMA redacted in full
23 Bates range 824-830 but only partially redacted Bates range 1935-1946. *Compare* Third *Vaughn*
24 Index, Bates Nos. 824-830 *with id.*, Bates Nos. 1935-1946. An examination of the unredacted
25 copies shows FEMA asserts the deliberative process privilege over documents that do not contain
26 advice to aid agency deliberations. Rather, these documents include a general overview of the
27 NFIP program, and an email regarding the open-ended process of revision of NFIP regulations and
28 interrelated discussions about whether FEMA should consult with the FWS/NMFS under the ESA.

1 Third, FEMA incorrectly applies the deliberative process privilege to documents
 2 concerning ongoing considerations about what agencies should do with broad regulatory authority.
 3 The documents at Bates range 1926-1931, identified as “General Responses to NMFS
 4 Comments,” appear to be revisions of NFIP regulations and interrelated discussions about whether
 5 FEMA should consult with the FWS/NMFS under the ESA. The deliberative process must be
 6 limited to clearly identified decisions, rather than ongoing considerations of what to do with broad
 7 regulatory authority. *See Assembly of Cal.*, 968 F.2d at 921. Otherwise, the privilege would be
 8 boundless, as “[a]ny memorandum always will be ‘predecisional’ if referenced to a decision that
 9 possibly may be made at some undisclosed time in the future.” *Id.* As such, these generalities
 10 about ongoing discussions among and between agencies regarding FEMA’s broad regulatory
 11 authority and what FEMA may do with it are not pre-decisional.

12 Fourth, FEMA also seeks to redact email correspondence dating July 30, 2015 through
 13 October 6, 2015 between Michael Grimm and NMFS relating to a “possible consultation under the
 14 Endangered Species Act concerning such changes.” Third *Vaughn* Index, Bates Nos. 1-6, 8-9.
 15 Based on the dates and content contained in these emails, the documents appear to be identical to
 16 those Judge Ryu already found did not satisfy the deliberative process privilege.³ “Exemption 5
 17 does not protect . . . communications that promulgate or implement an established policy of an
 18 agency.” *Ecological Rights Found.*, 2017 WL 24859, at *14 (quoting *Brinton v. Dep’t of State*,

19
 20 ³ FEMA withheld documents similar in nature to these in *Ecological Rights Foundation v. FEMA*,
 21 2017 WL 24859 (N.D. Cal. Jan. 3, 2017). Presiding over that case, Judge Ryu found those
 22 documents were not subject to the deliberative process privilege. *Id.* at *3-5; *see* First Hunt Decl.
 23 ¶ 9. In that case, FEMA requested the return of numerous emails exempt from disclosure pursuant
 24 to the deliberative process privilege. *Ecological Rights Found.*, 2017 WL 24859, at *14. FEMA
 25 claimed it inadvertently produced the documents to EcoRights pursuant to a large FOIA request
 26 for “all documents addressing Endangered Species Act section 7 consultations that have been
 27 initiated or proposed pertaining to the implementation of the National Flood Insurance Program in
 28 California.” *Id.* at *1. The emails, dated July 6, 2015 through August 25, 2015, were from
 FEMA’s Director of Office of Protected Resources Donna S. Wieting to Michael Grimm, NMFS’s
 Acting Assistant Administrator for Mitigation; they concerned whether FEMA is legally obligated
 to engage in a section 7(a)(2) consultation with NMFS pursuant to the Endangered Species Act as
 part of FEMA’s rulemaking process regarding the NFIP. *Id.* at *2. That court refused to return
 the documents to FEMA finding the emails “did not appear to be predecisional, because the letters
 convey each agency’s official policy to the other agency.” *Id.* at *4.

1 636 F.2d 600, 605 (D.C. Cir. 1980)).

2 FEMA's assertion of deliberative process privilege over Bates ranges 1-6 and 8-9 is further
3 undermined by the fact that NMFS and FWS did not consider these documents to be subject to
4 that privilege. *See* First Hunt Decl., Ex. A at 2. In a separate FOIA request by EcoRights to
5 NMFS, NMFS provided EcoRights with copies of documents concerning a conflict between
6 FEMA and NMFS over FEMA's ESA § 7 consultation duties in conjunction with FEMA's NFIP.
7 *See* Third *Vaughn* Index, Bates No. 1-6, 8-9. NMFS found these documents not to be protected
8 under the deliberative process, and provided unredacted copies of Bates page 2 while FWS
9 provided unredacted copies of Bates ranges 3-4. *Id.* This shows NMFS and FWS found that the
10 documents should not be withheld as deliberative process. FEMA offers no reason why that
11 production was improper and no reason to find these same documents are now subject to the
12 deliberative process privilege.

13 Lastly, FEMA fails to explain how disclosure would expose FEMA's decision-making
14 process so as to discourage candid discussion. FEMA also does not provide any justification for
15 how the agency would be harmed by disclosure as required by the FOIA Improvement Act of
16 2016. 5 U.S.C. § 552(a)(8)(A)(i). Absent a showing of foreseeable harm to an interest protected
17 by the deliberative process exemption, the documents must be disclosed. In failing to provide
18 basic information about the deliberative process at issue and the role played by each specific
19 document, FEMA does not meet its burden of supporting its withholdings with detailed
20 information pursuant to the deliberative process privilege.

21 2. Attorney-Client Privilege

22 The attorney-client privilege protects from discovery "confidential communications
23 between attorneys and clients, which are made for the purpose of giving legal advice." *United*
24 *States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011). To invoke the attorney-client privilege, the
25 party seeking protection must establish the following elements: (1) legal advice of any kind is
26 sought, (2) from a professional legal adviser in his or her capacity as such, (3) the communications
27 relating to that purpose, (4) made in confidence (5) by the client, (6) are at the client's instance,
28 permanently protected (7) from disclosure by the client or by the legal adviser, (8) unless the

1 protection be waived. *United States v. Martin*, 278 F.3d 988, 989 (9th Cir. 2002). The fact that a
2 person is a lawyer does not make all communications with that person privileged. *United States v.*
3 *Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996). “Because it impedes full and free discovery of the truth,
4 the attorney-client privilege is strictly construed.” *Weil v. Inv./Indicators, Research & Mgmt.,*
5 *Inc.*, 647 F.2d 18, 24 (9th Cir. 1981).

6 FEMA fails to meet its burden of showing the attorney-client privilege was properly
7 invoked. While some of the exemption justifications in the Third *Vaughn* Index mention
8 attorneys’ names, the entries contain insufficient information to reasonably support a conclusion
9 that these documents contain legal advice or could reveal communications of a confidential nature.
10 *See e.g.*, Third *Vaughn* Index, Bates Nos. 1-6, 8-9. For example, FEMA asserts the attorney-client
11 privilege for emails that appear at Bates ranges 1-6 and 8-9; however, FEMA provides no basis for
12 the Court to determine that the withheld information was in fact related to the giving or receiving
13 of legal advice. *See id.* FEMA merely recites boilerplate attorney-client privilege elements to
14 justify the withholdings. *See, e.g., id.* (“[T]he attorney-client privilege protects confidential
15 communications between an attorney and his client relating to a legal matter for which the client
16 has sought professional advice. It applies to facts divulged by a client to his attorney, and
17 encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those
18 facts, as well as communications between attorneys that reflect client-supplied information. The
19 attorney-client privilege is not limited to the context of the litigation.”). FEMA cannot meet its
20 burden through its use of boilerplate language where “[n]o effort is made to tailor the explanation
21 to the specific document withheld.” *Wiener v. F.B.I.*, 943 F.2d 972, 978-979 (9th Cir. 1991).

22 FEMA also asserts attorney-client privilege for Bates ranges 147-153. Once again, FEMA
23 provides a boilerplate recitation of the elements of attorney-client privilege and does not provide
24 necessary information to ascertain that the withheld information reflected the giving or receiving
25 of legal advice. *See, e.g., id.*, Bates Nos. 147-153 (“[T]he attorney-client privilege protects
26 confidential communications between an attorney and his client relating to a legal matter for
27 which the client has sought professional advice. It applies to facts divulged by a client to his
28 attorney, and encompasses any opinions by an attorney to this client based upon and thus

1 reflecting, those facts, as well as communications between attorneys that reflect client-supplied
2 information. The attorney-client privilege is not limited to the context of litigation.”). In its
3 Objections to FEMA’s Third *Vaughn* Index, EcoRights states FEMA’s assertion of attorney-client
4 privilege is further undermined by the fact that EcoRights requested and received from NMFS
5 unredacted copies of the exact same pages FEMA now attempts to withhold subject to the
6 attorney-client privilege. *Id.*, Bates Nos. 147-153. This shows that NMFS believed the documents
7 are not exempt under attorney-client privilege. FEMA offers no basis to find the NMFS’s
8 production was improper so as to preclude production here.

9 In short, FEMA’s justifications for invoking the attorney-client privilege are insufficient,
10 as they fail to identify how a lawyer is involved or to what extent the documents contain legal
11 advice. ““These documents might well contain legal advice and confidential information, but
12 [FEMA] does not say so.”” *National Res. Def. Council v. U.S. Dep’t of Defense Council*, 388 F.
13 Supp. 2d 1086, 1104 (C.D. Cal. 2005) (quoting *Judicial Watch, Inc. v. U.S. Postal Serv.*, 297 F.
14 Supp. 2d 252, 267 (D.D.C. 2004)). Despite having three opportunities to do so, FEMA has not
15 met its burden of establishing the attorney-client privilege was prepared by an attorney or provided
16 to an attorney for the purposes of legal advice and remains confidential.

17 3. Attorney Work Product

18 The attorney work product privilege of Exemption 5 “clearly applies to memoranda
19 prepared by an attorney in contemplation of litigation which set forth the attorney’s theory of the
20 case and his litigation strategy.” *Sears*, 421 U.S. at 154 (1975) (citations omitted). The doctrine
21 aims to balance the “promotion of an attorney’s preparation in representing a client” and
22 “society’s general interest in revealing all true and material facts to the resolution of a dispute.” *In*
23 *Re Seagate Tech., LLC*, 497 F.3d 1360, 1375 (Fed. Cir. 2007), *abrogated on other grounds by*
24 *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016) (internal quotation marks and
25 citation omitted). If a document is covered by the attorney work-product privilege, the
26 government need not segregate and disclose its factual contents. *Maricopa Audubon Soc’y*, 108
27 F.3d at 1092.

28 FEMA asserts attorney work product protection with a boilerplate recitation of the

1 exemption. *See* Third *Vaughn* Index, Bates Nos. 1-6, 8-9 (“[T]he attorney work-product privilege
2 protects documents and other memoranda prepared by an attorney in contemplation of
3 litigation.”). FEMA cannot satisfy its burden of proof by relying on a mere recitation of the
4 elements of the attorney work product doctrine. *See Coastal States Gas Corp.*, 617 F.2d at 865
5 (“[i]f an agency were entitled to withhold any document prepared any person in the Government
6 with a law degree simply because litigation might someday occur, the policies of FOIA would be
7 largely defeated.”). FEMA therefore improperly asserts the attorney work product privilege.

8 4. Summary

9 For the foregoing reasons, the Court **GRANTS** EcoRights’ Motion for Summary Judgment
10 and **DENIES** FEMA’s Cross-Motion regarding Exemption 5. FEMA shall produce all documents
11 redacted and withheld pursuant to these exemptions within two weeks of the date of this Order.

12 **B. FOIA Exemption 6**

13 Exemption 6 protects “personnel and medical files and similar files the disclosure of which
14 would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). In
15 evaluating the application of Exemption 6, courts “balance the public interest in disclosure against
16 the interest Congress intended the exemption to protect.” *Cameranesi v. U.S. Dep’t of Def.*, 856
17 F.3d 626, 637 (9th Cir. 2017) (internal quotation marks and citation omitted). A threat to privacy
18 that is conceivable on some generalized conjectural level is not sufficient to justify invoking
19 Exemption 6. *Yonemoto*, 686 F.3d at 694.

20 When analyzing documents exempt under U.S.C. § 552(b)(6), the Court determines
21 whether the record is a “similar file” within the meaning of the exemption. *Forest Serv. Emp. for*
22 *Env’t Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1026 (9th Cir. 2008). The phrase “similar files”
23 is to be construed broadly and covers “detailed Government records on an individual which can be
24 identified as applying to that individual.” *U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595,
25 602 (1982) (internal quotation marks and citation omitted). If records qualify as “similar files,”
26 then two steps remain. The Court determines if “disclosure implicates a personal privacy interest
27 that is ‘nontrivial.’” *Yonemoto*, 686 F.3d at 693. If the agency fails to establish that disclosure
28 “would lead to the invasion of a non-trivial personal privacy interest protected by Exemption 6,

1 the FOIA demands disclosure, without regard to any showing of public interest.” *Id.* at 694. “An
2 agency may carry its burden of establishing a nontrivial privacy interest by showing that the
3 requested disclosure has ‘the potential’ to result in . . . harassment[,]” such as possible
4 embarrassment and retaliatory action from “media, curious neighbors, and the public interest
5 group itself, which might try to make unwanted contacts with the employees.” *Cameranesi*, 856
6 F.3d at 639 (internal quotation marks, citations, and modifications omitted). If the agency meets
7 its burden, the Court engages in a balancing test, asking whether the identified privacy interests
8 outweigh the public’s interest in the disclosure of information that “would shed light on an
9 agency’s performance of its statutory duties or otherwise let citizens know what their government
10 is up to.” *Lahr*, 569 F.3d at 974 (internal quotation marks and citation omitted).

11 FEMA contends there is no pending motion seeking “disclosure of third-party, non-
12 governmental personally identifying information.” *See* FEMA Opp’n at 3. This is incorrect.
13 EcoRights moves for summary judgment arguing FEMA’s Exemption 6 redactions were improper
14 (EcoRights Mot. at 6), which FEMA defends (FEMA Mot. at 14). Furthermore, the parties’
15 Partial Settlement Agreement required FEMA to provide unique identifier codes for each of
16 FEMA’s Exemption 6 redactions that appeared in FEMA’s document production in response to
17 the October 19 FOIA request. *See* EcoRights Mot. at 6; *see also* Minute Entry re: Settlement.
18 EcoRights contends FEMA has, to date, left dozens of un-coded Exemption 6 redactions in the
19 documents it produced. EcoRights Mot. at 6. As such, FEMA cannot plausibly argue it is
20 surprised that EcoRights requests release of all documents withheld under Exemption 6.

21 FEMA invoked Exemption 6 to redact portions of records that contain the names of
22 personal contact information of private citizens in the LOMA records system. FEMA Opp’n at 3.
23 FEMA contends it limits disclosure of LOMA application records and the personally identifying
24 information contained therein to ensure compliance with the Privacy Act of 1974. *Id.* However,
25 the unredacted records do not contain personnel or medical records. They instead appear to be
26 applications from property owners or developers for Flood Insurance Rate Map Amendments, or
27 requests to exclude properties from Special Flood Hazard Areas when appropriate. FEMA’s
28 Flood Insurance Rate Maps are publicly available, and any alterations to the maps are likewise

1 public documents.⁴ Pl.’s Suppl. Stmt. at 5.

2 While the applications and request might qualify as “similar files” within the meaning of
3 Exemption 6, FEMA has not provided any particularized explanation of what non-trivial privacy
4 interest would be implicated if these third party, non-governmental names and contact information
5 are disclosed. Nothing in the record leads the Court to find these individuals will be subjected to
6 “embarrassment, shame, stigma, and harassment” or other negative consequences if their
7 associations with these records were revealed. *Forest Serv. Emp.*, 524 F.3d at 1026. While there
8 may well be some non-trivial privacy interest implicated here, the Court declines to speculate as to
9 what that may be, and it cannot conclude these documents are categorically protected on the basis
10 they contain “names” and “business contact information.” *See Wiener*, 943 F.2d at 988 (“The
11 reviewing court should not be required to speculate on the precise relationship between each
12 exemption claim and the contents of the specific documents.”) (internal quotation marks, citations,
13 and brackets omitted).

14 Assuming, arguendo, FEMA had carried its burden of establishing a nontrivial interest, the
15 public’s interest in the disclosure of the information greatly outweighs FEMA’s privacy interest in
16 the LOMA record system. The Court agrees with EcoRights that “local communities are entitled
17 to this information so they may adopt map changes and revisions in their own flood mapping for
18 their land-use regulation in floodplains so areas within their jurisdiction can be approved for
19 participation in FEMA’s National Flood Insurance Program.” *See* Pl.’s Suppl. Stmt. at 5. As
20 such, the maps have a significant public interest as the primary tools used in flood protection,
21 habitat preservation, and evaluation.

22 Throughout this litigation the Court provided FEMA with numerous opportunities to
23 address deficiencies in its three *Vaughn* Indices. While FEMA has requested more bites, the Court
24 agrees with EcoRights’ assessment that the apple is down to its core. For the foregoing reasons,
25

26 ⁴ Flood Insurance Rate Map, <https://www.fema.gov/flood-insurance-rate-map-firm> (last visited
27 Nov. 30, 2017); How to Find your Firm and Make a FIRMette, FEMA, [www.fema.gov/media-
28 library-data/1475101463102-67d0ca994fa3d8b9246f570034ea79b0/How_to_Find_Your_FIRM_and_Make_a_FIRMette.pdf](http://www.fema.gov/media-library-data/1475101463102-67d0ca994fa3d8b9246f570034ea79b0/How_to_Find_Your_FIRM_and_Make_a_FIRMette.pdf)
(last visited Nov. 30, 2017).

1 the Court **GRANTS** EcoRights’ Motion for Summary Judgment and **DENIES** FEMA’s Cross-
2 Motion regarding Exemption 6. FEMA shall produce all documents redacted and withheld
3 pursuant to these exemptions within two weeks of the date of this Order.

4 **C. Search Cut-off Dates**

5 EcoRights contends the Court should issue declaratory judgment that FEMA’s search cut-
6 off date violates FOIA. EcoRights Mot. at 15; SAC ¶¶ 66-68. In each of FEMA’s document
7 releases, FEMA used the date it began its document search as the search cut-off date. FEMA Mot.
8 at 16-17. FEMA’s record search for the April 8 request began on April 8; FEMA’s record search
9 for the October 17 request began on October 18; and FEMA’s record search for the October 19
10 request began on October 27. Neuschaefer Decl. ¶ 12, Dkt. No. 46-1. FEMA thus only searched
11 for documents in existence on the date the search began, but not for documents created between
12 the time the search began and the time it produced responsive documents. FEMA contends “the
13 scope of requests is limited to the date the search begins, as both a practical matter and as FEMA’s
14 policy to make documents available to the maximum extent possible.” Hudak Decl. Ex. 4 at 1.

15 A date-of-search cut-off ensures that any records will be captured by the agency’s search,
16 resulting in the processing of records that would be included through a search conducted with a
17 more restrictive date-of-request cut-off. *See Public Citizen v. Dep’t of State*, 276 F.3d 643, 644
18 (D.C. Cir. 2010) (recognizing that for an agency with a large backlog of FOIA requests, a search
19 conducted using a date-of-search cut-off would capture “a potentially large number of relevant
20 documents” created after the date of the request); *see also McGehee v. C.I.A.*, 697 F.2d 1095, 1104
21 (D.C. Cir. 1983) (favoring a date-of-search cut-off because it “results in a much fuller search and
22 disclosure” than does a date-of-request cut-off). A search cut-off based on the date that a FOIA
23 search begins therefore is appropriate. *Our Children’s Earth Found. v. Nat’l Marine Fisheries*
24 *Serv.*, 2015 WL 4452136, at *10 (N.D. Cal. July 20, 2015) (rejecting any argument the appropriate
25 cut-off date is not the day the searching began and citing cases); *South Yuba River Citizens League*
26 *v. Nat’l Marine Fisheries Serv.*, 2008 WL 2523819, *14-15 (E.D. Cal. June 20, 2008) (holding
27 date-of-search cut-off proper); *Edmonds Inst. v. U.S. Dep’t of Interior*, 383 F. Supp. 2d 105, 111
28

1 (D.D.C. 2005) (“The D.C. Circuit has all but endorsed the use of date-of-search as the cut-off date
2 for FOIA requests.”)).

3 “Under the date-of-search approach, [a plaintiff] can, with relative ease, file a second
4 FOIA request for documents created since [the cut-off date].” *Edmonds Inst.*, 383 F. Supp. 2d at
5 111. EcoRights could receive all documents responsive to its first FOIA request that post-date
6 April 8 simply by filing a follow up FOIA request; indeed, that is what EcoRights did by sending
7 FEMA another FOIA request on October 17. For the foregoing reasons, the Court **GRANTS**
8 FEMA’s Cross-Motion and **DENIES** EcoRights’ request as to the declaratory judgment claim on
9 this issue.

10 **D. Timeliness of FEMA’s Response**

11 When an agency receives a request for information, FOIA requires the agency to determine
12 within twenty days “whether to comply with such a request,” at which time it must immediately
13 notify the requester of its determination. 5 U.S.C. § 552(a)(6)(A). If the agency concludes that it
14 may need more time to respond to the request, it must first notify the requester so that the latter
15 has an opportunity to narrow the request. *Id.* Then, the agency may extend the twenty-day
16 deadline by an additional ten days if there are “unusual circumstances.” *Id.* Unusual
17 circumstances include the need to collect records that are held off-site, to review voluminous
18 materials, or to consult with another agency. *Id.*

19 EcoRights seeks a declaratory judgment that FEMA’s delays in responding to Plaintiff’s
20 FOIA request are unlawful. EcoRights Mot. at 15. Declaratory relief is proper when there are
21 purely legal questions at issue and if the judgment will clarify the legal issues and provide clarity
22 to the parties and the public. *Natural Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1299 (9th
23 Cir. 1992). Declaratory relief may be warranted when an agency has ignored statutory mandates,
24 including deadlines imposed by statute. *See id.* (granting declaratory relief because the “court
25 must uphold adherence to the law, and cannot condone the failure of an executive agency to
26 conform to express statutory requirements.”).

27 FEMA violated FOIA by failing to respond to EcoRights’ April 2016 and October 2016
28 requests within the statutory time limit. On April 8, 2016, FEMA sent EcoRights an email

1 acknowledgment of the April 2016 request which invoked the 10 working-day extension. Hudak
2 Decl. ¶¶ 2-3 & Exs. 1-2. With the invocation of the 10 working-day extension, the FOIA deadline
3 for FEMA’s final response to the April 8 request was May 20, 2016. *Id.* ¶ 3. But FEMA provided
4 its response to the April 8 request on September 16, 2016 – 119 days after the statutory deadline.
5 *Id.* ¶ 11 & Ex. 10.

6 FEMA repeated this violation with regard to EcoRights’ October 19, 2016 request. On
7 October 20, 2016, FEMA received EcoRights’ FOIA request and again sought a 10-day extension
8 to respond. *Id.* ¶ 14 & Ex. 13. As such, FEMA’s response was due on December 2, 2016. On
9 December 2, 2016, FEMA sent EcoRights an interim response letter that FEMA processed 19 out
10 of 1,182 responsive pages. *Id.* ¶ 14 & Ex. 16. On December 15, 2016, FEMA released a second
11 interim response letter, which stated that out of the 600 pages reviewed “300 pages are releasable
12 in their entirety, and portions of 200 pages are exempt from release.” *Id.* ¶ 14 & Ex. 17. FEMA
13 released its final response on December 29, 2016 – 27 days after the statutory deadline for the
14 October request. *Id.* ¶ 14 & Ex. 18.

15 FEMA has repeatedly failed to comply with its statutory responsibility to respond fully to
16 EcoRights’ FOIA requests within the statutory timeframe. FEMA also has repeatedly failed to
17 produce a sufficiently-detailed *Vaughn* Index, despite having multiple opportunities to do so;
18 repeatedly failed to produce complete, labeled sets of documents; and repeatedly failed to meet
19 production deadlines in these proceedings. The recurring nature of these violations and the
20 possibility that they might reoccur with any of EcoRights’ future FOIA requests show that
21 declaratory relief is appropriate under these circumstances. For the foregoing reasons, the Court
22 **GRANTS** EcoRights’ Motion and **DENIES** FEMA’s Cross-Motion. EcoRights is entitled to
23 declaratory relief because FEMA has repeatedly failed to comply with its express statutory
24 requirements.

25 **E. Request for Discovery**

26 FOIA provides that any reasonably segregable portion of a record shall be provided to any
27 person requesting such record after deletion of the portions which are exempt under this
28 subsection. 5 U.S.C. § 552(b)(E). The district court may rely on an agency’s declaration in

1 making its segregability determination. *Pacific Fisheries, Inc. v. United States*, 539 F.3d 1143,
2 1148 (9th Cir. 2008). Sufficiently detailed agency affidavits are presumed to be made in good
3 faith and may be taken at face value. *Hunt*, 981 F.2d at 1119. “In short, a district court is not
4 required to conduct an independent *in camera* review of each withholding unless an agency
5 declaration lacks sufficient detail or bears some indicia of bad faith by the agency.” *Hamdan v.*
6 *U.S. Dep’t of Justice*, 797 F.3d 759, 779 (9th Cir. 2015).

7 FEMA’s Disclosure Branch Chief Eric Neuschaefter initially represented that FEMA
8 “considered and made a determination regarding whether there was any non-exempt segregable
9 information with respect to each redaction and withheld document. The releases to plaintiff reflect
10 FEMA’s judgment that there is no additional non-exempt segregable information that has no be
11 released.” First Neuschaefter Decl. ¶ 6, Dkt. No. 46-1. The Court ordered FEMA to file a
12 declaration from a person having personal knowledge of FEMA’s efforts to ensure it has not
13 withheld segregable information to “provide a more complete description of FEMA’s efforts.”
14 May 11, 2017 Order, Dkt. No. 50. Mr. Neuschaefter filed a second declaration explaining FEMA’s
15 process in greater detail. *See* Second Neuschaefter Decl., Dkt. No. 52.

16 EcoRights nonetheless requests the Court allow it to “conduct discovery, including
17 deposing appropriate FEMA witness[es] regarding the issue of segregability in order to develop an
18 adequate record to determine whether FEMA has complied with its obligation.” Pl.’s Suppl. Stmt.
19 at 4. While the discovery process ordinarily grants each party access to evidence, discovery in
20 FOIA cases is limited because the underlying case revolves around the propriety of revealing
21 certain documents. *Wiener*, 943 F.2d at 977. Courts have uniformly acknowledged that discovery
22 is unusual and disfavored in FOIA cases. *Lane v. Dep’t of Interior*, 523 F.3d 1128, 1134 (9th Cir.
23 2008). The decision whether to allow discovery rests within the district court judge and is
24 “sparingly granted.” *Jones v. Fed. Bureau of Investigation*, 41 F.3d 238, 242 (6th Cir. 1994).

25 Because the Court has ordered FEMA to produce all information withheld pursuant to
26 Exemptions 5 and 6, and because Mr. Neuschaefter’s Second Declaration sufficiently describes the
27 steps FEMA took to ensure segregable information was produced, EcoRights’ request for
28 discovery is **DENIED AS MOOT**.

1 **CONCLUSION**

2 For the reasons explained above, the Court **GRANTS IN PART** EcoRights’ Motion for
3 Summary Judgment and **DENIES IN PART** FEMA’s Cross-Motion for Summary Judgment. The
4 Court **ORDERS** FEMA to release all documents redacted and withheld from disclosure pursuant
5 to Exemptions 5 and 6. The Court **DENIES** EcoRights’ request for declaratory judgment
6 pertaining to FEMA’s use of the date-of-search cut-off, and **GRANTS** EcoRights’ request for
7 declaratory judgment as to the issue of untimeliness. The Court also **DENIES** EcoRights’ request
8 for discovery.

9 No later than January 4, 2018, EcoRights shall file a notice to confirm FEMA has
10 complied with this Order.

11 **IT IS SO ORDERED.**

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13 Dated: November 30, 2017



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15 MARIA-ELENA JAMES
16 United States Magistrate Judge
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