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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FOOD & WATER WATCH, INC., et al.
Plaintiffs,
v.
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.
Defendants.

Case No. 17-CV-02162-EMC (KAW)

**ORDER RE SECOND AND THIRD
JOINT DISCOVERY LETTERS**

Dkt. Nos. 79, 81

Plaintiffs filed the instant lawsuit seeking judicial review of Defendant United States Environmental Protection Agency's ("EPA") denial of Plaintiffs' petition to regulate the fluoridation of drinking water supplies under the Toxic Substances Control Act. (*See* Compl., Dkt. No. 1.) Pending before the Court are two joint discovery letters. (Dkt. Nos. 79, 81.)

Having reviewed the discovery letters, the Court requires supplemental briefing on the Second Discovery Letter. Specifically, the Court requires further information regarding the policy decisions at issue. Although Defendants contend that they are "not required to point to a specific decision as long as it can demonstrate that the documents were prepared to assist decisionmaker on a specific issue," the Ninth Circuit has held that an "agency **must** identify a specific decision to which the document is predecisional." *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir. 1997). While the agency need not state what the agency ultimately chose to do, the agency must still point to a specific decision. *Id.* The second Ross declaration fails to identify a specific decision that the following documents are related to: (1) the National Toxicology Program's ("NTP") 2016 systemic review of animal literature, and (2) the NTP's pending systemic review of human literature. (Second Ross Decl. ¶¶ 10-11, Dkt. No. 79-5.) Accordingly, Defendants shall, within one week of this order, identify the policy decision for

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Northern District of California


1 which these documents were "prepared in order to assist an agency decisionmaker in arriving at
2 his decision." *Assembly of Cal. v. U.S. Dep't of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992)
3 (internal quotation omitted). Plaintiffs may file a response within one week of Defendants' filing.
4 The briefs shall be no more than five pages.

5 Additionally, Defendants shall provide chambers copies of the eleven-document
6 representative sample reviewed by Mr. Ross in preparing his declaration on the deliberative
7 process privilege for *in camera* review. (Second Ross Decl. ¶ 5.) Defendants shall coordinate the
8 submission of the material for *in camera* review with Courtroom Deputy Indira Aguilar, who may
9 be reached at (510) 637-3525. Defendants shall ensure that the Court receives the materials by
10 March 22, 2019. The Court may compel production of these materials if Defendants fail to
11 comply with any of the foregoing. If Defendants to not make arrangements to retrieve the
12 materials after the Court has completed its *in camera* review, the Court will dispose of the
13 materials.

14 As to the Third Discovery Letter, the Court finds the Letter suitable for disposition without
15 hearing or further briefing and will issue a decision in a separate order.

16 IT IS SO ORDERED.

17 Dated: March 12, 2019

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KANDIS A. WESTMORE
19 United States Magistrate Judge
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